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## **NZJER Special Issue: The General Election in New Zealand in 2011**

### *Editorial*

It has been a tradition that the *New Zealand Journal of Employment Relations* publishes a special issue on employment relations issues in the run up to a General Election. While this issue follows that tradition, there are *two* major changes. Under the Mixed Member Proportion (MMP) electoral system, minor parties and their policy positions have become more important. As there are at least five or six minor political parties which could have an influence on the formation of the next Government, a suitable coverage of each party's policies could have been a rather extensive. Instead, the Journal editors took the decision to commission an overview article from two academics. The overview article by Peter Skilling and Julianne Molineaux covers six political parties and provides a brief insight into the employment relations position of each party. Secondly, it was not possible to obtain a detailed policy statement from the National Party. We wrote to the Minister of Labour, Kate Wilkinson in July and were told (by the Minister's Press Secretary) that a detailed policy position was not ready and that the Minister would not have the time to do a detailed policy overview (see instead [http://www.national.org.nz/PDFGeneral/Employment\\_Relations\\_Policy.pdf](http://www.national.org.nz/PDFGeneral/Employment_Relations_Policy.pdf)). In light of this, the Editors invited Professor Nigel Haworth to write a critical review of the National-led Government's employment relations policies.

Besides the three articles about the minor parties, the policy position of the Labour Party and Professor Haworth's review, there is also an article by three academics who seek to address the key employment relations issues which *could* have featured in this General Election. While some of the suggestions by Geare, Edgar and Honey will probably have limited chance of being implemented, they do highlight the policy tensions and divisions which have been a mainstay of New Zealand employment relations for some time. These policy tensions and divisions are also obvious in the last two articles, though these articles were not part of the Journal's General Election coverage. The articles deal with the fundamental issues of employee representation in occupational health and safety, and the connection between employer attitudes and the elusive search for a comparative improvement in productivity levels.

Professor Erling Rasmussen, Co-editor of the NZJER

# Time for a Change in Employment Relations Approach

DARIEN FENTON\*

## Introduction

Labour believes that collective bargaining and industry engagement are essential components to lifting productivity and wages in New Zealand.

While there were significant changes to the employment relations system under the previous Labour Governments during 2000-2008, this has not resulted in higher rates of collective bargaining or wages, and productivity continues to languish. The International Monetary Fund (IMF) and the World Bank now point to low rates of collective bargaining in countries, including New Zealand, as a contributor to the global financial meltdown (Kumhof and Rancière, 2010; Aidt and Tzannatos, 2002). Put simply, if workers do not get a fair share through joining together in unions and collective bargaining, they are unable to contribute to the economy and pay their way.

The reforms to the wider New Zealand economy over the last 25 years have seen income at the top end grow by more than 40% in real terms, but workers on low and middle incomes have struggled. More of the same policy will deliver more of the same results: wages lagging, productivity falling behind and people leaving for better opportunities overseas. *It is time for a change of approach.*

This article focuses on employment relations, though it is important to stress that those employment relations changes have to be aligned with wider changes in economic and social policies (where the Labour Party has proposed significant changes recently). In particular, the article focuses on necessary changes to achieve better wage outcomes and protection of employee rights. These changes are closely associated with shifting towards the elusive high wage, high skill and highly productive economy where improved equality and equity are seen a part of the solution (Wilkinson and Pickett 2009). As part of these aims, the Labour Party is proposing new Industry Standard Agreements to be determined by a Workplace Commission as well as measures to deal with more volatile working environments and the rise in non-standard work. Abolishing the 90-day restrictions on personal grievance rights for new employees and rolling back recent changes to the Holidays Act are obvious element of such a new employment relations approach.

## Higher Wages

Labour's wages policy will help lift wages in New Zealand across the board. We will work with employers, unions and sector groups to fundamentally change New Zealand's economy from a reliance on low wages and longer hours to an investment in more productive workplaces where high trust, high skill and high wages are the success indicators of New Zealand businesses and jobs. A critical first step,

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\* Darien Fenton is the Labour Party Spokesperson on Labour Issues.  
Authorised by Chris Flatt, 160 Willis Street, Wellington.

and one which will help the lowest-paid workers directly, is an increase to the minimum wage to \$15 an hour, which Labour has long-signalled.

However, more must be done. The experience of the past 20 years shows that New Zealand's labour market arrangements have led to a relative decline in pay for New Zealand workers. Lower pay means New Zealand business face fewer incentives to lift productivity and investment in the workplace, and in workers' skills and education. It is a vicious cycle – low wages and low productivity – with New Zealand families bearing the consequences. A critical advantage that Australian families – and Australian businesses – have over their New Zealand cousins is a fairer labour market. Stronger rights at work mean decent pay for Australian workers and higher productivity for Australia. Instead of reducing the Australian-New Zealand pay gap, the gap continues to widen.

Since New Zealand's employment relations system was deregulated in the 1980s and early 1990s, wages have grown at a far slower rate than that of the economy as a whole. The share of the economic pie going to workers has decreased over the past three decades. The weakening of workers' bargaining power following the Employment Contracts Act 1991 has been a major factor, along with the growing capital intensity of the economy, according to Council of Trade Union (CTU) economist, Bill Rosenberg.

From 1992 to 2009, the average real output per worker rose, on average, by 2% a year, but real wages rose by at less than half that amount (Guthrie and Gawith, 2011). Australia, which has retained a stronger collective bargaining environment, has seen a far smaller decline in workers' share of the economic pie as shown by the graph below.



Source: Rosenberg, 2011

Economic growth will not be successful in closing the wage gap with Australia unless we also have an employment relations environment that allows workers to gain a greater share of the benefits of that growth.

Slow wage growth has been most evident in a number of low-skilled and largely non-unionised industries. These industries not only have wage rates that are well below the rest of the workforce, but their wages are also rising at a lower rate. This has led to increasing 'wage growth dispersal', so that those with the highest wages are 'pulling away' from the rest at the top end with higher rates of wage growth, while those with lowest wages are falling ever further behind the median.

This growing gap between wage earners and employers and investors (who are the main beneficiaries of the drop in workers' share of income), and in particular, the growing wage gap between different industries, not only makes life a struggle for low and middle income wage workers but also destabilises the wider economy.

As the wage gap grows, those in the lower and middle parts of the income distribution are encouraged to borrow more to keep up with society's standard of living expectations. This excessive borrowing is unsustainable and eventually results in defaults which mean investors lose money, lending constricts and the economy shrinks.

The former Labour Government sought to deal with this issue of 'wage growth dispersal', not through wages policy, but in part through redistributive government policies (e.g. 'Working for Families'). Such policies delivered real income gains to families who were eligible for them, but there is now a growing recognition that there are political and practical limits to what can be achieved through after-the-fact rebalancing of market incomes in this way. It risks becoming a never-ending treadmill, which fails to deal with the underlying causes of inequality.

Efforts to increase union density and bargaining power under the Employment Relations Act 2000 (ERA) have had a limited impact. Union density is very low, with just 9% of the private sector workforce in a collective agreement and several industries with no union representation (Towner, 2011). There are only three multi-employer collective agreements (MECAs) in the private sector and it has proved almost impossible for unions, particularly in lower paid industries such as Aged Care and Retail, to set standards across industries in this way.

Labour's policy will implement Industry Standard Agreements, which will be a new and different form of agreement under the ERA. It would join the existing individual, collective and multi employer collective agreements that the Act already provides for. Industry Standard Agreements would stem from the collective agreements already in place in an industry; the "norms" of these collective agreements would be determined by a Workplace Commission and become the minimum standards that those in the defined industry must at least meet. The provisions of Industry Standard Agreements will extend to all workers covered by them (i.e. within the industry the Agreement covers) where a collective agreement does not exist. Employers and workers will continue to be able to negotiate terms and conditions that exceed those set out in Industry Standard Agreements, but they will not be able to agree to terms that are less than those in the applicable Industry Standard Agreement. With the Industry Standard Agreement framework in place, the norms in an industry will become a floor through which nobody's terms and conditions can fall. The gains that workers make through collective bargaining will be shared with all those covered by these new Agreements.

Labour will provide for a six month transition period to occur after the ERA amendments gain Royal Assent in which no Industry Standard Agreement applications may be made. During this period, the Government will provide resources to assist employers and unions in understanding the new law and

building capability for negotiations. Employers and union organisations will be encouraged to discuss potential standards, build up understanding of key issues and agree on scope of the industry, so where possible common ground can be reached before negotiations begin.

We expect that there will need to be substantial changes to the ERA and we will work carefully through the process of amending the law, but it is necessary to face the fact that New Zealand workers are not paid enough. This is about putting some rules in place to make sure they can be.

## **Better Jobs**

Labour supports international labour standards and their effective implementation in New Zealand, including the promotion by the ILO of decent work for all and raising labour and social standards.

The outcome of good labour law should be that any worker who wants to be represented at work, to have a voice through a union and to be able to influence the wages and conditions applying in their industry and at their workplace, should be supported to do so. While Labour is committed to extending collective bargaining to more workers as the preferred means of setting wages and conditions, we will also continue to build on a floor of safety net rights for all workers.

Labour will repeal the National Government's unfair laws where workers can be fired without cause in their first 90 days of employment and the restrictions on the access for workers to their unions in the workplace. We will also restore reinstatement as the primary remedy when an employee has been unjustifiably dismissed, along with the test of justification. Labour will also amend the Holidays Act to 2008 settings to protect the rights of workers to time off for rest and recreation, and ensure that all New Zealand workers have access to 11 days off with pay for recognised public holidays, including Anzac and Waitangi Day.

Labour will strengthen collective bargaining by amending the ERA to provide for greater legislative support, including multi-employer collective bargaining and we will also enable unions and employers to set up systems in which all workers contribute to the benefits of enterprise and multi-enterprise bargaining.

## **Changing Working Environments**

One of the consequences of the global financial crisis and the changes to work over the past 20 years is that good jobs have been too easily discarded in the quest for great business efficiency, cost containment and profit. No worker should be deprived of their economic livelihood without proper consideration of the consequences, and good jobs should not be simply handed over to the whims of the market and "flexibility". Labour will defend decent jobs against outsourcing and reduced terms and conditions by providing for the right to strike when a collective agreement is in force where the employer makes a significant proposal for restructuring or outsourcing that in effect renders the collective agreement ineffective.

Labour will also provide certainty for employers and employees in situations of redundancy by implementing the recommendations of the 2008 Ministerial Advisory Group report on redundancy and

restructuring. It has also been announced that we intend to improve on pay and employment equity which has been neglected under the National-led Government (Hyman 2011). Finally, we will consider possible improvements to Paid Parental Leave.

## **Non-Standard Work**

Labour believes that all workers should be protected against harms and risks that are broadly seen as being unacceptable and below a necessary floor where people should not be required to provide their labour. We are concerned at the growth in non-standard work, where large numbers of contractors, casual and temporary workers effectively have no rights.

We will ensure that workers employed in precarious forms of employment (such as labour hire, casual employment and contracting) are given similar rights to those in more traditional forms of employment. We will also investigate and implement best practice statutory support and legal rights for dependent contractors, including minimum wage protection and other rights. As a minimum, Labour will extend the right to organise and collectively bargain to contractors who are primarily selling their labour as well as ensuring an effective and cheap disputes resolution procedure.

Finally, Labour will repeal the National Government changes to the ERA with regards to workers in the film and video production industries.

## **Health and Safety**

The level of work related injuries, illness and deaths remains unacceptably high. Labour is committed to creating safer workplaces and ensuring that injured workers are entitled to compensation and assistance. In general, we intend to elevate public awareness and responses around workplace deaths and injuries to where they are taken as seriously as our Road Toll.

Labour will establish a Commission of Inquiry into New Zealand Workplace Health and Safety, which would be tasked with examining why New Zealand's record of workplace accidents and injuries is not improving, what measures are needed to improve them, how other comparable countries are able to have a lower per worker rate of injury and death and how changes should be implemented.

This could mean moving to a regulatory framework where legislated standards are required, but as a minimum, worker participation, involvement of recognised health and safety delegates and effective enforcement in the workplace will be fundamental to any change.

Labour will also ensure that any regulatory framework provides for a properly resourced occupational health and safety inspectorate that has the technical expertise to enforce the legislative requirements.

Labour has already announced its Mine Safety policy which will seek to align the current mining safety legislation with the Queensland State legislation within a New Zealand context. We will also reinstate check inspectors.

## Concluding remarks

The continuous search for more 'flexibility' in employment relations has undermined job security, protection of employee rights and decent wage packages for many people. It has yet to bring about any sustainable improvement in our productivity levels and the relative decline in living standards – particularly compared to Australia – has become a brutal reality for many workers struggling to meet ends. No wonder the 'grass seems greener on the other side'.

The Labour Party proposes a different approach, symbolised in a lift of the statutory minimum wage to \$15 an hour to overcome the vicious circle of low wages and low productivity. It wants to facilitate investments in New Zealand workers by restricting low wage and employment conditions through strengthening collective bargaining coverage by having a Workplace Commission determining Industry Standard Agreements. In particular, Labour wants to ensure better protection for employees in precarious forms of employment. It also wants to address the poor record of workplace accidents, injuries and illnesses by improving worker participation and by properly resource inspection and advice functions.

In line with a new approach to employment relations, Labour will repeal several of the National-led Government's recent public policy changes. That includes the 90-day restriction on personal grievances of new employees, restoring holiday entitlements and abolishing changes to employment in the film and video production industries. It is definitely time for a change of approach!

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## The Minor Parties: Policies and Attitudes

PETER SKILLING\* and JULIENNE MOLINEAUX\*\*

### Abstract

In 15 years of MMP Government in New Zealand, no party has ever been successful in governing alone. There are good reasons, then – National's current dominance in the polls notwithstanding – to assume that one or more of the minor parties will be included in governing arrangements after the General Election on November 26. This paper presents a descriptive summary of the employment relations policy positions of the six minor parties (ACT, the Green Party, the Mana Party, the Maori Party, New Zealand First and United Future) that have some chance of success at this year's Election, to assess the influence they might have on subsequent policy formation. The summary, based primarily on relevant publicly available documents, also considers the factors likely to influence how each party might engage with others.

### Introduction

The make-up of the next Government is uncertain. While the National Party has polled above 50% since 2009 (Pundit, 2011), it is far from clear that this support will translate into a majority in the November 26 General Election. Support for incumbent Governments can evaporate during Election year as events unfold (Levine and Roberts, 2003); in addition, voting preferences can be volatile with many voters making their decision close to Election Day (Vowles, 2003). National has indicated that it will make further changes to employment laws if re-elected (Trevett, 2011a), but its ability to implement any changes will, most likely, depend on support from other parties. Labour has indicated a desire to raise the minimum wage and to reverse the 90-day trial period for new workers (Fenton, 2011), but unless it can boost its own support by an extraordinary amount, Labour will need support partners to form a new Government and pass legislation. To date, no party under MMP has been able to form a majority single-party Government.

It is reasonable, therefore, to assume that governing arrangements after November's Election will be built around agreements between one of the major parties and one or more support parties. With this in mind, this article surveys the explicit policies and the underlying attitudes towards employment relations held by the minor parties that are most likely to be represented in Parliament after this year's Election. We present this survey in (mostly) alphabetical order, to avoid the possibility of suggesting priority. It is based on a range of documentary data: publicly available statements taken from the parties' websites, public speeches made by members of the parties, and Parliamentary records of debates of relevant issues. The parties considered here were also given a chance to respond to a standard set of questions put to them by the authors, although only the Green Party responded. This failure to respond is entirely understandable, given the constraints on the time and resources available to minor parties, especially in an Election year.

There are five minor parties in Parliament that will be contesting the 2011 General Election: the ACT Party, the Green Party, the Mana Party, the Māori Party, and the United Future Party. We survey each of these below, along with New Zealand First, who narrowly missed out on re-election in 2008 and is campaigning again in 2011. Our survey is primarily a descriptive piece in which we set out the parties' positions as objectively as possible. Where appropriate, it derives a degree of cohesiveness from the observation that the

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\* Senior Lecturer, Faculty of Business and Law, Auckland University of Technology.

\*\* Lecturer, Faculty of Business and Law, Auckland University of Technology.

policy prescriptions of political actors are logically connected to the ways in which those actors construct and represent the nature of the relevant policy ‘problem’ (Fischer, 2003; Stone, 2002).

We focus, then, on how the parties under consideration construct the employment relations ‘problem’, and assess how their policy prescriptions make sense within a broader understanding of the social and political world. We note, however, the limitations of this focus in fully apprehending the decisions of some of the minor parties. Within a governing arrangement, their values and ideologies are often in tension with pragmatic considerations of what they can and should demand of larger parties. Unless employment relations policies are crucial to a party’s core beliefs – as they appear to be with ACT, the Greens and Mana – there is every possibility that a minor party will compromise in this policy area for the sake of influence in another. Or, as witnessed by the Māori Party since 2008, a minor party may support a major party in Government, oppose its employment relations policies but, for lack of influence, still see those policies pass through Parliament.

If one or more of the minor parties is included in governing arrangements after the Election, the included parties will have achieved what Muller and Strom (1999) call their “office-seeking goal”. While a presence at the ‘top table’ of Government confers a certain amount of prestige, exposure and financial benefit, it is not the only aim of political parties. As Muller and Strom (1999) argue, parties are also motivated by their “policy-making” and their “vote-seeking goals” (see also Miller, 2005). The tensions between these three goals are felt in a particularly acute way by minor parties for whom a formal arrangement with a larger party offers more influence but no guarantee of success in achieving its “policy-making goal”. Being formally aligned with a larger party includes undertaking to support that party on matters of supply and confidence, which involves voting for the major party’s budget. The budget process is intertwined with policy programmes as programmes typically require money; thus the minor party may find itself tacitly supporting policies that it opposes (see Sharples, 2011). This support may well threaten the smaller party’s long-term “vote seeking” goal if they are perceived as too closely aligned with a policy agenda that diverges from the expectations of their constituency.

Being a support party, thus, carries definite dangers for the long-term prospects of a small party. The history of MMP Government in New Zealand is filled with such cautionary tales, including the rise and fall of United Future, New Zealand First and, most dramatically, the Alliance. In a contemporary example, the Māori Party is currently contemplating the double-edged sword of its participation in governing arrangements since 2008. While the Party defends its relationship with National as the best way to exercise influence and secure “gains for our people” (Pita Sharples as cited in Trevett, 2009), it has come at a high price. The Māori Party has faced criticism from those who see it as enabling (through their annual support for the Government’s budget) a right-wing policy agenda that contradicts its stated commitment to greater equality (Godfery, 2010), even when that agenda – as in the case of employment relations policy – has proceeded in the face of Māori Party opposition.

## **The Minor Party Landscape**

ACT, the Māori Party and United Future are currently in a governing relationship with National, providing votes for confidence and supply in exchange for some policy influence and Ministerial posts outside Cabinet. Each party has its own agreement with National that outlines which policies both must support, the extent of the minor party’s freedom to negotiate support on a case by case basis, and the conditions under which they may speak against National’s policies (ACT, 2008c; Māori Party, 2008a; United Future, 2008). National, being only four votes short of a majority, can pass legislation with the support of either the Māori Party (who represent four votes), or the ACT Party (five votes). This support arrangement has enabled National to downplay the fears of its moderate voters about the influence of ACT while simultaneously increasing National’s bargaining power when negotiating with its support parties (Smith, 2010). National

has been able to pass a wider range of policy by appealing to one or the other of these two very different parties. The arrangement, however, is not always a comfortable one for ACT or the Māori Party. The major governing party after the 2011 Election may not enjoy so much flexibility.

2011 gave rise to two political events involving minor parties, both of which have the potential to alter the results on Election night. The ACT Party experienced a coup in which Party leader and Minister outside Cabinet Rodney Hide was replaced by a non-MP, former National Party leader Don Brash. Claiming he could increase ACT's polling, Brash was installed as extra-Parliamentary leader. Hide will not stand again in the Epsom seat, an electorate he won for the ACT Party in 2005 and 2008. Because ACT has polled below the 5% threshold since the 2002 Election, Hide's success in this electorate has been the key to the Party's Parliamentary representation. In polls to date, Brash's leadership has not significantly improved ACT's fortunes (Pundit, 2011); furthermore, polling indicates that unless Prime Minister John Key explicitly instructs National supporters in Epsom to cast their candidate vote for ACT, ACT will fail to win the seat and thus fail to return to Parliament (Grafton, 2011). Brash's history on race-based issues has the potential to further complicate any governing arrangements that include the Māori Party.

The second upheaval in the minor party landscape was Hone Harawira's resignation, under threat of expulsion, from the Māori Party following his continued criticism of the Party's relationship with National. Harawira established the Mana Party in April and his subsequent win in the Te Tai Tokerau by-election in June gives the Party a strong chance of on-going representation in Parliament. Prospects for the two Māori parties in the General Election will depend on their relationship leading up to poll day. Strategic voting in the Māori electorates could potentially result in the Mana and Māori Parties winning as many as 9 MPs between them (Farrar, 2011), giving them a larger bargaining position for policy designed to advance Māori interests. Such a Māori-Mana bloc could determine the make-up of the next Government, especially if United Future and ACT fail to win more than one or two seats. While such an outcome might seem mutually beneficial, personal animosity and policy differences between Harawira and the Māori Party seem certain to prevent such collaboration (New Zealand Herald, 2011), possibly enabling Labour to recapture some of the Māori seats.

These political upheavals increase the difficulty of predicting the policy outcomes of the Election.

**Table One: Summary of ER Positions of the Minor Parties**

	ER policy closest to which major party*	Current Number of MPs	ERA Bill (No. 2)	Holidays Amendment Bill	ERA (Film Production Work) Bill	Minimum Wage	Youth Minimum Wage
<b>ACT Party</b>	National	5	Support	Support	Support	Opposed to increases to minimum wage (ACT Party, 2011) and sceptical of the very concept (ACT, 2008b)	Support (but unnecessary if the minimum wage scrapped)
<b>Green Party</b>	Labour	9	Oppose	Oppose	Oppose	Increase "to 66% of the average wage, with an immediate increase to \$15 an hour" (Green Party, 2011b)	Oppose
<b>Maori Party</b>	Labour	4	Oppose	Oppose	Support (3 votes only)	Increase to \$15/hour (Māori Party, 2008b)	Oppose
<b>Mana Party</b>	Labour	1	Oppose**	Oppose**	Oppose**	Increase to \$15/hour, and to 2/3 of the average wage by April 2013 (Mana Party, 2011b)	Oppose
<b>NZ First</b>	Labour	-	-	-	-	Increase to \$15/hour (New Zealand First, n.d.)	Unclear
<b>United Future</b>	National	1	Support	Support	Support	Unclear	Unclear

(Green Party, 2011b)

\* See also additional comments and caveats in the text.

\*\* The Mana Party did not exist in parliament at the time of these bills. Its position is presumed on the basis of Harawira's speeches at the time and the party's stated positions.

## The ACT Party

The ACT Party was established to promote the economic liberalisation policies that Roger Douglas began as Finance Minister of New Zealand from 1984 to 1988, commonly known as Rogernomics (Reid, 2003). Since the leadership (from 1996-2004) of Richard Prebble, ACT has adopted some populist social conservative policies such as a tough line on crime (Edwards, 2010), but its approach to employment relations remains with the Party's classical liberal roots.

Following the 2008 General Election, ACT entered into a confidence and supply agreement with the minority National-led Government. It gained two Cabinet positions (reduced to one following the leadership change in May 2011), neither of which was in the employment relations area. The confidence and supply agreement listed seven policy areas that the two parties agreed to move on; none of these had a strong employment relations focus.

Although ACT's representation in Parliament is small (five MPs), they have had some influence over Government policy and have been supporters of the more right-wing policies proposed by National. ACT's support has enabled National to pass legislation that its other main supply and confidence partner, the Māori Party, has objected to: the Employment Relations Amendment Bill (No 2), and the Holidays Amendment Bill, for example.

ACT constructs the employment relations problem as Government getting in the way of free negotiations between employers and employees. There is an unspoken assumption that all parties to such negotiations have equal power. ACT views the employment relationship as being one of contract law, in which

The freedom to offer one's labour as one sees fit is a fundamental right. To deny adults freedom of contract in the name of 'protecting them' from exploitation, demeans and patronises all workers and all employers (ACT, 2008b).

There is an assumption that this increased freedom will lead to greater efficiency for firms, and that firms will pass the benefit of this greater productivity onto their workers. As part of their 2008 Election policy, ACT explained the chain of events from freedom to higher wages like this: "Allow freedom of contract to make it easier to trial new workers and replace poor performers.... Business runs better with right staff. *Workers and company earn more*" (ACT, 2008a. The authors' emphasis).

ACT frames its employment relations policies as breaking down privilege and benefiting the disadvantaged. ACT supports the 90-day trial period for new workers as it gives the vulnerable and the disadvantaged an opportunity to get a start in the job market. ACT claims opposition to trial periods protecting existing workers and locking out the unemployed, especially Māori and Pacific workers who might find work if employers could hire them on trial (Douglas, 2010). Similarly, ACT supports a lower minimum wage for young workers, claiming youth rates will help young people, who are disproportionately unemployed, get a "foothold on the job ladder" (ACT, 2011). ACT has been openly critical of National for not adopting a youth minimum wage, claiming current subsidies for youth work schemes would be unnecessary if youth wages were in force (Douglas, 2011). The Party's employment relations policy encapsulates welfare policy, rewarding and incentivising work over benefits by lowering the tax that workers pay and placing time limit and workfare requirements on welfare for the able-bodied (ACT, 2008b).

ACT has not been able to use its time in Government and its policy wins to increase its popularity. There have been a series of messy personality-based scandals since 2008, this year's unconventional coup and the extraordinary situation whereby no current ACT MP is seeking re-election. These upheavals and the unpopularity of some of ACT's policies – such as the creation of the Auckland super-city – have not helped its electoral chances. Currently polling well below 5%, ACT almost certainly needs to win Epsom in order

to return to Parliament (Pundit, 2011), and has selected former Auckland mayor John Banks to run for the seat. A tactical deal between National and ACT to not split the right-wing vote in Epsom and marginal electorates would increase both Parties' electoral chances (Bennett, 2011). Such a deal between National and ACT makes sense; if ACT does not return to Parliament, or returns with only a small clutch of MPs, National may be dependent on the Māori Party for Government formation, lessening its chances of progressing the employment relations policy agenda it has signalled for its second term.

## The Green Party

While the Green Party was formed in 1990<sup>1</sup> around an explicit environmentalist agenda, it has always included a significant left-wing, social justice element (Green Party, n.d. a). The Party has consistently advocated for the rights of workers, and for the regulation of employment relations to ameliorate the power of employers and the supposed demands of a flexible market economy.

The Green Party is currently the biggest of New Zealand's minor parties, represented in Parliament by nine members. Indeed, it was recognised this year by the Electoral Commission as occupying a unique space in New Zealand politics, with its voter support over an extended period of time distinguishing it from the other minor parties (Electoral Commission, 2011; Green Party, 2011). The Party's size has allowed it to develop and articulate relatively comprehensive positions across a range of policy areas. It has also allowed it to have a representative on the Transport and Industrial Relations Select Committee, along with five National and three Labour members.

The Party envisages society in general, and employment relations in particular, as marked by conflict and unequal relations of power, such that the interests of labour and capital are often opposed to each other. In their minority view (co-authored with the Labour Party) on the Employment Relations Amendment Bill (No 2), the Green Party argued that the legislation represented an unfair and unjustified shift "towards the interest of employers at the expense of employees", and that it was at odds with the Employment Relations Act's acknowledgment of "the inherent inequality of power in employment relationships" (Transport and Industrial Relations Committee, 2010: 5). In Parliament, Industrial Relations spokesperson Keith Locke (as cited in NZ Parliament, 2010c: 15663) argued that the Bill "will give more power to employers *against workers and against members of unions*" (the authors' emphasis).

In Parliament, the Green Party has consistently voted against the Government's employment relations policies. In their minority view on the ER Amendment Bill (No 2), Labour and the Greens described some of its provisions as "supposed solutions to problems that do not exist", citing Treasury and the Ministry of Economic Development's complaint of "the lack of robust evidence on the impact of the proposed amendments" (Transport and Industrial Relations Committee, 2010: 5). Locke (as cited in NZ Parliament, 2010a) argued further that the Bill's provisions also ignored advice and concerns voiced by the Department of Labour. According to Locke (2011, Personal Communication), the Greens' top employment relations policy priority is to "raise the minimum wage – initially to \$15 an hour and then progressively over a four year period to two thirds of the average wage". Beyond this, they would seek to enact a range of measures designed to "improve collective bargaining, and widen the number of workers covered by collective agreements, as a mechanism to reduce inequality in New Zealand" (K. Locke, Personal Communication – 10 June, 2011). The Greens have also drafted a Bill to promote gender pay equity (Delahunty, 2011) that gained unexpected prominence amid the public furore over statements made by – and the subsequent dismissal of – Alasdair Thompson, Chief Executive of the Employers and Manufacturers Association (Northern) (Delahunty, 2011).

The most comprehensive statement of the Party's approach to employment relations issues can be found in the Industrial Relations Policy on its website (Green Party, n.d. b). This policy is entirely consistent with the

stance adopted in Parliament. In this document, the Greens situate employment relations at the heart of their political vision, stating that “decent pay and working conditions, a meaningful and secure job, and a safe working environment” are “hallmarks of a fair and decent society.” Work is understood not as a system of contractual arrangements between parties, but in more aspirational terms. Work, it is said, should be “meaningful” and reflect workers’ individual and cultural preferences; jobs should be “secure [and] empowering.” Against the “inherent potential for inequality of power between employers and employees”, the Greens insist on the facilitation of “workplace democracy and collective organisation”. In their alternative vision, “workers, employers, and unions should be involved in making decisions about issues in their workplaces, the economy, and the environment” (all quotes in this paragraph from Green Party, n.d. b).

Polling consistently and comfortably over the 5% threshold, the Greens will probably return to Parliament. While the Party has not ruled out supporting a National-led Government (NZPA, 2011b), their hopes for substantial legislative influence after the 2011 Election rely on a centre-left bloc getting over 50% of the seats. At the time of writing, this seems unlikely.

## **Māori Party**

The Māori Party was formed in 2004 in opposition to the Labour-led Government’s passage of the Foreshore and Seabed Act (FSA). In 2005, the Party won four of the seven Māori seats (Electoral Commission, 2005), and in 2008, this increased to five of the seven (Electoral Commission, 2008). However, the Māori Party’s share of the party vote throughout the country was low at 2.12% and 2.39% respectively, with many voters in the Māori seats casting their party votes for Labour. Key policies of the Māori Party include the repeal of FSA, the promotion of the Treaty of Waitangi, support for Māori representation, and policies that advance tino rangatiratanga. Māori Party policies are explained in terms of traditional values. For example, support for “the alienated and the dispossessed” (Pita Sharples, in New Zealand Parliament, 19 May 2011), and those on low incomes (Māori Party, 2008b), are explained using principles of manaakitanga (hospitality or charity) and kotahitanga (unity).

The Māori Party has voted against most, but not all, of National’s employment relations changes. Against claims that the 90-day trial period for new employees would help the young, the unskilled and Māori and Pasifika gain employment, the Māori Party opposed the policy. Co-leader Tariana Turia (in New Zealand Parliament, 4 August 2010) doubted that the trial period made it any easier for Māori to overcome the “brown barrier” of systematic racial discrimination in employment, and MP Rahui Katene (as cited in NZ Parliament, 2010c) noted its potential to make work more precarious for existing employees. In the same speech, Katene quoted a letter from an education union, who wrote, “This amendment will further turn the balance of power away from employees, in particular young and vulnerable employees, and those employed in low unionised work sites” (p. 15666). In speaking against the Holidays Amendment Bill, Katene (ibid.) further stressed the unequal power between employers and employees, expressing concern that “there are no safeguards against employers wielding undue pressure on an employee to cash up their leave and sell away their holiday.” She also supported the need for workers to have time off work to rest and spend with their whānau (extended family).

The major piece of Government-sponsored employment relations legislation that the Māori Party has supported this term is the Employment Relations (Film Production Work) Amendment Bill, which designated film production workers as contractors not employees. Māori Party support for this Bill was based on the assumption that it would create jobs, a key policy platform for the Party. Their support, however, came with the proviso that they were “... on high alert to prevent the unscrupulous treatment of workers or conditions that might serve to erode the integrity of [New Zealand’s] reputation” (Katene as cited in NZ Parliament, 2010b: 15052).

The Māori Party achieved one of its founding goals by negotiating the repeal of the FSA with the National Party. The nature of that Act's replacement – the Marine and Coastal Areas Act – and the Māori Party's tacit support for other items on National's agenda, has caused dissatisfaction with some supporters (Godfery, 2011). The most notable expression of this dissatisfaction was Hone Harawira's departure from the Party, and the resulting establishment of the Mana Party. If the Māori Party continues its relationship with National after this year's Election, then these tensions will only be compounded as National has indicated a more radical agenda for its second term. On the question of a minimum wage, for example, National's consideration of a youth wage and ACT's preference for the removal of the minimum wage altogether (ACT, 2008b) stand directly opposed to the Māori Party's support (in line with the positions of Labour and the Greens) for an increase to \$15 an hour.

## Mana Party

As the newest of the parties considered here, it is difficult to assess not just the policies of the Mana Party but also their prospects for electoral success. The Mana Party might expect to draw support from those Māori disaffected by the Maritime and Coastal Areas Bill and, more broadly, from those in favour of greater self-determination and ownership rights for Māori. Yet, the nascent Party has also positioned itself as the champion of those marginalised in socio-economic terms, specifically the poor and the unemployed. A number of social justice and worker rights activists, such as Sue Bradford, Matt McCarten and John Minto, have been associated with the early development of the Party; Bradford is standing as a candidate for Mana in the general electorate of Waitakere.

Mana's position, derived from public speeches, interviews and its website, is consistently informed by a vision of society divided along class lines in which Governments support the dominance of the capital-owning class through "economic policies that drive people into poverty, and then penalise them for being poor" (Harawira, 2011). Accordingly, the current Government is charged with,

giving tax breaks to the rich, bailing out failed finance companies, selling off our natural resources, turning prisons into private profit ventures, and spending \$36 million on a yacht race on the other side of the world, while ordinary New Zealanders are starving, workers are being forced into slavery by the 90-day bill, and Māori rights are being drowned in the Raukumara Basin (Mana Party, 2011a).

In more concrete terms, Mana commits itself to the pursuit of full employment, to increasing the minimum wage to \$15 an hour immediately, and to two-thirds of the average wage by April 2013, to opposing the introduction of a youth minimum wage, to giving workers "greater bargaining power to negotiate wages and conditions with their employers" and to opposing "changes that reduce the bargaining power of workers and unions" (Mana Party 2011b). The Party promises to provide a "natural home to a growing number of ordinary Kiwis cast adrift by this National government" and to promote "the pride and dignity of workers who built this country into the special place that we all call home" (Mana Party, 2011a). Harawira has also stated his intention to ensure "a decent days wage for a decent days work", to "overturn National's 90-day Slave Bill" and to "support the rebuilding of a strong union base to give workers back the rights they've lost over the last 20 years" (Harawira, 2011).

Having won the Te Tai Tokerau by-election in June, Mana is likely to be back in Parliament after the General Election. Judging by the Party's origins and early rhetoric, they are unlikely to support any National-led Government. Phil Goff has stated that Labour would not work with any Party led by Harawira, citing his unstable record in Government and his extreme and offensive statements (NZPA, 2011a). Whatever their status after November, Mana can be depended on to oppose any initiatives that erode the security and the status of workers in employment relations. The Party may well find it appealing to stay

outside of governing arrangements in order to maintain maximum freedom to speak against the initiatives of any Government.

## **New Zealand First**

From a high-point of 17 MPs after the 1996 Election, New Zealand First's support has steadily declined. Having become dependent for their Parliamentary presence on Winston Peters winning the Tauranga seat, the Party disappeared from Parliament in 2008 when he failed to do so. Current polling suggests that New Zealand First is attracting 2.5% support which, while significantly above most of the other parties considered here, is still well below the 5% threshold (Pundit, 2011). With insufficient concentration of support in an electorate, the Party faces an uphill struggle to return to Parliament in 2011.

New Zealand First's founding principles include an appeal to economic nationalism (Miller, 2003), and their 2011 employment policies are framed in terms of developing the local economy and the local manufacturing sector (New Zealand First, n.d.). Its stated positions fit well with a broader pitch to those 'ordinary New Zealanders' who feel disenfranchised and alienated by social and economic change. New Zealand First advocates a limited engagement with globalisation, supports New Zealand ownership of key assets, and opposes trade deals with countries that have lower wage structures than New Zealand. While its guiding principles espouse the ideal of "less government", New Zealand First also suggests a more active approach when it states that "employment of New Zealanders is our first planning priority", and that "[h]igh unemployment is not acceptable". The Party aims to train unskilled New Zealanders to fill skill gaps, promising that immigration will cease to be used as an excuse for our failure to train, skill and employ our own people." It also believes that wages in New Zealand are too low, and argues that lifting the minimum wage to \$15 an hour and lifting "all our income" through "using all our resources and our people, to benefit us" will decrease the exodus of skilled workers to Australia (New Zealand First, n.d.).

It is unlikely that New Zealand First will return to Parliament this Election. Even if they do, they are unlikely to have any influence over the policies of a National-led Government following John Key's emphatic refusal to work with leader Winston Peters (Trevett, 2011b). Their policies have more in common with the Labour Party and others who support lifting the minimum wage and rejecting the sale of state assets.

## **United Future**

The United Future Party (originally the United Party) was established in 1995 as a centrist party in the new MMP environment (Aimer, 2003). Formed by seven existing National and Labour MPs, the Party was designed to be to work "with either of the major parties in government, to blunt their extremes and knock off their rough edges" (Dunne, 2007). While United Future has had a presence in Parliament since the first MMP Election in 1996, this has largely been due to leader Peter Dunne's hold on the Ōhāriu electorate: 2002 was the only Election where it exceeded the 5% threshold. Despite its low polling, Dunne has secured a Ministerial post in three of the five MMP administrations (Aimer, 2003; Edwards, 2010) and, with the exception of 1999-2002, the Party has had some sort of arrangement with the Government of the day.

As in many other policy areas, United Future frames the employment relations problem with the need for more common sense, practical support for small businesses, community groups and individuals. Its employment relations policies include reviewing "employment law to ensure that it reflects the reality of workplace relations in small businesses", but policy available on the Party website does not clarify what this



means (United Future, n.d. a). Many of United Future's employment policies are aimed at assisting the new migrant community, older people, the disabled and the unskilled gain work (United Future, n.d. b).

While describing himself as centrist, and he has demonstrated the capacity to work with both National and Labour, Dunne appears more comfortable with National's employment relations policies. Despite being a Labour Party MP in the 1990s, Dunne did not oppose the Employment Contract Act 1991 (Aimer, 2003). As a Minister outside of Cabinet since the 2008 Election, Dunne has voted with the National-led Government in its employment relations reforms. He did not speak in the Employment Relations Amendment Bill (No 2) or the Holidays Amendment Bill debates, but his Party has promoted the 90-day trial period as a way for youth and migrants to enter the work force (United Future, 2011). Dunne voted in support of the Employment Relations (Film Production Work) Amendment Bill in 2010, but later attacked the Government for misleading him over the role of the unions in the stand-off (Dunne, 2010).

A rolling average of major polls puts United Future's support at 0.6%, the lowest of all the parties considered here (the Mana Party was still too new to be included) (Pundit, 2011). As such, the Party's electoral prospects this year are dependent once again on Dunne retaining his Ōhariau seat. This is by no means certain as Dunne's support has fallen in recent elections: he won the seat in 2008 with a 1006 vote majority and only 32.6% of the vote. If it is returned to Parliament, United Future is unlikely to adopt a strong stance on employment relations issues, although it would seem that the Party will be more comfortable supporting a National-led rather than a Labour-led Government.

## Conclusion

It is difficult to predict coalition or support arrangements after the Election let alone how these will impact on employment relations policies. To do so would require not only prescience about how seats and votes will fall, but the subsequent outcome of negotiations around governing and policies. Some parties, such as ACT, the Greens and Mana have located employment relations near the centre of a coherent ideological position, and they are more likely to prioritise a strong stand on these issues. Other parties do not place the same amount of stress on employment relations, and may be more willing to make strategic compromises in that policy area in return for other gains.

Complexities in prediction notwithstanding, it is worth paying attention to the minor parties and the strategic challenges they face in gaining re-election and policy traction as their positions may well be influential. While entering into a governing relationship offers a minor party no guarantee of achieving its preferred policy position, in employment relations or any other area, one or more of the parties considered in this article may well be able to extract policy wins from their larger partners if the numbers dictate and if they negotiate skillfully. In the process, the small parties will have to weigh up the advantages of being in Government – including a certain amount of prestige, exposure and financial benefit as well as policy gains – alongside the inevitable dangers of being perceived as too closely aligned with a policy agenda that may diverge from the expectations of its constituency.

## Notes

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<sup>1</sup> The party was, however, a part of the five-party Alliance from 1991 to 1997

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## **A Commentary on Politics and Employment Relations in New Zealand: 2008-2011**

NIGEL HAWORTH\*

### **Introduction**

As a policy issue, Employment Relations (ER) has appeared to have been, publicly at least, of relatively limited significance in the run up to, and after, the 2008 election. It has, on occasions, drawn serious public and media attention – a flurry around the 90-day measure or around the Hobbit Case, for example – but, compared to the impacts of the 2008 global crisis, or taxation or welfare policies or, of course, events in Christchurch, it has been small beer. However, as we run up to the 2011 general election, ER reform is back on the table as a key plank of National's strategy for economic performance and the Prime Minister has warned the unions that they will not like proposals that are in the making (Radio New Zealand 2011). After three years of relative unimportance, ER may become a major political and electoral issue.

Trade unionists might well take issue with the description just offered of ER in the post-2008 period. They see the period very differently. They have experienced what might be described as "the thousand cuts" approach in ER. They observe a gradual erosion of ER provision, punctuated by some very serious measures indeed. They would argue that public debate on ER has often misunderstood the scale and persistence of that erosion. They expect more adverse change if a National-led Government is returned in the 2011 General Election.

Employers, on the other hand, are broadly happy with ER changes since 2008. The changes could, perhaps, have been quicker and more profound but, in general, the direction is thought to be positive. Further changes consequent of the re-election of a National-led Government would be desirable and anticipated (for example, in non-union collective arrangements or, more generally, on questions like Youth Rates).

In this commentary, we provide an assessment of the developments in ER since 2008, focusing on the political environment and, in particular, on the positioning of the National-led Government on ER issues.

### **The Opportunity**

ER issues were a relatively minor concern in the election campaigns of 2008. There were no pressing ER issues in the public's mind. Neither of the big parties went to the polls with a highly-charged ER statement and the Leaders' Debates barely mentioned them, if at all. Manifestoes said something, but not much about them. They were almost non-issues in the general public's view.

This was not true for the social partners. National went into the election with employment law changes clearly signalled but presented it, seemingly, as a "tweaking" of the framework rather than a root-and-branch reform (Rasmussen 2009: 166-7). In particular, it was stated explicitly that the Employment Relations Act (ERA) would stay as the overall legislative framework. However, it

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\* Nigel Haworth is Professor of Human Resource Development in the Department of Management & International Business, University of Auckland. Private Bag 92019, Auckland, New Zealand. Email: n.haworth@auckland.ac.nz

was not clear whether the array of issues in which it suggested an intention to move – holiday provision, non-union collective bargaining, the original 90-day provision, AC, Kiwisaver, for example – was high priority, or indeed a comprehensive statement of areas of policy interest. As in other areas, there was a feeling that National's policy directions were less developed than might have been expected in an Opposition, which had had nine years to develop positions.

The New Zealand Council of Trade Unions (NZCTU) responded adversely to these proposals. Whilst its electoral statement avoided a piecemeal engagement with National's ER platform for the election (see CTU, 2008), there was a concern in union circles about a return to an Employment Contracts Act (ECA) approach to ER (see, for example, Kelly, 2008).

Business New Zealand went into the election period arguing for a period of stability in ER provision, implicitly suggesting that the 1999-2008 period had been one of flux. It liked the idea of collective bargaining without union participation, of flexibility for the fourth week of holidays and the 90-day model as originally applied. It also developed a major focus on compliance costs, in which the impact of OSH and the Holidays Act played a significant part, as did the "ambush" of Kiwisaver and the costs of ACC. One might look at the changes that were supported and the compliance areas in which action would be appreciated and wonder what meaning Business New Zealand attributed to "restraint and consolidation" (Business New Zealand, 2008).

Thus, from a tripartite perspective, a National victory in the election might entail changes in the ER framework and in broader, related provisions, such as ACC and Kiwisaver. The parties were positioning themselves for the debate around such changes, yet even amongst the social partners, there was little sustained rhetoric about fear, conflict or major shifts in ER. Nearly a decade of tripartism and consensus seemed to have dulled the oppositional edge somewhat.

We might wonder why an issue, which, in previous decades, had been a touchstone political matter, had lost much of its political importance in the public sphere (as opposed to amongst the social partners). The answer probably lies in ER changes in the two decades prior to 2008. The ECA had devastated union density whilst simultaneously giving most employers a major shock as they geared up to understand and implement enterprise-level bargaining. The 1990s was a very difficult period for the social partners, if more so for one than the other. The unions were under major attack from an explicitly anti-union legal framework that sought to replace union-based collective bargaining with a unitarist, HR-driven, enterprise-based approach to wages and conditions. Employers (though not all) supported this attack on the unions but were not grounded in enterprise-based arrangements and floundered in the early years of the ECA. The outcome was a halving of union density and, in many companies, a take-it-or-leave-it approach to wages and conditions. The balance of power swung dramatically towards employers, and they took advantage of their new powers.<sup>1</sup>

The ERA sought to counterbalance the impact of the ECA. The ERA did not dispense with the ECA; it took key elements of the 1990 legislation and included them in a new framework. The framework was designed to promote improved economic performance by building better workplace relationships (as opposed to the ECA's focus on contract arrangements). The building block was still the enterprise and although unions put pressure on Government, there was no serious move to promote industry or sectoral arrangements. Labour's model adopted "soft regulation", that is, an approach encouraging, rather than attempting to legislate for, changed behaviours (Macneil, Rasmussen and Haworth, 2011). This was also true across the 1999-2008 Governments in general. Tripartism was introduced extensively. Initiatives on productivity and partnership were introduced, also on a tripartite basis. However, in the ER area, the three Governments in the period preferred to encourage and support rather than direct.<sup>2</sup> They did so for many reasons, two of which are particularly important. The first was the clash between business and the Labour-led Government in the first term, which, arguably, had a dampening effect on Labour's reforming zeal. Second, Social

Democracy, in general, has adopted a soft regulatory approach in the face of neo-liberal certainty. Social Democratic Governments have since the 1970s often faced the constraints imposed by neo-liberal macro-economic settings and the wider ideological impact of free market philosophies. One effect of this is to temper “hard law” interventions in policy areas, such as ER and Governments preferring instead to use “soft regulation”, that is, measures designed to encourage and support rather than to direct.

The combined impact of the passage of time, the ERA and soft regulation created what seemed to be an agreement around the wider ER model. The social partners both had their problems with the framework, yet, in general, it and its agencies (the Employment Relations Authority and the Mediation Service, in particular) became relatively non-controversial. Trigger issues (for example, industrial disputes) did not arise to disrupt the consensus. There were issues on which a positive joint purpose existed between the social partners, as in the case of better-performing workplaces or training provision. As the 2008 election approached, there were, at least publicly, few if any ER issues that had that element of conflict, which would make ER a political football in the election campaign. It seemed to be an issue around which a practical and political accommodation reigned.

Therefore, when a National-led Government came to power in 2008, it had a tremendous opportunity. ER was, it appeared, politically non-controversial. Its legislative framework worked and seemed to achieve something of a consensus. On the face of things, the social partners were engaged positively around important issues, such as growth, productivity and performance. Issues signalled as concerns around the election were, potentially, open to resolution in a tripartite approach. There was a platform on which to build greater focus and success in the productivity area. This was an area in which continuity and confirmed consensus could deliver serious benefits, particularly as the 2008 global crisis exploded. What was required for this potential to be realised was, of course, that the three parties – Government, employers and unions – actively and jointly took advantage of that potential. This was not to be.

## First Days

The National-led Government came into power in adverse circumstances. The worst global downturn since the inter-war Great Depression was in train, and New Zealand had already entered the downturn as a result of drought and other factors. These were circumstances in which ER issues were not likely to gain immediate priority. Indeed, apart from the signalled 90-day measure, it was not obvious if the new Government was going to do anything much about ER, and if it was, what it would be was not clear. On the contrary, the new Government seemed willing to continue the tripartite tradition of its predecessors.

The Jobs Summit captured that early sense of continuity. It was a tripartite process in which the NZCTU played a strong role, alongside both business and Government sectors. Personal relationships, so important in New Zealand, between the NZCTU and, in particular the Prime Minister, seemed to be open and mutually respectful. Some of the measures that were implemented from the summit, especially the jobs subsidy approach, were welcomed by all, if sometimes argued to be too little, too narrowly focused. (see, for example, NZCTU, 2009a; b). Subsequently, the Prime Minister took part in productivity-related public events held by the NZCTU, reinforcing a perception that continuity through the change in Government was possible. The responsible Minister appeared, on the face of things, to be, at best, moderately grounded in either the work of the Ministry or the strengths and weaknesses of the extant ER model.

This perception was reinforced by informal conversation around the corridors of the Ministry, the employers’ and union organisations and also amongst media specialists (see, for example,



Armstrong, 2011). The general feeling was that ER was, in general, low in the Government's priorities. The exception to this was the public sector, in which it became clear early on that changes would be a priority for the new Government. However, in the public sector, the Partnership for Quality approach and positive developments in the health sector seemed to have established a modus operandi that new Ministers could adopt.

The general prescription for how New Zealand would escape the economic crisis also lent some support to a continuing tripartite framework with a focus on productivity. As was true for most economies, the route out of the crisis was reduced to two key elements – increased trade with the global economy and improved productivity (which would deal not just with price pressures, but would also emphasise a shift up the value curve into higher value, more sophisticated products). In such a model, enterprises could not be “black boxes” from which Government was excluded. Improved productivity required a joint effort across the Government, employers, unionised and non-unionised workforces to challenge each workplace to improve performance, from the simplest adoption of a 7 Wastes approach<sup>3</sup> to the implementation of full-scale partnership models. Here again was a crisis-driven opportunity to make best use of the tripartite arrangements of the previous decade.

## **The 2008-2011 Period<sup>4</sup>**

We can now turn to events subsequent to the Jobs Summit. Major Government ER interventions, judged in terms of impact and/or visibility, include:

- The introduction, under Urgency, of the initial 90-day measure (2008)
- The demise of the Partnership for Quality (2008) and a deterioration in the social dialogue in the Public sector
- The Hobbit Issue (2010)
- Changes to the ERA and the Holidays Act (including the extension of the 90-day measure) (2010)

Other interventions include:

- Ending of pay and employment equity studies (2008)
- Removal of the minimum wage protection for workers on the Recognised Seasonal Employer (RSE) scheme (2009)
- Disestablishment of the National Occupational Health and Safety Advisory Committee (NOHSAC) (2009)
- Changes in rest and meal breaks (2009)
- Closure of the Partnership Resource Centre (2011)
- Announcement of a new High Performance Work Initiative (2011)
- Fishing Inquiry (2011)
- New labour inspectorate provision for hazardous industries (2011)

The original 90-day measure was presented as an election promise met. The 90-day idea had currency for a considerable period before the election and was clearly signalled in National's election policy. It was fiercely opposed by the trade unions and supported by employer groups. Importantly, the debate around the measure divided between neo-liberal (market) and what might be described as “institutional” analyses of labour market dynamics. The measure represented a polarising tendency, not just between the social partners, but also intellectually around labour market performance. Thus, already in 2008, the signals from the new Government were mixed. On the one hand, there was, it seemed, an openness to dialogue at the Jobs Summit, yet simultaneously a willingness to move against one social partner in the interests of another. There was no detailed

tripartite assessment of the 90-day measure. The measure was taken through Parliament under Urgency and, subsequently, the Department of Labour (DoL) admitted that

the department has no way of monitoring those who lose their jobs within 90 days, other than through the complaints procedure, nor has it the ability to report positive or negative impacts on the labour market (New Zealand House of Representatives, 2009. See also Cheng, 2011).

It was, therefore, a political move, carrying with it a known risk of polarising positions and threatening future tripartite engagement with scant regard to the monitoring of its effects.

In the public sector, the Partnership for Quality lost traction and faded from view. Mr. Key had spoken to the PSA conference, making it clear that his Government would not continue with the Partnership for Quality but would be open to engagement with the PSA. It was rather like the Jobs Summit versus the 90-day measure, a mixed signal. Subsequently, in early 2009, the PSA raised the question of a further agreement with the Government, which replied that it would consider the idea. Nothing came of that and then, as an effect of the 90-day measure and the Government's policies in the public sector, the idea of an agreement lapsed. It is clear that the Government was not strongly interested in sustaining strong social dialogue in the public sector and was comfortable in allowing it to lapse. Equally, the PSA, growing in a view that the new Government was marked by a polarising approach to ER, decided also to walk away from the Partnership for Quality model, whilst remaining open to constructive engagement where it might be in the interest of its members.

Subsequently, the public sector has become even more strongly polarised as an effect of Government policy and rhetoric. Under the rubric of 'shifting the back office to the front office', first capping and then cutting the size of the public sector, became Government policy. Between December 2008 and December 2010, 1886 jobs were lost in the core public sector and the PSA suggests that a further 600 plus jobs had either been lost or announced as cuts in January-August 2011 (Personal Communication, August 2011). The 2011 Budget provisions clearly envisaged further job losses, though implementation decisions were pushed down to decisions at departmental CEO-level to distance such outcomes from Ministers. Bargaining advice to Government departments emphasises modest, performance-related settlements, fiscal prudence and careful cost control, and it was made clear that the extended, 2010 90-day provision (see below) be applied in the public sector. The SSC expects to maintain a relationship with the PSA but it is clearly to be a relationship founded on Government expectations, and the existence of some departments is now challenged as the Government questions the structure of the core public sector.

Even more striking has been the "framing language" used by the Government about the public sector. This has moved a long way from the partnership language of the Partnership for Quality. Mr. English has launched a dismissive attack on public servants as purveyors of waffle and suggested that they lack integrity and creativity. Mr. Key has weighed in with comments about a bloated and inefficient public sector. Dr. Brash, leader of the Government support party, ACT, has spoken of public servants as Little Hitlers. Putting to one side the hyperbole found in statements of this type, it is clear that the post-2008 Government and its allies disrespect public servants.

The Hobbit Case in 2010 captures the shift from ambiguity towards, to explicit opposition to trade unions on the part of the post-2008 Government. The outcome of the dispute was, in ER terms, quite extraordinary. In a contingent move, uninformed by any detailed policy analysis, the Government chose to remove, from a group of New Zealand workers, the possibility to make full use of the national ER framework in place. Instead, that layer of workers was arbitrarily defined as contractors, except in the unlikely event the employer chooses to take a collective approach to ER. This was done to appease an alliance of powerful domestic and international forces in the global

film industry. It was a measure that, in its haste and content, carried through Parliament under Urgency, is difficult to associate with a modern and developed OECD nation. The NZCTU opposed this measure as firmly as employer groups supported it. However, the NZCTU opposition was clouded by the Government's dismissive approach to the NZCTU's attempts at problem-solving in the dispute. Instead, the Government chose to elide all union involvement in the matter into one camp, providing an explicit rationale for what can only be described as old-fashioned union bashing.

Also, in 2010, the Government brought through a range of amendments to the ERA and to the Holidays Act. A key rationale for the changes was to "rebalance" fairness in ER from employee to employer interests, in the interests of efficiency. It was, therefore, expressly a one-sided Government intervention into legislation, much as had been the intervention in the Hobbit Case.

The amendments of the ERA included:

- Reduced union access rights
- Extended communication rights for employers during bargaining
- Extension of the 90-day provision to all enterprises
- Shifts towards employer interests in the Personal grievance process

Amendments of the Holidays Act allow:

- The "cashing-up" of up to one week's holidays
- The transfer of observance of a public holiday
- Significantly tighter requirements relating to the provision of medical certificates

Many of these issues were the site of established, fierce employer-union opposition, often over an extended period. The "rebalancing" favoured the employer party in every important issue. It was the partial granting of an employer wish-list that had grown since 2000. Outside the parliamentary process, there was no attempt to construct a tripartite engagement on potential changes in the legislative framework. It was an explicit political decision to favour employer interests.

## **An Opportunity Lost?**

When we look at the ER scene in New Zealand over the 2008-2011 period, we are struck by the cumulative, major change in both its operating principles and its substance. The tripartism that marked the 1999-2008 period has all but disappeared. The dialogue between employer organisations and unions has suffered in equal measure, for without a strong Government commitment to inclusive dialogue, collaborative problem-solving gave way to factional argument, and in a context in which Government favoured one faction over another. It is not simply that tripartism has fallen away but that Government has promoted positively a pro-business agenda in both the public and private sector ER contexts. From a degree of modest ambiguity in 2008, the Government has moved to adopt principles that are aligned more with the ECA than with the principles underpinning the ERA. Hence, when the Prime Minister announces that his re-election will see further ER measures that the unions will not like, he is confirming that shift in ER principle.

This is also true for matters of substance. From the pragmatic approach to job matters found in the Jobs Summit, the subsequent practical ER measures introduced by the post-2008 Government – from the initial 90 Day measure to the changes in the public sector, the Hobbit Case and on into the 2010 ERA and Holidays Act amendments – have been fundamentally one-sided. We note that the Government is unabashed by this view. It is proudly a Government that sees itself supporting

businesses, both domestic and international, and wishes to provide an ER system that emphasises that preference.

As the 2011 election approaches, the Government is wedded to an ER model that favours employers and proposes to do more in that direction, if re-elected. It has replaced a tripartite model of engagement and joint problem-solving with a framework in which one social partner has privileged access and another is held at a considerable distance. It is interesting to adduce reasons for this positioning. First, it seems that there was no coherent “front line” ER policy at the time of the election. Rather, there was a piecemeal, contingent set of issues, derived mainly from contact with employer organisations.

Second, as its time in office progressed, older hands around the Cabinet with a stronger ideological commitment to neo-liberal thinking were comfortable with a dismantling of tripartism and a “rebalancing” of ER (and other) policy towards business interests.

Third, in response to the crisis and then the consequent debt issues, orthodox neo-liberal policy settings (as in the case of public expenditure, for example) became dominant and, with them, views about ER more akin to those found in the ECA.

Fourth, employer organisations abandoned tripartism without a fight, clearly expecting to gain privileged access to a pro-business Government. To an extent, this may have come true though we also appear to observe less leverage over Government for those organisations that they might have expected. One of the most striking features of the post-2008 period is the volte face of the employers as they sought contingent advantage.

Fifth, in the absence of Government or employer interest in tripartism, the unions were relatively isolated from the debates influencing the Government, and though regular meetings with the Government took place, union influence was generally limited.

Sixth, we note that the DoL has been on constant restructuring for much of the period since 2008. This may have undermined the extent that its “epistemic community” could, if so inclined, promote continuing tripartism in policy matters. This was not helped by the Government’s post-2008 downgrading of key areas of tripartite activity in the 1999-2008 period, such as the productivity agenda.

In sum, in the absence of a strong Government drive for sustained tripartism, a union movement supporting such arrangements was unable to promote them effectively, especially as employer organisations adopted other arrangements. There is much to ponder on the ease with which nearly a decade of tripartism can be abandoned so easily by two of the three parties.

Whether the replacement of tripartism and social dialogue by a one-sided focus on employer interests is an opportunity lost or a desirable return to an anti-union, unitarist ER framework is, therefore, a matter of principle. In many ways, it is reducible to the defining social democratic-neo-liberal clash that has driven the developed world and beyond since the 1970s. Social Democracy, operating at a macro level in terms of Keynesianism, welfare provision, active Government and social inclusion still emphasises tripartism, the importance of voice for both employers and unions in that tripartism and the legitimacy of pluralism in ER frameworks. The neo-liberal approach – centred on principles of individualism, market-driven competition and non-intervention by the Government – in practice, favours businesses (the “bearer” of market behaviour) and regards unions as a malign, collective affront to individual rights. Whilst such vocabulary is generally eschewed by the post-2008 Government (though not in the public sector, and not about the unions in the Hobbit Case, for example), the Government’s objective position is ever-more closely aligned with that neo-

liberal tradition. Protestations, to the contrary, are belied by the weight and tendency of legislative moves over the last three years.

If, therefore, one is of a neo-liberal tradition, then post-2008 ER shifts are broadly positive. It is a question of the Government doing better, both in the narrow ER context and in the wider labour market policy settings. If one is of social democratic bent, one sees the demise of tripartism and the general tendency towards ER settings that favour one social partner over another as damaging to both the ER environment and to New Zealand's economic performance. We might conclude reasonably that, notwithstanding a claim to pragmatism, the post-2008 Government's ER approach has charted a clear course in the former direction and intends, if elected, to continue with a full head of steam.

## Notes

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<sup>1</sup> Not all, as we said. Some, often larger, more sophisticated organisations, continued traditional constructive, pluralist bargaining arrangements, but they were in a minority (Ballard and McAndrew, 2006).

<sup>2</sup> There were, of course, exceptions to the soft regulation model – in health and safety, maternity leave and minimum wages, for example.

<sup>3</sup> In Lean Production Systems, identifying areas of waste (the 7 Wastes) is a basic element of improved performance. The 7 areas are transportation, inventory, motion, waiting, over-processing, over-production and defects.

<sup>4</sup> For the purposes of this article, wider issues, which have a bearing on tripartism, the relationship between the social partners and on government thinking on labour markets –for example, taxation policy, ACC, Kiwisaver, a productivity agenda, trade matters, privatisation, minimum and youth wages – are excluded.

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## The Employment Relations Act 2000: a Brief Overview and Suggested Changes

ALAN GEARE<sup>\*</sup>, FIONA EDGAR<sup>\*\*</sup> and KELLY HONEY<sup>\*\*\*</sup>

### Abstract

This paper gives an overview of the Employment Relations Act 2000, showing its genesis in the Employment Contracts Act 1991 and argues that further amendments to the legislation should be for genuine reason – of improving employment relations – rather than to simply appease self-interested sections of the electorate. Any advancement towards a balance of power between employers, unions and employees represents improvement in employment relations. We call for less rather than more change to allow parties to have confidence in the system and argue that when change occurs, it is prudent that changes be: required in the first instance, widely discussed, well thought out, well drafted and commonsensical. It is proposed that the 90-day trial period be repealed, that redundancy legislation be introduced and other important areas such as dismissal, collective bargaining and unions be left alone to improve employment relations in New Zealand.

### Introduction

Our article is concerned with the Employment Relations Act 2000 (ERA). In November 2011, there will be a General Election and the possibility of further amendments to the ERA. If the ERA had represented a significant change to the pre-existing legislation, the parties to employment relations (employers, employees and unions and the state) would still have had over a decade to come to grips with the particular legislative philosophy. The reality is that rather than a decade, they have had over two decades, because as will be argued below, the genesis of the ERA was in fact the Employment Contracts Act 1991 (ECA).

Yet, despite the relative stability of the legislative philosophy, there have been numerous amendments to legislation during this period. We argue that, rather than continue with New Zealand's predilection for incessant tinkering with employment relations legislation, there should be a conscious effort to celebrate stability. The Court of Appeal strongly endorsed this view in *Aoraki v McGavin* [1998] (at 292): "It is imperative that employees and employers be able to plan with confidence and determine what their respective rights and obligations are." While the Court of Appeal was referring, in that instance, to legislation regarding redundancy, the quote is equally apposite to all areas of employment. Consequently, we suggest that proposed amendments be kept to a minimum and should be proposed only after careful consideration and for the purpose of improving employment relations and not simply to appease elements of the electorate.

### Background

In marked contrast to the last two decades, the previous decade from 1982-1991 experienced extremely radical changes in legislative philosophy. In 1982, the key legislation was the Industrial

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<sup>\*</sup> Professor (and Head) of the Department of Management, University of Otago.

<sup>\*\*</sup> Senior Lecturer at the Department of Management, University of Otago.

<sup>\*\*\*</sup> Doctoral Candidate in the Department of Management, University of Otago.

Relations Act 1973 (IRA) and New Zealand was still in the so-called “Arbitration Era” (Geare and Edgar, 2007), which dated back to 1894 when the Industrial Conciliation and Arbitration Act (ICAA) was passed. Significantly, that Act was entitled “An Act to encourage the formation of Industrial Unions and Associations, and to facilitate the settlement of Industrial Disputes by Conciliation and Arbitration.” Certainly, the 1894 Act had been re-enacted and had had many amendments but the underlying philosophy was unchanged. There were some significant changes during the 90 years – in particular compulsory unionism by law from 1936, followed by compulsory unionism by agreement from 1961.

The “Arbitration Era” effectively came to an end in 1984 when an Amendment Act made Arbitration available only if both employers and unions wanted it. The 1984 Labour Government’s economic changes opened up the economy to overseas competition and resulted in widespread redundancies and increasing unemployment (see Table 1 below for the drop in employment 1985-9). The union movement was probably at its weakest for decades. Not surprisingly employers refused *en bloc* to take disputes to arbitration.

Although the Labour Government had weakened unions through their economic policies, their intent was expressed in the title to the new Labour Relations Act 1987 (LRA): “to facilitate the formation of effective and accountable unions.” The LRA introduced “significant, indeed radical, changes in industrial relations” (Geare, 1989: 213). The Act was notable in that it had been widely discussed and well thought through before enactment. Its aim was to have strong unions able to collectively bargain with employers in an effective manner. Unions were now required to have 1000 members and membership remained compulsory by agreement. The most significant change in philosophy was that strikes (and lockouts) became legal over interest-type disputes – setting terms and conditions. This “Collective Bargaining Era” was to last only five years.

Although Labour was trying, by legislation, to create strong and effective unions, their economic changes had much more impact and the union movement was weakening. Two prominent organisations: the then New Zealand Employers Federation (NZEF) and the New Zealand Business Roundtable (NZBR) published a series of attacks on “unions and union officials, compulsory union membership and the system of wide coverage union-management documents” (Geare, 2001: 289). Time and again there was a call for flexibility in the labour market.

In 1990, National became Government and very quickly introduced the ECA. There were two notable features of the ECA:

- (a) It was a very rushed piece of legislation, described as “poorly thought through in legal terms and which contains glaring ambiguities” (Anderson, 1991: 129) and with legal drafting which “was in many areas abysmal” (Geare, 2001: 292).
- (b) The purpose of the ECA was “to promote an efficient labour market” and, in effect, this was seen to be achieved by allowing employers to do as they wished. As observed by Dannin (1992: 3) its provisions matched “with great precision” those of the NZEF and NZBR.

Also, not surprisingly, those two organisations were fulsome in their praise for the ECA and, in a joint publication, considered the Act to be “making an outstanding contribution to productivity growth” (NZBR and NZEF, 1992: 1). In contrast, Gill (2009: 37) points out that the years of the ECA coincided with “a substantial drop in OECD productivity rankings.”

The Court of Appeal stated that “the Act is not anti-union, it may fairly be described as union-neutral” (United Food Workers, 1993: 370). Technically, this is correct, but given that, as described



above, previous legislation, for nearly a century, had supported unions and collective bargaining, the sudden and total removal of all support for unions and collective bargaining certainly appeared anti-union and “the impact of the ECA on unions was devastating” (Cooper and May, 2005: 4).

Unions under the ECA no longer enjoyed:

- (a) sole bargaining rights
- (b) protection from “member poaching” by other unions
- (c) compulsory union membership by agreement – indeed that was now explicitly illegal
- (d) sole access to the personal grievance procedure – the grievance procedure was now available to all employees, subtly removing a major selling point for unions

Indeed, collective bargaining was no longer supported by this legislation; it was permitted, but so was individual bargaining. The ECA purported to allow employees to “choose” collective bargaining or individual bargaining, but it also gave the same rights to employers. As a result, of course, if the parties had different “choices” only the more powerful would get its “choice.”

The wish list discussed earlier of the NZEF and NZBR was granted to a significant degree. Unions were severely weakened, compulsory membership was made illegal and industry, regional and national union-management documents were almost all replaced by workplace agreements.

However, the ECA was not simply the statute. The total Act is the statute and common law – how it is interpreted by the Employment Court and the Court of Appeal. The Chief Judge’s sentiments were expressed in his judgement in (*Ford v Capital Trusts* [1995] at 66) when he stated that “fortune may favour the strong, but justice must favour the weak.” As argued elsewhere (Geare, 2001), common law resulted in a marked change in the ECA during the period it was in effect.

## **The Employment Relations Act 2000**

Prior to the 1993 General Election, the Labour Party had outlined its proposed Employment Relations Act (ERA), which if they won the General Election would replace the ECA. At that time, those proposed reforms were described as “superficial rather than substantial, and are cosmetic rather than creative” (Geare, 1993: 203). In the intervening period, little has changed and although employer groups greeted the ERA with “howls of protest” (Cooper and May, 2005: 4), the howls soon subsided. Indeed, when the Labour-led Government proposed the Employment Relations Amendment Act 2004 (ERAA), employers again howled in protest, but this time because they considered the ERA did not need fixing. The ERA, with the 2004 Amendment, “represent moderate reform, a degree of re-regulation within a clear ECA context” (Cooper and May, 2005: 4).

It is worth emphasising that the following significant changes introduced by the ECA still remain in effect even after the ERA 2000 and the ERAA 2004 passed by Labour-led Governments:

- a) Employers with sufficient power can ensure there is individual bargaining, regardless of the wishes of their employees.
- b) In contrast to other Western democracies, compulsory union membership is still illegal.
- c) The personal grievance procedure is still available to all employees, thereby removing a major “selling point” for unions.
- d) Enterprise agreements, rather than industry or regional documents, are still the norm.
- e) Collective bargaining still *may* take place, but unions do not enjoy sole bargaining rights or protection from membership poaching.

Certainly the ERA looks more union-friendly than did the ECA (which pretended unions did not exist). In s.3 the ERA states its object is:

- (a) to build productive employment relationships ...
  - (i) by a legislative requirement “for good faith behaviour” – which, by implication, was more significant than the “implied mutual obligations of trust and confidence.”
  - (ii) “by acknowledging and addressing (sic) the inherent inequality of power in employment relations” – the acknowledgement is realistic, the claim that the inequality is “addressed” is, as argued below, questionable.
  - (iii) “by promoting collective bargaining” – but, again as argued below, without much enthusiasm or significance.

During its tenure, the Labour-led Government did achieve a large increase in the number of unions in New Zealand. This was because the ERA requires that should collective bargaining occur, it is to be between a “union” and the employer. If employers wanted to collectively rather than individually bargain, they had to do it with a “union” so workforces were required to become a paper union to comply with the law. During the period December 1999-December 2001, as Table 1 below shows, the *number* of unions doubled. Union *density* also went up – but only from 21.1% to 21.6%. So, while some of these paper unions may actually function as real unions, there is little evidence to support this. Before passing the 2004 Amendment, the then Minister of Labour claimed she saw “a number of advantages with employers bargaining collectively with unions in good faith” (Wilson, 2003: 124). If the Labour-led Government had been serious about *promoting collective bargaining* and *addressing the inequality of power*, then a lot more needed to be done than what actually occurred. In effect, a return to similar legislation to the LRA 1987 would be required. It is very clear that the Labour Party, both when in power and now in opposition, has no intention of proposing that.

**Table 1: Trade Unions, Membership and Union Density 1985-2006**

Year	Union membership	Number of unions	Potential union membership		Union Density	
			Total employed labour force	Wage and salary earners	(1)/(3) %	(1)/(4) %
	(1)	(2)	(3)	(4)	(5)	(6)
Dec 1985	683006	259	1569100	1287400	43.5	53.1
Sept 1989	684425	112	1457900	1164600	47.0	55.7
Dec 1991	514325	66	1518800	1196100	33.9	43.0
Dec 1995	362200	82	1730700	1357500	20.9	26.7
Dec 1999	302405	82	1810300	1435900	16.7	21.1
Dec 2000	318519	134	1848100	1477300	17.2	21.6
Dec 2001	329919	165	1891900	1524900	17.4	21.6
Dec 2005	377348	175	2105600	1719500	17.9	21.9
Dec 2006	382538	166	2109800	1764500	18.1	21.7

(1985 and 1989 are from Harbridge, May and Thickett (2003: 143); the rest are from Feinberg-Danieli and Lafferty (2007: 32)

## Possible legislative areas for scrutiny

In the introduction, we indicated our preference was for change to be kept to a minimum, and to be for the purpose of improving employment relations rather than appeasing self-interested sections of the electorate. Political reality makes this hope more than somewhat naïve. However, it is surely problematic that legislative amendments are rarely accepted as necessary or beneficial, for example, the National-led Government's ERAA 2010 introduced changes to unions' right of access. Anderson (2010: 93) states "there was no rational reason for this change, but that is true of many of the changes in the Amendment Act", a view which was supported by Robson (2010: 98) who in considering the changes to mediation felt "it is equally difficult to assess whether this was ever a problem that required a remedy."

Rather than fixing a genuine problem, the change to unions' rights of access is more indicative of a subtle philosophical shift away from the ERA's mandate for increased cooperation and the focus on relationships and back towards the ECA's emphasis on flexibility and resistance towards unions. This amendment increases the power of the employer, thereby increasing the likelihood of conflict between employers and unions, a change that was neither necessary nor beneficial to employment relations in general.

It is, of course, possibly true that a high percentage of both employers and employees allow the never ending amendments to employment law to wash over them without any concern or acknowledgement. However, there is the point made by Davenport (2010: 96) that "participants in industrial relations are likely to view a change in the law as entitling different conduct ...", and even if it only impacts a small percentage of participants, it is essential that changes be well thought out and result from a genuine belief they will improve employment relations.

Focusing on the ERA, there are four legislative areas we wish to highlight:

- a) dismissals;
- b) the 90 day trial period;
- c) redundancy provisions; and
- d) collective bargaining and unions.

### *Dismissals*

Since the personal grievance procedure was introduced successfully in 1973 after an initial failure in 1970, employees have been able to take a grievance if they considered they had been "unjustifiably dismissed." Until the ERAA 2004 and 2010, the test of justification was left to common law. As argued elsewhere (Geare, 2007), case law developed along different lines. One approach was, as expressed by the Chief Judge in *NZ Food Processing Union v Unilever* [1990], that the dismissal be considered in all the circumstances to be substantively justified and procedurally fair. Within a few years, the Chief Judge expressed things somewhat differently and also somewhat contradictorily in *Drummond v Coca Cola Bottlers* [1995] at 232-3:

It is now well settled that it is incorrect to look at dismissal separately from the point of view of substantive justification and procedural fairness, especially in that order for it is likely to lead to a mindset that on certain assumptions the dismissal must be justified, leading to a reluctance to defeat the making of those assumptions by criticism of what is sometimes described as 'mere procedure'. The true inquiry is one that looks at the dismissal overall but it would be no exaggeration to say that the inquiry into procedure should come first.

An alternative approval was expressed by the Court of Appeal in *Northern Distribution Union v BP Oil* at 483 as “the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken ...” It is possible that the Court of Appeal used the word “would” after careful consideration. We suggest this is highly improbable, given their very reasonable observation in the “Oram” case (*W & H Newspapers v Oram* at 487) that:

The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of ‘could’ rather than ‘would’.

The Labour-led Government decided to “repeal” Oram in the 2004 Amendment and included a test of justification in s.103A:

For the purpose of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

We see this reverse back to “would” as unfortunate. Taken literally, it implies that *no* dismissal is justified unless *all* fair and reasonable employers would do the same thing and dismiss. Research shows that seemingly fair and reasonable employers can take a variety of approaches to the same issue. For example, in a study of 150 general or plant managers’ reactions to a theoretical case of employee theft where an employee admits theft to a supervisor, responses varied greatly (Geare, 1996). Indeed, some 78% stated they would probably dismiss, while 22% stated that they would give counselling and/or a warning. Of course, not all those surveyed may be considered fair and reasonable. However, 57 outlined their approach indicating impeccable procedural fairness, with a further 37 giving a reasoned response, but showing some procedural inadequacies. The final 56 gave a knee-jerk reaction to dismiss on the spot.

The ERAA 2010 appears to acknowledge this divergence and reverts back to “could”, a move we consider sensible. The 2010 Amendment also specifies basic procedures and in s.103A(5) goes on to put in statutory form, what was well accepted in common law:

The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –  
“(a) minor; and  
(b) did not result in the employee being treated unfairly.”

Further amendment to this area is undesirable.

### ***90-day trial period***

The 90-day trial period was introduced by the ERAA 2008 and applied to employers with 19 employees or fewer. The ERAA 2010 amended the section so that it now applies to all employers.

The 2008 Amendment was rushed through under urgency. Roth (2009: 7) points out that “fast law tends to be bad law” and that the 90-day trial is a good example of this. Given that the 2010 Amendment simply extends the legislation to apply to all employers, the problems Roth observed still remain and so “it is not likely to accomplish what it is intended to do, and is more likely to achieve the opposite if employers are relying upon it for dismissals free of any legal consequence.” (Roth, 2009: 7)

The Department of Labour Report on Trial Periods (Johri and Fawthorpe, 2010) summarised the official objectives of trial periods as:

- to encourage small and medium enterprises to take on employees
- to reduce employment relationship problems experienced by small businesses
- to provide opportunities for those who might suffer disadvantage in the labour market, including
  - women
  - youth
  - first-time workers
  - Maori and Pasifika
  - people returning to work after a period of unemployment or child rearing
  - people with disabilities or mental illness
  - migrants, or
  - people with overseas qualifications.

Those objectives are highly laudable but, unfortunately, there is little evidence that they will ever be achieved, and little probability that any policy maker actually believed they could or would be achieved.

We believe the 90-day trial period was introduced to appease those employer groups who had convinced themselves that there was a “grievance gravy train” (Woodhams: 8) encouraged by “no win no fee advocates” and even that some employees “may be provoking confrontations in the hope of winning a financial settlement through such advocates” (ibid). That report (p. 6) goes on to point out that those allegations had no foundations and also that “the median direct cost of all ERPs (employment relationship problems – on merit) including those proceeding to legislation represented was about \$5,000, of which \$2,800 represented payouts to employees.”

A further myth about grievances is that small businesses experience more grievances than do large businesses. This is a misinterpretation of survey data and results in such claims as Roth (2009: 7), who suggests “surveys indicate that small and medium sized employers are more likely to have unjustifiable dismissal claims raised against them than larger employers, and such claims tend to occur within the first six months of employment.” In fact, surveys only show that small businesses have more grievances *per 100 employees*. Woodhams (2007: 11) states

the incidence rate per 100 employees per year was higher for small businesses (2.9) than for large businesses (1.2), indicating that employees are more likely to experience an ERP if they work for a small business than a large one.

What this means is that an *employee* in a small firm is more likely to be involved in an employment problem than an *employee* in a large firm – but *not* that small businesses have more grievances than large. In fact, Woodhams (2007: 11) shows

smaller businesses were less likely than larger businesses to experience a problem (6% of small businesses had experienced a problem during the survey period, as opposed to 53% of large businesses. This is not surprising, given that large businesses employ more staff.

Overall, Walker and Hamilton (2009) consider there is a low incidence of grievances.

Some oppose the 90-day trial because it disregards “the elementary human dignity of consultation before dismissal” (Hughes, 2009: 3). We have sympathy with that sentiment, but our primary objection is that the 90-day trial period panders to employers who are poor managers. As Rosenberg (2010: 80) puts it, the

legislation is encouraging poor personnel management practices such as failing to supervise employees adequately, failing to give them feedback to enable them to improve their performance, and using dismissal rather than good interview and employment practices to address the quality of the appointment process.

For good managers, the 90-day trial period is unnecessary. Good managers utilise effective selection processes, ensure new employees not only know what is required of them, but also are able to perform, or are receiving training, and monitor their performance and work attitudes. If there are problems, they are addressed. In rare cases employees may be dismissed – but the need for dismissal will be considerably lower when there is careful monitoring of performance and attitudes. Good employers reserve the use of dismissal for situations where the trust and confidence in the relationship has been destroyed.

Unfortunately for poor managers, the 90-day trial is likely to exacerbate the situation and make them worse by allowing them to continue in managerial roles with inadequate managerial skills because they feel they have the “let-out” of dismissal within the 90 days, there is no incentive for them to upskill. These poor managers will be less likely to monitor performance and attitude and so mediocre employees, who could have become adequate with monitoring, will be disadvantaged. Furthermore, employees bound by the 90-day trial period are at risk of being “let-go” for *less than* breaching the trust and confidence in the employment relationship because there are no legal consequences for the dismissal. While incidence statistics, according to Walker and Hamilton (2009) vary widely, overall they appear comparable to those internationally.

Although a National-led Government will almost certainly leave the 90-day trial period in place to appease employers with poor or no managerial skills, we strongly advocate its removal.

### ***Redundancy legislation***

In contrast to the 90-day trial period where we advocate a repeal of legislation, with regards to redundancy legislation we advocate that the new Government finally take redundancy out of the “too hard” basket and introduce redundancy legislation. The case has been argued over the years (Geare, 1983; Geare, 1999; Geare and Edgar, 2006) and consequently we will put forward only a brief discussion.

In the absence of comprehensive redundancy legislation, employees who do not have a redundancy agreement will receive whatever their employer chooses to give, what they are able to negotiate when in a very weak bargaining position or whatever compensation they are able to receive by taking a personal grievance over the manner of the dismissal. Over the years, liberal minded judges

have “interpreted” union-management agreements and legislation in what could be claimed either as “very liberal” or “judicially active”, depending on your viewpoint.

The Court of Appeal in *Aoraki v McGavin* made a valiant effort to curb the judicial activism, which began back in 1983 with *Wellington Local Bodies* and continued through *Wellington Caretakers IUW v GN Hale & Son Ltd* [1990] 836 and *Brighouse and Bilderbeck*. However, while the Court of Appeal tried hard, it did not stop activism and it appears that it “simply required more creativity on the part of activists. Every comment in a decision is seen as a possible loophole and opportunity for further activism” (Geare and Edgar, 2006: 379).

As we argued in the introduction, employers and employees should be able to clearly determine what both their rights and obligations are. However, the absolute lack of clarity as to what is required in redundancy situations is illustrated in a very recent case *Vice Chancellor of Massey University v Wrigley and Kelly*, which involved the extent of information to be provided and consultation to occur over a redundancy situation, and whether information obtained “in confidence” can be kept confidential. New Zealand needs comprehensive, well thought out redundancy legislation – not the “piece-meal, half hearted” (Geare and Edgar 2006: 381) efforts made by the Labour-led Government in 2004. We very much hope that whoever wins the Election will have the courage and foresight to introduce comprehensive redundancy legislation – but we are not in the least confident that this will occur.

### ***Collective bargaining and unions***

We have already commented on this area so this will be brief. Given the Labour Party’s apparent reluctance to address the “inherent inequality of power in employment relations” via collective bargaining, which would require increased support for proper unions and a legislative requirement for collective bargaining, this is one area we recommend be left alone. Alternatively, we advocate for stability of the dismissal legislation, for the 90-day trial period to be repealed and for the introduction of legislation for redundancy situations as a means to address, in part, the current inequality of power in employment relations.

As we, yet again, witness a gradual pendulum shift in employment relations in New Zealand, we argue for some stability for our legislative framework. Motivated by recent governmental concern for improving workplace productivity, this arena is currently witnessing either the proposal or introduction of a raft of legislative changes. These changes, according to the Department of Labour, are aimed at creating “a more flexible and responsible labour market”, which in turn “is expected to contribute indirectly to improved productivity in a number of sectors” (Department of Labour Annual Report, 2010: 5). In all honesty, can the Government claim these changes are for the mutual benefit of employers and employees, or even for the benefit of enhancing employment relations in general? We think not. We see implicit in them a subtle shift in power leading to a deregulation of the labour market, evidenced by a weakening of employee rights and a gradual return to numerical flexibility – features very much reminiscent of the early 1990s. These changes will not prosper the employment opportunities of the disadvantaged, but rather they will work against them – inherently discriminating against the young and against women who leave and re-enter the workforce more frequently than do men.

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## **Legislation for Participation: an Overview of New Zealand's Health and Safety Representative Employee Participation System.**

LEIGH-ANN HARRIS\*

### **Abstract**

New Zealand's Health and Safety in Employment Amendment Act, 2002 favours increasing worker participation in occupational health and safety (OHS) via a system of health and safety representatives. This amendment gives workers the right to 'have a say' in the running of their organisations, and has significant potential for improving the working environment and making working life more democratic. This paper chronicles the political conflict that hampered the union movement's attempts to enshrine representatives within New Zealand OHS law, outlines the current legal provisions for employee participation set out in the country's principal OHS statute and looks at how the legislation is supported via state patronage of training courses for representatives. Research into what is known about the implementation and operation of OHS employee participation systems in New Zealand is presented, with particular reference to the health and safety representative. A future research agenda is proposed.

### **Introduction**

Employee participation is a cornerstone of systematic occupational health and safety management (OHSM), which has become the dominant legislative strategy for improving workplace health and safety across industrialised nations. Under OHSM, employers are responsible for OHS and have a general duty to implement processes for hazard management (Frick, Jensen, Quinlan and Wilthagen, 2000). Employee participation is seen as fundamental to this system because workers' practical knowledge of the production process can contribute to the effective management of hazards, and their cooperation is seen as vital for OHS improvements to be implemented successfully (Walters and Frick, 2000). Consequently, contemporary reform of OHS legislation, regulation and policy throughout many industrialised countries attempts to ensure employees' participate in OHSM (Bryce and Manga, 1985). Participative OHSM is not only embedded in international covenants, such as the European Union Framework Directive 83/391 and ILO Convention 155, but is also a requirement in the statutes of economies such as Canada, Australia and, more recently, New Zealand. Health and safety (HS) representatives, or workers mandated to represent workers' interests in relation to health and safety, are commonly endorsed as the primary model of participation (Walters, 2005).

International research, particularly from Britain, shows legal compulsion is critical in stimulating the establishment of representative structures for worker participation in OHS (Glendon and Booth, 1982; Leopold and Beaumont, 1982; Lewchuk, Robband Walters, 1996). Legislation provides guidance on the form and nature of participation and legitimises representatives' rights to resources, thus enabling participation (Walters, 2005). While New Zealand's principal OHS statute, the Health and Safety in Employment (HSE) Act 1992, requires employers to adopt an OHSM strategy (Frick and Wren, 2000), curiously, provisions for employee participation were originally negligible (Harcourt, 1996; Wren, 1997).

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\* Research Officer; Centre for Ergonomics, Occupational Safety and Health; School of Management; Massey University

A decade passed and the introduction of the HSE Amendment Act 2002 provided a supporting condition for employee participation in New Zealand workplaces. For the first time, workers had an enforceable right to participate in OHS beyond the traditional domain of collective bargaining, with the HS representative promoted as the primary mechanism for workers to channel their views. Harris (2004: 9) recognised the significance of this amendment as “break[ing] new ground for New Zealand”. In effect, the legislation heralded a new era for a country in which legally based employee participation schemes were eschewed (Harris, 2004), and representative worker participation was rare (Haynes, Boxall and Macky, 2005). Amendment of the HSE Act gave New Zealand workers similar rights to workers in other Western industrialised countries and improved conformance with ILO Convention 155 (New Zealand Government, 2008).

This paper describes the development and features of current New Zealand OHS legislation, with emphasis on the rights of HS representatives. I explain the genesis and progression of legislation for employee participation in OHS, which has tended to be framed to support the underpinning ideology of the prevailing employment relations legislation. It points to training as a necessary part of the infrastructure to ensure effective employee participation, and looks at what is known about the implementation and operation of the legislation within workplaces. Questions are raised as to how representatives are participating in workplace OHSM, and how effective their activity is likely to be in terms of improving health and safety outcomes and extending employee ‘voice’ in managing New Zealand organisations.

## **Origins of New Zealand legislation for HS representatives**

The possibility of a legal framework for HS representatives was mooted in the early 1980s when there was a surge of interest in OHS regulatory and administrative reform in New Zealand and abroad (for more on the reforms see Lamm, 1994; 2010; Wren, 1997; 2002). New Zealand’s trade unions instigated calls for reform following serious industrial accidents. Unions, with the Labour Party as their political ally, advocated legislative-based HS representatives and OHS committees as a means of empowering workers to protect their health and safety. Yet, employers’ representatives and the National Party wanted OHS reforms to empower employers to manage OHS and to limit workers’ rights to participate in order to minimise potential conflict and disruption (Wren, 1997). Employee participation, particularly legislative-based HS representatives, became a contentious political issue that dominated the reform process.

Conflict over legislated HS representatives and committees heightened when capital and labour were brought together at the Advisory Committee for Occupational Safety and Health (ACOSH). Established in 1985 as a tripartite platform, ACOSH had a broad agenda: OHS legislative and administrative reform (Wren, 1997). Yet, broader issues were marginalised as the proposed introduction of compulsory HS representatives and committees dominated the agenda for the first 18 months (Harcourt, 1996). According to Wren (1997), the reason for this dominance was that both employers and union representatives continually engaged in passionate debate without apparent compromise or resolution. Unions wanted representatives’ rights to be protected in law, but employers resisted the notion of legal compulsion, preferring arrangements to be voluntarily determined in the workplace subject to employer discretion (Wren, 2002). Indeed, employers opposed any legal reforms that would give workers greater influence in decisions about OHS and wider issues affecting their working lives, as demonstrated by their objections to statutory based industrial democracy schemes proposed by the Committee of Enquiry into Industrial Democracy in the late 80s (Harris, 2004).

To hasten OHS reform, the chair of ACOSH sought to appease employers’ and workers’ representatives by stipulating the introduction of a voluntary code of practice for HS representatives

and committees that would become mandatory if uptake was limited. The Department of Labour (DOL) (1987) issued the *Code of Practice for Health and Safety Representatives and Health and Safety Committees* to all factories employing more than 10 staff (Mullen, 1990). Employers had no influence on the code's content (Wren, 1997), which is perhaps the reason for the Employers Federation simultaneously releasing its own code that, apparently, attempted to minimise union influence within workplaces (Mullen, 1990).

Accounts suggest that neither code was willingly or widely adopted. For example, of the 427 factories that Moir (1989) surveyed, 51% reported making no changes in response to the codes, while Mullen's (1990) results revealed that only 30% of factories (n=385) were willing to voluntarily adopt the codes.

Union demands for compulsory representative employee participation appeared to be satisfied when significant reform was proposed via the Occupational Safety and Health (OSH) Bill 1990. The Labour Government's OSH Bill recommended an OHSM framework, including provisions for HS representatives and committees (Wren, 1997). When Wren interviewed a union official years later, the official declared: "The OSH Bill really was the union agenda, that was our Bill, that was what we wanted" (Wren, 1997: 116). However, any union celebrations were short-lived. The OSH Bill was withdrawn by the National Government after the party's victory at the 1990 General Election, which shifted the influence on legislative reform in favour of employer interests (Campbell, 1995; Wren, 1997). The new National Government handed employers the opportunity to progress OHS reform and redress what they perceived to be a power imbalance that immoderately favoured workers' interests.

In 1992, the National Government enacted major OHS legislative and administrative reform by passing the HSE Act. A policy of state paternalism whereby employers were told which hazards to manage and how, was abandoned in favour of a system that obliged employers to manage risks created in the course of business activity by implementing OHS management systems with guidance from prescriptive performance standards (Allen and Clarke, 2006; Gunningham and Johnstone, 2000; Wren, 1997). The HSE Act emphasised employers' responsibility for hazard management but conferred workers few rights to participate (Harcourt, 1996).

Employee participation, a fundamental cornerstone of OHSM, was a victim of this legislative reform and managerial prerogative was protected and promoted. Unlike the OSH Bill, the HSE Act contained no legal requirements for HS representatives or committees as these were perceived to be inconsistent with the neo-liberal philosophy that underpinned the concurrent changes to the employment relations regime (Lamm, 2010; Wren, 1997). Ratification of the Employment Contracts Act (ECA) 1991 ended nearly a century of centralised conciliation and voluntary arbitration in favour of a decentralised system that gave managers the right to determine terms and conditions of employment, including OHS (Jeffrey, 1995).

Alignment of the HSE Act with the ECA meant that provisions perceived to obfuscate managerial prerogative were omitted from the country's principal OHS statute (Anderson, 1991). Employers were obliged to give employees opportunities to assist with hazard management, but these provisions 'lacked teeth' and were unenforceable (Harcourt, 1996). Rights of workers to participate in OHS remained weak during the employers' ascendancy from 1991 to 1999.

Election of the fifth Labour Government in 1999 saw yet another shift in political influence and attempts to ameliorate employer dominance and restore a sense of balance to the employment relationship. Upon return of the Labour Party to Government, Minister of Labour, Margaret Wilson, proposed a package of employment relations reforms intended to improve workers' rights, including

emendations to the HSE Act (Lamm, 2010). OHS legislative reform was prompted by concerns about the efficacy of the HSE Act to protect workers given New Zealand's high rate of occupational illness, injury and fatality relative to other developed countries (Wilson, n.d.). Wilson and leadership of the New Zealand Council of Trade Unions (NZCTU) agreed that the poor OHS record was attributable to deficiencies in the HSE Act, particularly the omission of strong rights for employee participation (Harris, 2004).

In 2001, Margaret Wilson introduced the HSE Amendment Bill, which included provisions for elected HS representatives and OHS committees (Harris, 2004). She saw representative employee participation as an important mechanism for reducing the country's high level of occupational injury and fatality (Wilson, n.d.). She primarily based this assumption on findings from a British study by Reilly, Paci and Holl (1995), the reliability of which has since been seriously questioned (Nichols, Walters and Tasiran, 2004). The study's findings were used to justify that "legislated employee participation, in the form of health and safety representatives and committees, reduces the overall costs and incidence of injury by up to 50 percent" (Wilson, n.d.: 3).

Amendment of the HSE Act was also intended to facilitate the aims of the Labour Government's new piece of employment relations legislation, the Employment Relations Act (ERA) 2000 (Wilson, n.d.), which again reflected the Government's propensity to couch OHS legislation within the context of employment relations policy (Wren, 2002). The ERA's objective is: "to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship" (Wilson, 2004: 16). Wilson surmised that employee participation in OHS would support the ERA's objectives by increasing communication and cooperation between workers and employers (Lamm, 2010).

Faced with the renewed prospect of legislation for employee participation, employers' representatives opposed the HSE Amendment Bill. For instance, Business New Zealand (2002) questioned the need for the amendment, citing a downward trend in workplace accidents since the introduction of the HSE Act. Other accounts suggest that, paradoxically, the HSE Act failed to improve the country's OHS performance (Lamm, 2010). Minister Wilson sought to appease employers by reaffirming managerial prerogative and ensuring that the legislation could accommodate employee participation schemes already in operation (Harris, 2004). The HSE Amendment Bill was enacted as the HSE Amendment Act 2002, and contained statutory provisions for HS representatives for the first time in New Zealand's history.

## **Legislation for Participation: the HSE Amendment Act's Provisions for Employee Participation**

Under the HSE Amendment Act, employers are responsible for workers' health and safety, but employee participation is fundamental to this process as it ensures all people with relevant knowledge can contribute to improving OHS (s.19A). To support this co-operation, the law created a general duty on employers to involve employees in OHS.

The HSE Amendment Act requires employers to "provide reasonable opportunities for ... employees to participate effectively in ongoing processes for improvement of health and safety" (s.19B[1]). These "processes" are referred to in sections 6-13 of the HSE Amendment Act (s.19B [2]) and give employees the right to:

- participate in the process of taking all practicable steps to ensure their working environment is safe and healthy (s.6);

- participate in identifying and assessing hazards, including recording and investigating accidents (s.7);
- participate in controlling significant hazards via elimination (s.8), isolation (s.9) or minimisation (s.10);
- results of workplace OHS monitoring (s.11);
- information about emergency procedures, hazards and controls (s.12); and
- training and supervision in the use of plant, objects, substances and equipment (s.13).

When determining how employees participate in these processes, employers must consider workplace contextual variables (s. 19[B]), such as the nature of hazards, whether employment is permanent or temporary, number(s) of worksite(s) and staff numbers. Employee count is an important variable because it determines whether an employee participation system is required.

One of the significant changes introduced by the HSE Amendment Act is the obligation on employers to negotiate with their employees and any relevant union(s) to determine an employee participation system (Hay, 2003). If a business employs fewer than 30 staff, a request by one employee or a union representative is sufficient to oblige that employer to develop a system. Businesses with more than 30 staff must have an employee participation system. Parties to the employment relationship have to co-operate in good faith to design, implement, maintain and review a system that allows employees to participate in OHS. The notion of good faith aligns the HSE Amendment Act with the ERA, and implies that this process is characterised by information sharing, cooperation and trust (Wilson, 2004).

Other than these requirements, the HSE Amendment gives workplaces freedom to determine the nature of their employee participation systems (s.19C). Parties can decide whether employees will participate in OHS directly with management or via representative channels, such as HS representatives, OHS committees or both. They also have scope to determine the roles and functions of these representative participatory mechanisms(DOL, 2002b). Schedule 1A of the HSE Amendment Act, or the 'default system', provides guidance on what *may* be included in an employee participation system. This system has to be implemented if parties cannot agree on how employees will participate (s.19D).

Central to the model of employee participation in the default system is the HS representative. The default system advocates democratic election of representatives, but an election is not required if there is only one nominee. If there are no nominees, the position should be considered vacant. The number of HS representatives at a workplace should be determined with reference to contextual variables, such as the type(s) of work performed and the way in which employees are grouped at worksite(s). A maximum of five HS representatives should participate in OHS committee meetings and must constitute at least half the committee's membership. Further, the default system specifies a range of possible HS representative functions. Taken verbatim from Schedule 1A (Part 2), representatives are:

- a) to foster positive health and safety management practices in the place of work;
- b) to identify and bring to the employer's attention hazards in the place of work and discuss with the employer ways that the hazards may be dealt with;
- c) to consult with inspectors on health and safety issues;
- d) to promote the interests of employees in a health and safety context generally and in particular those employees who have been harmed at

work, including in relation to arrangements for rehabilitation and return to work:

- e) to carry out any functions conferred on the representative by –
  - i. a system of employee participation; or
  - ii. the employer with the agreement of the representative or a union representing the representative, including any functions referred to in a code of practice.

However, the code of practice referred to in section e) ii does not exist, as consensus could not be reached regarding the content. In 2004, the Minister of Labour appointed a tripartite committee to develop a code (Wilson, 2005). According to one participant, members lost “goodwill” after a series of meetings and the committee dissolved in 2005 as parties struggled to agree on the content, suggesting lingering class conflict. Disagreement centred on whether HS representatives appointed by management were legitimate and when the default system should become mandatory (Bob White, Senior Policy Analyst, DOL, personal communication, 8 May 2009). While a code of practice never eventuated, the DOL produced guidelines to assist with the interpretation of the HSE Amendment Act (DOL, 2002a,b; 2003).

Under the HSE Amendment Act, HS representatives are also conferred special rights. Notably, they are entitled to:

- access information about OHS systems and issues (s.12 [2]);
- make recommendations about OHS matters to which the employer must implement or provide a written explanation as to why the proposal will not be adopted (s.19B [4]); and
- two days paid leave annually to attend approved HS representative training courses (s.19E), but this is subject to negotiation of the employee participation system.

Further, representatives have rights to advise workers to refuse to perform work that is likely to cause serious harm (s.28), and to issue their employer a hazard notice (s.46). The latter should describe a hazard and list possible solutions for its control. Notice should only be issued if the employer fails to address a hazard that the representative has previously raised in an attempt to facilitate a resolution. Recognising that employers might unfairly discriminate against those who exercise these rights, representatives have access to personal grievance proceedings if they perceive they have been disadvantaged because of their OHS activities (ERA s.104 and 107).

These statutory rights provide representatives with a degree of power but are not intended to be arbitrarily used. Rights related to the prevention of harm and hazard notices only extend to representatives that have attended approved training courses (s.46A). ‘Approved’ means that the course has been certified by the Minister of Labour and supports the aims of the HSE Amendment Act (s.19G). Thus, the HSE Amendment Act explicitly endorses the need for formal training opportunities for representatives if they are to utilise the avenues of influence available under law.

## **Provision and Funding of HS Representative Training**

The NZCTU was the first organisation to develop a two-day training course for HS representatives, and to appeal to ACC to fund its delivery (Wilson, 2005). Commentators regarded this as a strategy to increase union membership (Harris, 2004), which may be why employers initially expressed a “considerable degree of scepticism” towards the initiative (Wilson, 2005). Possibly to convey political neutrality, ACC agreed to subsidise HS representative training courses delivered by both the NZCTU and EMA so that all representatives could attend for free or at minimal cost. This funding



has helped ensure that, of the 12 institutions approved to train HS representatives, the NZCTU and EMA are the country's largest providers of training for employee participation in OHS (Paul Fitzgerald, Employment Relations Education Authority, DOL, personal communication, 12 February 2010). Both organisations offer three two-day courses, the content of which is briefly outlined in Table 1. Theoretically, this training should increase representatives' capacity to participate in OHS management in the short-term, ultimately reducing accident and injury rates over the long-run (Johnson and Hickey, 2008).

**Table 1. NZCTU and EMA HS representative training course content: stages 1-3**

Stage	Content
<b>One</b>	Provides an overview of the HS representative role, OHS legislation and components of OHS management systems (Johnson and Hickey, 2008).
<b>Two</b>	Focuses on the accident investigation process (Johnson and Hickey, 2008).
<b>Three</b>	Teaches representatives how to measure OHS outcomes, 'sell' recommendations for OHS improvements and informs them about the return-to-work and rehabilitation processes (EMA, n.d.; NZCTU, 2007).

Government subsidy of HS representative training facilitates operation of the HSE Amendment Act by relieving employers of the financial costs associated with training representatives. Justification for this funding is embedded in the DOL's *Workplace Health and Safety Strategy to 2015*, which regards employee participation as a key injury prevention strategy (New Zealand Government, n.d.). Yet, despite the apparent centrality of employee participation to New Zealand's injury prevention efforts, economic downturn has seen a reduction in Government funding of HS representative training. Since 2009, ACC only subsidises courses run by NZCTU, EMA and Impac for representatives from high risk industry sectors, including metal manufacturing, agriculture, construction, forestry, meat processing, public health and road transportation (Paul Fitzgerald, Employment Relations Education Authority, DOL, personal communication, 3 December 2008). Transferring training costs to businesses in sectors beyond these industry classifications is likely to result in reduced attendance at courses (Lamm, 2010), thus potentially signalling the erosion of a mechanism shown to support New Zealand's representatives (Johnson and Hickey, 2008). However, the impact of this funding reduction is yet to be evaluated.

## **Evaluation of New Zealand's OHS Employee Participation Systems**

In spite of the legal and state patronage of employee participation in OHS, surprisingly little is known about the implementation, operation or effectiveness of OHS employee participation systems within New Zealand's workplaces (Harris, 2010; Lamm, 2010). The subject has received scant academic attention but government agencies, under the fifth Labour-led Government, commissioned social marketing research agencies to conduct some evaluative research (Colmar Brunton, 2004; Johnson and Hickey, 2008).

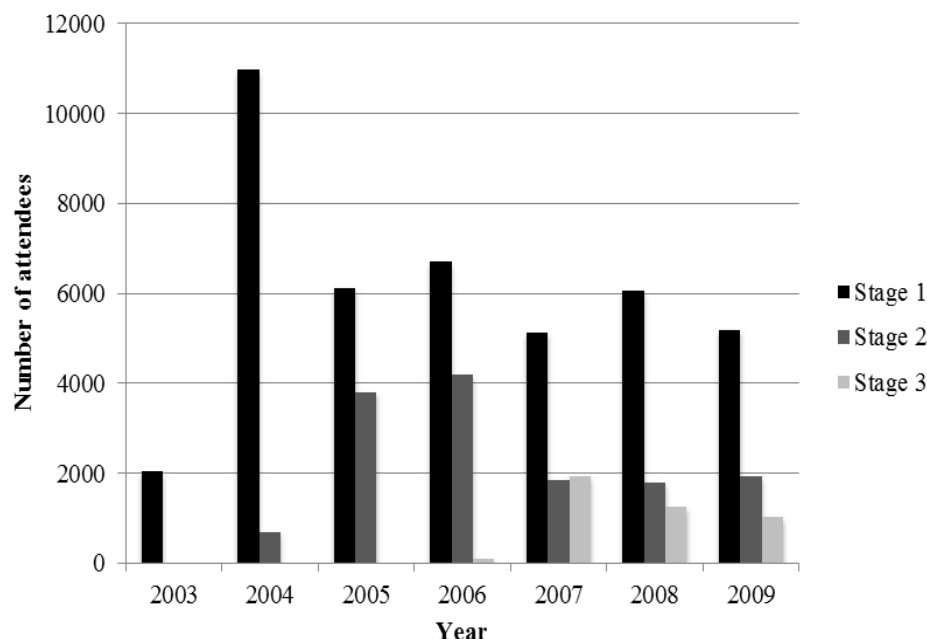
### ***Quantitative evaluations of New Zealand's OHS employee participation systems***

Soon after the HSE Amendment Act came into force, the DOL contracted Colmar Brunton (2004) to determine the Amendment's impact on the prevalence and nature of employee participation in OHS as well as employers' attitudes towards the matter. Of a national telephone survey of 600 employers, the majority (75%) reported that employees were able to participate in OHS, particularly via

meetings (business size indeterminate due to contradictory descriptions of participants). Employers were found to have surprisingly positive attitudes towards employee participation with three quarters agreeing that employee involvement in OHS was beneficial, the most popular reason being that it was “important to involve employees in health and safety matters”(Colmar Brunton: 10). It was argued that employers most favourable to participation were those with representative participatory structures established at their workplaces, but reporting inconsistencies make it impossible to ascertain prevalence. According to Colmar Brunton (2004, Table 6), 16% of employers confirmed that they had an OHS committee, 35% had HS representatives and 60% had neither. Yet, elsewhere in the report, Colmar Brunton (2004) reported that, more optimistically, 49% of the sample had a committee, 64% had HS representatives and only 27% had neither representative participatory structures. Disconcertingly, these discrepancies may influence Government policy and are being perpetuated. For instance, Harris (2004) used the figures in Table 6 of Colmar Brunton’s report to suggest that the prevalence of representative structures was low in New Zealand, claiming: “60% of all employers stated that they had neither a health and safety committee nor a health and safety representative!” (2004: 7). Additionally, it was impossible to ascertain from Colmar Brunton (2004) whether participatory mechanisms existed voluntarily prior to the HSE Amendment Act or came about in response to it.

Attendance figures at approved HS representative training courses suggest, however, that the HSE Amendment Act had a stimulatory effect on employee participation. Figure 1 shows that attendance figures for stage one peaked the year after the HSE Amendment Act came into force, and numbers have remained steady at between 5,000–6,000 participants. From 2003-2009, a cumulative total of 42,233 representatives attended stage one. Yet, only a minority of attendees appear to progress to the advanced stages, and training providers cite low attendance from construction, transport and on-hire sectors (Allen and Clarke, 2006).

**Figure 1. Attendees at approved HS representative training courses (2003-2009)**



Source: Paul Fitzgerald, Employment Relations Education Authority, DOL, personal communication, 12 February 2010

Attendance at training courses has been positively interpreted as an indication that the HS representative model has traction. In 2005, President of the NZCTU claimed New Zealand’s HS representative system had reached “critical mass” (Wilson, 2005), while the DOL (2007) inferred

that the volume of course participants suggested there was a “growing pool of skilled and experienced representatives...making a significant difference to New Zealand’s occupational health and safety performance” (p.19). It is unclear whether this statement is speculative or based on findings from in-house, unpublished research. I found evidence to support the DOL’s proposition via an ACC Civil Servant who provided access to Research New Zealand’s (Johnson and Hickey, 2008) unpublished evaluation of HS representative training courses. Notably, the combined evaluation of the NZCTU and EMA’s courses indicated that HS representatives are potentially improving the country’s OHS performance by contributing to OHSM. Of the 290 attendees interviewed by telephone, most (>80%) reported facilitating the identification of hazards and communicating OHS information to workers. HS representatives’ tendency to focus on operational rather than strategic OHS activities is a consistent theme internationally (Brun and Loiselle, 2002; Gaines and Biggins, 1992; Hillage, Kersley, Bates and Rick, 2000; Tragardh, 2008).

While Research New Zealand’s (Johnson and Hickey, 2008) study provides insight into how New Zealand HS representatives enact the role, it shares limitations common to questionnaire surveys. Notably, it fails to explain the nature and extent of representatives’ participation, particularly within the workplace, is restricted to the perspectives of individual representatives and does not develop qualitative insight into the experiences of HS representatives.

### *Qualitative evaluation of New Zealand’s OHS employee participation systems*

A cross-perceptual study carried out by Harris (2010) serves to complement and enhance knowledge gained from quantitative studies. Harris’ two organisational case studies were large metal manufacturers committed to employee participation in OHS. The investigation focussed on the HS representative role as it had been interpreted and enacted in New Zealand workplaces within the bounds of the HSE Amendment Act. Data were collected via semi-structured interviews with eight HS representatives and a range of actors shown to influence the representative role, including line managers, workers, OHS managers, senior managers and a union representative. Thematic analysis of the interviews revealed that, whilst the HSE Amendment Act stimulated the establishment and formalisation of representative employee participation structures, Businesses A and B had diverse interpretations of the purpose of the HS representative, which seemed to influence role enactment.

Business A introduced HS representatives and an OHS committee to comply with the HSE Amendment Act and secure an ACC levy discount under the Workplace Safety Management Practices (WSMP) programme. Yet, in contravention of the legislation, and apparently without worker opposition or a union to represent worker interests, the OHS manager determined the HS representative role unilaterally and communicated her expectations ‘top down’ to representatives. The representatives’ purpose was to take responsibility for OHS management and to provide workers with an avenue of redress if their health and safety was jeopardised. Unsurprisingly, HS representatives had a ‘managerialist’ interpretation of their role and undertook compliance and monitoring functions. Two of the four representatives were typecast as ‘administrators’ because they sought to improve health and safety by administering their unit’s OHS management systems, and were vital in accrediting the systems to a basic, ‘primary’ standard under the WSMP programme. Business A’s other two representatives were typecast as ‘workshop inspectors’ because they primarily informed workers of their OHS obligations (e.g. to wear personal protective equipment) and monitored compliance. They were perceived to have improved workers’ attitudes towards OHS. In essence, Business A’s representatives acted akin to managers rather than workers’ representatives. Yet, co-workers perceived that their representatives represented their interests and provided a legitimate channel to articulate OHS concerns. Workers gave the impression that, through their representatives, they had a greater say in the running of their organisations, findings that may ameliorate concerns over the ‘representativeness’ of managerial defined HS representative systems (Wright and Spaven, 1999).

In contrast to the relative infancy of Business A's employee participation system, Business B institutionalised HS representatives in the 1970s under union auspices to service workers' interests. Still, the HSE Amendment Act prompted the formalisation and expansion of this system beyond the unionised workforce and an employee participation agreement, outlining the HS representative role, was negotiated between management and workers. Findings suggest that details of this agreement were generally not well communicated or known, leaving the role to be interpreted 'bottom up' by workers and managers. Within this context, representatives used their technical knowledge to participate in hazard management, which is perhaps akin to the form of participation that theorists and legislators envisaged as the appropriate type of engagement. Notably, two of the four representatives were typecast as 'problem solvers' because they focussed on seeking technical solutions to manage hazards and facilitated improvements to production from an OHS perspective. The other two representatives acted like 'craft experts' by asserting specialist craft-based expertise at OHS committee meetings to influence the development of standards and procedures for the management of specific hazards. Both of Business B's representative 'types' were perceived to give workers a legitimate channel to raise OHS concerns.

Harris (2010) also found that, commonly, representatives from both businesses seemed to foster the secondary aims of the HSE Amendment Act. All appeared to act in good faith to enhance the interests of management and workers, even though their approaches to the role varied, as demonstrated by the four identified role types.

HS representatives' role enactment appeared to be influenced by a range of factors. A particular influence was how the purpose of the HS representative was defined and communicated within the organisation, especially whose interests (management or workers) influenced role definition and how well expectations were communicated. Also pertinent was representatives' expert power based on their formal skills/qualifications, OHS knowledge, organisational knowledge and ability to form coalitions. Finally, role enactment appeared to be related to the representatives' job roles, which determined their access to resources and the types of activities in which it was acceptable for them to participate.

Harris's (2010) findings are, however, likely to reflect 'best practice' rather than the 'norm' based on the choice of research site and industry. For HS representatives to be better placed to improve OHS, there is a clear need for research into how the role is played out in workplaces throughout New Zealand.

## **Future Research Agenda**

There remains considerable scope to broaden New Zealand's research agenda on employee participation in OHS. Firstly, it is important to ascertain the prevalence and nature of employee participation systems within New Zealand workplaces to determine where support should be directed to improve operation of the law. At present, basic facts such as the prevalence of HS representatives and OHS committees are unknown (Lamm, 2010). The nature of employee participation systems established within businesses is also unclear, particularly the extent to which the default system has been adopted and how representative systems function in combination with the direct participation systems that seem to be popular in New Zealand (Colmar Brunton, 2004).

Second, provisions for employee participation within the HSE Amendment Act should be evaluated against the purposes for which they were intended. Effort should, therefore, be directed to determining how employee participation in OHS affects rates of occupational injury. It should be noted that the relationship between representative employee participation and injury rates is difficult

to measure because of significant methodological limitations associated with complex cause-and-effect relations and variations in reporting standards (Shearn, 2005; Walters, 2005). Researchers, thus, recommend the use of mixed methodologies and triangulation to attain more reliable results (Bryce and Manga, 1985; Nichols, et al., 2004). Other means of measuring changes in OHS performance, such as assessing improvements to organisations' HS management operations, can also be useful proxy indicators of the effectiveness of representative participation (Walters, 2005).

Third, research is needed to determine how provisions for employee participation within the HSE Amendment Act affect employment relations and employee participation in New Zealand. Important questions pertain to the nature of representative participation: how 'representative' is it and to what extent are workers able to exercise 'voice' in the determination of employee participation systems, but also in operational and strategic decisions as individuals and as part of OHS committees?

Consideration of wider contextual circumstances is essential to enhance understanding of why the legislation fails and succeeds. Legal protections for HS representatives have remained intact under the fifth National Government, thereby allaying earlier fears that a change in Government might jeopardise their statutory rights (Harris, 2004). However, the HS representative system has faced challenges, particularly recognition that the prevailing economic downturn is likely to negatively impact on workers' ability to participate in OHS (Lamm, 2010; Wilson, 2005). International evidence suggests that employee participation schemes wane during recessions as managers tend to be receptive to the views of employees with skills and qualifications in demand on the labour market (Jensen, 1997; Walters and Frick, 2000). Additionally, managers are often more willing to share decision-making power with workers if they perceive them to have competent OHS knowledge, which is often enhanced by workers' attendance at HS representative training (Leopold and Beaumont, 1982). Yet, reduced Government funding of HS representative training courses potentially reduces workers' access to OHS knowledge and skills, particularly if they come from industry sectors that are not prioritised and funded by ACC. This raises questions about the status of, and support mechanisms for, employee participation in those industry sectors that are not considered 'high risk' by New Zealand's OHS administrative authorities.

In spite of potentially counterproductive economic conditions, other mechanisms could encourage employee participation. The Partnership Resource Centre and Workplace Productivity Group have helped to raise awareness of the link between employee participation and productivity (Lamm, 2010). Additionally, the ACC's WSMP programme offers financial incentives to businesses that demonstrate sound OHS management systems, including arrangements for employee participation (ACC, 2008). Harris (2010) found that the WSMP programme motivated a particular business to implement employee participation. However, further research could explore, more widely, the extent to which the WSMP programme promotes employee participation in OHS and influences the nature of that participation.

## Conclusion

This overview of the development and features of current New Zealand OHS legislation highlights the significance of the HSE Amendment Act's provisions for employee participation in OHS. For the first time, workers were given a legitimate and enforceable right to participate in matters concerning their health and safety. HS representatives were introduced to help reduce the country's high level of occupational injury and illness, and to foster good employment relations. They form a significant part of New Zealand's injury prevention strategy and potentially give workers greater influence over the conditions under which they are employed to protect their health and safety.

The historical perspective adopted here suggests that legal support was necessary to establish employee participation in OHS within New Zealand. Employers, fearing that representatives would encroach on managerial prerogative, expressed significant political opposition to legislation for representatives. Evidence shows that there was limited uptake of the voluntary codes of practice for HS representatives and committees in the late 1980s, so legislation was necessary to stimulate institutionalisation of these representative participatory structures.

Since the passing of the HSE Amendment Act, attendance figures at HS representative training courses suggest this model of employee participation has been established in New Zealand workplaces. While training has shown to be beneficial, this critical support mechanism for representatives is in jeopardy following Government cuts to the funding of course attendees. The impact of funding changes as well as the HSE Amendment Act's provisions for employee participation in OHS, however, remains to be seen.

Revisiting the origins of the legislation and what is known about employee participation in OHS within New Zealand workplaces serves as a reminder of the potential contribution that representatives can make. If the full potential of the HSE Amendment Act to improve working lives is to be realised, research should be undertaken into the role of HS representatives and employee participation in OHS more generally. Moreover, research must link back to the spirit and intent of the legislation, which this paper goes some way to clarifying.

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# **New Zealand Employer Attitudes and Behaviours: What are the Implications for Lifting Productivity Growth?**

ERLING RASMUSSEN\* and BARRY FOSTER\*\*

## **Abstract**

This article addresses two issues. First, the rise of individualism in New Zealand employment relations as collective bargaining coverage has declined. Second, the effect this rise in individualism is having on achieving a high wage, high skill economy. In its discussion, the article draws on previous work on the historical rise of individualism, with a special emphasis on developments under the Employment Relations Act (ERA) 2000. The article focuses on the role of employer attitudes and, based on results from surveys of private sector organisations employing 10 or more staff, employers' dislike of collective bargaining and unions dominates findings. Finally, the article asks whether individualism can be aligned with a productive, high wage and high skill economy. It is argued that it is more likely that the economy will end up in a low skill, low wage situation.

## **Introduction**

This paper connects two debates which are often discussed separately. First, it discusses the rise of individualism in employment relations and the role that employer attitudes and strategies have played in this shift. Second, the paper overviews the economic and social implications of the rise in individualism and, in particular, how this raises doubts whether a high wage, high skill economy can be achieved. Although the paper is concerned with comparatively relevant theoretical explanations, issues and trends, it takes its empirical starting points in New Zealand surveys and analyses. While several explanatory factors have been associated with the decline in collective bargaining, this paper focuses on the role of employer attitudes and strategies as a key explanatory factor. As proposed in the Strategic Choice Theory (Bamber, Lansbury and Wailes, 2004; Kochan, McKersie and Cappelli, 1984), this has also been aligned with a more active role of management/employers in influencing and framing the employment relations agenda.

In investigating a shift to individualism in employment relations in New Zealand, a national survey of firms employing 10 or more staff was conducted (Foster, Murrie and Laird, 2009a; Foster, Rasmussen, Laird and Murrie, 2009b). Overall, the survey found that employers have little interest in collective bargaining. However, there are two distinct groups amongst employers: if employers are involved in collective bargaining, they have a more relaxed and positive approach to collective bargaining as opposed to employers who are not involved. With a strong employer preference for individual bargaining, the future of collective bargaining in New Zealand looks grim. Furthermore, the leading employer confederation – Business New Zealand – has been opposed to a development of industry-level collective bargaining. It also voiced its opposition to the 2000-2007 employment relations reforms, which have favoured collective bargaining and increased statutory employment minima (Burton, 2004; 2010; Foster and Rasmussen, 2010).

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\* Professor Erling Rasmussen is in the Management Department, Auckland University of Technology.

\*\* Barry Foster is in the Management School, Massey University, Palmerston North

While the rise in individualism is clearly aligned with employer preferences, it may raise serious obstacles for particular approaches to achieving a high-wage, high-skill economy (McLaughlin, 2010). In evaluating these obstacles, the so-called New Zealand 'experiment' is an appropriate example, given that the current employment relations has incorporated two different approaches: the first being one of the most deregulatory public policy approaches to employment relations amongst OECD countries, which was followed in the new millennium by the public policy approach inspired by European 'social democracy' understanding (Haworth, 2004).

Unfortunately, these attempts have failed to move the New Zealand economy onto a high-wage, high-skill path. However, there appears to be different reasons for their failure. The New Zealand 'experiment' has shown that there can be several issues with pursuing a deregulatory approach to employment relations. These issues have included low productivity, low wages and employment conditions, growing social inequities, limited investments in infrastructure and upskilling (Dalziel and Lattimore, 1999). Subsequently, the economy has struggled to overcome the fallout from these issues in the new millennium (Rasmussen, 2009).

The post 2000 'social democracy' approach has also had limited success as it assumes strong collectivism will ensure industry solutions *and* decent employment standards across the economy. However, the rise in individualism has undermined the role of collectivism and, thus, some kind of 'functional equivalents' is necessary to pursue this reform path. In most cases, legally extended employment standards, including higher statutory minima, would be an obvious option. This would probably raise political opposition since employers are often waging war on statutory minima increases in the name of 'flexibility' and 'affordable labour costs'.

On that background, the 'low road' can easily be the preferred option for at least a significant section of the labour market. This became a serious issue in New Zealand after the 2008 economic downturn as a National-led Government has pursued increased 'flexibility' and lower compliance costs. This has also been a recurrent issue in other Anglo-American countries with the USA being the prime exponent (O'Toole and Lawler, 2006). Whether this will become the dominant scenario has been discussed as some commentators have debated if ILO's decent work agenda and establishing international labour standards have gained traction (Haworth, Hughes and Wilkinson, 2005; Standing, 2008). It can also be pointed to that many OECD countries have witnessed the introduction of more comprehensive statutory minima and improved individual employee rights in recent years. Thus, 'the jury is still out' and this is what makes the debate of path-breaking changes to New Zealand employment relations and their economic and social impacts so fascinating.

## **The Historical Rise in Individualism**

New Zealand employment relations has been in turmoil for at least the last 25 years. It has witnessed major changes in the 1980s, the 1990s and post 2000. The Employment Contracts Act (ECA) 1991 facilitated a sharp shift from industry and occupational based bargaining to workplace and individualised bargaining, a steep decline in union density and new forms of employee representation (Dannin, 1997). There was also a remarkable expansion of individual employee rights in terms of human rights, privacy and personal grievance rights as employment regulation covered all employees (Rasmussen, Hunt and Lamm, 2006). As such, the 1990s witnessed a radical shift towards individual employment agreements being the dominant mode. It is also important to stress that a rise in individual employment rights fitted well with the National Government's anti-union strategy in the early 1990s. However, these rights became less popular amongst conservative politicians in the second half of the 1990s and this view has re-appeared under the post-2008 National-led Government (see below).

It is more difficult to explain how individual employment rights have continued to rise under the Labour-led Governments in the new millennium. These Governments promoted a new form of 'social democracy' with an emphasis on collectivism, public-private collaboration and workplace partnership (Haworth, 2004). The new legislative framework supported explicitly collective bargaining and unionism, and was seen as a deliberate attempt to overcome the contractualism and individualism of the ECA (Wilson, 2004a). This included several measures to bolster unions: better workplace access, exclusive bargaining rights for registered unions, 'good faith' bargaining obligations and abolishing strike restrictions on multi-employer bargaining (for overviews, see Rasmussen, 2004; 2009; 2010). While union membership has increased in the public sector and, while unions have become more visible under the ERA, there has been little improvement in overall union density and in the private sector, union density has dropped by 50% in the new millennium to around 9% in late 2008 (Blumenfeld, 2010).

Why did union density decline in the private sector when the legislation was explicitly (in its objectives and in its intent) supporting collectivism? This is a rather complex issue and it is probably fair to say that no definitive answer has been provided. In an overview of existing research (Rasmussen and Walker, 2009: 129-133), it has been suggested that the following explanatory factors have been important:

- the existence of a 'representation gap'
- the unions' inability to gain ground on multi-employer collective agreements
- employee apathy or lack of interest
- employer resistance or lack of support.

The work by Haynes, Boxall and Macky (2006) and Charlwood and Haynes (2008) have attempted to explain the reasons why there is a representation gap. Based on an analysis of the New Zealand Election Study surveys, Charlwood and Haynes (2008: 104) found that "receding union reach" (ie. a 'representation gap') was a core explanation of union decline during 1990-2002. As this alludes to awards and 'blanket coverage' being abolished by the ECA 1991, this is probably not surprising. However, Charlwood and Haynes (2008: 104) "largely discount structural factors as causes of union decline" which, considering that New Zealand has experienced more structural changes than most other OECD countries, is rather surprising and should prompt further research. They also discount employer resistance as a major cause of union decline in New Zealand. The work by Waldegrave, Anderson and Wong (2003) also came to the conclusion that employee apathy was a contributing factor to union decline.

Rasmussen et al. (2006) have also argued that the rise in individual employment rights have, undoubtedly, had some influence on employee interest in union membership. In the 1990s, the extension of individual employment rights was in line with the Government's liberal thinking and anti-union stand. The Labour-led Governments' position is rather more *contradictory* since employment relations promoted both collectivism and individual employment rights. In fact, the extension of statutory minima was considerable and has changed employment conditions for many people in the lower end of the labour market. Given that background, Rasmussen et al. (2006) asked why employees should become union members if the main employment gains were provided through Government intervention? This is also supported by McNeil, Haworth and Rasmussen (2010) in their analysis of different regulatory impacts. Again, it is important to stress that there is a lack of research into union membership decline, and that the rise in individualism is just one factor amongst many.

Likewise, although we focus on employer attitudes below, employer antipathy (or employees' perception of negative employer attitudes) can only be seen as one of several factors in a rather complex decision-making process surrounding collective bargaining and union membership (see Bryson, 2008). Still, employer attitudes, behaviour and strategies have become crucial in influencing the employment relations outcomes and processes in New Zealand as employment relations have been decentralised, union presence has declined, and individualised employment arrangements and rights have increased. The real issue in connection with this paper is, however, that long-term productivity benefits can be hard to envisage and so can the link to a high wage, high skill economy.

### ***Where to now?***

In late 2008, there was a political power shift when a National-led Government gained office. Interestingly, employment relations was hardly discussed and the National Party announced explicitly that it would keep the ERA, though with some modifications. However, it has been suggested that "the National Party's policy would involve considerable change to the existing public policy platform." (Rasmussen and Walker, 2009: 168)<sup>1</sup> as it sought to implement the following changes:

- Removing the union monopoly bargaining rights for collective agreements to allow non-union workers to enter into collective agreements;
- Reviewing personal grievance procedures;
- Introducing an optional 'probationary period' where new employees would not have access to personal grievance provisions;
- Reducing compliance costs, and in particular, removing ACC's monopoly over workplace injury insurance;
- Revisiting the Holidays Act.

Some of these changes have already been implemented, some of them are still being considered and further changes have started to be discussed. Most of the changes point in the *opposite* direction to a high-wage, high-skill economy. For example, are reducing statutory minima the way to encourage employers to improve wages and other employment conditions? It also appears that a short-term solution allowing people to 'sell' one week of annual leave when most people only have four weeks annual leave entitlements and when long working hours have become a well-recognised problem (Callister, 2005). Furthermore, following the Government's announcement of 32 proposed policy changes in August 2010, employment relations has, once again, a higher profile in the public policy debate (Haworth, 2010b; Hodge, 2010; Kay, 2010). Yet, there are few public policy analyses which link employment relations changes to the wider economic debate about New Zealand's relative decline (However, see Business New Zealand, 2009; Haworth, 2010b).

As Rasmussen and Anderson (2010: 218-220) have illustrated, the policy changes promoted by the National Party have clear links to the defunct policies of the 1990s. The main difference is that the envisaged changes come into play in a piecemeal fashion, and thus, public policy changes appear less of a frontal attack on collective bargaining, unions and employee conditions, compared to the policies of the 1990s. Instead, it appears as if the piecemeal efforts to deal with specific issues were an attempt to generate some immediate economic gains through providing employer cost relief. Taking a totally different tack, the union movement has indicated that legislative change to support collective bargaining and unionism is high on their agenda. This has included calls for some kind of extended bargaining coverage, though the traditional terms of awards and blanket coverage are yet to appear. "A new approach to the law would also enable collective bargaining results achieved by unions to be available to all workers across industries, including those enterprises not directly

involved in the bargaining” (Kelly, 2010: 146). This emphasis on industry and multi-employer collective bargaining cuts across the attitudes of the vast majority of employers, as shown below. It is also a diametrically different approach than that pursued by the National-led government and signals that employment relations will be unstable and a major political battleground for years to come.

## **Employer Attitudes to Collective Bargaining: Survey Evidence**

In New Zealand, there has been limited research into the employers’ attitudes to collective bargaining or even to employment relations matters in general. The sparse available research indicates, however, that there has been an attitudinal shift in favour of individualism and unitarist employer opinions in the last couple of decades. For example, a 1986 survey found that pluralist ideology was prevalent amongst managers (Geare, 1986). Likewise, McAndrew and Hursthouse (1991) concluded that employers preferred national agreements as opposed to enterprise agreements because of the increased costs and greater chances of conflict associated with the latter. It seems obvious to many observers that the ECA has facilitated a stronger employer animosity towards collectivism and this has continued under the ERA (Burton, 2004; 2010; Foster and Rasmussen, 2010). This is also in line with recent surveys of employer attitudes, which have concluded that managers have become more unitarist in their opinions about employment relations in their workplaces (Geare, Edgar and McAndrew 2006; 2009). Recent research conducted by the Department of Labour (2009) has further buttressed the idea that employers are quite happy with conducting direct bargaining/negotiations/discussions with their employees but, as a group, they have limited time or trust in unions and collective bargaining.<sup>2</sup>

Using previous studies as a springboard, researchers from Massey University and Auckland University of Technology decided to survey employer attitudes to collective bargaining. The intension was to explore how much employer attitudes had shifted since the above mentioned survey of McAndrew and Hursthouse (1991). It also investigated whether there were a range of employer attitudes and, if so, what factors were influential in explaining difference.

Three surveys were carried out providing a national coverage of private sector organisations which employed 10 or more staff (for a more detailed description, see Cawte, 2007; Foster et al. 2009a; Foster and Rasmussen 2010). These were undertaken using a cross-sectional survey design where the surveys matched the sample demographics used by previous New Zealand studies (McAndrew 1989; McAndrew and Hursthouse 1991). It also allowed the entire population of employers (6800 individual firms) to be surveyed, and covered employers within all 17 standard industry classifications which had been used by previous researchers (for example, see Blackwood, Feinberg-Daneili, Lafferty, O’Neil, Bryson and Kiely, 2007). The three surveys involved a self-administered questionnaire in two regions (the lower half of the North Island and the South Island), a hard copy was mailed to respondents and in the third region (the upper half of the North Island), an online survey was used. The response rates ranged from a disappointing 8% for the online survey to 19% and 21% respectively for the two postal surveys.

### ***Respondents’ Attitudes to Collective Bargaining***

We have already discussed findings in our other reports and articles (for references, see Foster and Rasmussen, 2010) and we will focus on two distinct groups of employers in this paper. Thus, Table 1 asks: how do the attitudes of employers *who are engaged* in collective bargaining compare with those employers *who are not engaged* in collective bargaining? The table highlights those variables that are of significance to employers’ attitudes toward the process of collective bargaining (such as,

the interest of employees in the process, its relevance to the business, and whether collective bargaining has been considered at all). Taken as a whole, those variables showed marked differences between the two groups of employers. Of those engaged in collective bargaining, only 21% believed their employees lacked interest in the process. Of those not engaged, the proportion is reversed with 70.1% arguing that their employees lacked any form of interest in collective bargaining.

**Table 1 – Respondents attitudes to collective bargaining**

Variable	Engaged in CEA, n (%)			Not engaged in CEA, n (%)			(P<0.000)#
	Agree	Disagree	Unsure	Agree	Disagree	Unsure	
Takes too long to bargain	127(39.4)	165(51.2)	30(9.3)	265(40.8)	99(15.3)	284(43.8)	***
Transactional costs too high	101(31.8)	165(50.1)	51(16.1)	227(35)	81(12.5)	340(52.5)	***
Employees not interested	67(21)	215(67.2)	38(11.9)	457(70.1)	41(6.2)	154(23.6)	***
CB not relevant to business	51(15.9)	252(79)	18(5.6)	487(74.1)	94(14.3)	76(11.6)	***
CB never considered	20(6.2)	292(91)	9(2.8)	489(74.8)	117(17.9)	48(7.3)	***
Lack of info on how to bargain	51(16)	219(68.4)	50(15.6)	214(33.1)	190(29.4)	243(37.6)	***
Unsure what to bargain about	16(5)	296(92)	10(3)	195(29.9)	367(56.2)	91(13.9)	***
CB adds nothing of value to business	98(30.5)	183(57)	40(12.5)	515(78.3)	51(7.7)	92(14)	***
Individual bargaining offers greater benefits	152(47.2)	119(36.8)	51(15.8)	485(73.8)	68(10.4)	104(15.8)	***
Unions has never approached us about CB	49(15.3)	265(82.8)	6(1.8)	578(87.7)	52(7.9)	29(4.4)	***

# Chi-squared test for differences in more than two proportions. \*\*\* (P<0.000)

The survey and the semi-structured, face-to-face responses highlight stark differences in employers' opinions. In particular, the strong individual approach clearly prevailed among employers, as the statements show:

*“Our staff have had no desire to negotiate collectively. To be honest, the staff are not interested”.*

*“The employees at my place prefer to deal with me face to face rather than being represented by a third party. There is ability for them to discuss their individual performance rather than being locked into a collective agreement”.*

Differences were also found in the proportion of respondents who agreed that collective bargaining was *not* relevant to their business. Amongst those employers involved in collective bargaining,

15.9% agreed that it was not relevant to their business versus 74.1% amongst those not involved. In the interviews, some employers involved in collective bargaining found that it was not relevant because of the quality of the relationship with the union or because the workplace had no major problems (according to the manager). These were typical comments:

*"With our current one I wouldn't say that it offers any benefits or is of relevance. I believe that if you have a good union who works with you in partnership then it can be very productive".*

*"I just honestly see no value – we don't have employment disputes. It's a happy workplace".*

Further strong differences were found when employers were asked if they had considered engaging in collective bargaining, with 74.8% of non-involved employers having never done so against 6.2% of involved employers. It is interesting to note that some employers (30%) involved in collective bargaining agreed with the point that individual bargaining offers greater benefit. This implies that those employers would probably prefer individualised bargaining but it is not a realistic option for them at the moment. This stance also featured strongly in the interviews. Here is a typical example of opinion amongst those employers involved in collective bargaining but who consider that individual bargaining offers greater benefit:

*"I don't think they got anything through collective bargaining that we would not have if they were on individual agreements. We only go through the motions as the ERA requires us to negotiate with the union".*

In the interviews, a number of employers involved in collective bargaining also felt that collective bargaining encouraged mediocrity:

*"I think as far as all the issued stuff they get, like boots, gear and that, should all be in a collective employment agreement, but as far as wages go, some of our guys really deserve a pay rise and some don't. With collective bargaining, then they all get it. Some people you would love to give a rise, others you don't. I think wages should be on an individual basis."*

However, 57% of employers involved in collective bargaining disagreed that collective bargaining would add nothing of value to the business. From the interviews, it would appear that this was the main position among employers who have a good working relationship with the union (or unions). Below are typical responses amongst employers who think that collective bargaining can add something of value to their business:

*"The whole process of the agreements is a lot quicker and a lot smoother. We like to have union involvement".*

*"The benefits of collective bargaining for us are that it is easier to manage with one package".*

Finally, those involved in collective bargaining found that the transactional costs were high (50.1% agreed). This was the overwhelming opinion across all employers and it was strongly expressed in the semi-structured interviews. As one employer said:

*"There is a huge cost in the bargaining process. Our team consists of the HR manager and advisor, chief commercial officer and an EMA [Employers and Manufacturers Association]"*



*person. It costs us lost wages and time and the administration process of costing out the claims is considerable”.*

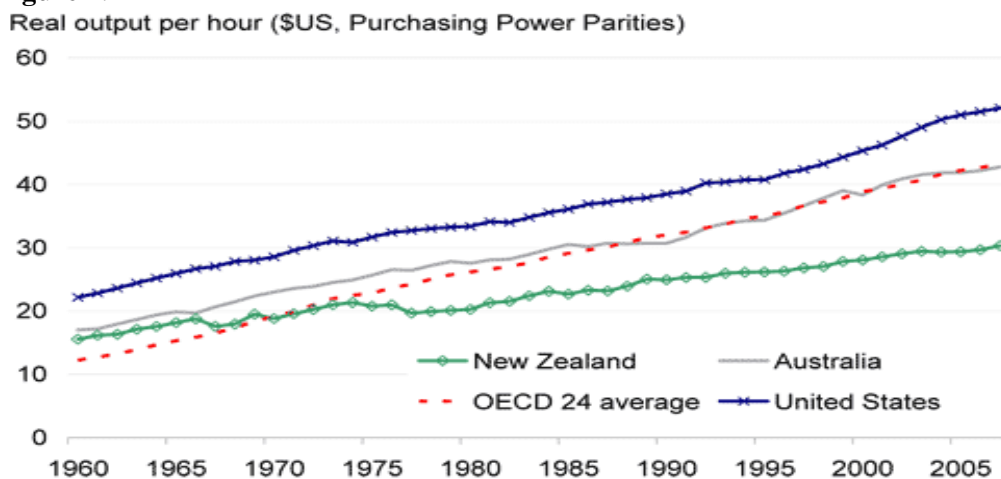
Overall, it is important to note that the employers who are engaged in collective bargaining constitute a clear minority and even amongst these employers, there is criticism of bargaining processes and associated outcomes. Generally, employers have a negative attitude towards collective bargaining and unionism, and they would prefer to conduct their employment relations affairs in direct discussion with individual employees.

## The Long-Standing Issue of Low Productivity Growth

Comparatively slow productivity growth has been a long-standing problem in New Zealand, refer to Figure 1. From having one of the highest living standards (measured in gross domestic product per head) in the 1950s, there has been a persistent comparative decline in New Zealand's living standards, currently sitting below number 20 amongst OECD countries. This comparative decline has influenced the so-called New Zealand 'experiment' and has prompted radical public policy changes. The ECA tried to create an 'efficient labour market' through facilitating employer-driven flexibility and the ERA sought to facilitate 'productive employment relationships'. Neither of these legislative frameworks has brought about the anticipated improvements in productivity growth. It is still debated in New Zealand as to why and to what degree this has happened (see Haworth, 2010a; Rasmussen, 2009: 447-455). In respect of the ECA, it has been suggested that the policy prescription may have been wrong and/or the context was not supportive enough (for example, in terms of infrastructure investments). In case of the ERA, the emphasis on collectivism and collaboration did not manifest itself and there was considerable catch-up investment in, for example, infrastructure, education and social problems. Some commentators – including many employer organisations – have also disputed the different employment relations approach.

Whatever the explanations, the comparative decline in New Zealand's living standards and productivity has now become a mainstay of news reports. As mentioned above, employment relations has temporarily regained its high profile role and it is likely to be a major issue in the 2011 General Election. The big question is whether the current employment relations approach is putting New Zealand on the track towards a more productive economy, and thus, breaking the relative economic decline seen in Figure 1.

**Figure 1.**



Source: Treasury, 2008

*Can individualism be aligned with a productive, high-wage, high-skill economy?*

The leading employer organisation, Business New Zealand, has clearly voiced the employer opposition to many of the employment relations changes under the previous Labour-led Governments in 2000-2008. This has been supported by various other employer organisations and ‘think tanks’, including the high-powered Business Roundtable. For example, in response to New Zealand’s lowest growth in productivity in 31 years, Business New Zealand argued, in a press release, that New Zealand should implement a Productivity Commission (as in Australia) and needed “things like more flexible employment law, lower taxes and a smaller compliance burden...” (Business NZ, 2010).<sup>3</sup> These arguments are in line with Business New Zealand’s briefing to the incoming Government in 2008 where it advocated more flexibility and freedom in the workplace. There appears to be two problems with this argument: first, it is difficult to associate the higher Australian productivity growth with ‘flexible employment law, lower taxes and a smaller compliance burden’. Second, the implied suggestion that legislative support of more individualism may encourage greater competitive flexibility and innovation which would then drive higher productivity appears to have little empirical basis. For example, the productivity experience of the 1990s, where employers had a remarkable free hand in terms of establishing their preferred working arrangements (see Boxall 1997, Deeks and Rasmussen, 2004: 165-169), does not provide a convincing scenario.

Generally, it is unclear how employer preferences for workplace and individualised employment relations can be part of a successful attempt to build a sustainable route to a high-wage, high-skill economy in New Zealand. As discussed below, there seems to be at least *three types of issues* associated with this approach.

1. There are few major New Zealand owned firms (except Fonterra) and industries which have shown substantial growth recently, and arguably too few industry-level collaborative solutions exist which can establish a sustainable economic growth path.
2. The lack of major collaborative solutions is particularly noticeable in the training and skills area because the key actors appear to have some overlapping interests. Recently, management capabilities have been raised as a crucial training and skills issue.
3. There is a distinct lack of a broadly based ‘plan’ of how to inform and persuade employers to adopt more productive employment relations approaches.
4. Employer aversion to mandatory minima and/or collectively agreed minima facilitates a low cost, low skill ‘equilibrium’ where mainstream employers have to compete with employers who have rock-bottom employment conditions and invest little in their staff.

*First*, under the Labour-led Governments a number of initiatives were taken to develop industry growth paths and there was direct support for several ‘sunrise industries’ (Haworth, 2010). These efforts have had some success but they were limited in funding and coverage and have had insufficient impact across the economy. Employer organisations have been involved in some of these initiatives and they have set out alternative growth strategies. For example, Business New Zealand (2009) has set out a wide-ranging 50 points plan to lift productivity levels but there have been limited Government action in many of the suggested areas of policy change. This may come, however, if the 2011 General Election results in another National-led Government. Overall, the action plans suggested by Business New Zealand (2009) build on the assumption that private sector initiatives will drive the lift in productivity growth. This view is somewhat problematic since low private sector investments have become a major issue.<sup>4</sup> In light of the absence of industry ‘locomotives’ and comprehensive government growth plans, it is unclear whether the Business New Zealand approach will overcome the current issues surrounding productivity growth.

*Second*, in the training and skills area, there has been considerable overlap between employer, union and Government interests (Burton, 2010; Wilson, 2004b). This was illustrated by the launch of a new Skill Strategy for New Zealand in 2008, which was supported by employers, unions and Government (Tertiary Education Commission, 2008). Even in this area of overlapping interests, there appears to be ample room for improvement. This has been illustrated by wide-ranging skill shortages pre-2008 and concerns about the propensity to ‘free-ride’ amongst small and medium sized employers. In a survey of employers’ perspectives on skill shortages, Baron and McLaren (2006) found that employers were openly pessimistic about the prospects of any improvement in the supply of skilled labour (especially qualified trades people) over the medium to long-term future. Importantly, Baron and McLaren found that *employers were split on how to rectify the situation*. Employer opinions ranged from suggesting a more active role, supporting existing vocational training schemes to expressing support for the old industry training system that was disestablished in the early 1990s. And this does not address the underlying problem that many employers do not invest sufficiently or at all in vocational training or have well-defined career paths (Hunt and Rasmussen, 2007; Williamson, Harris and Parker, 2008). It is unclear how an individualised approach will deal with this problem, especially in light of the prevalence of small and medium-sized firms.

A particular problem in terms of skills and capabilities concerns management capability in New Zealand, especially competent and inspirational leadership of organisations. This issue has been clearly signalled by the research sponsored by the New Zealand Institute of Management (NZIM)’s research on management capabilities (Matheson, 2009). That research has wide implications since, if organizations in New Zealand want to compete nationally and internationally, then they need to be effective in areas such as employee engagement and focus on innovation. As New Zealand Trade and Industry (NZTI, 2011) has argued: “Businesses are only as successful as their owners and managers. In an ever-changing world it is essential that you actively build your management capabilities.” However, the NZIM research has shown that implementation of these ideas is weak in New Zealand compared to other countries who see these measures as a priority (Birchfield, 2011). Several possible reasons have been advanced for this problem with management capabilities and leadership (Birchfield, 2011; Geare et al., 2009). It may be the smallness of our economy and organisations where budgets and resources can be tight which may comprise efforts to enhance management capabilities. It is often argued that ‘quick fix’ measures prevail. Another impediment to insufficient capabilities and the lack of leadership can be the culture of the organisation.

*Third*, there is a distinct lack of a broadly based ‘plan’ of how to inform, persuade and make it easy and cost effective for employers to adopt more productive employment relations approaches. Again, the many small and medium-sized businesses constitute a thorny problem. This has been recognised in the area of information where there has been considerable effort in the new millennium. Employer organisations have been active in their provision of information and services. They have also been involved in and supportive of government initiatives (Burton, 2010). For example, the Department of Labour now has a raft of online information and application options, and there have been a string of workplace ‘demonstration case studies’, which the Partnership Resource Centre and Workplace Productivity Group have promoted (see Haworth, 2010). Still, there appears to be ample room for improvement. In the survey of employer opinions discussed above, we asked employers about the quality of information and the practical value of the information on collective bargaining and good faith which they received from their business organisations. The majority of respondents found the information either poor (25.4%) or just adequate (38.8%). We also asked employers what they thought of the advice from the Government and the results were similar. Interesting, there was greater concern amongst small to medium-sized enterprises than amongst larger organisations. As larger organisations will often have specialist staff or can afford consultants who can advise them,

this leaves the many small and medium-sized employers in the lurch. If these employers are not receiving good advice then what do they do?

*Fourth*, the preference for workplace and individualised employment arrangements and, in particular the constant criticism of statutory minima changes, opens the gate for low paying and low productivity employers (as McLaughlin (2010) has argued). This has clearly been the trend under the post-2008 National-led Government (see above), where both collective and individual employment rights have been seen as barriers to more ‘flexible’ employment arrangements. It is puzzling that there has been pressure from employer organisations to reduce employment standards as this makes it easier for mainstream employers to be undercut by ‘cheap labour’ employers. If neither collective bargaining nor statutory minima are seen as suitable ways of lifting employment standards, then higher employment standards can only happen through employer competition for staff. Although such competition has been driving up employment conditions in the new millennium (until the post-2008 economic crisis), it has also been associated with labour market ‘bottlenecks’ and insufficient productivity improvements. This is exactly the ‘low skill, low wage equilibrium’ that McLaughlin (2010) talks about. Again, it is difficult to see how such an approach can establish a sustainable basis for the elusive high skill, high wage economy.

## Conclusion

The rise in individualism and workplace bargaining has coincided with growing concerns over disappointing productivity growth, and that combination has had a major impact on public policy debate in New Zealand. There have been serious attempts of path-breaking in respect of employment relations and this has happened to a large degree. Within a radically changed economic and social context, current New Zealand employment relations has moved a long way. As shown, the regulatory framework, the institutional setting (including collective bargaining) and the attitudes and behaviours of the key players have shifted considerably in a matter of two or three decades. As such, the New Zealand ‘experiment’ in employment relations changes is of comparative interest if one is interested in mainstream employment relations research areas: employment regulation, union renewal, employer attitudes and strategies, protection of employee rights, employee influence and participation, high performance work systems, etc.

However, it is still unclear how the on-going shift towards workplace and individual bargaining can be aligned with the aspirations of higher productivity growth. As New Zealand lacks major New Zealand-owned industrial giants (except in the dairy industry), there are few key firms or industries which can establish sufficient strong leadership in terms of economic growth and productive work practices. It is also problematic that efforts in the area of vocational training have fallen short, despite this being an obvious area where tripartite collaboration could have prospered with employer organisations voicing their support. It is highly likely that a new economic upswing will feature skill shortages. New Zealand appear trapped in a ‘low skill, low wage equilibrium’ and this is further aggravated by a latent ‘brain drain’ of highly educated people because of the comparatively low wages in New Zealand.

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<sup>1</sup> The importance of these changes has been debated in New Zealand with some researchers arguing that the current Government’s labour law reform is not that substantive (see eg. Hodge 2010).

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<sup>2</sup> As the Department of Labour (2009) research draws on some of our survey results, it is important to be aware of this when findings are reported. However, the Department of Labour research had a broader focus as it also included focus groups and interviews with practitioners, employer and union representatives, and academic researchers.

<sup>3</sup> The Productivity Commission was enacted by the current National-led Government in December 2010

<sup>4</sup> However, a recent survey of the IT, high-tech manufacturing biotech sectors (the 'TIN 100') has found that growth, revenues and employment were all significantly up, compared to 2010 (see O'Neil, 2011).

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