

# *Special Edition: Labour Law*

## **Contents Page: NZJER, 2012, 37(1)**

<b>Name</b>	<b>Title</b>	<b>Page Number</b>
Margaret Wilson	Introduction	1-2
Andrew Steward	Australian Labour Law in Transition: The Impact of the Fair Work Act	3-21
Joellen Riley	Bargaining Fair Work Style: Fault-lines in the Australian Model	22-29
Leeanne Templer	Good Faith in Collective Bargaining Communications in Australia and New Zealand	30-43
Max Harris	The Rule of Law in Private Law: A New Animating Ideal for Employment Law?	44-59
Susan Hornsby-Geluck	An Uneven Playing Field – Partial Strikes	60-69
Scott Worthy	Revisiting <i>Stokes Valley</i> : Trial Periods and Statutory Interpretation	70-81
Jonathan Barrett & Leigh Thomson	Returning Dignity to Labour: Workplace Safety as a Human Right	82-89
Leeanne Templer	New Zealand and the Proposed Australian Model Workplace Health and Safety Act	90-99
Jennifer Moore	An Evaluation of Whether New Zealand's Occupational Health and Safety Law Adequately Addresses the Risks to Workers Exposed to Nanotechnology and Nanoparticles	100-117
John Goddard	Hunting for Happy Feet in Honolulu: The Elusive Struggle for Pay Equity – A Comparative View	118-150
Amanda Reilly	Time, Work, and Law: a New Zealand Perspective	151-160
Amanda Reilly	Equality and family responsibilities: a critical evaluation of New Zealand law	161-166

## **Special Edition NZJER**

### **Labour Law**

#### **Introduction**

On 3 June 2010, the New Zealand Labour Law Society was launched in Auckland by its Patron Judge Coral Shaw. The launch was sponsored by the NZWALMI (New Zealand Work and Labour Market Institute) which has continued to support the Society with administrative assistance. The Society has sought and been granted affiliation to the International Society of Labour and Social Security Law (ISLSSL) as the New Zealand member of the international society. The purpose of the Society include: promoting the study and exchange of ideas about labour law; providing a forum for debate for lawyers and others working in the field; and the holding of meetings, seminars and conferences and publication of papers and research relating to labour law.

This publication resulted from papers presented at the first Labour Law Conference held in Wellington in December 2011 in fulfilment of the objectives of the Society. The Society was substantially supported in the holding of the conference by the Victoria University of Wellington Faculty of Law. The papers cover a diverse range of topics including the keynote address by Andrew Stewart that reviews recent developments in the Australian labour law regulatory framework. Recent changes to the Australian health and safety legislation are also reviewed while another paper compares the Australian and New Zealand health and safety regimes. Two other papers also discussed aspects of health and safety including the risks associated with nanoparticles and nanotechnology. Topics covered in other papers included partial strike law, recent case law on the 90-day rule, developments in pay equity and the relationship between equality, the family and employment law. There was also a thought provoking paper on the application of the rule of law to employment law, and another on the notion of a Guaranteed Basic Income. The scope and diversity of the topics demonstrated the range of issues confronting labour lawyers.

The increasing number of challenges facing the regulation of employment relations is not surprising, given that the labour market is facing the reality of globalisation of the New Zealand economy. The challenge for New Zealand has been to adapt to the demands of globalisation without destroying the values and principles that underpin the unique character of our society. The pressure to forsake the notions of equalitarianism, a sense of fairness, and respect for others has been great in recent times. Since the 1970s, New Zealand has been locked in an ideological struggle over the regulatory framework for employment relations. This has created uncertainty and a short termism that may account at least partially for low productivity and economic growth.

New Zealand is not alone in a clash of ideologies to determine the labour market regulatory regime. Developments within the International Labour Organisation (ILO) and the European Union (EU) have also centred on how to reconcile economic and social objectives within the labour market public policy. For example, the 1998 ILO Declaration on Fundamental Principles and Rights at Work and the Decent Work programme were a response to a labour market that demanded greater flexibility. This 'soft law' approach was designed to work with countries to advance labour rights through a programme of measures that were appropriate to their conditions. There has been a vigorous debate within the academic world on whether this approach has undermined the notion of employment rights. The reality is that the labour market policy follows economic policy and when that policy embraced the notion of the unregulated or regulation-light market, the labour market had to adjust.

The Employment Relations Act was an attempt to accommodate the changing reality of the labour market while ensuring the rights of workers to organise and bargain collectively. The notion of good faith was incorporated in the legislation to inject a requirement for fairness when determining the wages and conditions that would regulate the employment of workers. The enactments of health and safety, holidays, and paid parental leave legislation were also an attempt to provide a labour standards code for New Zealand workers. This code has been amended by the National government to provide further labour market flexibility by removing from workers in the film industry employment rights such as holidays, sick leave, paid parental leave and health and safety requirement by deeming them to be contractors. The 90-day rule, the cash for holidays exchange and restricting union representatives' access to the workplace are examples of recent regulated flexibility. Further changes are foreshadowed in the National government election manifesto.

If past experience is anything to go by, the next change of government will also see a raft of statutory changes. This see-saw approach to labour market regulation creates challenges for law practitioners. Hence, the relevance of the New Zealand Labour Law Society as a forum for legal practitioners to analyse, discuss and contribute to the policy debate. It is intended to hold further conferences, seminars and workshops in the future and make available through publications such as the NZJER the productivity of these events to a wider audience. It is appropriate to acknowledge the contribution of the committee members who have contributed to the current issue including Professor Gordon Anderson, President; Pam Nuttall, Secretary; Amanda Reilly, Simon Mitchell, Stewart King, Anne-Marie McNally, Andrew Dallas, Mike French, and Margaret Wilson, Committee Members.

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# Australian Labour Law in Transition: The Impact of the Fair Work Act

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## Introduction

The last two decades have seen almost constant change in Australian labour law. Since the Hawke Government replaced the Conciliation and Arbitration Act 1904 with the broadly similar Industrial Relations Act 1988, there has scarcely been a year without some substantial proposal for legislative reform, at either federal or State levels, or both.

However, since 2005 in particular, the pace of change has quickened dramatically. We have seen two major rewrites of federal industrial law. The first, the Howard Government's 'Work Choices' amendments, brought thousands of Australians onto the streets in protest, set off an advertising war, and ultimately helped to bring an end to 11 years of conservative government. The second, the Labor Government's 'Fair Work' legislation, has disappointed unions and employer groups alike – yet holds out the welcome prospect of a return to stability in labour regulation.

This paper outlines the changes effected by the Work Choices and Fair Work legislation, and the values and objectives underlying these two important and contentious sets of reforms. In order to put them in their proper context, however, it is necessary to start by explaining a reform process that began over 20 years ago.

## Background: From Compulsory Arbitration to Enterprise Bargaining

Back in the 1980s, labour regulation in Australia was still dominated (as it had been for much of the twentieth century) by the idea of industrial tribunals using compulsory powers of conciliation and arbitration not just to resolve workplace disputes as they arose, but to set minimum standards on wages, working hours and other conditions of employment<sup>1</sup>. Those standards were expressed in awards, legally binding instruments that could (and often did) apply across entire industries or occupations. The Commonwealth and each of the States had their own tribunal systems, with no clear or predictable delineation between them. Because the federal system was based on the Commonwealth's constitutional power to provide for the conciliation and arbitration of industrial disputes that crossed State boundaries, its reach was limited by the propensity of parties to become involved in (or indeed deliberately create) 'interstate' disputes<sup>2</sup> (Guidice, 2007). Some industries

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This paper is an updated version of a piece that originally appeared as "Labour Law in Transition: From Work Choices to Fair Work" in P Sadler (ed) *Contemporary Issues in Law & Policy* (Applied Law & Policy, Perth, 2010) 73.

<sup>1</sup> As to the origins and development of the conciliation and arbitration systems, see S Macintyre and R Mitchell (eds) *Foundations of Arbitration* (Oxford University Press, Melbourne, 1989); J Isaac and S Macintyre (eds) *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, Melbourne, 2004).

<sup>2</sup> See G Guidice "The Constitution and the National Industrial Relations System" (2007) 81 Australian Law Journal 584 at 591–595.

tended to be covered by federal awards, some by State instruments, and others still by a mixture of the two. There were also certain matters that were regulated by State legislation, even for workers covered by federal awards, such as occupational health and safety.

In practice, it was common for employers and trade unions to negotiate as to the content of awards, and, indeed, to strike enterprise-level deals that improved on award conditions or dealt with local issues. However, that bargaining took place under the shadow of conciliation and arbitration procedures that could be unilaterally invoked at any time. The arbitration systems gave Australian unions a role and influence that went beyond their capacity to organise at individual workplaces. Whether or not an employer was prepared to negotiate over employment conditions, a union with a recognised interest in the relevant industry or occupation could notify a dispute to a tribunal and seek new or varied award standards to cover that business – regardless of whether it had members there or not. Unions could also seek, in various ways, to protect their organisational security, including seeking award provisions and giving their members ‘preference’ in employment over non-members<sup>3</sup>.

During the 1980s, the conciliation and arbitration system came under increasing fire from a number of academics, business groups and conservative commentators. Although there were a range of criticisms, the most damning charges included that the system privileged unions, imposed unnecessarily high labour costs, and was generally too centralised in its focus.<sup>4</sup> Importantly, and under the influence of the likes of John Howard and Peter Costello, the Liberal Party became committed to the idea of a radical ‘deregulation’ of the labour market that would severely limit the influence of both unions and tribunals, and restore the prerogative of management to set conditions that suited the needs of their business. It was a vision based firmly on the *individualisation* of employment relations.<sup>5</sup>

In only one instance did such thinking lead to the complete dismantling of an arbitration system; that was in Victoria, where in 1992 the Kennett Government – very much taking its lead from New Zealand’s Employment Contracts Act 1991 – introduced a system of individual employment agreements, underpinned by a set of limited statutory standards.<sup>6</sup> The reforms had only limited success, not least because many unions sought federal award coverage so as to override the new State laws. In 1996, the Government abandoned the experiment and instead entered into a deal with the newly elected Liberal/National Government headed by John Howard to refer almost all of the State’s industrial powers to the Commonwealth<sup>7</sup>. Since then, with certain exceptions, Victorian workers have been subject only to federal industrial laws.

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<sup>3</sup>See generally P Weeks *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (Federation Press, Sydney, 1995).

<sup>4</sup>See eg H R Nicholls Society *Arbitration in Contempt* (H R Nicholls Society, Melbourne, 1986); R J Blandy and J Sloan “Escape From the Banana Republic: Labour Market Reforms” 98 National Institute of Labour Studies Working Paper Series (Flinders University, Adelaide, 1988); J Niland *Transforming Industrial Relations in New South Wales: A Green Paper* (NSW Government Printing Office, Sydney, 1989); Industrial Relations Study Commission of the Business Council of Australia *Enterprise-Based Bargaining Units: A Better Way of Working* (Business Council of Australia, Melbourne, 1989). See also C Mulvey “Alternatives to Arbitration: Overview of the Debate” in R Blandy and J Niland (eds) *Alternatives to Arbitration* (Allen & Unwin, Sydney, 1986).

<sup>5</sup>See generally S Deery and R Mitchell (eds) *Employment Relations: Individualisation and Union Exclusion* (Federation Press, Sydney, 1999); D Peetz *Brave New Workplace: How Individual Contracts are Changing Our Jobs* (Allen & Unwin, Sydney, 2006); B Dabscheck “The Contract Regulation Club” (2006) 16 Economic and Labour Relations Review 3

<sup>6</sup>Employee Relations Act 1992 (Vic).

<sup>7</sup>See Commonwealth Powers (Industrial Relations) Act 1996 (Vic).

Elsewhere, there was agreement – even on the part of supporters of the arbitration system – that greater emphasis must be placed upon bargaining at the enterprise level than had hitherto been the case.<sup>8</sup> A particular objective was to use enterprise bargaining to lift the productivity and, hence, competitiveness of Australian businesses. This is a goal that was embraced by the Australian Labor Party (ALP) and the peak union body, the Australian Council of Trade Unions (ACTU), as much as by the conservative parties and the employer groups. During the 1990s, Labor and conservative governments at the federal level, and in every State, enacted legislative amendments to give their industrial laws a greater focus on the enterprise.<sup>9</sup> Aside from in Victoria, these reforms followed a common pattern. They permitted parties to register enterprise-level agreements which, if they met certain criteria, could take effect for what was nominally a fixed period. During that period, the agreements would not only override any awards that would otherwise be applicable, but also preclude the relevant tribunal from exercising its arbitral powers in relation to the matters covered. In effect then, the amendments created a limited right to ‘opt out’ of the various conciliation and arbitration systems. At the federal level, it was also accepted that workers should have the right to take ‘protected’ industrial action in support of a new enterprise agreement. Prior to that, strikes and other forms of industrial action had almost invariably been illegal, although extremely prevalent in practice.<sup>10</sup>

Despite the common pattern, there were key differences between the legislative models favoured by the Labor and Conservative parties. The ALP’s preferred option was to impose a ‘no-disadvantage’ test. This allowed almost unlimited freedom to bargain *upwards* from the wages and conditions set by existing awards (now thought of as a ‘safety net’ rather than the primary form of regulation), while preserving the tribunal’s capacity to reject agreements which undercut those conditions.<sup>11</sup> Labor also accepted – albeit over the opposition of the union movement – that collective agreements could be struck between an employer and a group of workers without the involvement of a union; but it endeavoured to hold the line against allowing employers to strike deals with individual workers that overrode awards. The conservative parties, by contrast, tried in most jurisdictions not just to ‘strip back’ awards, so that they dealt with a more limited range of matters than had previously been the case, but to make it easier for agreements to reduce the award conditions that remained. They sought to achieve this objective in a number of ways, including by replacing the no-disadvantage test with a requirement that an agreement comply with a small number of basic minimum standards. They also attempted to accord primacy to individual agreements over collective agreements, to outlaw any form of discrimination against non-unionists, and, more generally, to reduce the power and influence of the tribunals.

The Howard Government’s first wave of reforms in 1996 achieved most of these objectives, including the introduction of a system of individual Australian Workplace Agreements (AWAs)<sup>12</sup>, but the Liberal/National Coalition’s lack of control of the Senate meant that it was forced to enter into a compromise with the centrist Australian Democrats to secure the passage of its legislation. In particular, it was compelled to accept the retention of a no-disadvantage test for both AWAs and

<sup>8</sup> See generally A Stewart “Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation” (1992) 5 Australian Journal of Labour Law 101; D Macdonald, I Campbell and J Burgess “Ten Years of Enterprise Bargaining in Australia: An Introduction” (2001) 12 Labour & Industry 1.

<sup>9</sup> See generally D R Nolan (ed) *The Australasian Labour Law Reforms: Australia and New Zealand at the End of the Twentieth Century* (Federation Press, Sydney, 1998).

<sup>10</sup> See B Creighton “Enforcement in the Federal Industrial Relations System: An Australian Paradox” (1991) 4 Australian Journal of Labour Law 197.

<sup>11</sup> See eg the reforms introduced by the Industrial Relations Reform Act 1993 (Cth).

<sup>12</sup> See Workplace Relations and Other Legislation Amendment Act 1996 (Cth), which amended the Industrial Relations Act 1988 (Cth) and renamed it the Workplace Relations Act 1996 (Cth).

certified (collective) agreements. Over the next eight years, the Howard Government put forward various proposals for further reform,<sup>13</sup> but only a few of these were passed, and then in amended form.<sup>14</sup> The more contentious measures failed to progress, notably in relation to the exemption of small businesses from the need to act fairly in terminating employment.<sup>15</sup> This last measure was said to be necessary in order to generate job growth, although no hard evidence was ever advanced to substantiate the assertion that unfair dismissal laws were deterring employers from hiring workers who would not otherwise have found a job.<sup>16</sup>

## The Work Choices Legislation

The Coalition's opportunity was to come in 2005, when it unexpectedly gained control of the Senate. In May 2005, after a lengthy internal debate about just how far to go in dismantling the existing system, John Howard announced a package of reforms that was eventually given the brand name 'Work Choices' and marketed to the public at considerable expense.<sup>17</sup> It was claimed that the reforms would "create a more flexible, simpler and fairer system of workplace relations for Australia", one which would "improve productivity, increase wages, balance work and family life, and reduce unemployment."<sup>18</sup>

In November, a massive and hastily-drafted Bill was put before the Parliament – not, as might have been expected, to replace the Workplace Relations Act 1996 (WR Act), but to amend and renumber it. After a cursory Senate inquiry, the Bill was passed with nearly 300 amendments, all proposed by the Government itself and most correcting oversights or errors. It passed into law as the Workplace Relations Amendment (Work Choices) Act 2005 and was proclaimed to take effect on 27 March 2006, together with a hefty new set of regulations.<sup>19</sup>

Given the controversy that surrounded their enactment, it is hardly surprising that the Work Choices reforms were described as "radical" or "revolutionary" by many commentators.<sup>20</sup> However, in many ways, they fell short of the "big bang" that might have been expected.<sup>21</sup> What the Coalition chose to do was to retain many of the existing institutions and processes, but undermine them in various ways.

<sup>13</sup> See eg Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (Cth).

<sup>14</sup> See eg Workplace Relations Amendment (Termination of Employment) Act 2001 (Cth); Workplace Relations Amendment (Genuine Bargaining) Act 2002 (Cth); Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004 (Cth).

<sup>15</sup> See eg Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004; and see S O'Neill "Unfair Dismissal and the Small Business Exemption" Background Note (Parliamentary Library, Canberra, 2008).

<sup>16</sup> See P Waring and A de Ruyter "Dismissing the Unfair Dismissal Myth" (1999) 25 Australian Bulletin of Labour 251; W Robbins and G Voll "The Case for Unfair Dismissal Reform: A Review of the Evidence" (2005) 31 Australian Bulletin of Labour 237.

<sup>17</sup> The validity of the appropriation of the A\$55 million that was eventually spent on the campaign was challenged in the High Court, but upheld in *Combet v Commonwealth* (2005) 224 CLR 494.

<sup>18</sup> Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) 1.

<sup>19</sup> See especially the Workplace Relations Regulations 2006 (Cth).

<sup>20</sup> See eg J Murray "Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law" (2006) 35 Industrial Law Journal 343; R Hall "Australian Industrial Relations in 2005 — The WorkChoices Revolution" (2006) 48 Journal of Industrial Relations 291.

<sup>21</sup> See A Stewart "Work Choices in Overview: Big Bang or Slow Burn?" (2006) 16(2) Economic and Labour Relations Review 25. The changes were certainly not as fundamental as those adopted by the Keating Government in 1993: see R Mitchell, P Gahan, A Stewart, S Cooney and S Marshall "The Evolution of Labour Law in Australia: Measuring the Change" (2010) 23 Australian Journal of Labour Law 61.

This was particularly true in relation to the national industrial tribunal, and the Australian Industrial Relations Commission (AIRC). Its powers to set and adjust minimum wage rates were transferred to a new body, the Australian Fair Pay Commission, whose five members were appointed on limited term contracts. It was widely assumed that this group would be more sympathetic to the Government's desire to hold down wage increases in order to create greater incentives for employers to hire low-paid workers.<sup>22</sup> The AIRC also lost responsibility for the approval of collective workplace agreements, which, like AWAs, were now lodged with the Office of the Employment Advocate (OEA). Most significantly, its compulsory powers of conciliation and arbitration were almost entirely removed. Leaving aside certain functions in controlling the use of industrial action, the AIRC was now expected to compete with private mediators and arbitrators in providing voluntary dispute resolution services; although the fact that its services were freely available, and that it retained the support of most of the major employers and unions, gave it a significant edge in that regard.<sup>23</sup>

Awards, too, were retained, though provision was made for further 'simplification' and 'rationalisation' of their content and coverage. Crucially, the no-disadvantage test for registered agreements was removed, meaning that awards no longer functioned as a safety net for workplace bargaining. Certain award provisions were designated as having 'protected' status – for example, any requirement to pay overtime or other 'penalty rates' for long or anti-social hours of work. But even a protected award condition could be modified or removed by clear enough words in a workplace agreement. Hence, there was nothing now to stop employers from engaging workers on sub-award conditions, especially through AWAs. Indeed, the legislation made it clear that employers could require job-seekers to sign an AWA as a condition of being hired. Furthermore, once an employee became subject to an AWA or collective agreement, the bulk of any otherwise relevant award would no longer apply to them, even if the agreement was subsequently terminated and not replaced. The true safety net was now provided by the Australian Fair Pay and Conditions Standard (AFPCS), a set of five minimum conditions that applied to all federal system employees, except those covered by pre-Work Choices agreements. The AFPCS required employers to observe a basic wage rate (in most cases derived from an award), and refrain from expecting employees to work more than 38 hours per week plus reasonable additional hours. It also obliged employers to provide four weeks' annual leave, various forms of personal leave, and 12 months' unpaid parental leave.

Other significant reforms introduced by Work Choices included an exemption from unfair dismissal claims that extended well beyond 'small' businesses. Employers with 100 or fewer employees were now entirely immune from any complaint that they had acted harshly, unjustly or unreasonably in dismissing a worker; and even larger employers could resist any claim by pleading a 'genuine operational reason' for a dismissal.

There were also amendments that further restricted the capacity of trade unions to organise protected industrial action, or to enter workplaces to hold discussions with current or potential members. The new rules on industrial action included a requirement to conduct a secret ballot of members to obtain their authorisation for the action to proceed. In addition, there were limitations on the kind of terms

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<sup>22</sup> See eg P Waring, A de Ruyter and J Burgess "The Australian Fair Pay Commission: Rationale, Operation, Antecedents and Implications" (2006) 16(2) *Economic and Labour Relations Review* 127. In the result, most of the Fair Pay Commission's decisions awarded minimum wage increases that broadly matched what the AIRC had been granting over the previous decade. It was only in its final decision in July 2009, which imposed a wage freeze in response to the recession brought on by the global financial crisis, that the Commission performed to expectations: see *Wage Setting Decision July 2009* (2009) 183 IR 1.

<sup>23</sup> See A Forsyth "Dispute Resolution under Work Choices: The First Year" (2007) 18 *Labour & Industry* 21.



that could be included in a workplace agreement, with prohibitions aimed specifically at provisions commonly sought by unions. A separate but related initiative involved the enactment of special legislation to regulate bargaining and industrial action in the building industry.<sup>24</sup> Among other things, this established the Australian Building and Construction Commission (ABCC), a body with extensive powers of investigation and enforcement, whose task was to combat the culture of “lawlessness” in the industry identified by the Cole Royal Commission.<sup>25</sup> Employers in the industry were required to conduct their employment relations strictly in accordance with the Government’s National Code of Practice for the Construction Industry if they wished to bid for publicly funded work. In a similar vein, the threat of funding cuts was used to force universities not just to offer all staff individual agreements, but to rewrite all their policies and procedures to remove any guaranteed role for unions.<sup>26</sup> The “command and control” mentality<sup>27</sup>, evident in these and other restrictions on agreement-making stood in stark contrast to the Howard Government’s rhetorical commitment to “freedom” and “choice” in bargaining.<sup>28</sup>

Perhaps the most far-reaching changes introduced by the Work Choices legislation concerned the coverage of the federal system. Instead of operating by reference to interstate industrial disputes, the new system’s application was dictated primarily by the nature or location of each employer. In particular, the corporations’ power in s 51(xx) of the Constitution was used to regulate all trading, financial or foreign corporations and their employees. In addition, all other employers in Victoria and the Territories were covered: the former as a result of the 1996 referral of powers, the latter by reliance on the Commonwealth’s general power in s 122 of the Constitution to make laws in relation to the Territories. Added to the Commonwealth’s control of its own agencies, this brought somewhere between 75 and 85% of the Australian workforce within the scope of the federal system.<sup>29</sup> The WR Act was now specified to operate to the complete exclusion of State or Territory industrial laws, except on ‘non-excluded’ matters, such as workers compensation, occupational health and safety, discrimination, training and long service leave. Therefore, for most purposes, federal system employers could only now be subject to federal regulation. Where a State award or agreement had previously applied to such an employer, it was given effect as a federal instrument. A subsequent measure, the Independent Contractors Act 2006, also prevented the States and Territories from subjecting contractors engaged by corporations (or by Commonwealth agencies or in a Territory) to anything in the nature of ‘industrial’ regulation.<sup>30</sup>

<sup>24</sup> Building and Construction Industry Improvement Act 2005 (Cth); and see A Forsyth, V Gostencnik, I Ross and T Sharard *Workplace Relations in the Building and Construction Industry* (LexisNexis Butterworths, Sydney, 2007).

<sup>25</sup> See T R H Cole *Final Report of the Royal Commission into the Building and Construction Industry* (Commonwealth, Canberra, 2003).

<sup>26</sup> See Higher Education Legislation Amendment (Workplace Relations Requirements) Act 2005 (Cth); S Rosewarne “Workplace “Reform” and the Restructuring of Higher Education” (2005) 56 *Journal of Australian Political Economy* 186

<sup>27</sup> See J Howe ““Deregulation’ of Labour Relations in Australia: Towards a More ‘Centred’ Command and Control Model” in C Arup et al (eds) *Labour Law and Labour Market Regulation* (Federation Press, Sydney, 2006) 147; S Cooney, J Howe and J Murray “Time and Money under Work Choices: Understanding the New Workplace Relations Act as a Scheme of Regulation” (2006) 29 *University of New South Wales Law Journal* 215.

<sup>28</sup> See Stewart “Work Choices in Overview”, above n 21, at 35, 52; Murray, above n 20, at 365. The reaction by many employers and unions to the government’s restrictions was to negotiate informal ‘side’ deals on matters that could not lawfully be included in registered agreements: see A Stewart and J Riley “Working Around Work Choices: Collective Bargaining and the Common Law” (2007) 31 *Melbourne University Law Review* 903.

<sup>29</sup> There have been varying estimates of this coverage, none of them precise. For more recent figures, see Explanatory Memorandum, Fair Work Amendment (State Referrals and Other Measures) Bill 2009 (Cth), v–vi.

<sup>30</sup> See J Riley “A Fair Deal for the Entrepreneurial Worker? Self-Employment and Independent Contracting Post Work Choices” (2007) 19 *Australian Journal of Labour Law* 246; A Forsyth “The 2006 Independent Contractors Legislation: An Opportunity Missed” (2007) 35 *Federal Law Review* 329.

## The Fight Against Work Choices

The immediate response by the States and Territories to the federal 'takeover' was to mount a constitutional challenge to the Work Choices legislation; but in November 2006, the High Court rejected that challenge on all counts.<sup>31</sup> Other legal responses by some of the States, each of which, at the time, had Labor Governments, proved more successful.<sup>32</sup> These included 'de-corporatising' certain public sector agencies or local councils, so that they fell outside the scope of the new federal system;<sup>33</sup> and also legislating to extend their regulation of federal system employers in some of the 'non-excluded' areas still left to them.<sup>34</sup> A further tactic was to establish inquiries or commission research to explore the impact of the Work Choices reforms on workers and their families.<sup>35</sup> Victoria, indeed, created a new public office, the Workplace Rights Advocate, with the specific objective of promoting the 'fair industrial treatment' of Victorian workers.<sup>36</sup> A number of other States and Territories followed suit.<sup>37</sup> Some also introduced procurement guidelines that effectively required government suppliers or contractors not to use the federal changes to cut working conditions.<sup>38</sup>

The most significant campaign waged against Work Choices, however, was the one conducted by trade unions and various community groups, under the banner of 'Your Rights at Work'.<sup>39</sup> Featuring some highly effective TV advertising, it highlighted the potential for employers to exploit the new legislation to remove entitlements and dismiss workers with impunity. One particular advertisement had a major impact. It showed a mother, 'Tracey', being threatened with the sack unless she came in to work at short notice, despite being unable to make any arrangements for the care of her children.<sup>40</sup>

With the economy growing strongly at the time, unemployment low and skilled labour in short supply, there was, in truth, little incentive or opportunity for most employers to use the new legislation to their full advantage. Nonetheless, evidence began to emerge of low-wage workers in industries, such as retail and hospitality, seeing their take-home pay fall under standard or 'template' agreements (both individual and collective) that lowered or removed 'protected' award conditions.<sup>41</sup>

<sup>31</sup> *New South Wales v Commonwealth* (2006) 229 CLR 1: see A Stewart and G Williams *Work Choices: What the High Court Said* (Federation Press, Sydney, 2007); S Evans, C Fenwick, C Saunders, J-C Tham and M Donaldson "Work Choices Case: Analysis and Implications" in *Work Choices: The High Court Challenge* (Thomson, Sydney, 2007) 1.

<sup>32</sup> See I Landau "Legislating on the Margins of the Federal Takeover: Victoria's Response to WorkChoices" (2008) 21 Australian Journal of Labour Law 30; A Stewart "Testing the Boundaries: Towards a National System of Labour Regulation" in A Forsyth and A Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, Sydney, 2009) 19 at 29–32.

<sup>33</sup> See eg Public Sector Employment Legislation Amendment Act 2006 (NSW); Statutes Amendment (Public Sector Employment) Act 2006 (SA); Local Government and Industrial Relations Amendment Act 2008 (Qld).

<sup>34</sup> As, for example, in relation to child labour: see eg Industrial Relations (Child Employment) Act 2006 (NSW); Child Employment Act 2006 (Qld) Parts 2A - 2B.

<sup>35</sup> See eg Industrial Relations Commission of South Australia *Inquiry Into the Impact of Work Choices in SA – Report* (Adelaide, 2007).

<sup>36</sup> See Workplace Rights Advocate Act 2005 (Vic).

<sup>37</sup> A Workplace Rights Ombudsman was created in Queensland, a Fair Employment Advocate in Western Australia, and a Workplace Advocate in the Northern Territory.

<sup>38</sup> See J Howe and I Landau "'Light Touch' Labour Regulation by State Governments in Australia" (2007) 31 Melbourne University Law Review 367 at 382–383.

<sup>39</sup> See K Muir *Worth Fighting For: Inside the Your Rights at Work Campaign* (UNSW Press, Sydney, 2008).

<sup>40</sup> The ad can be seen at <http://www.youtube.com/watch?v=1WvMTAci5nU>

<sup>41</sup> See eg D Peetz *Assessing the Impact of 'Work Choices' — One Year On* (prepared for the Department of Innovation, Industry and Regional Development, Victoria, 2007); J Evesson, J Buchanan, L Bambery, B Frino and D Oliver *Lowering of Standards Report: From Awards to Work Choices in Retail and Hospitality Collective Agreements* (Workplace Research Centre, Sydney, 2007); B Pocock, J Elton, A Preston, S Charlesworth, F MacDonald, M Baird, R

A much-publicised example of this was the retailer, Spotlight, offering an increase of two cents per hour in basic wage rates, while abolishing penalty rates and paid rest breaks.<sup>42</sup> Suspicions were also aroused when it emerged that the Government was suppressing data collected by the OEA with regards to the content of workplace agreements.<sup>43</sup>

With community unease over the reforms growing, and facing a resurgent Labor Opposition now led by Kevin Rudd and Julia Gillard, the Howard Government was forced into a retreat. Declaring that it had never intended its new system to be used to strip away award conditions, it announced in May 2007 a series of changes that were subsequently given effect through amendments to the WR Act.<sup>44</sup> The changes included a new 'fairness test' for workplace agreements, which required 'fair compensation' to be provided to an employee in the event that any protected award conditions were changed. The task of processing agreements and determining whether they passed the fairness test was given to a new agency, the Workplace Authority, which replaced the OEA. Responsibility for ensuring compliance with awards and other standards was also transferred. The Office of Workplace Services, formerly a unit within the Department of Employment and Workplace Relations, was transformed into the Office of the Workplace Ombudsman, with a specific brief to be more visible and active in enforcing the WR Act.<sup>45</sup> The Government also sought to drop all reference to the unpopular term 'Work Choices', even going so far as to instruct call centre staff responsible for handling public enquiries about the new laws to use 'workplace relations' instead<sup>46</sup>.

Despite these changes, and support from business-funded advertising that sought to portray 'workplace reform' as being under threat from a union-dominated ALP,<sup>47</sup> the Coalition lost office in November 2007. Industrial relations featured strongly during the election campaign as one of the key points of difference between the major parties.<sup>48</sup> John Howard became only the second serving Australian Prime Minister to lose his own seat, after Stanley Bruce in 1929. In a curious parallel, he, too, had suffered defeat over the issue of reforming the federal industrial system.

There seems little doubt that what brought the Work Choices reforms undone was a combination of an effective scare campaign, and the Howard Government's unwillingness to come clean about both the nature and likely consequences of its changes. For example, the Government constantly referred to 'higher wages' under the new system, even though the abolition of the no-disadvantage test meant that take-home pay could be reduced by the cutting of penalty rates under agreements. It claimed that award conditions would be 'protected by law', when they could be removed by a single line in the fine print of an agreement. It spoke of empowering employers and employees to 'sit down together' and negotiate conditions that suited their mutual needs, when it must have known that in

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Cooper and B Ellem "The Impact of 'Work Choices' on Women in Low Paid Employment in Australia: A Qualitative Analysis" (2008) 50 *Journal of Industrial Relations* 475.

<sup>42</sup> See "Spotlight AWAs could cut retail workers' pay by up to \$100 per week: ALP" *Workplace Express* (Australia, 25 May 2006).

<sup>43</sup> See M Davis "Revealed: how AWAs strip work rights" *Sydney Morning Herald* (Australia, 17 April 2007) at 1. The information in question was later released by the Rudd Government: see "Gillard says statistics prove AWAs ripped off workers" *Workplace Express* (Australia, 13 March 2008).

<sup>44</sup> Workplace Relations Amendment (A Stronger Safety Net) Act 2007 (Cth).

<sup>45</sup> As to the impact of this change, see T Hardy "A Changing of the Guard: Enforcement of Workplace Relations Laws Since Work Choices and Beyond" in Forsyth and Stewart, above n 32, at 75.

<sup>46</sup> "Federal Government deletes more references to Work Choices" *Workplace Express* (Australia, 17 May 2007).

<sup>47</sup> See M Lyons "'Lies, Damned Lies and Statistics': The Business Coalition for Workplace Reform Campaign of 2007" (2007) 18(1) *Labour & Industry* 119.

<sup>48</sup> As to the significance of industrial relations in the lead-up to the 2007 election, see R Hall "The Politics of Industrial Relations in Australia in 2007" (2008) 50 *Journal of Industrial Relations* 371 at 373

the real world employment conditions are generally imposed rather than negotiated.<sup>49</sup> When independent research and analysis highlighted the likely impact of the Work Choices changes on low-paid and vulnerable workers, or questioned the need for reform at all,<sup>50</sup> the Government's response was generally to vilify those concerned, rather than to engage with the substance of their work.<sup>51</sup>

It is interesting to speculate what might have happened if John Howard and his colleagues had shown the courage of their convictions on industrial relations. This might have involved admitting straight up that the purpose of their reforms was to shift the balance of power in favour of employers, accepting that some workers would be worse off as a result, but then seeking to show how this would create economic and social benefits for the community. As it was, the Government found itself caught up in an advertising war it could not win. It was the ACTU's image of workers under pressure from uncaring bosses that captured the public mood, rather than the Government's glossy vision of smiling workers shaking hands with their supervisors, or the business groups' attempts to show small retailers being menaced by union 'thugs'. The Coalition was also outflanked by a Labor policy that was more effective in claiming ownership of the concept of 'fairness' in labour regulation.

## Forward with Fairness

The ALP's 'Forward with Fairness' policy was carefully crafted during 2007,<sup>52</sup> with two main objectives in mind. One was to capitalise on the widespread anti-Work Choices sentiment; to that end, Labor promised to abolish AWAs, end the capacity of employers to offer agreements that undercut award standards, and restore access to unfair dismissal claims. It also undertook to expand the statutory safety net of minimum conditions, and impose an obligation on parties to bargain in good faith when negotiating collective agreements. To reinforce the impression of a new beginning, there was a promise of a new agency, Fair Work Australia (FWA), to replace both the AIRC and the various other bodies created by the Howard Government.

The second objective, on the other hand, was to reassure both the business community (in particular, the mining sector) and the wider electorate that Labor's changes would be 'responsible' rather than radical. Forward with Fairness promised to retain 'tough' laws on industrial action, right of entry and freedom of association. There would be special recognition for the position of small businesses in the new unfair dismissal system. A lengthy transitional period before many of the main changes were introduced would allow employers ample time to adjust. In addition, Labor promised to

<sup>49</sup> See M Westcott, M Baird and R Cooper "Reworking Work: Dependency and Choice in the Employment Relationship" (2006) 17(1) Labour & Industry 5; and see also M Gardiner "His Master's Voice? Work Choices as a Return to Master and Servant Concepts" (2009) 31 Sydney Law Review 53. The typical lack of bargaining in most employment relationships was evident in the tendency for AWAs to be standardised documents that did not vary from worker to worker: see P Waring and J Burgess "The Privileging of Individualism in Australian Industrial Relations" (2006) 14 International Journal of Employment Studies 61 at 70–71.

<sup>50</sup> See eg G Considine and J Buchanan *Workplace Industrial Relations on the Eve of Work Choices: A Report on a Survey of Employers in Queensland, NSW and Victoria* (Workplace Research Centre, Sydney, 2007), suggesting that most employers were in fact content with the existing system, and that the changes were being driven by 'fears', 'imagined problems' and 'a preoccupation with isolated pockets of union militancy': Ibid, at 23.

<sup>51</sup> See A Stewart and A Forsyth "The Journey from Work Choices to Fair Work" in Forsyth and Stewart, above n 32, 1 at 15.

<sup>52</sup> See K Rudd and J Gillard *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces* (ALP, Canberra, 2007); K Rudd and J Gillard *Forward with Fairness: Policy Implementation Plan*, (ALP, Canberra, 2007).

complete two tasks left unfinished by the Howard Government. It would seek the co-operation of the States to create a single, national system of industrial regulation, at least for the private sector, and it would also modernise the award system, offering new scope for employers and individual workers to vary the effect of selected provisions.

The pervasive theme in Forward with Fairness was that of restoring *balance*— between ‘fairness’ and ‘flexibility’, and (implicitly) between the interests of workers and employers. The very fact that elements of the policy attracted criticism from both unions and business groups was treated as some sort of proof that Labor must have ‘got the balance right’.<sup>53</sup> There are those who would have preferred to see the ALP take the opportunity to start again and design an entirely new system of regulation, based on fundamental rights and values,<sup>54</sup> but for all the rhetoric about ‘tearing up’ or ‘burying’ Work Choices, it was apparent that Forward with Fairness was promising incremental rather than radical change – and that significant aspects of the Howard Government’s reforms would survive.<sup>55</sup>

## The Fair Work Legislation

The Rudd Government’s first move on taking office was to secure the passage in March 2008 of a number of key amendments to the WR Act.<sup>56</sup> Among other things, these reintroduced a no-disadvantage test in place of the more limited ‘fairness test’, and precluded employers from offering any further AWAs – although those who had been using such agreements were permitted to offer Individual Transitional Employment Agreements instead, at least until the end of 2009. The amendments also initiated a process for the AIRC to review and modernise the award system again by the end of 2009.

With those changes out of the way, the Government moved to draft the ‘substantive’ measure that would give effect to the bulk of its proposed reforms and replace the WR Act. In marked contrast to the Work Choices legislation, the Government consulted widely over its new legislation and was prepared to make changes in response to stakeholder submissions, although it generally resisted pressure to depart from the central commitments in its Forward with Fairness platform. The Government also made a conscious effort to make the new legislation more accessible to users. Over the preceding two decades, the federal industrial legislation had become lengthy and excessively complex. A significant reason for this was the lack of trust that successive governments had shown in the AIRC and the courts. Rather than allowing decision-makers to use their judgement in interpreting and applying the legislation, those governments had sought to anticipate and provide for every eventuality.<sup>57</sup> By contrast, Labor’s avowed aim was to make the new legislation ‘simple and

<sup>53</sup> See A Stewart “A Question of Balance: Labor’s New Vision for Workplace Regulation” (2009) 22 Australian Journal of Labour Law 3 at 45–46. Cf The “third way” rhetoric adopted by the Blair Government in the UK: see eg H Collins “Is There a Third Way in Labour Law?” in J Conaghan, R M Fischl and K Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press, Oxford, 2002) at 449.

<sup>54</sup> As for example with the proposal from the Australian Institute of Employment Rights for a ‘charter’ of rights: see M Bromberg and M Irving (eds) *Australian Charter of Employment Rights* (Hardie Grant Books, Melbourne, 2007); and see further R McCallum “Australian Labour Law After the Work Choices Avalanche: Developing an Employment Law for our Children” (2007) 49 Journal of Industrial Relations 436; C Fenwick “Decency and Fairness in Labor Standards: An Australian Perspective on a Canadian Proposal” (2008) 29 Comparative Labor Law & Policy Journal 491; J Riley and P Sheldon (eds) *Remaking Australian Industrial Relations* (CCH Australia, Sydney, 2008).

<sup>55</sup> See generally Forysth and Stewart, above n 32.

<sup>56</sup> Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth).

<sup>57</sup> See A Stewart “A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation” (2005) 31 Australian Bulletin of Labour 210 at 216–219; Stewart “Work Choices in Overview”, above n 21, at 26–27.

straightforward to understand', and to avoid 'micro-regulation' by 'conferring broad functions and appropriate discretion on Fair Work Australia'.<sup>58</sup>

The outcome of the consultation and drafting process was the Fair Work Bill 2008, which was tabled in Parliament in November 2008. Following a series of last-minute compromises to secure the support of the crossbenchers in the Senate, it eventually passed in March 2009, becoming the *Fair Work Act* 2009.<sup>59</sup> The bulk of its provisions were proclaimed to take effect on 1 July 2009. Two important parts, however, were given a delayed commencement. These were the new 'safety net' provisions in Part 2-2, setting out the National Employment Standards (NES) that prescribe minimum conditions for all employees covered by the Act, and Part 2-3, dealing with modern awards. In accordance with the timetable set while Labor was in opposition, these provisions took effect from 1 January 2010.

Where Forward with Fairness envisaged a single regulatory body to oversee the new regime, the FW Act created two. FWA has replaced the AIRC, the Fair Pay Commission and the Workplace Authority. Structured in a way that is broadly similar to the AIRC, it has also inherited that tribunal's President and most of its members.<sup>60</sup> Its work is complemented by a separate body, the Office of the Fair Work Ombudsman (FWO). This has not only taken over the compliance and enforcement functions of the Workplace Ombudsman, but also assumed responsibility for the provision of information and advice on workplace rights and responsibilities. Labor also proposed that the ABCC be replaced by a Fair Work Building Industry Inspectorate, with more limited powers, though the necessary amendments failed to pass in the Senate.<sup>61</sup>

Besides the safety net provisions mentioned above, other features of the FW Act included:

- a new system of 'enterprise agreements' between employers and groups of employees, covering either single or multiple enterprises;
- an obligation on the part of employers, unions and other 'bargaining representatives' to negotiate new enterprise agreements in good faith, with provision for FWA to intervene in various ways to resolve bargaining disputes;
- provision for FWA to conduct annual wage reviews, plus four-yearly reviews of modern awards;
- a new set of 'general protections' against discriminatory and other wrongful treatment at work, subsuming (and expanding upon) a range of provisions in the WR Act concerning matters, such as freedom of association, coercion, misrepresentation and unlawful termination;
- a revamped system for employees to complain of unfair dismissal, subject to a requirement to complete a 'minimum period' in employment of six months, or 12 months in the case of an employer with fewer than 15 workers; and
- a right to take protected industrial action in relation to a proposed single-enterprise agreement, subject to similar requirements as under the WR Act.

<sup>58</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [r.4].

<sup>59</sup> For an overview of the legislation, see Stewart "A Question of Balance", above n 53.

<sup>60</sup> As to the similarities and differences between the AIRC and FWA, see the symposium on 'Fair Work Australia and the Legacy of the Commission' (2011) 53(5) *Journal of Industrial Relations*.

<sup>61</sup> Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (Cth). A similar proposal is currently before the Australian Parliament, but on present indications seems unlikely to fare any better: see Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 (Cth). The government needs support either from the Liberal/National Coalition, which opposes any changes to the ABCC, or the Greens, who want to see an end to all special regulation for the building industry. At present there is no compromise in sight that would secure the votes of either group.

The FW Act is complemented by a number of related measures,<sup>62</sup> the most important being the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (TPCA Act). This has repealed the WR Act; other than two schedules relating to the registration, rules and internal affairs of trade unions and employer associations. Those schedules have survived as a renamed *Fair Work (Registered Organisations) Act 2009*. The TPCA Act has also preserved the operation of selected other provisions in the WR Act for transitional purposes. While many of the arrangements in the TPCA Act will shortly be of historical significance only, the main exception is Schedule 3, which provides for the continuing operation of pre-FW Act awards and agreements as 'transitional instruments'. These can generally continue to operate until supplanted by modern awards or new enterprise agreements.

For the most part, the rights and obligations created by the new Fair Work legislation apply in relation to 'national system employers' and their employees. According to s 14 of the FW Act, those employers include trading, financial and foreign corporations, Commonwealth agencies and other employers that operate in a Territory. The term 'national system employer' is separately extended to include any other type of employer in a 'referring State', subject to any limitations imposed by that State.<sup>63</sup> Towards the end of 2009, New South Wales, Queensland, South Australia and Tasmania agreed to join Victoria in referring powers to the Commonwealth,<sup>64</sup> with effect from 1 January 2010. Only Western Australia, now in the hands of a Liberal government, has refused to co-operate in creating a national system. Apart from Victoria, the referring States have determined that they will retain their own industrial legislation and tribunals to deal with State government agencies and (except in Tasmania) local councils. However, non-governmental employers and employees are now almost entirely subject to federal regulation.

As was the case under the WR Act, even national system employers can still be regulated by State or Territory laws in relation to 'non-excluded' matters, such as training, discrimination and child labour. Labor has not moved to take over responsibility for these areas,<sup>65</sup> but in some cases it is seeking to promote the harmonisation of State or Territory legislation. In relation to occupational health and safety, for example, it has secured general agreement to the adoption of a 'model' law,<sup>66</sup> and created a new agency, Safe Work Australia, to oversee the reform process.<sup>67</sup> It is also seeking to develop a new national standard on long service leave,<sup>68</sup> though less progress has been made to date on that front.

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<sup>62</sup> See eg Fair Work Regulations 2009 (Cth); Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009 (Cth).

<sup>63</sup> See Fair Works Act, Part 1-3 Divs 2A, 2B, as amended or added by the Fair Work Amendment (State Referrals and Other Measures) Act 2009 (Cth).

<sup>64</sup> See Industrial Relations (Commonwealth Powers) Act 2009 (NSW); Fair Work (Commonwealth Powers) Act 2009 (Vic); Fair Work (Commonwealth Powers) and Other Provisions Act 2009 (Qld); Fair Work (Commonwealth Powers) Act 2009 (SA); Industrial Relations (Commonwealth Powers) Act 2009 (Tas).

<sup>65</sup> Except in relation to rules regarding the payment of wages: see FW Act Pt 2-9 Div 2, replacing State legislation such as the *Victorian Workers' Wages Protection Act 2007* (Vic).

<sup>66</sup> See Australian, State, Territory and New Zealand Workplace Relations Ministers' Council, WRMC 83 Communiqué (25 September 2009). The model Work Health and Safety Act was supposed to be enacted in each participating jurisdiction in time to take effect from 1 January 2012, though at the time of writing it appears that only the Commonwealth, New South Wales, Queensland, the Australian Capital Territory and the Northern Territory will have passed the necessary legislation by then.

<sup>67</sup> See Safe Work Australia Act 2008 (Cth).

<sup>68</sup> See Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [r.76].

## The Fair Work Legislation in Operation

At the time of writing this paper, the new Fair Work regime has been in operation for over two years. There have certainly been some significant changes – though their practical impact has been muted. For example, although the new NES are important, most were already available to workers under the WR Act.<sup>69</sup>

One exception is the entitlement of up to 16 weeks' severance pay on redundancy, under s 119 of the FW Act. This was previously a standard benefit under awards and enterprise agreements, but has now been extended to managerial and professional employees not covered by awards.<sup>70</sup> There is also a right under s 65 for (some) working parents to request flexible work arrangements to accommodate their caring responsibilities, but there is, in most cases, no way of challenging the reasonableness of any refusal by the employer.<sup>71</sup> Research suggests that in any event, such flexible arrangements were already a common feature of employment relationships in Australia, albeit by consent rather than legal right.<sup>72</sup> Perhaps a more significant initiative in this area has been the introduction of a 'paid parental leave' scheme, remedying a long-standing gap in Australia's labour standards.<sup>73</sup> However, this was not done as part of the NES, which continue to provide an entitlement only to *unpaid* parental leave. There is, instead, a separate statute, the *Paid Parental Leave Act 2010* – though its title is a misnomer, as rather than provide for leave as such, it offers a government-funded payment, set at the national minimum wage, that can be spread over up to 18 weeks. For eligible employees, any right to take leave must still depend on the NES, or require the agreement of the employer.<sup>74</sup>

The advent of the 'modern award' system has brought more substantial changes. To the surprise of many seasoned observers, the AIRC completed the massive task of reviewing more than 1500 federal and State awards in time for the new system to commence in 2010. There are now 122 modern awards, almost all of which are structured to apply to a specified industry. Importantly, however, most have transitional provisions that are designed to phase in the modern award wage rates over a period that will end in mid-2014, so that, for the time being, many 'old' awards remain relevant in determining minimum conditions and setting a safety net for enterprise bargaining. (Unsurprisingly, employer groups have tended to complain about the wage or penalty rates that are steadily being phased up, while saying little about the many that are being phased down). There are also a large number of 'enterprise awards' that can continue to apply to a single business, at least until the end of 2013.<sup>75</sup> In theory, these can be 'modernised' by FWA and continue in operation after that date, although in practice FWA has signalled that it will take a great deal of convincing that the

<sup>69</sup> See J Murray and R Owens "The Safety Net: Labour Standards in the New Era" in Forsyth and Stewart, above n 32, at 40.

<sup>70</sup> See B Creighton and A Stewart *Labour Law* (5th ed, Federation Press, Sydney, 2010) at [18.57]–[18.61]. Note that there are various exclusions and exemptions, so that for instance the entitlement does not apply to anyone working for an employer with fewer than 15 staff.

<sup>71</sup> See Creighton and Stewart, above n 70, at [13.94]–[13.97].

<sup>72</sup> See N Skinner and B Pocock "Flexibility and Work-life Interference in Australia" (2011) 53 *Journal of Industrial Relations* 65.

<sup>73</sup> See Productivity Commission *Paid Parental Leave: Support for Parents with Newborn Children* (Inquiry Report No 47, Melbourne, 2009).

<sup>74</sup> The eligibility requirements for the two schemes (the NES unpaid leave entitlement and the Paid Parental Leave Act) are somewhat different, so that complex issues arise as to their interaction: see generally E McCarthy, E Jenkin and A Stewart *Parental Leave: A User-Friendly Guide* (Lawbook Co, Sydney, 2012).

<sup>75</sup> See TPCA Act, Sch 6.



employers concerned should not fall back to the relevant industry award.<sup>76</sup> FWA has also been reluctant, to date, to vary modern awards, other than to correct errors or remove ambiguities,<sup>77</sup> although it is about to embark on an interim review of the modern award system required by the legislation.<sup>78</sup>

In relation to wage fixation, FWA's new Minimum Wages Panel has, to date, completed two of the annual reviews it is required to undertake.<sup>79</sup> Its decisions have resulted in modest adjustments to award rates of pay, and also to the National Minimum Wage Order that protects award-free workers. The National Minimum Wage now sits at A\$15.51 per hour. Perhaps of greater significance, however, has been the use made of the pay equity provisions in Part 2-7 of the FW Act. These permit FWA to make 'equal remuneration orders' for specified groups of employees. Unlike equivalent provisions in previous legislation, which were never successfully invoked, the new provisions focus on the need for equal pay for work of equal *or comparable* value, and there is no requirement to establish that existing pay rates have been set on a discriminatory basis.<sup>80</sup> A test case brought by the Australian Services Union to secure wage rises for the largely female workforce in the social and community services sector has resulted in a finding that their work is significantly undervalued.<sup>81</sup> At the time of writing, no orders have yet been made, FWA having requested further evidence and argument as to the scope and timing of any increases. However, the Commonwealth has committed to providing at least \$2 billion in funding to permit organisations in the sector – many of whom rely heavily on government funding to provide their services – to afford any resulting pay increases.<sup>82</sup>

As for the new enterprise bargaining regime, any initial expectations that the new obligation to bargain in good faith might have a major impact have been quickly dispelled. Under Division 8 of Part 2-4 of the FW Act, FWA can make 'bargaining orders' to resolve concerns about a failure to negotiate in good faith. These have been most commonly used to prevent employers from rushing to put an agreement to a vote of the relevant group of employees without first giving unions or other bargaining representatives a reasonable opportunity to negotiate.<sup>83</sup> However, in other respects FWA has been fairly conservative in using its new powers, ruling, for instance, that an employer may legitimately bypass unions and communicate directly with its workforce as to the progress of bargaining.<sup>84</sup> In a number of cases, it has issued 'majority support determinations', forcing recalcitrant employers to bargain where a majority of employees in a workplace or enterprise can be

<sup>76</sup> See eg *Re Bank of Queensland Agents Award* (2010) 195 IR 358; *Yum! Restaurants Australia Pty Ltd v Full Bench of Fair Work Australia* [2011] FCA 1315. In both these cases FWA elected to terminate enterprise awards rather than modernise them.

<sup>77</sup> For a significant exception, see *Shop, Distributive and Allied Employees Association v National Retail Association Ltd* [2011] FWAFB 6251, agreeing to reduce the minimum shift length for young shop employees who want to work a short shift after finishing school. An earlier attempt to secure a more general change to the shift length provisions in the General Retail Industry Award 2010 had been rejected: see *Appeal by National Retail Association Ltd* [2010] FWAFB 7838.

<sup>78</sup> See TPCA Act, Sch 5 item 6; *Award Modernisation* [2011] FWA 7975.

<sup>79</sup> See *Annual Wage Review 2009–10* (2010) 193 IR 380; *Annual Wage Review 2010–11* [2011] FWAFB 3400.

<sup>80</sup> See M Smith and A Stewart "A New Dawn for Pay Equity? Developing an Equal Remuneration Principle under the Fair Work Act" (2010) 23 Australian Journal of Labour Law 152.

<sup>81</sup> *Equal Remuneration Case* [2011] FWAFB 2700.

<sup>82</sup> See "Gillard commits \$2 billion to fund SACS equal pay increases" *Workplace Express* (Australia, 10 November 2011).

<sup>83</sup> See eg *Australian Municipal, Administrative, Clerical and Services Union v Queensland Tertiary Admissions Centre* (2009) 185 IR 371.

<sup>84</sup> See eg *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* (2010) 195 IR 58. Cf A Bukarica and A Dallas *Promoting Good Faith Bargaining under Australia's Fair Work Act 2009* (Construction, Forestry, Mining and Energy Union, Sydney, 2010).

shown to want that.<sup>85</sup> It should be emphasised, however, that, unlike the position in New Zealand, s 228(2) of the FW Act makes it clear that parties cannot be required to reach agreement, or to make particular concessions. There has been nothing to suggest that the new provisions will do much to spread collective bargaining, except in those rare cases where an employer is facing an organised workforce but still refuses to recognise the union(s) in question.<sup>86</sup>

Despite all this, Australian employer groups have been increasingly vocal in attacking what they claim to be an increase in ‘union power’ under the Fair Work legislation.<sup>87</sup> There have been particular complaints about the ‘barriers’ that the new legislation is said to impose on attempts to lift productivity.<sup>88</sup> There are at least two problems, however, with such arguments.

The first is the absence of any credible link between labour productivity and labour regulation, as a number of recent studies have pointed out.<sup>89</sup> During the 1990s, Australia experienced what is generally regarded as a surge in productivity, under both Labor and Conservative governments. For the past decade, productivity has declined; notwithstanding the dramatic shifts in regulatory policy. There is little, if any, evidence to support the Rudd Government’s claim that the renewed emphasis on collective bargaining in the Fair Work legislation would lift productivity,<sup>90</sup> but nor, by the same token, is there anything to suggest that the current laws are ‘sapping productivity across the country’.<sup>91</sup> As the President of FWA has pointed out, “much of the debate about productivity seems to be based on political positioning rather than on hard analysis.”<sup>92</sup>

The second point is that even the most superficial scrutiny of the employer group complaints reveals that their primary concern is not productivity, but *profitability*. This is especially true of the persistent attacks by retailers on the ‘archaic penalty rate structure’ that continues to be embodied in the modern award system.<sup>93</sup> Being able to pay shop workers less for working on evenings or weekends would, undoubtedly, lower labour costs – but it is hard to see how it would make those workers more productive.

Another area in which there has been a great deal of hysteria and overreaction has been the regulation of industrial action. As previously noted, Labor has largely retained the Howard Government’s restrictive laws on industrial action, ensuring that Australia remains in flagrant breach

<sup>85</sup> See eg *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Cochlear Ltd* (2009) 186 IR 120.

<sup>86</sup> Division 9 of Part 2-4 does have some interesting provisions that are intended to facilitate multi-employer bargaining in ‘low-paid’ sectors. But only one application has been made to date under these provisions and their practical value is open to question: see R Naughton “The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?” (2011) 24 Australian Journal of Labour Law 214.

<sup>87</sup> See eg “It’s all going unions’ way, says AiG” *Workplace Express* (Australia, 30 November 2011), referring to a speech by Heather Rideout from the Australian Industry Group.

<sup>88</sup> See eg P Anderson, Chief Executive, Australian Chamber of Commerce and Industry “Employer Flexibility versus Job Security” (Workforce Conference, Sydney, 5 September 2011); G Bradley (President, Business Council of Australia) Address (Australia-Israel Chamber of Commerce, 12 September 2011).

<sup>89</sup> See eg “Working by Numbers: Separating Rhetoric and Reality on Australian Productivity” ACTU Working Australia Paper (Melbourne, 2011); K Hancock “Enterprise Bargaining and Productivity” (Twenty Years of Enterprise Bargaining Workshop, Melbourne, 5 November 2011).

<sup>90</sup> See Explanatory Memorandum, Fair Work Bill 2008 (Cth), [r.194]–[r.198].

<sup>91</sup> Australian Mines & Metals Association “Tsunami of consensus building for IR change” (5 September 2011).

<sup>92</sup> G Giudice, Address (Australian Labour and Employment Relations Association National Conference, Fremantle, 7 October 2011) at 7.

<sup>93</sup> See eg Australian Retailers Association “Retailers call for IR review after PC says Fair Work deters employment” (press release, 5 August 2011).

of international labour standards.<sup>94</sup> Working days lost to industrial action remain at historical lows,<sup>95</sup> and if the public might be inclined to believe otherwise, it would only be because disputes are so rare today that almost every incidence of industrial action gets reported by the media! Despite this, the super-profitable mining industry remains so concerned at union ‘militancy’ that it is calling for the FW Act to be changed to outlaw industrial action where union claims are considered to be ‘extravagant’, or where the workers concerned are earning more than \$118,100.<sup>96</sup>

If changes to the laws on industrial action are to be made, however, they may well take a different form – and purely because of one high-profile dispute. Qantas had been, unsuccessfully, negotiating for some months with three groups of its workers (long-haul pilots, flight engineers and ground staff), when, on Saturday 29 October 2011, it took the dramatic step of announcing that it would lock out those workers. While the lockout was set to commence in two days’ time, it opted to ground its entire fleet with immediate effect, stranding many passengers around the world. The Federal Government immediately applied to FWA to have all industrial action at Qantas terminated under s 424 of the FW Act, on the basis that an indefinite work stoppage at Australia’s major airline would be likely to cause significant damage to important parts of the economy, such as the tourism sector. Some 30 hours later, and following two late-night sittings, the order was made.<sup>97</sup> The parties were given 21 days to negotiate new agreements. When that deadline passed, the matters were listed for compulsory arbitration in early 2012.<sup>98</sup> FWA will be required to make a ‘workplace determination’ under Part 2-5 that effectively resolves each bargaining dispute and has the same force as a registered enterprise agreement.

At one level, the Qantas affair played out in an entirely predictable way. The unions representing the three groups of workers were seeking commitments on job security that management was not prepared to give, having adopted a business strategy that involves offshoring many of its operations, both to reduce costs and to open up new markets in Asia. All three groups had been taking sporadic industrial action that, at least in the case of the engineers and baggage handlers, was costing the airline money and driving customers away. Qantas was perfectly entitled, under the legislation, to respond by taking protected industrial action of its own; and by initiating a complete shutdown, it would have known that an application to FWA to send the matter into arbitration was inevitable – just as would have happened had any of the unions commenced an indefinite strike. It was clearly banking on getting a more favourable outcome from arbitration than from a negotiated settlement induced by many months of damaging but low-level industrial action. Few other organisations could have adopted a similar strategy. The route to ‘last-resort’ arbitration under s 424 is available (as it has been since 1993) only in the case of major threats either to the economy, or to public health and safety. There are not many employers, at least outside the essential services, that have that kind of impact. FWA has, in any event, tended to interpret s 424, and other provisions dealing with the

<sup>94</sup> See S McCrystal *The Right to Strike in Australia* (Federation Press, Sydney, 2010).

<sup>95</sup> See eg the figures extracted in Giudice, above n 92, at 6. A ‘spike’ in the most recent data, showing 10.1 days lost per thousand employees over the third quarter of 2011, is put in context by comparing it with the figures of over 50 (and in some cases 80) recorded in 1990–91: see Australian Bureau of Statistics *Industrial Disputes, Australia, September 2011* Catalogue Number 6321.0.55.001 (ABS, Canberra, 2011). The great part of the recent increase was in any event attributable to an industrial dispute involving New South Wales public servants – who are not covered by the Fair Work legislation.

<sup>96</sup> Australian Mines and Metals Association “The Fair Work Act – Meaningful Change Required” (press release, 26 September 2011). The dollar figure chosen is the same as the ‘salary cap’ for unfair dismissal claims, as discussed below.

<sup>97</sup> *For Tertiary Education, Skills, Jobs And Workplace Relations* [2011] FWAFB 7444.

<sup>98</sup> See “Qantas-TWU arbitration to begin in March, as ALAEA asks members to consider status quo on job security” *Workplace Express* 25 November 2011.

suspension or termination of protected industrial action, as requiring something more than the ordinary kind of loss or disruption that is the very point of taking or threatening such action.<sup>99</sup>

Despite this, the aftermath of the Qantas action has seen a clamour for the law to be changed. This partly reflects a sense of outrage about two particular features of the airline's conduct: its failure to give any advance notice of its actions (though nothing in the Act forced it to do so);<sup>100</sup> and the fact that it could, in effect, inflict 'self-harm' in order to seize what it perceived as a strategic advantage. However, there have also been suggestions that the threshold for compulsory arbitration should be lowered. These issues are likely to be ventilated in an independent review of the FW Act that will commence in 2012, in accordance with a commitment given before the legislation was passed. Since its narrow re-election in 2010, what is now the Gillard Government has generally been reluctant to contemplate changes to the legislation but, in the wake of the Qantas affair, it seems to have rediscovered an appetite for reform. It has announced that it is prepared to look at the idea of a legislated 'code of conduct' for bargaining,<sup>101</sup> and also supported a change to Labor's policy platform calling for FWA to be given greater powers to intervene in bargaining disputes.<sup>102</sup>

While employer associations have been vociferous in their attacks on the modern award system and the bargaining regime, less has been said about the issue of unfair dismissal protection. Relief from such laws undoubtedly remains a core objective for the small business sector. But in truth, the new unfair dismissal system is operating in a way that creates few difficulties for employers. With the restoration of eligibility for those working for employers with 100 or fewer staff,<sup>103</sup> the annual number of claims of 'harsh, unjust or unreasonable' dismissal has jumped from 8,000 to just under 13,000.<sup>104</sup> Over a quarter of these now involve employers with less than 15 workers,<sup>105</sup> though importantly, FWA is administering the new procedures in such a way that the overwhelming majority of claims are settled within a few weeks, usually after a conciliation conference conducted by telephone.<sup>106</sup> Information collected about settlements reveals that 58% involve payouts of less than \$4000.<sup>107</sup> Few applicants are reinstated to their old jobs. Therefore, in effect, the unfair dismissal laws are not delivering industrial justice, so much as a modest severance payment.

There has been greater employer concern about the new 'general protections' against victimisation at work. The redrafting of these provisions has created a deal of uncertainty as to their operation,<sup>108</sup> although it, as yet, hard to find examples of genuinely new forms of liability being imposed.<sup>109</sup> The

<sup>99</sup> See eg *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360.

<sup>100</sup> Section 414 of the FW Act requires employees to give at least three clear working days' notice of any protected action. But employers taking 'response' action must merely give written notice immediately before a lockout starts. The same applies if employees then in turn respond.

<sup>101</sup> See "Minister flags bargaining code" *Workplace Express* (Australia, 9 November 2011).

<sup>102</sup> See "ALP considering easier access to arbitration" *Workplace Express* (Australia, 3 December 2011).

<sup>103</sup> Note that non-award employees (principally managers and professionals) earning more than A\$118,100. per year are still excluded, as they have been since 1994: see Creighton and Stewart, above n 70, at [19.39]–[19.43].

<sup>104</sup> See *Annual Report of Fair Work Australia, 1 July 2010–30 June 2011* (FWA, Melbourne, 2011) at 10, 81

<sup>105</sup> See "FWA says investigations on track, President defends his speech in fiery Estimates" *Workplace Express* (Australia, 19 October 2011).

<sup>106</sup> See J Acton "Where Have All the Cases Gone? Voluntary Resolution of Unfair Dismissal Claims" (Australian Labour Law Association National Conference, Adelaide, 19 November 2010).

<sup>107</sup> See "Three-quarters of conciliated unfair dismissal claims involve money" *Workplace Express* (Australia, 20 October 2010).

<sup>108</sup> See eg S Rice and C Roles "'It's a Discrimination Law Julia, But Not as We Know It': Part 3-1 of the Fair Work Act" (2010) 21(1) *Economic and Labour Relations Review* 13.

<sup>109</sup> Cf *Barnett v Territory Insurance Office* [2011] FCA 968, ruling that an employee may not claim under s 340 that adverse action has been taken against them because of a 'workplace right', where the only right in question arises under their employment contract.

decision that has generated most controversy, that of the Full Federal Court in *Barclay v Board of Bendigo TAFE*<sup>110</sup> could have arisen under any previous version of these provisions. It involved a union delegate who was disciplined for sending an e-mail alleging corrupt behaviour by management without following proper procedures. Even though it was accepted that his employer believed it was taking action against him for breaching his employment obligations, the majority of the court ruled that, on an objective basis, the 'real reason' lay in his activities as a union official. It remains to be seen whether the High Court, which has granted leave to appeal, will agree with this fairly radical reinterpretation of the protections for union members and delegates.

What has been particularly worrying employers has been the increasing number of dismissal-related general protections claims that are being lodged with FWA under s 365 of the FW Act. The legislation provides for the compulsory conciliation of such complaints, over 500 of which were made in the third quarter of 2011 alone.<sup>111</sup> FWA cannot make a formal decision in relation to these claims, which, if they are to be pursued, must be taken to the Federal Court or Federal Magistrates Court; but the conciliation conference is still an opportunity to confront the employer and seek some form of settlement. Anecdotal evidence suggests that many of these proceedings involve tenuous allegations, and are really unfair dismissal claims that have been lodged out of time.<sup>112</sup> It seems likely that there will be calls during the forthcoming review of the Act for some form of 'filter' to be applied to such applications.

## Looking Ahead

Despite the increasingly strident calls for change from Australian employer groups, there is a real prospect of a period of stability in Australian labour law for the first time in over 20 years. There are still some adjustments to be made, as the transition continues from the WR Act to the new Fair Work regime; but it seems unlikely that the next several years will be anything like as turbulent as the past five have been.

As far as further reforms are concerned, there are undoubtedly some in the Liberal Party with a sense of unfinished business. Since the failure of Work Choices, the pragmatic view has been that it would be better to steer away from radical changes to labour regulation. Indeed, Liberal leader, Tony Abbott, has declared Work Choices 'dead, buried and cremated',<sup>113</sup> and went into the 2010 election promising no immediate change to the Fair Work legislation. However, pressure is growing from sections of the party to re-think this stance – and also from the employer groups, whose salvoes against the current system are quite clearly framed with the Opposition in mind, not so much the Government. Nevertheless, even if the Coalition is persuaded to revive elements of its former policies, it seems likely that the left-leaning Greens will continue to hold the balance of power in the next few Senates, as they have done since mid-2011. That hardly bodes well for any proposal to reintroduce individual statutory agreements, reduce unfair dismissal protection or create new forms of 'flexibility' for employers.

As for Labor, there is still a great deal of pressure from the union movement (and indeed many backbenchers) to go further than it did with the Fair Work legislation, especially in freeing up the

<sup>110</sup> (2011) 274 ALR 570.

<sup>111</sup> See *Unfair Dismissals Report Jul–Sep 2011* (FWA, Melbourne, 2011).

<sup>112</sup> Under s 366(1), a dismissal-related general protections claim must be filed within 60 days of the termination, whereas the time limit under s 394(2) for a claim of harsh, unjust or unreasonable dismissal is a much tighter 14 days.

<sup>113</sup> See "Abbott refuses to say 'never, ever'; reform needed, says business" *Workplace Express* (Australia, 19 July 2010).

controls on industrial action. However, there seems little inclination on the part of the ALP's current leadership to move in that direction. Labor has proclaimed a willingness to give primacy to collective bargaining, and its new laws have certainly created a more level playing field for trade unions.<sup>114</sup> Its policies and legislation remain primarily concerned with the rights and freedoms of individual workers. Unionism is tolerated, but not actively encouraged – certainly not the 'militant' variety.<sup>115</sup> In its second term, it has been willing (among other things) to propose increases to compulsory employer contributions to superannuation schemes,<sup>116</sup> new forms of protection for vulnerable outworkers in the clothing industry and long-distance truck drivers,<sup>117</sup> and a new (though very limited) payment for fathers and other 'secondary carers' taking leave on the birth or adoption of a child.<sup>118</sup> Overall, however, there seems every reason to suppose that Labor will continue to practise the 'politics of balance' that carried it into office, and that has been so evident in its handling of workplace relations to date.

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<sup>114</sup> See A Forsyth "'Exit Stage Left', now 'Centre Stage': Collective Bargaining under Work Choices and Fair Work" in Forsyth and Stewart, above n 32, at 120; C Fenwick and J Howe "Union Security After Work Choices" in Forsyth and Stewart, above n 32, at 164.

<sup>115</sup> See further Stewart "A Question of Balance", above n 53 at 47–9.

<sup>116</sup> See Superannuation Guarantee (Administration) Amendment Bill 2011 (Cth).

<sup>117</sup> See Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (Cth); Road Safety Remuneration Bill 2011 (Cth).

<sup>118</sup> See *Paid Parental Leave: Dad and Partner Pay* (Australian Government, Canberra, 2011).

## Bargaining Fair Work Style: Fault-lines in the Australian Model

JOELLEN RILEY\*

### Abstract

The model of good faith bargaining introduced by the Fair Work Act 2009 (Cth) requires bargaining representatives to bargain in good faith with every other bargaining representative appointed by an employer or employee. This obligation is producing some interesting problems. The work once done by trade unions (in marshalling collective views of employees, funding the work of bargaining, and settling their own demarcation issues) appears to be falling into the lap of employers. This paper will examine some of the fault lines appearing in the system – possibly as a consequence of an ill-considered attempt to accommodate individualism in an essentially collective system. The paper is based on some empirical research, as well as an examination of Fair Work Australia decisions.

### Good faith bargaining according to the Fair Work Act 2009 (Cth).

The introduction of an obligation to bargain in good faith in Australian labour law<sup>1</sup> has produced a great deal of professional commentary and scholarly analysis, seeking to clarify precisely what such an obligation means for employers and unions.<sup>2</sup> Much of that commentary compares the Australian obligation, enshrined now in the Fair Work Act 2009 (Cth) s 228, with good faith bargaining obligations in North American and New Zealand law. This paper focuses on a peculiarity of the Australian law, not found in the North American laws: the obligation to bargain in good faith with a number of bargaining representatives, and not only with a single employee association that has secured an entitlement (through some kind of trade union recognition process) to represent the entire workforce.

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<sup>1</sup> The term “labour law” has been adopted here, in preference to “industrial law”, which is out of vogue in Australia since the inception of single business enterprise bargaining, and “workplace relations law”, which connotes the particular anti-union agenda of the former Howard Coalition government.

<sup>2</sup> For a selection of publications see: Alex Bukaric and Andrew Dallas with Anthony Forsyth (ed) *Promoting Good Faith Bargaining under Australia's Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand* (CFMEU Mining and Energy, Sydney, 2010); Rae Cooper and Bradon Ellem “Fair Work and Re-regulation of Collective Bargaining” (2009) 22 AJLL 284; Rae Cooper and Bradon Ellem B “Getting to the Table: Fair work and Collective Bargaining” (paper presented at the Collective Bargaining Workshop, RMIT, 23-24 November 2010); Breen Creighton *Good Faith Bargaining under the Fair Work Act – Striking a Balance: Discussion Paper for the Business Council of Australia* (January 2010); Anthony Forsyth “‘Exit Stage Left’, now ‘Centre Stage’: Collective Bargaining under Work Choices and Fair Work” in Anthony Forsyth and Andrew Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, Sydney, 2009) 120; Richard Naughton “The Obligation to Bargain in Good Faith: Inspired Innovation or Legislative Folly?”, Working Paper No 6 (Centre for Employment and Labour Relations Law, University of Melbourne, 1995); Aaron Rathmell “Collective Bargaining after Work Choices: Will ‘Good Faith’ take us Forward with Fairness?” (2008) 21 AJLL 270; George Strauss “Should Australia Copy America Employee Relations Practices?” in Joellen Riley and Peter Sheldon *Remaking Australian Industrial Relations* (CCH, Sydney, 2008) 223.

It is argued here that this peculiarity of Australian law introduces an inconvenient level of complexity in the Australian system. This paper notes three inconvenient consequences of the obligation to bargain with multiple bargaining representatives:

1. The absence of a formal trade union recognition process, and the ability for everyone to appoint his or her own individual representative, means that the obligation to arrive at a consensus on the employees' side of the bargaining table now falls to the employer. Bargaining is multi-lateral, not bi-lateral; disputes between competing employee groups can hold up the process for settling agreements. The obligation (and opportunity) to find the appropriate consensus between competing employee demands appears to fall into the employer's hands.
2. Arguments have emerged over who is responsible for paying wages for the work of bargaining. Unions pay their own delegates to perform bargaining duties, but non-union bargaining representatives must fund themselves while in bargaining negotiations. Employers are not obliged to pay wages to employees during bargaining negotiations. Those who agree to pay wages are legitimately concerned that this may encourage more employees to self-represent.
3. Old demarcation disputes have reemerged. It appears that employees can exercise their right to appoint any bargaining representative, even when that representative is affiliated with a union that has no general entitlement to represent the industrial interests of the workforce at that particular site.

It appears that two conflicting agendas have created this complexity. On the one hand, the ALP (Australian Labor Party) Government has been committed to the reinstatement of collectivism in Australian labour law, after the ravages of the Work Choices laws which hastened union exclusion and individualisation of employment relations.<sup>3</sup> On the other hand, the Government has found it politically expedient to maintain the concept of freedom of association articulated in the Workplace Relations Act 1996 (Cth) as a right to belong *or not to belong* to a union.<sup>4</sup> The trade union movement was so effectively demonised during the Howard years that it is highly unlikely any ALP Government could ever sell the electorate legislation which gave unions a monopoly in the negotiation of enterprise bargains. The rhetoric adopted by the Australian Council of Trade Unions (ACTU) in its pre-2007 Election campaign supporting the abolition of the Work Choices laws, "Your Rights at Work",<sup>5</sup> has been very influential in shaping the Fair Work (FW) Act as legislation protecting individual worker's rights. That individualism extends to the right to participate directly in enterprise bargaining negotiations. Nevertheless, the growth of this kind of individualism probably has earlier roots.

## **The origins of non-union bargaining in Australian labour law**

The absence in Australian law of a formal trade union recognition process to ensure that employees speak in a single voice in collective enterprise bargaining appears to have had its genesis in the Keating Government's Industrial Relations Reform Act 1993 (Cth). This enactment included provisions permitting employers to make

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<sup>3</sup> Work Choices" is used throughout this paper as shorthand for the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) which commenced on 26 March 2006, and is widely reputed to have driven the demise of the Howard Coalition government: see Roy Morgan (2007) "IR Reforms Still Driving Labor Support: Liberal Voters Afraid of Union Dominance" <[www.roymorgan.com/news/polls/2007/4179](http://www.roymorgan.com/news/polls/2007/4179)>.

<sup>4</sup> See former Workplace Relations Act 1996 (Cth) Part XA, enacted in the Workplace Relations and Other Legislation Amendment Act 1996 (Cth) with effect from 1 January 1997.

<sup>5</sup> To view a selection of advertisements, visit the YouTube website <[www.youtube.com](http://www.youtube.com)>.



collective enterprise agreements (called “enterprise flexibility agreements”, or EFAs) directly with employees, without the involvement of a union.<sup>6</sup> A rationale for this novel invention was the desire to encourage enterprise bargaining as a means for trading productivity improvements for better wages and conditions (and for escaping the prevalence of “one size fits all” industrial awards), not only in unionised industries, but in new industry enterprises where unions had no effective presence.<sup>7</sup> The unions did not much like this innovation, nevertheless, the concept that the Australian enterprise bargaining system should permit non-unionised employees to participate independently of unions has remained.

The Howard Government’s Workplace Relations Act 1996 (Cth) (both before and after the notorious Work Choices amendments) also maintained an avenue for direct bargaining between employers and employees, without the involvement of unions.<sup>8</sup> Of course, many of the agreements made without union involvement were made as a consequence of the acceptance of “take-it-or-leave-it” offers, and not as a consequence of any genuine negotiation process.<sup>9</sup> Notwithstanding, concerns about these non-union enterprise agreements, the idea that each employee, whether a member of a union or not, should be entitled to participate in enterprise bargaining, has persisted, even after the enactment by the ALP Government of the FW Act 2009 (Cth).

The system established by the Work Choices laws that all enterprise agreements are made between employers and employees directly, and that trade unions participate as “bargaining representatives”, has been retained.<sup>10</sup> All employees have an entitlement to appoint a bargaining agent; union members will be taken to have appointed their union, unless they expressly make an alternative election.<sup>11</sup> Employers (who are, by definition, bargaining representatives themselves) are obliged to bargain in good faith with all bargaining representatives appointed by employees.<sup>12</sup> In most cases, the bargaining representatives are unions, nevertheless, there have been some instances where employees have appointed other bargaining representatives (or sought to represent themselves), and on these occasions, employers have sometimes faced difficulties in securing an enterprise bargain.

## Employer experiences

Assertions that the present bargaining framework manifests the inconvenient consequences described above became apparent in the course of some interviews conducted as part of a research project into Australian employers’ experiences of good faith bargaining in the first round of bargains, struck after the commencement of the FW Act.<sup>13</sup> This project, conducted by the author with Dr Troy Sarina,<sup>14</sup> initially set out to investigate whether the new good faith bargaining obligation in s 228 of the FW Act was having any influence on the bargaining strategies of those employers, who had maintained a practice of bargaining collectively with unions

<sup>6</sup> See Amanda Coulthard “Non Union Bargaining: Enterprise flexibility Agreements” (1996) 38 JIR 339.

<sup>7</sup> See Second Reading Speech, House of Representatives, 28 October 1993, *Debates*, at 2781.

<sup>8</sup> See generally Anthony Forsyth and Carolyn Sutherland “Collective Labour Relations Under Siege: the Work Choices Legislation and Collective Bargaining” (2006) 19 AJLL 183.

<sup>9</sup> See generally Shelley Marshall and Richard Mitchell “Enterprise Bargaining, Managerial Prerogative and the Protection of Workers’ Rights: An Argument on the Role of Law and Regulatory Strategy in Australia under the Workplace Relations Act 1996 (Cth)” (2006) 22 IJCLIR 299.

<sup>10</sup> See Fair Work Act, s 174.

<sup>11</sup> See Fair Work Act, s 176.

<sup>12</sup> See Fair Work Act, s 176(1)(a).

<sup>13</sup> This project, “Legal Regulation and the Evolution of Organisational Practice: The Impact of Good Faith Bargaining Rules on Employment Relations Strategies” was funded by an Institute of Social Sciences Research Grant, University of Sydney

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throughout the Workplace Relations and Work Choices years. We wanted to see whether a statutory injunction to bargain “in good faith” would make any difference to the behaviour of experienced collective bargainers who already enjoyed established relationships with trade unions. We knew that good faith bargaining obligations, together with the abolition of the option of using Australian Workplace Agreements, had dragged certain big players (such as, Telstra, Cochlear and the Commonwealth Bank) back to the bargaining table with unions, but we were curious to see whether s 228 was doing any work in improving the quality of enterprise negotiations. We wished to test the assertions by the Minister of the day (Julia Gillard) that good faith bargaining would encourage “employees and employers to examine the way they work, discover new ways to improve productivity and efficiency, and share ideas that make workplace more harmonious and flexible.”<sup>15</sup> We interviewed several industrial relations managers from three large enterprises, and also held a workshop attended by a number of advisors to many organisations, with a view to discovering the impact of the good faith bargaining obligation in practice.<sup>16</sup> In the course of this project, however, we discovered some unexpected matters which were distracting even experienced collective bargainers. One of them was the problem of dealing with multiple bargaining agents.

## Multiple bargaining agents

As explained above, the FW Act entitles each employee to appoint a bargaining representative to negotiate on his or her behalf in collective bargaining negotiations with their employer. In theory, an employer may be obliged to recognise as many bargaining representatives as there are employees in an organisation. In practice, very few employees appoint their own independent bargaining representatives, however, if any employees have chosen to do so, an employer will be faced with the obligation to negotiate with a number of employee representatives, each representing a different cohort of the workforce. For some of the managers we interviewed, this created some apprehension that their former settled relationships with established and experienced union negotiators would be disturbed by the intervention of any number representatives of special interest groups, and possibly some eccentric “Aunt Sallys”, interested only in coming along to bargaining meetings out of curiosity, or to enjoy the perks of attending bargaining sessions.

Managers were concerned about practical inconveniences and costs: what if dozens of employee representatives in a national enterprise all insisted on being flown (at the employer’s expense) to a central meeting location, and accommodated over night? Would this add to the cost of bargaining, and perhaps encourage more employees to appoint themselves as bargaining agents, so that they too could join the party? The industrial relations managers said this problem had not yet emerged as a major inconvenience, however, some managers did report that they now had to deal with a second bargaining representative acting for a minority of the workforce with a different agenda from the union. At a workshop discussing these views, one industrial relations manager for a university said that she had, in fact, received notification from more than 50 non-union bargaining representatives when she first issued the required notices under Fair Work Act s 173. She opined that employers with highly professional workforces were more likely to face a need to deal with multiple bargaining representatives.

One question arising when more than one representative is appointed is whether an employer is obliged to meet with all bargaining representatives simultaneously, or whether the good faith obligation permits separate

<sup>15</sup> Julia Gillard, Minister for Employment and Workplace Relations “Introducing Australia’s New Workplace Relations System” (National Press Club, Canberra, 17 September 2008).

<sup>16</sup> The project’s findings on good faith are to be published separately.

negotiations with the different groups. Managers interviewed generally expressed a preference for holding meetings separately, generally because they felt that separate meetings allowed them greater control over negotiations. Several managers expressed a fear that bargaining representatives may bring adverse action claims if they were disgruntled by the employer's approach to dealing with different groups.

'Adverse action' complaints can be brought under the General Protections provisions in FW Act Part 3-1, where an employee can demonstrate that they have been treated in a less advantageous manner than others at the workplace, on account of their entitlement to exercise a workplace right (such as their freedom to join or not join a union, or their right not to suffer discriminatory treatment on the grounds of sex, disability, age, or some other protected characteristic). Adverse action claims can be brought by employees during the course of their employment, not only upon termination.<sup>17</sup>

The concern that special interest groups may delay settlement of an agreement, and may bring adverse action claims, was realised in *Qantas Airways Limited*.<sup>18</sup> This was an application for approval of an enterprise agreement voted up by Qantas flight attendant staff after successful negotiations involving the Australian Services Union (ASU) which supported the application for approval. Two employees, Ms. Waterhouse and Ms. Edwards, were bargaining representatives for a number of part-time employees in the Brisbane international terminal. They objected to some clauses in the agreement, for reasons including that those clauses gave preference in the allocation of overtime to full-time staff. Their objection to approval of the agreement was alleged indirect discrimination on the grounds of sex. This argument could not be sustained: Commissioner Raffaelli found that women made up the majority of the full-time workforce as well as the part-time workforce, so any advantage conferred upon full-time staff could not be construed as an act of discrimination against women. The part-timers objection was discounted and the agreement ultimately approved. Nevertheless, this skirmish demonstrates that the obligation to negotiate with minority groups can delay the approval of an agreement voted up by majority of employees.

Even in this case, where Qantas had met with the minority group's representatives and made some changes to the agreement to accommodate their concerns, the minority could still contest approval. In the days when agreements could be made directly with unions, the union bore the responsibility of accommodating disparate claims into a unified employee voice. It is not surprising that a system which burdens the employer with that responsibility should raise concerns for employers who have long been accustomed to dealing only with the union.

Employers are not permitted to take any steps themselves to require the various employee representatives to sort out their claims themselves before coming to the bargaining table. There is provision in the FW Act for Fair Work Australia (FWA) to make a bargaining order (under s 229) if it finds that the participation of too many bargaining representatives is interfering with efficient bargaining.<sup>19</sup> FWA can make an order under s 231 that "some or all" of the representatives meet and elect one of their number to represent them all in bargaining.<sup>20</sup>

Nevertheless, employers cannot pre-empt this kind of problem by requiring employees to elect representatives for the purpose of bargaining, as was demonstrated in *Capricornia Pty Ltd trading as Quality Hotel Batman's Hill on Collins*.<sup>21</sup> In that case, an employer with a non-union workforce wanted to strike an enterprise bargain under the FW Act with employees. Instead of doing what many employers appear to do, and simply put its own

<sup>17</sup> See for example *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* [2011] FMCA 58.

<sup>18</sup> *Qantas Airways Limited* [2011] FWA 3632.

<sup>19</sup> See Fair Work Act, s 230(3)(a)(ii).

<sup>20</sup> The provision does not appear to have been used to date.

<sup>21</sup> *Capricornia Pty Ltd trading as Quality Hotel Batman's Hill on Collins* [2011] FWA 727.

non-negotiable agreement to a vote of employees 21 days after announcing the intention to bargain, this employer genuinely attempted to encourage employees to bargain. The employer asked employees to form a bargaining team by electing a number of representatives from each of the classifications of occupation at the workplace. This approach – designed to establish a manageable team of elected representatives chosen by a vote of the majority – was held to contravene the FW Act, because it denied each individual employee the statutory entitlement to appoint his or her own personal bargaining representative. The employer's error in assuming that the responsibility for choosing a workable number of representatives should rest upon the collective of employees would be excusable if the employer was familiar with collective bargaining practices in European and North American jurisdictions. This peculiarity of Australian law actually discourages employers without a union presence from proactively encouraging the establishment of employee bargaining teams.

### Who pays for bargaining work?

Managers interviewed also expressed concerns about how much paid time they needed to provide non-union bargaining representatives to engage in bargaining meetings. For a national employer who can expect to hold weekly meetings over the course of a few months to meet the good faith bargaining obligations in s 228, this could amount to a considerable amount of paid time. Unions, of course, pay their own dedicated staff, most of whom will *not* be direct employees of the employer in any event. But who pays the non-union bargaining representatives? The work is done for the employee or employees appointing the representative. What if the representative is the employee, or another member of the employer's staff, so that the bargaining work will take the employee away from normal duties? Is the employer obliged to release employees from normal duties to attend bargaining sessions?

The question of who must pay for the time that independent bargaining representatives spend around the bargaining table was resolved in *Bowers v Victoria Police*.<sup>22</sup> Sergeant Bowers wanted to attend the same negotiation meetings for an enterprise agreement with VicPol as the Police Federation of Australia (PFA). VicPol had agreed to organise his rosters to enable him to attend the meetings, but he argued that he should be entitled to attend during paid working hours. Commissioner Smith held that Sergeant Bowers was acting as his own bargaining representative, and on behalf of 132 other police prosecutors, and was not entitled to paid time off work to attend bargaining meetings. Although Commissioner Smith said that "many employers do provide paid time for employees to attend bargaining sessions,"<sup>23</sup> he held that VicPol's obligation to give genuine consideration to his proposals did not mean that it was obliged to pay his salary during meeting times.

The *Bowers* decision implies that the industrial relations managers' concerns about the costs of bargaining can easily be resolved: employees pay the costs for their own representation. This is entirely consistent with the spirit of Article 2 of the International Labour Organisation (ILO) Right to Organise and Collective Bargaining Convention C98, which insists that employers should fund or otherwise exert influence over worker organisations. Bargaining is indeed 'work', but it is not work that forms part of the employee's duties in service of the employer. Organised trade unions deal with the problem of how to pay for the work of bargaining by employing their own paid officials. Union members pay for bargaining services through their dues. The new breed of voluntary bargaining representatives need to establish their own arrangements for funding the work of bargaining. They cannot impose those additional costs upon the employer; and they ought not accept payment from the employer while performing any collective bargaining function, because this conflicts with the ILO

<sup>22</sup> *Bowers v Victoria Police* [2011] FWA 2862.

<sup>23</sup> *Ibid* at [30].

principle that workers ought not be under any suspicion of control or influence by the employer when engaged in collective bargaining.

Interestingly enough, no issue was raised in the *Bowers* case about the obligation of the 132 police prosecutors to contribute to a fund to pay for the work Sergeant Bowers was undertaking on their behalf. This exposes another peculiarity of the Fair Work system. It permits free-riding. Those who pay union dues support work that benefits many who do not contribute, but the FW Act (like the Workplace Relations Act before it) prohibits the compulsory levying of any kind of bargaining fee.<sup>24</sup> It should also be remembered that in the Australian system, once an enterprise bargain is struck for a particular occupational group, every employee performing that kind of work will be covered by the enterprise agreement, not only the union members of a union that bargained for the agreement.

Another potential source of grievance buried in the *Bowers* case, is the timing of bargaining meetings. The employer and the union are likely to want meetings to be in normal working hours, because industrial relations managers and union delegates like to get their work done in ordinary time. Self-appointed employee bargaining representatives, however, may want bargaining meetings to occur out of hours, if attendance will interfere with their paid work. Whose will prevails? How will the obligation to bargain in good faith, by meeting at reasonable times, sort out these kinds of disagreements?

## Reemergence of demarcation disputes?

Some of the industrial relations managers interviewed also expressed concerns that the system requiring recognition of many bargaining agents has the potential to generate the kinds of problems that were once settled by the conciliation or arbitration of demarcation disputes. This fear is well illustrated by the FWA decision in *Tracey v Technip Oceania Pty Ltd*,<sup>25</sup> which involved agreement-making with waterside workers. This is an industry with a rich and colourful history of union rivalry.

When Technip advised employees of their right to appoint a bargaining representative for the purpose of negotiating a proposed agreement, it was dismayed to find that a number of them purported to appoint a certain Mr. William Tracey. Technip challenged the appointment because Mr. Tracey was Assistant Branch Secretary of the Maritime Union of Australia (MUA), well known to be a militant union. As a consequence of the settlement of a demarcation dispute many years earlier, Technip's staff were all entitled to be members of the Australian Maritime Officers Union (AMOU), but not the MUA. Understandably, Technip wished to bargain only with the AMOU and did not want the MUA influencing negotiations (or getting into stoushes with the AMOU during the course of bargaining). Technip sought to rely on the FW Act s 176(3) which provides that "an employee organisation cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement". Nevertheless, Commissioner Cloghan found that as the employees had appointed Mr Tracey himself, and not the MUA, Technip should be ordered to recognise him as a bargaining agent. The MUA could not act as their representative, but the MUA's representative could, so long as he acted in his personal capacity.

<sup>24</sup> See Fair Work Act, s 353.

<sup>25</sup> *Tracey v Technip Oceania Pty Ltd* [2011] FWA 3509; [2011] FWAFB 6551.

Technip appealed to a full bench of FWA. On appeal, the principal finding that Mr. Tracey had been validly appointed as a bargaining agent for the employees was not disturbed.<sup>26</sup> Nevertheless, the bargaining order was overturned by a majority of the full bench (but with a strong dissent by Drake SDP) on the basis that Mr. Tracey had applied for the order not in his personal capacity, but in his position as an official of the MUA. His correspondence was ‘bristling’ with indications that he was acting as an MUA official.<sup>27</sup> He used the MUA logo and his MUA contact details in his sign-off. Had he been more cautious and used personal stationery for his correspondence, it is arguable that Mr. Tracey would have succeeded in the matter.

It is not surprising that employers who have dealt in the past with difficult demarcation disputes should be apprehensive that some of those problems may be re-enlivened by rules which permit any person – even a union organiser for a rival union – to act as a bargaining representative at a workplace. It seems rather naïve to suggest that a union delegate can genuinely act in a personal capacity for persons who are not entitled (as a consequence of a demarcation arrangement) to official representation. On the other hand, it is difficult to see what other decision Commissioner Cloghan could have made given the privilege the FW Act confers on the individual’s right to choose his or her own bargaining representative.

## Conclusions?

The FW Act is relatively young. It is due for revision in 2012, as a consequence of promises made in the Explanatory Memorandum to the original Fair Work Bill 2008. My intuition, however, is that these matters are unlikely to be addressed in any review of the Act. The inconveniences caused by this peculiar system are an inevitable consequence of the now entrenched individualism in Australia’s approach to labour relations. Perhaps this is understandable, given the poor reach of union influence in many sectors of the Australian economy.<sup>28</sup> If you are a part-time worker in the private sector, chances of being a union member are now as low as 14 percent. While it is understandable the system should accommodate an insistence upon the Workplace Relations-style of freedom *not* to associate, it is clear that if too many non-union employees decided to pursue their rights of individual representation too vigorously, the system could become quite unmanageable. Presently, the general apathy of most of the non-unionised workforce is the only thing that permits collective enterprise bargaining to proceed efficiently. If too many more employees were to follow the path of the part-time flight attendants, the police prosecutors and waterside workers in the cases above, the hairline faults noted above may ultimately fracture the Fair Work bargaining system.

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<sup>26</sup> *Tracey v Technip Oceania Pty Ltd* [2011] FWAFB 6551 at [24].

<sup>27</sup> *Ibid* at [26].

<sup>28</sup> From August 2009 to August 2010, overall union density rates in Australia declined from 20% to 18%. See Australian Bureau of Statistics “6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, Aug 2010” (2010) <[www.abs.gov.au](http://www.abs.gov.au)>.

# Good Faith in Collective Bargaining Communications in Australia and New Zealand

LEEANNE TEMPLER\*

## Abstract

Communications during collective bargaining are of central importance to the conduct of employment relations in Australia and New Zealand as they may substantially impact collective bargaining outcomes. Although communications during collective bargaining are required to be in good faith in both jurisdictions, the Courts have approached communication material that seeks to “negotiate” with or persuade employees of employer viewpoint quite differently. This paper discusses how the Australian courts have allowed greater latitude to employer and employee representatives to communicate their points of view during collective bargaining, and in turn led to results which may be seen as undermining the collective bargaining process.

## Introduction

This paper compares the law covering communications during collective bargaining between employers, employees and bargaining representatives in Australia and New Zealand in the context of Good Faith Bargaining (GFB) requirements. Communication issues have assumed greater importance within the systems of enterprise based industrial relations in Australia and New Zealand over the last 20 years. They are integral to any consideration of collective bargaining parameters, and may substantially affect negotiation outcomes.<sup>1</sup>

Collective bargaining has only recently been concurrently covered by GFB provisions in both jurisdictions.<sup>2</sup> Although the current legislation in Australia and in New Zealand was enacted by Labour Governments, there are differences in the respective philosophies underpinning the two Acts. The Fair Work (FW) Act is based on individual rights and *enterprise* collective bargaining<sup>3</sup> and does not accord unions any particular status other than as professional bargaining agents like any others. Good faith is just one of many objects of the FW Act, and it contains simple GFB obligations. The New Zealand Employment Relations Act (ERA) 2000, however, promotes collective bargaining, accords unions exclusive status as bargaining representatives and gives good faith as well as GFB a central position in the objects of the legislative framework.<sup>4</sup>

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<sup>1</sup> Pam Nuttall “The Impact of Good Faith Principles on Communication Issues in Collective Bargaining” (2007) 32(1) NZJER 87 at 87.

<sup>2</sup> Aaron Rathmell “Collective Bargaining After WorkChoices: Will ‘Good Faith’ Take Us Forward With Fairness?” (2008) 21 AJLL 164 at 167.

<sup>3</sup> Fair Work Act 2009 s 3 (f), Rae Cooper and Bradon Ellem “Fair Work and the Re-regulation of Collective Bargaining” (2009) 22 AJLL 284 at 295.

<sup>4</sup> Gordon Anderson and Michael Quinlan “The Changing Role of the State: Regulating Work in Australia and New Zealand 1788-2007” (2008) 95 Labour History 111 at 126, Mazengarb’s Employment Law, Online Edition, at 3-7.

These different philosophies are shown in the following research to have impacted on the different ways communications that seek to “negotiate” during “good faith” collective bargaining are perceived in each jurisdiction.

## The New Zealand Position

The New Zealand government’s recent reform of s 32 of the ERA<sup>5</sup> is the latest in a series of legislative and judicial attempts to deal with the lack of clarity and relative complexity in the law covering communications during collective bargaining. This reform confirms an employer may communicate with the employer’s employees during collective bargaining, including about the employer’s proposals for the collective agreement as long as the communication is consistent with the GFB requirements set out in ss 32(1)(d) and 4 of the ERA.

In order to understand the current New Zealand legal position, it is necessary to understand the legal position in respect of communications during collective bargaining under the Employment Contracts Act 1991 (ECA). Section 12(2) was the key section relating to communications in collective bargaining negotiations. This section, which is much less prescriptive than the current ERA, referred to “recognising the authority” of the representatives for negotiations, rather than any direct reference to communications.

### *Employment Contracts Act Cases*

A discussion of the ECA position is facilitated by examining the following four cases, which interpreted ECA s 12(2).

In the first case, *Eketone v Alliance Textiles (NZ) Ltd*,<sup>6</sup> Cooke P expressed the law as it then stood to be: “[c]ertainly an employer is free not to negotiate with anyone: but if he wishes to negotiate I doubt whether he can bypass an authorised representative”.

In the next case, *NZ Medical Laboratory Workers v Capital Coast Health*,<sup>7</sup> the employer was judged to have crossed the boundary between the provision of legitimate information and attempted direct negotiation by the Employment Court. The employer had held a meeting which involved a presentation by management to employees on matters pertaining to the proposed collective employment contract that the union was not invited to, and informed employees of proposals before they informed the union. A number of letters and an information pack with a copy of the contract and explanatory material were also sent to staff. The Employment Court held the employer had undermined the authority of the bargaining agent.

On appeal in *Capital Coast Health*, the Court upheld the finding that some of the communications amounted to direct negotiation. However, Hardie Boys J expressed the position that “[t]he provision of factual information does not impinge on that [negotiating] process. But anything that is intended or calculated to persuade or to threaten the consequences of not yielding does.”<sup>8</sup> The employer’s letter warning of the financial consequences of strike action had not amounted to negotiating or attempting to negotiate with staff.

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<sup>5</sup> Employment Relations Amendment Act 2010, s 9.

<sup>6</sup> *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783 at 787.

<sup>7</sup> *NZ Medical Laboratory Workers v Capital Coast Health* [1994] 2 ERNZ 93.

<sup>8</sup> *Capital Coast Health Ltd v New Zealand Medical Laboratory Workers Union Inc* [1995] 2 ERNZ 305 at 320.



Between the Employment Court and Court of Appeal decisions in the *Capital Coast Health* case, *Ivamy & Ors v New Zealand Fire Service Commission* was decided.<sup>9</sup> The Fire Service Commission arranged for individual information packs containing contract proposals to be sent to fire fighters at a time when negotiations were under way. During negotiations, the employer had also been seeking to implement a restructure and there had been extensive meetings. The employer had agreed, as part of a settlement, not to negotiate directly with employees. In the Employment Court, Chief Judge Goddard stated that no further communication on the subject of negotiations should be addressed to the employees by the employer once negotiations were under way.<sup>10</sup> The employer argued that, pursuant to its right to freedom of expression under the Bill of Rights Act,<sup>11</sup> it should be allowed to communicate with employees in the manner it had.

Following that decision but before the Court of Appeal judgment in *Ivamy*, the decision in *Couling v Carter Holt Harvey* was delivered.<sup>12</sup> Judge Colgan considered that it was a matter of fact and degree as to whether communications about negotiations amounted to an attempt to negotiate. They would not necessarily undermine negotiations or representatives' authority to represent employees.

The Court of Appeal judgment in *Ivamy* then overturned the earlier Employment Court judgment and found the employer communications in that case did not undermine the authority of the bargaining agent.<sup>13</sup> Thomas J in his dissent commented that:<sup>14</sup>

[the fundamental rights of employees to choose whether they bargain collectively]...and to choose their bargaining agent or representative ... [will be taken away] ...and the process of collective bargaining ... [will be] undermined if the authority of the bargaining agent to represent the employees in negotiations for a collective employment contract is not recognised by the employer.

Thomas J listed two paragraphs of conduct that he did not think would be acceptable in recognising the authority of the bargaining agent but would now be considered legitimate in light of the majority decision.<sup>15</sup>

As explained in Butterworths Employment Law Guide, the decisions in *Ivamy* and *Capital Coast Health Ltd v NZ Medical Laboratory Workers Union* the Court of Appeal drew a line between impermissible "direct negotiation" with the employees represented, and on the other hand, permissible "direct communication" with those employees.<sup>16</sup> This difficult distinction effectively rendered section 12 inoperative in all but the most blatant bypassing cases.

### ***The Current Position***

The ERA provisions relating to communications during collective bargaining were designed to remedy the problems that had arisen under the ECA and clarify the type of communications which would cross

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<sup>9</sup>*Ivamy & Ors v New Zealand Fire Service Commission* [1995] 1 ERNZ 724 (EC)

<sup>10</sup> At 766.

<sup>11</sup> New Zealand Bill of Rights Act 1990 s 14. *Ivamy* above n 9 at 751.

<sup>12</sup>*Couling v Carter Holt Harvey* [1995] 2 ERNZ 137.

<sup>13</sup>*New Zealand Fire Service Commission v Ivamy* [1996] 1 ERNZ 85, [1996] 2 NZLR 587 (CA).

<sup>14</sup> At 116.

<sup>15</sup> At 124-125.

<sup>16</sup> Peter Agnew (ed) *Butterworths Employment Law Guide* (6 ed, LexisNexis, Wellington, 2002) at 232.

the line into unacceptable “negotiations” with employees. The ERA provisions were also designed to ensure the employer did not undermine the employee’s agent during collective bargaining.

The current position was established in the leading case *Christchurch City Council v Southern Local Government Officers Union Inc.*<sup>17</sup> Pursuant to s 32(1)(d) of the ERA, an employer is prevented from communicating directly with employees after bargaining has been initiated:

- (a) about their terms and conditions of employment, without the union’s consent, if it amounts to “*negotiating*” during bargaining (emphasis added)
- (b) in a manner that *undermines* or is *likely to undermine* the bargaining with the union or the union’s authority in bargaining (emphasis added).

The *Christchurch City Council* case considered the extensive provisions in the ERA relating to good faith and communications during collective bargaining. In that case, the City Council’s CEO communicated directly with council employees on matters related to bargaining during negotiations for a collective employment contract. The Employment Court found the council had breached s 32(1)(d) of the ERA, and had failed to comply with the duty of good faith with respect to three of the communications.

The Court of Appeal upheld the Employment Court’s opinion that by sending out the communications in question the City Council failed to comply with its duty of good faith.<sup>18</sup> However, it stressed that it is only in the absence of provisions in the Bargaining Process Agreements setting out what communications are acceptable that the statutory default provision comes into play.<sup>19</sup> However, the Court of Appeal took a different approach to interpreting the statutory provisions to the Employment Court. Firstly, it applied the principle of statutory interpretation that specificity trumps general and concluded that s 4 must be read consistently with the more specific s 32. Section 4 continues to apply in a s 32 case to the extent it is not inconsistent with the specific provision of s 32.

Section 4(1A) imposes a general “good faith” obligation that parties to an employment relationship can only communicate matters of “fact and opinion that are reasonably held about an employers business or a union’s affairs.” Such communications also need to comply with another good faith obligation “to be active and constructive and responsive and communicative” in employment relationships. They must also not do anything to mislead or deceive each other, or that is likely to mislead or deceive each other, pursuant to section 4(1)(b). Subsection 4(6) makes it a breach of subsection (1) for an employer to advise or to do anything with the intention of inducing an employee –

- (a) not to be involved in bargaining for a collective agreement; or
- (b) not to be covered by a collective agreement.

These obligations apply at all times whether or not bargaining has been initiated. However, communications must also comply with s 32(1)(d) *after bargaining has been initiated*.<sup>20</sup> (emphasis added)

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<sup>17</sup>*Christchurch City Council v Southern Local Government Officers Union Inc* [2007] 1 ERNZ 37 (CA).

<sup>18</sup> At [56].

<sup>19</sup>Gordon Anderson “Communications with employees during bargaining” [2007] ELB 37 at 39. Bargaining Process Agreements are important to assist the parties with an orderly bargaining process., as noted in *AUS v Vice Chancellor of the University of Auckland* [2005] 1 ERNZ 224 at [78].

<sup>20</sup> Jasmine Brown and Blair Scotland “Advising employers – Communication and passing on in collective bargaining” [2007] ELB 51 at 53.

Secondly, the Court of Appeal found the s 5 definition of “bargaining” covers all interactions between *parties* which relate to bargaining for a collective contract. However, the *parties* to the bargaining are the *employer* and *union*. The Court seems to have found only s 5(b)(i) applies to the employees represented in bargaining as it does not refer to “parties.”

Section 5 defines bargaining in relation to bargaining for a collective agreement as follows:

- (a) all the interactions between the parties to bargaining that relate to bargaining; and
- (b) (i) includes negotiations that relate to the bargaining; and  
(ii) communications or correspondence (between or on behalf of the parties before, during or after negotiations) that relate to the bargaining.

The Court of Appeal has indicated that an employer can potentially communicate with union member employees to clarify its position or to rectify incorrect and/or untruthful statements made by a union. However, such communication must comply with s 32(1)(d) and not undermine the union or the bargaining.<sup>21</sup>

In order to best understand s 32(1)(d) of the ERA, it is important to understand how the Employment Court’s interpretation of s 32 differed from the way the Court of Appeal interpreted it. The Employment Court had interpreted s 32(1)(d)(ii) as meaning “on matters relating to the bargaining...the employer must not communicate or correspond with persons for whom a representative is acting.”<sup>22</sup>

However, the Court of Appeal took the Employment Court to mean the above section meant all communications during bargaining were wrong. It is fair to say that s 32(1)(d) is confusing because not all communications on “matters related to the bargaining” are likely to cross the line into unacceptable “negotiations”. Nuttall makes the helpful point that at Select Committee stage and while the Employment Relations Bill was before Parliament, debate centred on whether all communications during bargaining should be prevented or only those that related to and undermined bargaining.<sup>23</sup> It seemed to be the intention of Parliament to only prevent communications that related to and undermined bargaining as opposed to statements of fact. Parliament simply does not seem to have expressed this clearly in the statute. The recent 2010 amendment is aimed at expressing this more clearly.

### ***“Directly or Indirectly Bargaining” and Undermining Bargaining***

There are several other terms in the ERA relating to Communications in bargaining that still require clarification by the Courts. Firstly, the exact meaning of “to directly or indirectly” bargain under s 32(1)(d)(ii) is still not completely clear. Some guidance can be taken from authorities under the ECA as the Court in *Christchurch City* accepted s 32(1)(d)(i) is based on the law as it stood under the ECA. However, in the *Christchurch City* case, the Employment Court also found that s 32(1)(d) does not codify the ECA 1991 position, rather it extends the obligations of each party. As extended, the definition of “undermine or likely to undermine” would encompass communications that:<sup>24</sup>

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<sup>21</sup>Brown and Scotland at 54.

<sup>22</sup>*Christchurch City Council v Southern Local Government Officers Union Inc* [2005] ERNZ 666, at [87] (EC).

<sup>23</sup>Pam Nuttall “Reviewing the communication cases: Christchurch City Council revisited” (2008) 33 (2) NZJER 45-55 at 49-52 and 54.

<sup>24</sup>Geoff Davenport “Communications with employees during bargaining – no blanket ban but still uncertainty [2007] ELB 40 at 44; *Christchurch City Council*, above n 22 at [116] and [117].

[p]ut the Council's case for wishing to have a MUCA and was a communication that related to the bargaining before the negotiation (although the Court of Appeal confined the obligations to after bargaining has formally been initiated); or "presented only one side of the argument without reference to the union"

Conduct which is "likely to undermine bargaining" or "the authority of the other in bargaining" is also capable of covering a broad range of activities. "Likely" in this section was defined in *BONZ* as "more probable than not" and a "real risk."<sup>25</sup>

Davenport, in his article on the subject, lists reasons why communications by the Council in *Christchurch City* had potential to undermine bargaining as the timing, content, presenting a one-sided argument, whether the communication criticised the bargaining party, the consequence for the union's member (did it create confusion or ill feeling?) and the nature of the issues communicated on and whether they are "negotiating points."<sup>26</sup>

The following significant cases relating to communications during a bargaining period have considered the meaning of "undermine" in s 32(1)(d). *Association of University Staff Inc v The Vice-Chancellor of the University of Auckland*,<sup>27</sup> and *NDU v General Distributors*.<sup>28</sup> In the *AUS* case, the union wanted to negotiate a Multi-Employer Collective Agreement (MECA) with all New Zealand Universities, however, the Vice Chancellor of the University of Auckland wanted to negotiate its own separate Single Employer Collective Agreement (SECA) with the Union. The issue was whether the Vice Chancellor had breached his duty of good faith.

In that case, the Court accepted that "**undermine**" had a broad meaning:<sup>29</sup>

Although the figurative dictionary definition of the word "undermine" includes underhanded, subtle or insidious means, we consider that s 32 (1) (d) (iii) is not so limited and must contemplate the action of undermining being carried out overtly as, for example, by a refusal to meet to bargain.

The Court found that as the Vice Chancellor had genuine reasons for taking the stance he did, that were clearly expressed to the union and acted on the legal advice it was given, it did not amount to a breach of good faith, even though its actions may have undermined bargaining.<sup>30</sup>

The Court expressed the view that:<sup>31</sup>

While on their face these communications were arguably unexceptional, we conclude that the timing, their unilateral nature and their instantaneous and personal distribution by email may, in all the circumstances, have undermined bargaining. By announcing that it would never bargain with other employers, contrary to the way in which it did so in the previous

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<sup>25</sup> *BONZ Group Pty Ltd v Cooke* [1994] 3 NZLR 216 at 229, Davenport, above n 24, at 44.

<sup>26</sup> Davenport above n 24 at 44.

<sup>27</sup> *AUS v Vice Chancellor of the University of Auckland*, above n 19, at [78].

<sup>28</sup> *National Distribution Union Inc v General Distributors Limited* [2007] 1 ERNZ 120.

<sup>29</sup> *AUS v Vice Chancellor of the University of Auckland*, above n 19 at [99].

<sup>30</sup> At [99].

<sup>31</sup> At [90].

bargaining round, could have the effect of undermining the form of bargaining balloted for by Auckland University staff who are members of AUS.

Other factors in the *AUS* and *NDU* cases which may be considered to determine whether they undermine bargaining or the union include: the effect on union membership and the tenor of the communications.<sup>32</sup> The *NDU* case highlighted that if the negotiating parties conclude a BPA specifying what the employer can communicate with union members directly, or stating what types of communications from either party are acceptable, then sending communications to the union for its comments before providing it to union members may provide some protection for employers against a breach of good faith claim.

### ***Recent Cases Considering Good Faith in Collective Bargaining Communications***

The following more recent cases have further clarified the meaning of GFB, and conduct which may undermine bargaining.

In *Service and Food Workers Union Inc v Sealord Group Ltd*,<sup>33</sup> the Employment Relations Authority held that the employer breached its GFB obligations when it held a meeting at which it addressed employees, including union members, and essentially ran the argument it used when negotiating with the union during collective bargaining. It also posted notices on its notice boards that were critical of the union's stance and which made negative statements about the union. The Authority held that the employer had bargained directly with union members, ignored the authority of the union representatives and conducted itself in a manner which had the potential to undermine bargaining.

In the case of *Mana Coach Services Ltd (MCSL) v NZ Tramways and Public Passenger Transport Union Inc*,<sup>34</sup> the Employment Court found that direct communication with the union's members was bad faith behaviour in breach of s 32(1)(d) of the Act. This evidenced a refusal to recognise the authority of the union's representatives, amounted to an attempt at indirect bargaining without its authority, and was conduct likely to undermine the bargaining or the authority of the union in relation to the bargaining. Individually, the letters that were sent to employees did not set out MCSL's expectation of the recipients but, read together, the implication was clear: members were to bring pressure on the union to accept options by the deadline if those options were not to be replaced by terms less attractive. MCSL's intention was to bypass the union and to present a new offer in bargaining. These communications were opportunistic and brazen.

In *Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd*,<sup>35</sup> the defendant was held not to have undermined bargaining when a management representative suggested to a member of the union's negotiating team that a potential impasse could be avoided either by dispensing with both lead negotiators (who had each demonstrated uncompromising attitudes) or otherwise progressing negotiations without them. The union had earlier, and successfully, argued for a change of the employer's previous lead negotiator and – in any event – the proposal to sideline the union's lead negotiator was part of a package that would also have sidelined the lead negotiator for the employer.

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<sup>32</sup>At [99], *NDU Inc. v General Distributors Ltd* [2007] 1 ERNZ 120 at [161].

<sup>33</sup>*Service and Food Workers Union Inc v Sealord Group Ltd* (2002) 6 NZELC 96,828.

<sup>34</sup>*Mana Coach Services Ltd v NZ Tramways and Public Passenger Transport Union Inc* [2010] NZEmpC 110..

<sup>35</sup>*Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd* [2008] ERNZ 537 (EC)..

In *Housing New Zealand Corporation v PSA*,<sup>36</sup> the Employment Relations Authority held that the evidence did not establish that the PSA attempted to undermine bargaining although it sent inaccurate and misleading communications to employees and breached terms of the Bargaining Process Agreement. It had not acted in good faith pursuant to s 4 of the ERA, however, the PSA was not penalised.

## The Australian Position

In Australia, the Rudd Labor government implemented the Fair Work Act 2009 (FW Act) which was intended to “get the balance right” between fairness and flexibility in Australian workplaces.<sup>37</sup> The conservative Howard coalition government’s previous WorkChoices legislation had expressly repealed the previous GFB provision. Work Choices had also closed off the ability of the courts or the Australian Industrial Relations Commission to imply good faith obligations into the bargaining regime.<sup>38</sup>

The industrial relations model under “WorkChoices” became known as “direct engagement” whereby employers were told to “bypass unions, bypass the Australian Industrial Relations Commission and deal directly with employees” in collective bargaining.<sup>39</sup> Employers had been left relatively free to create their own bargaining norms and, as there was no certification process to ensure agreements did not disadvantage employees, the quality, integrity and fairness of enterprise bargaining outcomes were threatened.<sup>40</sup>

The objects set out in s 3 of the FW Act, on the other hand, include achieving productivity and fairness through an emphasis on “enterprise level” collective bargaining. The FW Act reintroduced GFB requirements and enhanced rights for union involvement in collective bargaining.

The key GFB provisions in the FW Act in s 228(1) relate to bargaining representatives for enterprise agreements. The obligations are:

- (a) attend and participate in meetings at reasonable times;
- (b) disclose relevant information (but not confidential or commercially sensitive information) in a timely manner;
- (c) respond to proposals made by other bargaining representatives in a timely manner;
- (d) give genuine consideration to the proposals made by other bargaining representatives, and give reasons for the responses made to those proposals;
- (e) refrain from capricious or unfair conduct that undermines *freedom of association* or *collective bargaining* (emphasis added)
- (f) recognise and bargain with the other bargaining representatives.

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<sup>36</sup>*Housing New Zealand Corporation v PSA* ERA Wellington WA 174/10, 5311242, 29 October 2010.

<sup>37</sup>Andrew Stewart “A Question of Balance: Labor’s New Vision for Workplace Regulation” (2009) 22 AJLL 3 at 7; Andrew Stewart and Anthony Forsyth “The Journey from Work Choices to Fair Work” in Andrew Stewart and Anthony Forsyth (eds) “*Fair Work*” (Federation Press, Annandale, 2009) at 7-8.

<sup>38</sup>Confirmed in *Association of Professional Engineers, Scientists and Managers, Australia v Telstra Corp Ltd* [2008] AIRC 734 at 11.

<sup>39</sup>Anthony Forsyth “Good Faith Bargaining: Australian, United States and Canadian Comparisons” (paper presented to Chairman’s Lunch Seminar, US National Labor Relations Board, Washington DC, 4 November 2009) at 19, at n 50 per Stuart Wood as exemplified by Rio Tinto, Telstra and the Commonwealth Bank, “Good faith laws will end the Rio revolution” Workplace Express, 24 August 2009.

<sup>40</sup>Rathmell, above n 2, at 165.

It is noteworthy that s 228(1)(f) has some similarities with s 12(2) of the New Zealand ECA 1991. Cases decided pursuant to this section, and set out above, could be relevant in interpreting this section of the FW Act. Cases considering s 32(1)(d)(ii) of the ERA could also be relevant to s 228(1)(e) as both are concerned with conduct that undermines collective bargaining.

There was initial speculation about how the very general new GFB provisions in the FW Act would be interpreted. The Rudd government's "Forward with Fairness" platform, and central theme of fairness in the objects of the FW Act, signalled a clear change of direction in industrial relations. In practice, Fair Work Australia has stressed the need to approach the GFB requirements on a case by case basis.<sup>41</sup> The Commissioners have found breaches of the GFB provisions of the Act when:

- (a) bargaining agents have been bypassed by employers at crucial stages of negotiations (such as close to the time of a vote on a circulated agreement): *T & R (Murray Bridge) case*;<sup>42</sup>
- (b) agreements have not been properly explained to the employees or they have been misled: *Class Electrical v CEPU* and *United Group Rail cases*;<sup>43</sup>
- (c) agreements have been put to a vote for employee approval without advising the bargaining agent without giving them a reasonable time to propose any amendments to the document, and without responding to the proposals they put through their bargaining representative concerning the content of such an agreement: *APEESMA v DTS*,<sup>44</sup> *Alphington Aged Care*,<sup>45</sup> *United Group Rail NUW v Defries cases*;<sup>46</sup>
- (d) a different position has been put to employees through their bargaining representative, and the employer has sought to bargain with the representative and make an agreement with employees at the same time, such as in *Finance Sector Union*,<sup>47</sup> *Aegis Aged Care cases*;<sup>48</sup> and
- (e) the voting process has been unfair: *United Group Rail case*

The practical outcomes of the current Australian law relating to communications in collective bargaining in Australia have many parallels with those that existed under New Zealand's ECA 1991, and Australia's IR Act from 1993 to 1996.<sup>49</sup>

### ***Early Cases Interpreting section 228 of the Fair Work Act***

Very little foreign or pre-FW Act precedent has been cited in the decisions. A reason for this was given in the case of *Finance Sector Union*.<sup>50</sup> Commissioner Smith referred to decisions under the National Labour Relations Act in the United States of America in relation to bargaining in good faith. He decided not to deal with those cases for reasons including "there are a number of extra factors

<sup>41</sup>*The Australasian Meat Industry Employees Union v T & R (Murray Bridge) Pty Ltd* [2010] FWA 1320 (26/2/2010) at [44]; *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510(5/5/2010) at [24].

<sup>42</sup>*The Australasian Meat Industry Employees Union v T & R (Murray Bridge) Pty Ltd*, above n 41.

<sup>43</sup>*Class Electrical v CEPU* [2009] FWA 1541 (9/12/2009); *United Group Rail Services Limited* [2009] FWA 452 (9/10/2009).

<sup>44</sup>*APESMA v DTS* [2010] FWA 429, (28/1/2010).

<sup>45</sup>*Alphington Aged Care* [2009] FWA 301 (17/9/09).

<sup>46</sup>*National Union of Workers v Defries* [2009] FWA 88 (18/8/2009).

<sup>47</sup>*Finance Sector Union* [2010] FWA 2690 (9/4/2010).

<sup>48</sup>*Aegis Aged Care Staff Pty Ltd* [2010] FWA 3715 (12/5/2010).

<sup>49</sup>Rathmell, above n 2. See the Explanatory Memorandum to the FW Act, cl 168 which refers to good faith in the Industrial Relations Reform Act 1993.

<sup>50</sup>*Finance Sector Union* [2010] FWA 2690 (9/4/2010)

which may bear upon the establishment of the US jurisprudence in relation to GFB, including the establishment of exclusive bargaining rights, which do not find legislative parallels in Australia”.<sup>51</sup>

In an early case, the recommendation in *AFMEPKIU v Transfield Australia Pty Ltd* by Drake SDP was initially seen as signalling a step towards the more restrictive approach in New Zealand.<sup>52</sup> He recommended:<sup>53</sup>

[t]hat [during the program for negotiations] Transfield will not attempt to bypass the bargaining agent representatives in relation to its proposal by contacting for this purpose the members of the bargaining agent representatives directly, in meetings or by text or other telephonic messages;

Transfield will deal with all officers and delegates of the bargaining agent representatives who are authorised by their organisations to conduct negotiations.

However since then, another line of authority has developed through the *Heinz*,<sup>54</sup> *Fosters*,<sup>55</sup> *Mingara*,<sup>56</sup> and *Tahmoor Coal* cases.<sup>57</sup> Fair Work Australia has stressed the Courts should be “slow to interfere in the legitimate tactics undertaken by the parties during the bargaining process.”<sup>58</sup> In some of these cases, there is little doubt that the employers’ communication tactics would breach the New Zealand ERA standards, and will be considered in greater detail in the following pages. Fair Work Australia has continually highlighted the well-established principle that “it is important to encourage communication between employees and employers both directly as well as through their representative organisations.”<sup>59</sup>

Two early decisions provided guidance in interpreting the GFB provisions of the FW Act. In the first, *Total Marine Services Pty Ltd v Maritime Union of Australia*, Commissioner Cloghan established guidelines to assessing good faith conduct as follows:<sup>60</sup>

...for Fair Work Australia to be satisfied that good faith bargaining has not been met, it is necessary to assess all the circumstances including the industrial context, character of negotiators and negotiations. He also observed that the question must be asked, whether any of the parties are not genuinely trying to reach agreement, secondly, when making an assessment of the negotiations, to be even handed, and thirdly, referring to the Explanatory Memorandum to the Fair Work Bill 2008, in relation to what was to become s 228 of the Act, which refers to assisting when bargaining representatives do not bargain voluntarily or co-operatively.

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<sup>51</sup>At [58].

<sup>52</sup>*AFMEPKIU v Transfield Australia Pty Ltd* [2009] FWA 93 (14/8/09) at 93; Forsyth above n 39, at 20.

<sup>53</sup>Forsyth above n 39 at 18.

<sup>54</sup>*AFMEPKIU v HJ Heinz Co Australia Ltf (Echuca Site)* [2009] FWA 322 (22/9/09).

<sup>55</sup>*LHMU v Fosters Australia Ltd* [2009] FWA 750 (28/10/2009).

<sup>56</sup>*LHMU v Mingara Recreation Club Ltd* [2009] FWA 1442 (1/12/2009).

<sup>57</sup>*Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510 (5/5/2010).

<sup>58</sup>*LHMU v Fosters Australia Ltd* at [20].

<sup>59</sup>*LHMU v Hall* [2010] FWA 1065 (11/2/2010).

<sup>60</sup>*Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWA 290 (16/9/2009).



In the second, *LHMU v Fosters Australia Ltd*,<sup>61</sup> Kaufman SDP considered the meaning of “undermined freedom of association or collective bargaining” pursuant to s 228(1)(e) of the Act, and the meaning of “capricious”. Capricious is defined as “guided by caprice; readily swayed by whim or fancy; inconstant,” and “caprice” as “an unaccountable change of mind or conduct.”

He quoted the Explanatory Memorandum to the FW Act:<sup>62</sup>

The good faith bargaining requirements are generally self-explanatory. The last requirement, “refraining from capricious or unfair conduct ...” is intended to cover a broad range of conduct. For example, conduct may be capricious or unfair conduct if an employer – does not permit an employee who is a bargaining representative to attend meetings or discuss matters relating to the terms of the proposed agreement with fellow employees.

In a number of cases where employer communication tactics have been held not to breach the FW Act, the Fair Work Australia Commissioners have commented that the evidence has not supported the finding of a breach. In future, a more thorough approach to the presentation of evidence setting out details of alleged communication breaches would likely result in a stricter approach by Fair Work Australia to preventing conduct which undermines collective bargaining and good faith requirements.

### *Cases Illustrating the Differences in the Australian Approach to Communications*

As the GFB requirements apply to employee bargaining representatives as well as employers, there have been a number of cases where employers have claimed unions breached GFB requirements during negotiations. In the *Total Marine Services* case, Fair Work Australia declined to find a breach of GFB provisions by the unions involved, instead viewing the union’s behaviour as “legitimate negotiating tactics.” The Commissioner found during negotiations the union wanted to keep some options open and the employer wanted to consider the claim as a whole. In the *Heinz* case, the union was found to be entitled to distribute a notice advising employees not to respond to the employer’s proposal for eight hour shifts and accusing the employer of not acting in good faith. In *Minda*,<sup>63</sup> Fair Work Australia found it was acceptable for the union to communicate directly “once off” with the company’s board. In *Capral*, the union was entitled to distribute flyers to employees relating to the proposed enterprise agreement and terms and conditions of employment.

In some situations where Fair Work Australia has allowed a robust approach to negotiations, aggressive tactics have often been the norm for both employers and employees. Fair Work Australia has allowed communications with employees which would be seen as “negotiating and bargaining” in breach of the New Zealand ERA. Significantly, in the *Queensland Nurses Union* case,<sup>64</sup> the Commissioner found “an employer may directly communicate *and/or bargain* with its employees throughout the bargaining process”.

The recent Full Bench Appeal decision *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* illustrates the different approach Fair Work Australia has taken to communication issues

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<sup>61</sup>*LHMU v Fosters Australia Ltd*, above n 55.

<sup>62</sup>Fair Work Act 2009, *Explanatory Memorandum* at [951], *LHMU v Fosters Australia Ltd* at [13].

<sup>63</sup>*LHMU v Minda Incorporated* [2010] FWA 3461 (30/4/2010).

<sup>64</sup>*Queensland Nurses Union v The Corporation of the Roman Catholic Diocese of Toowoomba t/a Lourdes Home for the Aged, Lourdes Home Hostel* [2009] FWA 1553 (7/12/2009).

in comparison with the New Zealand position.<sup>65</sup> The CFMEU sought an order restraining the employer from putting the employer's proposed agreement to an employee ballot and relied only on the alleged breach by Tahmoor of the requirement in s 228(1)(e) to "refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining".<sup>66</sup>

The Commissioner at first instance had followed *Mingara* in holding that communicating with staff was good management practice.<sup>67</sup> So long as the employer did not refuse to meet and communicate with a bargaining representative, then in the Commissioner's view there was no breach of the GFB requirements of the Act. The CFMEU argued the material presented by Tahmoor management at meetings and in packages sent out to employees was tantamount to arguing in support of the position it was taking in collective bargaining. It also argued that there was a "level of intimidation" in that the possibility of a lock out of employees and selective re-engagement had been raised. Tahmoor also terminated bargaining meetings in January 2010 in order to put its proposed agreement to employees in a ballot. Small group meetings had been held without union officers being invited to attend and the meetings were held compulsorily during work time. At these meetings, the company adopted a "hard sell" position relating to its views in the employment negotiations. The meetings lasted for approximately four to five hours each.

The Commissioner, at first instance, had accepted that the employer bargaining representative adopted a very aggressive approach in the employee meetings and that he "probably crossed the line of what is reasonable in such circumstances", but he commented that aggressive tactics appeared to be the norm in the coal industry.

On appeal, the Commissioners found that although the company's action in communicating directly with employees might be inconvenient and offensive to the CFMEU, it was not improper. The Commissioners accepted that it appeared that the company made it less than convenient for CFMEU Lodge Officers to attend the small group meetings, and that Tahmoor may have been trying to influence employee views. However, the Full Bench found that the general practice adopted by Tahmoor in communicating directly with employees did not constitute an undermining of the CFMEU's role as bargaining representatives. The company's wish was to put its view to employees in an unencumbered manner as possible. The absence of a bargaining representative at a meeting held between the company and its staff was not considered inconsistent with the GFB requirements.

The Full Bench held on appeal that the Commissioner was entitled to conclude that after a very long period of negotiation the parties were simply unable to agree. In those circumstances, the conclusion was open that it was "not capricious or unfair conduct for Tahmoor to seek to explain its negotiating position to the employees directly."

A second case provides another good illustration of the differences in the Australian approach to communications during GFB. In *LHMU v Hall*,<sup>68</sup> LHMU applied for bargaining orders. Commissioner Cloghan declined to issue the orders as he was not satisfied on the basis of the evidence the employer had breached the GFB requirements. This case also highlights the need for applicants to ensure they obtain convincing evidence.

<sup>65</sup> *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWA FB 3510(5/5/2010).

<sup>66</sup> At [7].

<sup>67</sup> *LHMU v Mingara Recreation Club Ltd*, above n 56.

<sup>68</sup> *LHMU v Hall*, above n 59.

Amongst the negotiations, there was “robust” documentation by both parties describing each other’s position. This included the LHMU portraying the employer as “frightening” employees, describing negotiators as “monkeys” (in words and in caricature); misleading or inaccurate information (according to the employer) and the caricatured black suited, cigar smoking “fat capitalist” dragging a trolley load of money. For the employer, “robust” was the use of words like “unfair” “unreasonable” and “un-Australian” to describe the LHMU as well as portraying their role as wanting “to cause trouble” and providing misleading or inaccurate information (according to the LHMU). The union highlighted the employer’s taking and putting the employer’s own (best) perspective on information circulated. A difficulty that the union faced was that it did not come to the hearing with “clean hands.”<sup>69</sup>

The Commissioner found that it was not unusual for the employer to meet with its employees (without bargaining representatives or their delegates present) and to put forward the best perspective of the employer was common. He found that, with the absence of maybe an employer representative’s comments in relation to the closing down of facilities and the possible loss of jobs, these meetings were conducted in an environment where employees were free to have their say and did so. However, he did say he was sure that, on some occasions, the content and conduct of such meetings would breach GFB requirements, but he had not seen or heard evidence on this occasion to determine that it falls into this category.”

#### ***Contrast with New Zealand case law***

In contrast, the leading New Zealand case of *Christchurch City Council*<sup>70</sup> held that comparable direct employee communication tactics to those used in *Tahmoor* and *Hall* of holding meetings where the employer adopted a hard sell approach to their position in employment negotiations would be a breach of good faith in New Zealand. Similarly, in a case decided under the ECA in New Zealand, the employer in *New Zealand Fire Service v Ivamy* sent out information packs to staff.<sup>71</sup> Under current New Zealand law, communications of this nature would be in breach of GFB obligations, as illustrated by the recent New Zealand case of *Mana Coach Services*<sup>72</sup>. In this case, it was held the communications material sent to employees’ homes was intended to persuade them of the employer’s point of view and not allowed under the ERA. Unfortunately, insufficient evidence was presented in *Tahmoor* of the nature and content of information that was sent to employees. If the material was simply factual, it would not have breached the New Zealand GFB requirements. The New Zealand *Sealord* case also found that the employer had undermined the employees’ bargaining representative by (inter alia) holding meetings at which they directly communicated their negotiating position to staff, in a similar manner to *Tahmoor* and *Hall*.<sup>73</sup>

In the *Tahmoor Coal* case, the employer conducted compulsory meetings with staff that lasted four to five hours and adopted a hard sell approach. Although aggressive tactics were the norm in the coal industry, this should not have allowed the employer to breach its GFB obligations and communicate in a way that undermined the employee bargaining representative’s authority.

*Hall* provides another example of where the New Zealand Courts would find a breach of GFB provisions as the aggressive tactics, meetings and misleading information on behalf of the employer and even the union could be seen as undermining bargaining (if sufficient evidence was presented).

<sup>69</sup> At [23].

<sup>70</sup> *Christchurch City Council v Southern Local Government Officers Union Inc*, above n 17.

<sup>71</sup> *New Zealand Fire Service Commission v Ivamy*, above n 13.

<sup>72</sup> *Mana Coach Services Limited v NZ Tramways and Public Passenger Transport Union Inc*, above n 34.

<sup>73</sup> *Service and Food Workers Union Inc v Sealord Group Ltd*, above n 33.

## Conclusion

Although the Australian Parliament has legislated for good faith bargaining in the FW Act, it is not being applied to employee communications as strictly as the equivalent GFB provisions in New Zealand. A much stricter approach is taken in New Zealand to conduct that undermines bargaining, as evidenced by the leading case of *Christchurch City Council v Southern Local Government Officers Union Inc.*<sup>74</sup>

Fair Work Australia has interpreted the GFB requirements on a case by case basis, emphasising an even handed approach and the importance of encouraging communication between employees and employers both directly as well as through their representative organisations. The level of fairness and good faith in collective bargaining has increased from the “direct engagement” level under Australian Work Choices to the extent that employee bargaining representatives are now being recognised, and cannot be bypassed at crucial stages of negotiations. In addition, employees must not be misled, agreements must be properly explained and agreements cannot be put to vote for employee approval without advising the bargaining agent. However, persuasion, direct influencing of and bargaining with employees, intimidation, aggressive tactics and other conduct that would be seen as undermining bargaining in North America and New Zealand has been allowed in some cases. In the result, the actions of employers in cases like *Hall* and *Tahmoor Coal* may seriously undermine the process of collective bargaining.

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<sup>74</sup>*Christchurch City Council v Southern Local Government Officers Union Inc*, above n 17.

# The Rule of Law in Private Law: A New Animating Ideal for Employment Law?

MAX HARRIS\*

## Introduction

Law exists so that principles, and not purely power, govern relations between people in a society. The *rule* of law, by extension, is just concerned with maintaining and upholding, steadfastly, those principles of law against the reach of naked power. That simple formulation of the rule of law consists of many strands, however. Most rule of law literature focuses on how principles of law can be maintained and upheld against the reach of naked *public* power in the realm of public law.<sup>1</sup> What this paper focuses on is a forgotten strand of the rule of law: the need for principles of law to be maintained and upheld by the courts away from public law, where *powerful private parties* seek to place themselves above, or outside of, the law to secure an advantage for themselves. This strand is called in what follows “the rule of law in private law”. What is meant by private law is that area of law, generally involving two private parties (though sometimes involving the State acting in some private capacity), where no special duties or obligations attach to either party because of their affiliation to branches of government: obvious examples include the law of contract and the law of torts. The rule of law in private law is simply the application of rule of law precepts to that context.

This paper seeks to unravel the meaning of the rule of law, as well as to show that the strand of the rule of law identified above may already be woven into the fabric of private law. Only a single case study of an area of employment law is selected to test this claim, but it is tentatively suggested that “the rule of law in private law” might, with further investigation, be shown to be at work underneath the logic of decisions in employment law, and private law as a whole.<sup>2</sup> It should be noted that this paper focuses on cases in employment law involving two private parties, without State involvement, and does not intend to take any firm position on the debate over whether employment law should be classified as part of public law or private law. Examples of employment cases with two private parties do not prompt that debate.

This paper argues, too, that there may be merit in identifying this underlying pattern in the tapestry of employment law specifically. Viewing the pattern that gives effect to the rule of law in private law may help to spark thinking about the underlying ideals of employment law, and about the way in which employment law should interact with other bodies of law, such as public law, in developing concepts like the rule of law in private law.

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\* BA/LLB (Hons.), The University of Auckland. My thanks to Mark Bennett, Scott Worthy and Sir Edmund Thomas for their helpful comments on this paper. The usual disclaimer applies. The opinions expressed in this paper are mine alone.

<sup>1</sup> See, for instance, the analysis of Jeremy Waldron in: Jeremy Waldron “The Concept and the Rule of Law” (2008) 43 Ga L Rev 1.

<sup>2</sup> It should be pointed out that the term “employment law” is preferred to “labour law” in this paper, though it is not intended to carry a different meaning to the meaning attached commonly to “labour law” (for instance, the meaning given to the term “labour law” at the 2011 New Zealand Labour Law conference at which this paper was first presented).

The paper's structure reflects the development of these three points. Part I sketches the contours of "the rule of law in private law", explains how it can be situated within broader rule of law thinking, and examines whether the idea survives logical scrutiny. Part II explores a case study to show that, in employment law across several jurisdictions, the courts' approach to whether a party is an employee or independent contractor reflects the operation of the rule of law in private law. Close attention is paid in this regard to the recent United Kingdom Supreme Court judgment in *Autoclenz Ltd v Belcher* – its background, procedural history, relevant analysis, and relationship to the rule of law in private law – and the New Zealand parallel to this judgment is mentioned in passing.<sup>3</sup> Finally, Part III considers how the rule of law in private law might become a non-ideological animating ideal for employment law, and notes that the process of applying the rule of law in private law to employment law is a reminder of the need for dialogue between different bodies of law. This is not just some interesting but fruitless journey down a theoretical rabbit warren. Rather, it is an inquiry that can help explain and understand some of the forces driving many judgments in the employment law sphere. It is an inquiry, even more than that, that enjoins us all to work harder to improve the dialogue between employment law and other fields of law in a manner that proves to be profitable for all participants in that conversation.

## The rule of law in private law

This section develops and defends the concept of "the rule of law in private law" that is at the core of this paper, and is later applied to the employment law context. It is necessary to explore in more detail what the idea is, and what it is not. To illustrate that it involves a legitimate offshoot of rule of law thinking, an effort is then made to connect it with more conventional, existing rule of law ideas. Some obvious objections to the concept are also briefly considered, and rejected.

### *An outline of the concept*

In the late Lord Bingham's magisterial book, *The Rule of Law*, Thomas Fuller's 1733 injunction is quoted: "Be you never so high, the law is above you."<sup>4</sup> This quotation captures at least one part of the rule of law: the notion that nobody should be able to place themselves above the law. However, there is nothing in the injunction, "[b]e you never so high, the law is above you", or in the phrase "the rule of law", that suggests that it is only the executive or public officials that should not be able to place themselves above the law. It is understandable that most discussions of the rule of law have focused on branches of government: they wield power openly, which has the capacity to be abused, and needs regulating by principles of law. However, it is the thesis of this paper that any account of the rule of law is incomplete if it does not also explain how the rule of law might apply to private actors, especially in a private law context. The rule of law, I contend, must also extend to curbing the excesses of powerful private actors. They, too, are subject to the law and have the capacity to attempt to rise above it. When Thomas Fuller says "the law is above you", then, the "you" is a reference to not just the branches of government, but also private actors exercising power. It is a reference to all of those to whom the law applies.

This is all, however, a little fuzzy and in need of refinement, so that "the rule of law in private law" can have some more precise content.<sup>5</sup> What does "the rule of law" mean in a private law context, and how

<sup>3</sup> *Autoclenz Ltd v Belcher* [2011] UKSC 41 [Autoclenz (SC)].

<sup>4</sup> Tom Bingham *The Rule of Law* (Penguin, London, 2011) at 4.

<sup>5</sup> This is not to say that perfect precision should be sought in any conception of the rule of law. (As Jeremy Waldron notes, such precision is not possible in the rule of law context – and not desirable: Jeremy Waldron "Thoughtfulness and the Rule

can it be used to prevent abuses of power by private parties? I argue that the rule of law, in general, is directed at retaining the integrity and strength of law.<sup>6</sup> It prevents parties from evading the reach of law. In the private law context, therefore, the rule of law can have the most purchase if it serves *to curb private actors' attempts to create for themselves their own law in a manner that usurps the power of the court to be a final arbiter of the law and secures an advantage for themselves*. Private actors' efforts to "contract out" of the general law to achieve some benefit, without any legal authorisation for that contracting out, are the private law analogue of the executive and legislature placing themselves above the law (through, for example, the use of ouster clauses<sup>7</sup> or the passage of legislation overturning a court decision stating the law).<sup>8</sup> Just as these actions of the branches of government offend our rule of law sensibilities by giving the law a plasticity and malleability that allows manipulation by those in power, so too, the private law analogue – parties seeking to arrogate to themselves the power to determine the law, and to deprive the courts of this power – troubles our rule of law instincts. And, the rule of law in private law should be applied especially vigilantly where attempts to evade the reach of the law provide a particular benefit for the more powerful party in a transaction, since the rule of law – and law as a whole – are designed to protect against arbitrary advantages secured only through the assertion of power.

The rule of law in private law operates in the same way as other strands of rule of law thinking: as both a precept underpinning legislation and judicial decision-making (a descriptive concept), and an aspirational ideal to which we should reach in law reform and advocacy (a normative concept). In some instances, the rule of law in private law might be partially, but not fully, incorporated into legislation or the common law – its influence on a rule or on reasoning might be apparent, but the concept might not have been adopted wholesale. Several examples may help to render vivid this somewhat abstract discussion. In the New Zealand context, in favour of which this paper admits a certain inevitable bias, the rule of law in private law is manifested in the judicially-settled conclusion that it is generally not possible for parties to contract out of the Fair Trading Act 1986. The courts have made clear, in line with the rule of law in private law, that the general consumer protection principles of the Fair Trading Act are to apply to all and that parties should rarely be able to place themselves above these principles.<sup>9</sup> The rule of law in private law also animates the hostility towards "entire agreement" clauses expressed in s 4(1) of the Contractual Remedies Act 1979. This provision states that if a clause purports to "preclude a [c]ourt" inquiring into pre-contractual representations, the court will not, in practice, be precluded from reviewing matters unless it is "fair and reasonable" for the clause to be conclusive. It is suggested that this judicial straining to avoid giving effect to entire agreement clauses is driven by a desire to uphold the rule of law in private law, since entire agreement clauses are *prima facie* contrary to the rule of law in private law – they allow private parties to create their own law, and to block the courts' ability to oversee the legality of an aspect of a transaction. These examples illustrate that traces of the rule of law in private law can already be found across the legal landscape, and that it may prove fruitful to excavate the concept further in existing law and to acknowledge its influence on judicial decisions.

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of Law" (British Academy Law Lecture, London, 1 February 2011.)) What is sought here is sufficient clarity for the concept to be a workable one for the purposes of the analysis in the remainder of this paper.

<sup>6</sup> While one should take care not to place too much stock in linguistic analysis, it is noteworthy that the language that we use in talking about the law seems to assume that the law needs some inner strength: this is arguably why we speak of "breaking" the law. Infringements "break" the law, arguably, because they chip away at the law's normative integrity.

<sup>7</sup> As in, for instance, s 109 of the Tax Administration Act 1994, recently discussed by the New Zealand Supreme Court in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158

<sup>8</sup> See, for instance, the Foreshore and Seabed Act 2004 (repealed by the Marine and Coastal Area [Takutai Moana] Act 2011), enacted in response to the Court of Appeal decision in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

<sup>9</sup> See, for example, *David v TFAC Ltd* [2009] NZCA 44, [2009] 3 NZLR 239.

*The ties between this concept and other strands of rule of law thinking*

The rule of law is understood, in this paper, in Richard Fallon's terms as a web of interconnected strands that together serve to uphold principles of law against the reach of public and private power.<sup>10</sup> That is not how the rule of law is always conceptualised by scholars and judges. It is often associated with single ideas (such as liberty) or simple propositions, but these attempts over-simplify what the rule of law is, and how it is maintained in practice. They also polarise or shut down the debate on what the rule of law might mean instead of opening up new lines of inquiry. Accepting that the rule of law encompasses a web of related concerns properly accounts for the complexity of the concept, encourages ongoing debate about the meaning of the rule of law, and provides a useful set of familiar concepts that can be used to test whether a new strand of rule of law thinking belongs in the web of rule of law ideas. It is useful now to reflect how the rule of law in private law fits alongside conceptions of the rule of law already developed by other scholars.

There is, first, an echo of the rule of law in private law in the work of scholars who state that the rule of law requires the supremacy of law. Andrei Marmor points out that the "ideal of the rule of law is basically the moral-political ideal that it is good to be ruled by law"<sup>11</sup>, which resembles Tamanaha's view that "the law does rule and should rule"<sup>12</sup>, as well as Hayek's claim that the rule of law requires "reliance on the action of abstract rules governing the relations between individuals"<sup>13</sup>. Marmor's article goes no further than explaining why it is good to be ruled by law; but his observation (alongside Hayek, 1969) is broad enough to encompass the rule of law in private law. Marmor's approach presumes that all should be ruled by the law, including those private citizens who seek to evade the court's scrutiny by contracting out of the law or making their own law. Fallon's description of one aspect of the rule of law also has similarities to the concept that I have sketched above. Fallon's conception of the rule of law has five elements; the fourth of these elements is "the supremacy of legal authority". Elaborating on this, he argues that the "law should rule officials, including judges, *as well as ordinary citizens*."<sup>14</sup> Fallon gets closer to the rule of law in private law because of his express reference to the rule of law reaching out to protect private citizens. What his theory of the rule of law confirms is that the rule of law in private law has pertinent parallels to the definition of the rule of law as being concerned with the paramountcy of law itself.

Second, the rule of law in private law has resonance because it builds on rule of law theory relating to abuse of power. Dicey, of course, gestures towards the need for the rule of law to regulate arbitrary power.<sup>15</sup> Philip Selznick, whose theory of the rule of law in industrial relations most closely mirrors

<sup>10</sup> Richard H Fallon, Jr "The Rule of Law' as a Concept in Constitutional Discourse" (1997) 7 Columbia Law Review 1 at 6: "The Rule of Law is best conceived as comprising multiple strands, including values and considerations to which each of the four competing ideal types calls attention. It is a mistake to think of particular criteria as necessary in all contexts for the Rule of Law. Rather, we should recognize that the strands of the Rule of Law are complexly interwoven, and we should begin to consider which values or criteria are presumptively primary under which conditions."

<sup>11</sup> Andrei Marmor "The Ideal of the Rule of Law" in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (2 ed, Blackwell, Oxford, 2010) 666 at 667.

<sup>12</sup> Brian Z Tamanaha "A Concise Guide to the Rule of Law" in Gianluigi Palombella and Neil Walker (eds) *Relocating the Rule of Law* (Hart, Oxford, 2009) 3 at 10.

<sup>13</sup> FA Hayek *The Political Ideal of the Rule of Law* (National Bank of Egypt, Cairo, 1955) at 32, cited in Philip Selznick (with the collaboration of Philippe Nonet and Howard M Vollmer) *Law, Society, and Industrial Justice* (Russell Sage Foundation, New York, 1969) at 15.

<sup>14</sup> Fallon, above n 10, at 8 (my emphasis).

<sup>15</sup> Dicey's account focuses on the supremacy of law, as well as the need to prevent abuse of power: see AV Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan, London, 1961) at 202, where Dicey says that the



the theory sketched in this paper, notes that the rule of law “seeks progressively to reduce the degree of arbitrariness in positive law and its administration.”<sup>16</sup> E.P. Thompson expands on the idea. Famously calling the rule of law “an unqualified good” (a pronouncement that surprised his Marxist colleagues, many of whom viewed law as an inherently ideological instrument),<sup>17</sup> Thompson writes that it requires “the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims.”<sup>18</sup> The rule of law in private law is consistent with Thompson’s view. Thompson does not distinguish between public and private power, merely viewing power as “all-intrusive”; this would seem to justify a conception of the rule of law (such as the rule of law in private law) that aims to account for the abuse of private power. Thompson’s enjoiner for effective inhibitions upon power also matches the notion of the rule of law in private law, which places a check on power by preventing attempts by parties to create their own law in a manner that will benefit the powerful party.

Third, the rule of law in private law may trade on the strand of writing that emphasises the links between equality and the rule of law. Bingham emphasises that equal application of the law is a necessary part of the rule of law.<sup>19</sup> That legitimises what might appear to be an extension of the rule of law from the public law to the private arena, to ensure that the law is applied with equal vigilance to powerful private parties. Further, a recent paper by Paul Gowder underscores that the rule of law has equality, not liberty, at its foundation.<sup>20</sup> For Gowder, the rule of law is about “vertical equality between officials and ordinary citizens and horizontal equality among ordinary citizens.”<sup>21</sup> The rule of law in private law aims to foster such horizontal equality, by applying the law fearlessly where parties attempt to contract out of the law or secure advantages over each other.

This brief survey of some overlapping rule of law literature illustrates that the rule of law in private law has a certain pedigree in rule of law thinking: it is connected to strands of thought exploring the supremacy of law, the abuse of power, and equality. That pedigree suggests that the rule of law in private law is a concept that belongs in the web of interconnected strands that make up “the rule of law”, and helps to explain its initial persuasiveness.

### *Objections to this view of the rule of law*

With a *prima facie* case now established for the plausibility of the rule of law in private law, it is important to consider criticisms of the concept. If the rule of law in private law can be defended against these criticisms, it might be considered a workable idea that could be usefully applied to the employment law context.

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rule of law “means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.”

<sup>16</sup> Selznick, above n 13, at 12. I am grateful to Mark Bennett for drawing Selznick’s work to my attention after a first draft of this paper had been completed. Selznick articulates the question that drives his inquiry in the following way: “Can we justify, within the framework of legal theory, the application to private organizations of principles hitherto restricted to public government?” See: *ibid*, at 244. Selznick’s approach differs from my own in that Selznick argues that the rule of law should apply to private individuals and associations where private “governance” exists: *ibid*, at 274. I would not restrict the compass of the rule of law to the same extent.

<sup>17</sup> See discussion in Daniel H Cole “‘An Unqualified Human Good’: E.P. Thompson and the Rule of Law” (2001) 2 *Journal of Law and Society* 177.

<sup>18</sup> As noted in: *ibid*, at 182.

<sup>19</sup> Bingham, above n 4, at 55.

<sup>20</sup> Paul Gowder “Equality under the (Rule of) Law” (unpublished, 2011) <<http://papers.ssrn.com>>.

<sup>21</sup> *Ibid*, at 2.

It might be said immediately that speaking about “the rule of law in private law” is to colonise private law with public law concepts. The rule of law is a purely constitutional concept, some might say; a useful idea to bandy around when talking about governance and public administration, but an idea that would be out of place if applied to private transactions. To apply it to such transactions might be to allow for concepts that are even more foreign to the private lawyer, like human rights and procedural justice, to seep into private law. This objection has a superficial appeal; but, even if one were to accept the desire to rigidly compartmentalise the concepts and categories of private law and public law, this objection seems overstated. The notion of the rule of law in private law has content distinct from what the rule of law means in other contexts, as has been explained above (though it may share with other conceptions of the rule of law higher-level justifications such as equality and abuse of power). It requires already-existing law in the private law space to be enforced vigilantly against parties seeking to escape the reach of the law. Once seen in this light, it can be recognised that the rule of law in private law need not radically alter the arc of private law’s development; it only provides a new way of explaining decisions already made, and a new precept to bear in mind as the law is applied and developed.

That first objection comes from a private law perspective. What about the damage that might be done to “the rule of law” itself by devising or developing this new concept of the rule of law in private law? It is already accepted that there is some indeterminacy around what “the rule of law” means: indeed, Waldron, amongst others, has asked whether it is an “essentially contested” concept.<sup>22</sup> Does this development of a new strand of rule of law add further woolly thinking to an already imprecise area? And, could affirmation of this new strand dilute what little content has been accepted as part of the rule of law? While these are valid concerns, it is suggested that there are more advantages than disadvantages for the idea of the rule of law that come from bringing into its web the concept of “the rule of law in private law”. The rule of law is presently confined, arbitrarily (according to the argument in this paper), to the public law sphere. To explore how it should operate in private law is to contribute to the development of a *fuller* conception of the rule of law, which can operate across the legal system. Additionally, any concern about imprecision or the dilution of core rule of law content is easily minimised once it is acknowledged that, in defining the rule of law, we are not seeking one-line soundbites or simple propositions, but are rather identifying a web of interrelated concepts.

A separate challenge to “the rule of law in private law” relates to how new the concept really is. On one view, it might seem that the concept is reducible to a rallying-cry that provisions such as s 4(1) of the Contractual Remedies Act 1979 are to be applied without fear or favour – but that is merely to call for the enforcement of existing law! On another view, if “the rule of law in private law” requires only that the courts insist that parties do not block access to the courts, it is difficult to distinguish the concept from the notion that courts should be independent and impartial in applying the law – an uncontroversial tenet of the rule of law. It may be true that there is some overlap between “the rule of law in private law” and these positions. In fact, as was noted in the previous section, the linkages between “the rule of law in private law” and other conceptions of the rule of law could be part of the reason for the concept’s appeal. However, it is wrong to say “the rule of law in private law” offers nothing new. It plainly aims to reorient the rule of law to include the private law context, and focuses on the ability of private parties to evade the obligations of law – two areas that remain neglected, if not untouched, by existing rule of law scholarship.

Not all the possible deficiencies of this new concept can be canvassed or even envisaged here. What has been attempted is an assessment of whether “the rule of law in private law” can withstand some

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<sup>22</sup> Jeremy Waldron “Is the Rule of Law an Essentially Contested Concept (in Florida)?” (2002) 21 Law and Philosophy 137.

obvious objections. It is suggested that it passes this test. Attention turns in the next part of the paper to applying “the rule of law in private law” to the employment law context.

## **A case study: employment law through the lens of the rule of law in private law**

This paper does not pretend to prove, once and for all, that the rule of law in private law underpins private law as it is expressed in statute and the common law. That wide proposition can only be explored through extensive research. What is attempted here is to throw light on a single recent judgment of the United Kingdom Supreme Court, *Autoclenz Ltd v Belcher*, to illustrate *how* the rule of law in private law might be seen as driving legal reasoning in the employment law context. After the background, procedural history, and judgment are discussed, especial focus is placed on the rule of law in private law in the judgment. It is then noted in passing that the New Zealand parallel of *Autoclenz Ltd v Belcher* – *Bryson v Three Foot Six Ltd*,<sup>23</sup> which also dealt with the question of who is an employee deserving of employment law protections, may reflect reasoning grounded in the rule of law in private law. These examples – as well as providing a useful primer on recent developments in this area of employment law – suggest that the rule of law in private law may be an important principle latent in the law of employment.

### ***Autoclenz Ltd v Belcher: some background***

The issue in *Autoclenz Ltd v Belcher* (“*Autoclenz*”) was whether 20 valeters providing car-cleaning services in Derbyshire were “workers” under the National Minimum Wage Regulations 1999, or independent contractors not deserving of payment of minimum wages and entitlement to statutory paid leave. The Regulations defined a “worker” as a person who has entered into or works under:<sup>24</sup>

- (a) a contract of employment; or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

National Minimum Wage Regulations 1999 (SI 1999/584) (UK), reg 2(1).

The respondents (the valeters) had a contract with Autoclenz, the appellant, and Autoclenz had contracts with British Car Auctions (BCA) to clean vehicles. The original written contracts between those employed and Autoclenz, one of which was examined by the United Kingdom Supreme Court and was dated June 1991, described a person who had been employed by BCA as “the Sub-contractor.”<sup>25</sup> The contracts noted an undertaking by those employed to “perform the services ... within a reasonable time and in a good and workmanlike manner.”<sup>26</sup> Clauses 2 and 3 of the contract also attempted to make clear the legal status of those employed. In Clause 2, the signing party was said to “[confirm] that he is a self-employed independent contractor”, with tax arrangements specified, and in Clause 3, the parties were said to “agree and acknowledge that the Sub-contractor is not, and that it is

<sup>23</sup> *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

<sup>24</sup> National Minimum Wage Regulations 1999 (SI 1999/584) (UK), reg 2(1).

<sup>25</sup> *Autoclenz* (SC), above n 3, at [4].

<sup>26</sup> *Ibid*, cl 1.

the intention of the parties that the Sub-contractor should not become, an employee of Autoclenz.” On the basis of these contracts, Inland Revenue had concluded in May 2004 of the status of those working for Autoclenz that “the balance of probability leans more towards self-employment than PAYE.”<sup>27</sup>

In 2007, two new documents were drafted by Autoclenz. The first, not signed by the respondent Belcher, claimed that Autoclenz would engage valeters “FROM TIME TO TIME on a sub-contract basis”. It asked valeters, which it acknowledged to be “experienced”, to complete and return a form of agreement, which was said to “confirm that any contractual relationship between Autoclenz and yourself is one of client and independent contractor and not one of employer/employee”, and to protect Autoclenz from tax and insurance obligations. The first document said that “as an independent contractor”, the person employed could engage individuals to carry out work on the person’s behalf; would have to purchase overalls from Autoclenz identifying the person as an Autoclenz contractor; would be required to provide cleaning materials; would have to have a valid driving licence; and would “not be obliged to provide ... services on any particular occasion”. The second document, which seemed to bear some resemblance to the original contract, was signed by the respondent and described him as a “sub-contractor”. It also expressly noted that it was the intention of the parties that the sub-contractor was not an employee.<sup>28</sup>

### *Procedural history*

The Employment Tribunal (ET), which issued a judgment, in March 2008, on the preliminary question of whether the respondents were “workers”, made findings of fact after reviewing the contract constituted in the two documents described above. It held that the valeters would not have been offered further work had they not signed the revised contracts, and that the valeters did not negotiate any of the terms (though it was made clear to them by Autoclenz that Autoclenz regarded the valeters as self-employed). The valeters worked in teams of four, taking a batch of six vehicles at a time, and on most days, there was enough to work keep 14 valeters busy. They were paid according to their work, with invoices being prepared by Autoclenz (though notionally prepared by the valeters), and tax and national insurance arranged by valeters on a self-employed basis. Autoclenz provided equipment and materials, introducing a 5% charge for materials in 2007, as well as Autoclenz overalls.<sup>29</sup>

The ET found that the valeters were “workers” since they were working under a contract of employment, according to limb (a) of the definition of “workers” quoted above, and were at any rate workers under limb (b) of the definition. Judge Foxwell, giving judgment for the ET, emphasised that the valeters had no control over their hours of work, no economic interest in the way that work is organised, and did not work as individuals, but rather as teams. The individuals could not source their own materials and were, crucially, “subject to the direction and control of the respondent’s employees on site”. Autoclenz prepared invoices, determined the deductions and rates of pay, devised the contracts, and gave detailed specification of the services. Judge Foxwell thought that the supply of training and company overalls was not determinative, though it was relevant to the view that the valeters were “fully integrated into the respondent’s business” and had “no real other source of work”. The substitution clause, which allowed a valeter to engage individuals to send another valeter on their behalf did not reflect “what was actually agreed between the parties”, according to Judge Foxwell, which was that valeters were relied upon to turn up and had to notify employers in advance if they were unavailable for work: one of the respondents had worked elsewhere only once in 17 years of work. In

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<sup>27</sup> Ibid, at [5].

<sup>28</sup> Ibid, at [6]–[10].

<sup>29</sup> Ibid, at [11]–[15].

sum, these were contracts for “personal service” where work was done in return for money, with “the degree of control” exercised by Autoclenz consistent with these agreements being contracts of employment.<sup>30</sup>

The Employment Appeal Tribunal (EAT) differed, holding that the respondents had not worked under a contract of employment, per limb (a) of the definition, but had been working under a limb (b) contract, in which work was done for another party who was not a client or customer, rendering the individual doing the work a “worker”.<sup>31</sup> The Court of Appeal (Sedley, Smith and Aikens LJ) restored the judgment of the ET, holding that the valeters fell within both (a) and (b) of the definition. Each Judge delivered a separate judgment. Lady Justice Smith said “that the parties to a contract describe the effect of their contractual arrangements in a particular way is not conclusive of the actual effect of the contractual arrangement.”<sup>32</sup> The EAT had placed too much emphasis on the written agreement in reaching its conclusion that there was no contract of employment, said Smith LJ,<sup>33</sup> but was correct that the substitution clause and “right to refuse work” clause were a sham, obscuring the true status of the parties as workers or employees.<sup>34</sup> Lord Justice Aikens wished to state his reasons in his own words because the case raised “a serious issue in employment law and it is one that must arise frequently.”<sup>35</sup> Lord Justice Aikens felt it was not helpful to talk of “true intention” or “true expectation”, lest a court stray into parties’ subjective, private intentions.<sup>36</sup> In the employment sphere, where written terms can be dictated by one party, a court must, however, be “realistic and worldly wise” and “investigate allegations that the written contract does not represent the actual terms agreed.”<sup>37</sup> Applying that approach in the present context reveals that the valeters were workers, not independent contractors. Lord Justice Sedley was less hesitant in confirming that the valeters were “employees in all but name”. The protestations to the contrary in the contract were “odd” and “bore no practical relation to the reality of the relationship.”<sup>38</sup>

### *The judgment of the United Kingdom Supreme Court*

The Supreme Court (Lords Hope, Walker, Collins, Clarke and Wilson) handed down a unanimous judgment on 27 July, 2011, with the reasons given by Lord Clarke. Lord Clarke noted that the key question was in what circumstances the terms of a written agreement might be ignored. After laying out certain uncontroversial propositions, Lord Clarke observed that “a different approach has been taken” to interpreting contracts in the context of employment contracts. (Lord Clarke was careful to note that the judgment should not be, of course, thought as the correct legal approach to other contracts).<sup>39</sup> There is a need to focus on “the reality of the situation” where written documentation may not reflect the reality of the relationship.<sup>40</sup> Lord Clarke went on to consider the variety of instances where a court may disregard written terms because they represent “a sham”. After resolving some disagreements in the case law that need not detain us here, his Lordship observed that a court must assess “what was the true agreement between the parties.”<sup>41</sup> He agreed with the Court of Appeal that

<sup>30</sup> These details are all taken from the quoting of the ET’s findings at [37] of the Supreme Court’s judgment.

<sup>31</sup> Ibid, at [3].

<sup>32</sup> *Autoclenz Ltd v Belcher* [2009] EWCA Civ 1046 [“Autoclenz (CA)”], at [13].

<sup>33</sup> Ibid, at [54].

<sup>34</sup> Ibid, at [57]–[62].

<sup>35</sup> Ibid, at [71].

<sup>36</sup> Ibid, at [91].

<sup>37</sup> Ibid, at [92].

<sup>38</sup> Ibid, at [104].

<sup>39</sup> *Autoclenz (SC)*, above n 3, at [21].

<sup>40</sup> Ibid, at [22].

<sup>41</sup> Ibid, at [29].

the issues of bargaining power that arise in an employment context require a more sensitive approach to whether the terms of a written agreement represent the “true agreement” between the parties. Lord Clarke labelled this “a purposive approach.”<sup>42</sup> Applying these principles, Lord Clarke then leaned heavily on the findings of fact reached in the ET. He found that these findings could not be sensibly challenged, and concluded that it was open to the ET to hold that the terms of the written document could be disregarded,<sup>43</sup> thereby confirming the view that the valeters were “workers” under (a) and (b) of the definition.

### *Analysis*

On first glance, the outcome in this case might seem surprising, especially for those observers in favour of giving effect to written terms in contracts. The relevant written contract here had been as express as possible in identifying the valeters as independent contractors, not as employees; they were described as sub-contractors throughout; and both parties had signed this document. Autoclenz could have done little more to attempt to attain independent contractor status for the valeters. Despite this, the Court was uncompromising in finding that the written terms of the contract could be disregarded, and that it could, nonetheless, find that the valeters were workers, or, as they would be called in New Zealand, employees. What drove the Court to this conclusion?

In some ways, this was an orthodox application of the case law: several cases were cited by the Court for the proposition that the written agreement may not reflect the reality of the employment relationship – notably *Consistent Group Ltd v Kalwak* and *Firthglow Ltd (t/a Protectacoat) v Szilagyi* – and the Court simply applied the propositions from these cases.<sup>44</sup> The factual context also pulled strongly in the direction of the conclusion that the Court reached. It was evident that the substitution clause, allowing for alternative valeters, had not been used in practice, and “the right to refuse work” clause was a similarly hollow undertaking, given the fact that the evidence suggested one valeter had worked elsewhere only once in 17 years. It was arguably the settled legal position, and the facts, that led the Court to reject Autoclenz’s submission that the valeters should be regarded as independent contractors, in reliance at least in part on the written contract.

I argue, however, that the Court was, at most, impelled to its conclusion, and at the very least, fortified in its view, by an underlying commitment to the rule of law in private law. The Court in *Autoclenz* sought to guard against the ability of a party (in this instance, Autoclenz) from usurping the court’s function to determine the law and secure an advantage by inserting seemingly definitive statements into a contract. The Court affirmed that parties may not place themselves above the law, or the courts, in this way – and reminded parties that it will retain a supervisory role, reviewing written agreements in the employment sphere, and being willing to disregard these agreements where they do not accurately represent the factual matrix between the parties. Lady Justice Smith’s words in the Court of Appeal express the precept pithily: any attempt by parties to “describe the effect of their contractual arrangements in a particular way is not conclusive of the actual effect of the contractual arrangement” as determined by a court.<sup>45</sup> Of course, it is true that, had the factual matrix indicated that, the valeters were independent contractors, the Court would not have disregarded the terms of the written contract. However, that would be because no party would have been seeking an advantage through the creation

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<sup>42</sup> *Ibid*, at [35].

<sup>43</sup> *Ibid*, at [38].

<sup>44</sup> *Consistent Group Ltd v Kalwak* [2008] EWCA Civ 430, [2008] IRLR 505; *Firthglow Ltd (t/a Protectacoat) v Szilagyi* [2009] EWCA Civ 98, [2009] ICR 835.

<sup>45</sup> *Autoclenz* (CA), above n 32, at [13].

of an autonomous law, away from the Court's oversight. More importantly, had the Court acknowledged that the valeters were independent contractors in those circumstances, it would not have relinquished its role as final arbiter of the law, and would still have resisted parties' attempts to decide the law for themselves. Overall, the Court was influenced in *Autoclenz* by upholding the rule of law in private law – although the extent of that influence might be difficult to state with any certainty.

Some might say that it is odd to attribute to the United Kingdom Supreme Court, in this case, a basis for its decision that it did not itself identify. Lord Clarke might be surprised to be told that the reason he reached the conclusion he did was not one he recognised at the time. The same critique might claim that the reconstruction of the decision offered above involves too great a degree of inferential interpretation and reading between the lines of the judgment in *Autoclenz*. To be sure, suggesting that the rule of law in private law underlay the Court's decision requires inferences to be drawn. However, it will be recalled that no attempt has been made to say just how influential this concept was in guiding the Court to its conclusion. All that has been done is suggested, tentatively, that the Court had in mind a precept – relating to the role of the courts, and the relationship between the parties and the general law – that I have attempted to articulate and develop. It is difficult for courts to be wholly transparent in canvassing all considerations that have a bearing on their judgments. What is proposed here is the modest claim that there was one consideration latent in the judicial reasoning in *Autoclenz* that the Supreme Court may have been influenced by, but did not fully explain or explore.

### *Similar reasoning in Bryson v Three Foot Six in the New Zealand context*

It is useful to note, in passing, that in the New Zealand parallel to *Autoclenz*, *Bryson v Three Foot Six*,<sup>46</sup> in which the Supreme Court of New Zealand examined the question of whether a film industry worker was an employee or independent contractor; it might also be argued that the Court aimed to uphold the rule of law in private law. A contract, the “crew deal memo”, stipulated that the film industry worker in that case, Mr Bryson, was an independent contractor. The Supreme Court raised some doubts initially about whether the characterisation of the legal relationship between Mr Bryson and Three Foot Six, the company doing work for the Lord of the Rings Project, was a question of law at all, amenable to appeal.<sup>47</sup> However, proceeding to consider whether the Employment Court Judge had made an error of law, the Court (in a decision given by Blanchard J) held that she had, rightly, not treated “as a determining matter any statement by the persons that describes the nature of their relationship”, consistent with s 3(b) of New Zealand's Employment Relations Act (ERA) 2000. Only when “*the Court or Authority* has examined the terms and conditions of the contract and the way in which it actually operated in practice ... will [it] usually be possible to examine the relationship ...”<sup>48</sup> In this case, it was open to the Judge to find that “the crew deal memo did not give any reliable indication of the real nature of the relationship,”<sup>49</sup> and to find that – on the basis that he was fully integrated into Three Foot Six, not able to delegate his work, and working effectively full-time – Mr Bryson was an employee.

<sup>46</sup> *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721. This case has had something of a legislative sequel: the Employment Relations (Film Production Work) Amendment Act 2010, colloquially known as “*The Hobbit* legislation” because of the circumstances surrounding its passage, purports to preclude the possibility that workers in Mr Bryson's position could be “employees”, by amending the definition of “employee” in s 6(1) of the Employment Relations Act 2000. No court has yet definitively settled the legal effect of this amendment.

<sup>47</sup> *Ibid*, at [17]–[23].

<sup>48</sup> *Ibid*, at [32] (emphasis added).

<sup>49</sup> *Ibid*.

Again, it might be said that, while the Court applied orthodox principles (from statute and common law) in the face of strong facts, it was influenced, in some way, by an aversion to *Three Foot Six*'s attempt to stipulate definitively the legal status of its relationship with Mr Bryson. It also seems apparent that the Supreme Court sought to underscore the need for a court or judicial body to reserve the right to make an assessment of the factual circumstances and reach its own conclusion about whether an individual is an employee or independent contractor. These are principles at the heart of the rule of law in private law.

It had been noted in *Bryson* that the intention of the parties was “no longer decisive,”<sup>50</sup> and that under the previous legislation (the Employment Contracts Act (ECA) 1991), significant weight had been placed on the written contract. This raises an interesting question for proponents of the rule of law in private law: had the law been that the intention of the parties *was* decisive, how should a court have ruled in a scenario where the parties had made express that they believed that a worker was an independent contractor? In this situation, would the rule of law in private law not pull in the opposite direction to the law? How should a court have balanced these concerns? The answer to these questions is surprisingly simple: the obligation of the court, under the rule of law in private law, is only for the court to uphold the law against the parties' attempts to secure an advantage by placing themselves above, or outside of, the law. In a situation where the law dictated that the parties' intentions were decisive, the court would still take care to assess the parties' intentions. However, the parties' attempt to stipulate the nature of their relationship would no longer be an instance of the parties placing themselves above the law. Applying the rule of law in private law in that situation would *require* a court to give effect to the parties' contract.

Needless to say, it cannot be concluded from these two examples in the employment law arena that the rule of law in private law runs like a thread through private law. That would be inferring too much. What can be said is that a glimpse has been offered here of how the rule of law in private law might underpin judicial decision-making. It is hoped that the consideration of this case study might provide a platform for further thinking about the rule of law in private law in other legal contexts.

## **The value of this concept for employment law**

The rule of law in private law is a concept that may have relevance outside of employment law, in contract law and the law of torts, amongst other areas. However, this part of the paper highlights the particular value that the concept could have for employment law. Firstly, the rule of law in private law might prove to be an animating ideal for employment law as a whole. Secondly, the concept is important in serving as a reminder of the types of new frameworks that can emerge when ideas (such as the rule of law) originating in other fields of law (like public law) are harvested in new contexts.

### ***A new animating ideal?***

Historically, there has been little effort to theorise deeply what values lie beneath employment law: as Horacio Spector has noted, the “literature on the philosophical foundations of labor law is scant.”<sup>51</sup> This may be because employment law is an area of law that divides many people (including judges), and for which it is difficult to come up with bridging principles that find a middle ground between polarised positions. Where attempts have been made to arrive at descriptions of the ideals

<sup>50</sup> Ibid, at [5].

<sup>51</sup> Horacio Spector “Philosophical Foundations of Labor Law” (2006) 33 Fla St UL Rev 1119 at 1121.



underpinning employment law, the ideals have often been coloured by ideological views on freedom of contract or the protection of labour rights. While ideology may be difficult to escape (making talk of “non-ideological ideals” futile), there have been few accounts of employment law, as a whole, that are not wholly reliant on a commitment to certain ideological preferences.<sup>52</sup>

The rule of law in private law has considerable promise as a concept that might be shown to undergird employment law but that does not require such ideological preferences. The rule of law is a familiar legal concept (even if its content is the subject of much dispute) that would not be considered foreign to those judges, practitioners, and academics seeking a new animating ideal for employment law – even if the rule of law in private law is a slightly novel variation on the rule of law. The rule of law in private law is also especially suited to the needs of employment law in most jurisdictions. In most jurisdictions, there is now a statutory framework that governs employment law,<sup>53</sup> and the rule of law in private law provides a rationale for ensuring close adherence to that framework (on the part of judges as well as parties to a dispute), and applying that framework with vigilance.

The next challenge for scholars is to map out the theoretical underpinnings of employment law, in order to explore whether the rule of law in private law is relevant to issues in employment law other than the single issue canvassed as a case study above (namely, whether an individual is an employee or independent contractor). In the New Zealand context, several examples of future possible directions in the scholarship can be noted. The rule of law in private law may be a fruitful concept to use when theorising the pervasiveness of the good faith concept enshrined in s 4 of the ERA, because it highlights the inability of parties to contract out of legal requirements in an effort to secure an advantage. For a similar reason, it may be a useful way to justify and strengthen procedural fairness obligations in the context of dismissal, since it would provide an explanation for why such obligations should not be easily jettisoned.<sup>54</sup> It may even offer a justification for the view taken by Chief Judge Colgan in *Smith v Stokes Valley Pharmacy (2009) Ltd* that the introduction of employment trial periods of 90 days or less in ss 67A and 67B of the ERA does not extinguish the right of an employee to seek and receive an explanation for dismissal,<sup>55</sup> since, in that decision, Chief Judge Colgan attempted to preserve the enforcement of existing law, despite the introduction of ss 67A and 67B – a decision that might be thought to be consistent with the rule of law in private law. Further research is undoubtedly needed, and tensions within the concept will have to be worked through. One challenge will be whether the rule of law in private law can be redeployed to argue for reform in employment law (since it would be expected that an animating ideal for an area of law could be used to justify changes in the law), when perhaps the rule of law in private law exhibits a bias in favour the enforcement of existing law. Regardless of how this challenge is worked through, it is clear that the rule of law in private law has potential to be used as an idea both to rationalise existing employment law decisions and to forecast future decisions, if it can be properly theorised, and if it is the case, that it is a concept that often underlies judicial decision-making.

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<sup>52</sup> Gordon Anderson’s most recent suggestion that social justice underpins employment law may present one solution to this debate, though it remains to be seen how much consensus the idea of social justice attracts. See the discussion in Gordon Anderson *Reconstructing New Zealand’s Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, 2011).

<sup>53</sup> See, for example, the Employment Rights Act 1996 (UK) and the Workplace Relations Act 1996 (Cth).

<sup>54</sup> The standard obligations are set out in *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35 at 45–46.

<sup>55</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253. This case is closely scrutinised in: Scott Worthy “Revisiting *Stokes Valley* and Statutory Interpretation” (New Zealand Labour Law Conference, Wellington, 2 December 2011).

*A reminder of the value of dialogue for employment law*

The preceding passage outlined a very direct benefit for employment law that might be achieved by developing a theory of the rule of law in private law: namely, a unifying principle for that body of law. However, ongoing thinking about the rule of law in private law may also supply a more cerebral benefit for employment law: a reminder of how valuable it can be to borrow ideas from different bodies of law and apply them to new contexts. The notion of the rule of law in private law is a product of adopting a public law notion, the rule of law, and adapting it to the private law context. Even on the basis of the limited analysis offered in this paper, it seems true that such cross-fertilisation has use for employment law by sparking some fresh insight or at least probing conventional orthodoxies. It might be hoped that the development of the rule of law in private law might act as a spring for further cross-fertilisation between other areas of law and employment law. What is meant by cross-fertilisation is not necessarily wholesale, unthinking incorporation of ideas: of course, in some instances, doctrines will be inapplicable. What is required is debate, particularly amongst the academic community, about whether ideas might be fruitfully borrowed and applied, and a willingness for scholars in employment law and other fields to be in a state of dialogue. This dialogue should go both ways: so that ideas from areas such as public law can be tested within an employment law context, and ideas from employment law can be held up as possible solutions for problems in other areas of law.

Before exploring examples to make these somewhat abstract observations more concrete, it is worth making the point that employment law – at least in New Zealand, the jurisdiction with which the author is most familiar – seems especially bereft of the benefits of this dialogue. It is unclear why employment law has become insulated and isolated from this dialogue across different fields of law. It may be the product of the specialisation of employment law, and the establishment of separate institutions to deal with employment law matters (though one would think that the ability of the Court of Appeal and Supreme Court to consider employment law issues on appeal might at least lead to judges and lawyers being forced to contemplate employment law from time to time). It may be because employment law is seen as an area of law that is so much the product of political preference and policy that it can offer little by way of more general insights into the law (though employment law is by no means unique in being an area of law that is entangled in politics).<sup>56</sup> Or, it may be due to the fact that employment law remains in the midst of something of an identity crisis – since it lies on the margins of public law, contract law, tort law, and equity – that makes scholars in the field of employment law hesitant about engaging with any other particular field of law. Whatever the reason for this insulation, and notwithstanding the fact that right across the law there is arguably insufficient dialogue between the sub-disciplines, it appears fair to say that employment law could do well to be in a more lively state of dialogue with other bodies of law.

Because the concept at the core of this paper – the rule of law in private law – is an example of employment law importing an idea from elsewhere, it may be helpful to gesture towards some examples of dialogue being “exported” the other way (wherein employment law can supply concepts and approaches that might be picked up and explored by other bodies of law) to highlight the value of dialogue. It may not be sufficiently appreciated how much of a promising incubator employment law might be for novel doctrines and perspectives.

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<sup>56</sup> The view that employment law, at least in New Zealand, is closely entangled with issues of ideology was well-explained in: Margaret Wilson “Recent Developments in Employment Law” (Auckland University Law Review Contributors’ Symposium, Auckland, 7 October 2011).

One possible employment law “export” that might be of utility for the law of contract is the approach taken to contractual interpretation in determining whether a person is an employee or independent contractor, touched on in the analysis above. Employment law has long acknowledged that evidence of the factual matrix can be used to shed light on a relationship also embodied in a contract. At a time when the law of contract is grappling in certain jurisdictions with deciding on how much of the factual matrix is relevant to contractual interpretation, particularly in relation to post-contractual conduct,<sup>57</sup> evidence of how workable and robust the employment law posture has been (albeit in achieving different objectives) might be profitable for contract law scholars and contract law as a whole. Of course, in *Autoclenz*, Lord Clarke was very careful to limit his observations about disregarding written terms of a contract to the employment law sphere, and not to allow the comments to be used in an ordinary contract context.<sup>58</sup> On the approach suggested here, perhaps there would be some utility in not being so cautious.

A second instance where employment lawyers might advance the development of other bodies of law by outlining issues that have been dealt with in employment law that may be of relevance elsewhere, especially in New Zealand, is on the subject of good faith. There has been an extensive, and now possibly well-worn, debate in contract law over the existence and enforceability of a duty of good faith.<sup>59</sup> It seems that this is an area where employment lawyers can fruitfully contribute reflections on how the concept of good faith, outlined in s 4 of the ERA, has been developed and applied, even if it is a concept that has been tailored to the employment context. Dialogue might include discussion of how workable and practical good faith has been, and how it has been defined. Interestingly, in *Wellington City Council v Body Corporate 51702 (Wellington)*,<sup>60</sup> Tipping J alluded to the possible relevance of the employment law concept of good faith when assessing whether an agreement to negotiate in good faith was enforceable.<sup>61</sup> While Tipping J noted that the statutory nature of the duty of good faith in the employment law context allowed for greater certainty than in contract, the fact that he outlined the employment law duty of good faith in spite of this superficial difference – when counsel also had not addressed the point – reveals that perhaps Tipping J was of the view that there could be some further dialogue between contract law and employment law on this point.

The prospect of such dialogue will not appeal to those who support absolute specialisation, or to those who favour fine distinctions between areas of law and rooting ideas firmly within very narrow contexts; but to those who prefer not to classify the law into hermetically sealed compartments, and who accept that ideas, such as good faith can have a similar shape across various parts of the law, the notion of cross-fertilisation of concepts (exemplified by the development of the rule of law in private law) might be thought to be appealing. Some might even consider such cross-fertilisation essential to the law’s enduring unity and vitality.

<sup>57</sup> The High Court of Australia most recently expressed the view that post-contractual negotiations should be inadmissible in *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 251 ALR 322 (HCA); the New Zealand Supreme Court has taken a more liberal view towards admissibility in *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

<sup>58</sup> *Autoclenz* (SC), above n 3, at [20].

<sup>59</sup> For a small selection of the contributions to the debate, see James Allsop “Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle” (2011) 85 ALJ 341; Johan Steyn “The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy” (1991) 6 Denning LJ 1131; Paul Finn “Good Faith and Fair Dealing Australia” (2005) 11 NZBLQ 378; EW Thomas “Good Faith in Contract: A Non-Sceptical Commentary” (2005) 11 NZBLQ 391; and Rick Bigwood “Symposium Introduction: Confessions of a Good Faith ‘Agnostic’” (2005) 11 NZBLR 371.

<sup>60</sup> *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA).

<sup>61</sup> *Ibid*, at [36].

## Conclusion

This paper began by sketching a notion of the rule of law in private law. After the core components of the concept were laid out, its relationship to other rule of law concepts was explained, and it was defended against objections grounded in its alleged incompatibility with private law norms, its effect on the meaning of the rule of law, and its relative novelty. Emphasis was then placed on how the rule of law in private law was manifested in the reasoning of the United Kingdom Supreme Court in *Autoclenz*. To illustrate this, it was necessary to discuss the background and procedural history of the case, as well as the judgment's main parts. It was noted that a desire to uphold the rule of law in private law could be inferred from the reasoning in *Autoclenz*, and that a similar precept arguably underpinned the decision of the New Zealand Supreme Court in *Bryson v Three Foot Six*. While the rule of law in private law was said not to be confined to employment law, the final part of the paper examined the especial use of the concept to employment law – as a possible animating ideal for employment law, and as a reminder of the need for dialogue between employment law and other areas of law.

Some of the greatest leaps in insight in the common law have occurred through the use of inductive reasoning that has highlighted underlying patterns in parts of the law hitherto thought to be without order.<sup>62</sup> *Donoghue v Stevenson* is one case where that leap was made: a case where Lord Atkin discerned, when reviewing the historical course of negligence judgments, a sense of direction (in the form of the neighbourhood principle) latent in what, up to that point, had seemed like an erratic trail of individual judgments.<sup>63</sup> This paper would not immodestly claim to make that leap in insight for employment law, or private law as a whole, in arguing that the rule of law in private law can be induced as the underlying precept of much judicial reasoning. It does claim, however, to be written in the spirit of Lord Atkin's endeavour in *Donoghue v Stevenson* – as part of an enterprise seeking to crystallise or clarify the principles at the bottom of law itself. For Cardozo, this stock of principles drawn upon in court is not a set of ideas “lying beneath” the law; this reservoir of values, precepts, and propositions *is the essence of law itself*.<sup>64</sup> Whether we see such principles as law, or just as its sources, most would accept that the search for these principles is a worthwhile journey, upon which this paper has humbly embarked.

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<sup>62</sup> The term “leap in insight” is borrowed from Chief Justice Elias, who uses it in: Sian Elias “JUSTICE for One Half of the Human Race? Responding to Mary Wollstonecraft’s Challenge” (Address to the Canadian Chapter of the International Association of Women Judges’ Conference, Vancouver, 10 May 2011).

<sup>63</sup> *Donoghue v Stevenson* [1932] UKHL 100, [1932] AC 562.

<sup>64</sup> Benjamin N Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924) at 43. Selznick shares this view: “Legal ideas, variously and unclearly labelled ‘concepts,’ ‘principles,’ and ‘doctrines,’ have a vital place in authoritative decision. ... It would be wrong to speak of these as merely a ‘source’ of law; they are too closely woven into the fabric of legal thought and have too direct a role in decision-making.” See Selznick, above n 13, at 27.

## **An Uneven Playing Field – Partial Strikes**

SUSAN HORNSBY-GELUK\*

### **Introduction**

In 2002, fire fighters in the United Kingdom went on strike, creating widespread fear and causing the armed forces to step into the breach to provide emergency service cover. In New Zealand, the announcement in 2011 that 1,800 fire fighters were to undertake strike action provoked far less panic due to the nature of that strike action. The difference was that, whilst the fire fighters in the United Kingdom had been on complete strike, the New Zealand fire fighters were only partially striking. The fire fighters continued to turn up to work and perform core fire fighting duties, but they did not undertake other usual duties such as paperwork, training, equipment maintenance, installation of fire alarms, and community education programmes.

There is a growing trend in the use of strategic or partial strikes as opposed to the traditional form of industrial action whereby employees walk off the job completely. Partial strikes may include bans on particular activities such as answering phones or filling in paperwork, working “to rule”, going slow, bans on overtime, or taking breaks at the same time as colleagues, in order to cause disruption to the employer. The reason for this type of strike action is clear – employees do not get paid when they completely withdraw their labour, and have, therefore, sought creative ways to strike without sacrificing pay. As the law currently stands in New Zealand, the Fire Service Commission was not entitled to reduce the wages of the striking fire fighters – and yet, the fire fighters were not fulfilling all the requirements of their employment agreements.

There is a natural balance of power between employees and employers engaging in “traditional” industrial action. Whether the employee is striking or the employer has locked them out, the result is that the employee does not get paid and, the employer does not get any work done. However, the growing trend of strategic or partial strikes is tilting this balance of power in favour of employees. If employees can disrupt their employer’s business by undertaking a partial strike whilst suffering no loss of wages, there is no incentive for them to reach an agreement and bring an end to the strike action.

Recent evidence of this consequence has been demonstrated within the public sector over the past two years where partial strike action and work to rule tactics have been a common feature of protracted bargaining. Given the lack of adverse impact on the employees conducting these strikes, the action has, in many cases, carried on for a number of months causing significant disruption to those organisations.

This paper reviews the development of the law in New Zealand and concludes that the balance of power in industrial action has been tilted in such a way that there is now a need for legislative reform.

### **The Balance of Power**

Historically, there has been a natural balance of power between employees and employers in terms of the use of industrial action. The rights of each have been positioned to ensure the freedom of both to pursue their rights and interests in bargaining. This balance has occurred because during a traditional strike or a lockout, whilst an employee receives no wages, an employer has no output. The

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disadvantage experienced by both parties during a strike or lockout places an automatic control on the duration and frequency of such actions. Neither side can undertake industrial action without due consideration of the negative consequence they will experience from such action.

However, this traditional balance of power appears to have been altered by the advent of more creative approaches to industrial action.

## **Partial Strikes**

A partial or strategic strike occurs when employees do not walk off the job completely but refuse to undertake certain parts of their job. For example, university lecturers who refuse to mark students' essays but continue to carry out all the other duties of their position are on partial strike. A 'go-slow' or 'work-to-rule' is also a partial or strategic strike. Employees continue to perform their duties but seek to reduce their productivity and/or efficiency to the minimum necessary to technically perform the requirements of their job description. Any type of partial strike has the potential to significantly impact on an employer's productivity and cause disruption to the employer's business.

The Employment Relations Authority has interpreted the Employment Relations Act (ERA) 2000 in such a way that the only sanction available to employers facing a lawful partial strike is to suspend the striking employees altogether and, consequently, have no work performed. In this regard, the Employment Relations Authority has found that the ERA, in its current form, prevents employers from reducing the wages of partially striking employees.

### ***Thompson and Ors v Norske Skog Tasman Ltd***

In *Thompson and Ors v Norske Skog Tasman Ltd*,<sup>1</sup> the Employment Relations Authority considered the issue of whether employers are entitled to dock the wages of employees who engage in partial strike action. The four employees concerned in this case were control system tradesmen at the Kawarau paper mill. From August to December 2010, they withdrew their labour but remained on site, solely for the purposes of covering essential and emergency services. Initially, their employer, Norske Skog Tasman Ltd, continued to pay them full wages, notwithstanding the partial strike, in the expectation that the strike would be a short one. However, after the strike action had continued for a month, the company reviewed the appropriateness of continuing to pay full wages in light of the prolonged nature of the dispute.

The company then sent the employees a letter informing them that their wages would be reduced by 80%. They were told that they did not need to be on site during their shift but had to lodge their contact details with the Safety and Access Team so they could be contacted as necessary. The employees' union was invited to provide feedback on the proposed arrangement prior to the arrangement being implemented. The union's response was that the company was proposing a variation to the contract. Subsequently, the union claimed that the workers were not on strike. Ultimately, the company docked the employees' wages by 80% reflecting the reduction in output.

In the Employment Relations Authority, the employees claimed that there was no basis upon which their employer could legally reduce their wages, and that the reduction was a breach of s 4 of the Wages Protection Act 1983. Section 4 of the Wages Protection Act states that, except in the specified cases, "an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction."

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<sup>1</sup> *Thompson and Ors v Norske Skog Tasman Ltd* [2011] NZERA 291.

If employees are on strike, that is, a total strike, and are not working at all, then wages do not become payable. The employees in this case claimed that during a partial strike an employer has a choice between accepting the partial performance or suspending the striking employees.

The Authority referred to *Postal Workers Association v NZ Post Ltd* (see below) and agreed with the decision in that case that, to apply the doctrine of abatement, would be inconsistent with s 85(1)(c)(i) of the ERA 2000.<sup>2</sup> The Employment Relations Authority held that Norske Skog had acted unlawfully as it was not entitled to make a deduction from the employees' wages, even though both parties accepted that the employees were performing significantly reduced duties.

As a catchall, the Authority stated that, even if this conclusion was incorrect, the company was not able to deduct wages in the way that it did as the deduction was based on an arbitrary assessment of the work carried out. No records were kept and the employer was unable to show that the deductions accorded with the work not being carried out. Ultimately, the Authority made it clear that had the strike been a full strike, the employees' entire wages could have been docked. However, as it was only a partial strike and the employees continued to undertake part of their duties, they were entitled to their full wages, and no reduction could be made.

### ***Postal Workers Association v New Zealand Post Limited***

The Authority had reached this same conclusion in an earlier case involving New Zealand Post. In *Postal Workers Association v New Zealand Post Limited*, posties delivered some of the mail assigned to them but posted the rest of their allocated mail back into public post boxes along their delivery routes. The posties were undertaking some of their duties but refusing to carry out others – meaning New Zealand Post faced a partial strike situation. New Zealand Post did not discover what had occurred until the following day, at which point it took immediate steps to suspend the posties involved. New Zealand Post 'backdated' the suspension notices to take effect from the beginning of the day on which the partial strike occurred.

The Employment Relations Authority had to consider two issues – could an employer 'backdate' a suspension notice; and could an employer reduce the wages of an employee refusing to undertake all their duties? The first of these questions was easily disposed of, with the Authority finding that the statutory scheme for suspension was not open to being imposed retrospectively.

This meant that New Zealand Post could not justify refusing to pay the striking workers on the basis that they were suspended at the time the strike occurred. Accordingly, the Authority turned to the second question – is an employer entitled to dock the wages of an employee who is performing only part of their normal duties? The Employment Relations Authority considered the common law doctrine of abatement as this had been applied in the leading United Kingdom case relating to partial strikes *Miles v Wakefield*.<sup>3</sup>

The Authority was asked to consider whether the doctrine of abatement was available in New Zealand employment law for breach of contract as between an employer and an employee, as it is in the United Kingdom. The Authority considered s 85(1)(c)(i) of the ERA 2000; section 85(1)(c)(i) states that "lawful participation in a strike or lockout does not give rise to any action or proceedings for a breach of an employment agreement." This section prevents a lawfully striking employee from being sued for damages for breach of their employment agreement.

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<sup>2</sup> *Postal Workers Association v New Zealand Post Limited* (2007) 8 NZELC 98,918 (ERA).

<sup>3</sup> *Miles v Wakefield* [1987] 1 All ER 1089.

The contradiction, then, is that the doctrine of abatement is a remedy for breach of contract – but employees are protected from claims for remedies for breach of contract in the event of participation in a lawful strike. On this basis, the Authority held that abatement was inconsistent with the statutory scheme in New Zealand and, therefore, was not available under New Zealand employment law. To apply the abatement doctrine would remove part of the benefit of what is otherwise an immunity for striking workers from civil suit, and would, therefore, be inconsistent with s 85(1)(c)(i). Further, the Authority found that to apply the abatement doctrine would be inconsistent with the provision for the suspension of striking workers. The Authority held that surprise or wildcat strikes are permitted by the legislation and the employer's only redress in these circumstances is to suspend striking workers. Consequently, the posties were entitled to full pay for all hours worked on the day the partial strike occurred.

An employer's statutory power to suspend striking employees without pay is based on s 87 of the ERA 2000. Suspension is not necessary in the case of a full strike as the employees are not undertaking any work and, therefore, are not entitled to be paid. However, the Authority's decision means that the options available to an employer in the event of a partial strike are either to accept the partial strike action and pay the employee full wages, or to suspend the employee and pay no wages.

In a situation such as that faced by New Zealand Post, where the partial strike action was not discovered by the employer until after the event, the employer has no ability to suspend the employee and, therefore, has no option but to pay full wages. The Authority acknowledged that "guerrilla" tactics could legitimately be used by employees, but did not comment on the fact that this could mean that employers would have no ability to respond to employees striking unexpectedly. The result is to give employees significant power to disrupt an employer's business without suffering any repercussions.

### ***Miles v Wakefield***

In order to understand the Employment Relations Authority's decision, it is necessary to consider the House of Lords decision in *Miles v Wakefield*, which is the leading English case on partial strikes. The case was about a superintendent registrar of births, deaths and marriages who, as part of industrial action and in breach of his duties, refused to conduct marriage ceremonies on Saturday mornings, although he carried out his other duties on that morning. The Council informed Mr Miles that he would not be paid for work on Saturdays unless he was prepared to undertake the full range of his duties. When he refused, the Council withheld that part of his wages relating to Saturday work. Lord Templeman referred to the situation as Mr Miles refusing to work "efficiently" on the Saturday.

The purpose of declining to work efficiently on Saturday was to inconvenience the public and thereby advance the union's claim for higher salaries. Lord Templeman stated:<sup>4</sup>

The legislation does not protect the worker against losing his wages during a period of industrial action. If the worker were protected against losing both his job and his wages, nearly every threat of industrial action would result in capitulation of the employer.

The House of Lords recognised that balance in industrial action was necessary and if it was removed, all the power would be in the hands of the employee – inevitably resulting in the eventual capitulation of the employer. Ultimately, the employee hopes that the damage inflicted on the employer due to the industrial action will drive the employer to the bargaining table before the loss of wages suffered by the employee drives the employee back to work.

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<sup>4</sup> Ibid, at 1097.



Working properly, Lord Templeman summed up the balance as:<sup>5</sup>

In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work.

Mr Miles' counsel argued that there were only two options open to the Council: to dismiss Mr Miles or pay him in full.

Ultimately, the House of Lords held that where strike action is in the form of working inefficiently, the employer may decline to accept any work, and the employee will not then be entitled to wages. Alternatively, the employer can accept the limited work that the employee is offering, and reduce wages to reflect the level of work the employee is providing:<sup>6</sup>

The worker whose industrial action takes the form of 'going slow' inflicts intended damage which may be incalculable and non-apportionable but the employer, in order to avoid greater damage, is obliged to accept the reduced work the worker is willing to perform. In those circumstances, the worker cannot claim that he is entitled to his wages under the contract because he is deliberately working in a manner designed to harm the employer. But the worker will be entitled to be paid on a quantum meruit basis for the amount and value of the reduced work performed and accepted.

In determining the right of the employer to reduce wages, the House of Lords applied the concept of the remedy of abatement. The underlying principle is that wages are remuneration and must be earned; In a claim for wages under an employment contract, the worker must assert that he worked or was willing to work. An employee could only claim wages if s/he was willing to work for them. If the employee was not willing to work, then his/her wages could be abated accordingly.

As Mr Miles had not been ready and willing to work, and even, in fact, refused outright to undertake certain parts of his job, the House of Lords upheld the employer's deduction of salary as appropriate.

### ***The statutory scheme and abatement***

As explained briefly above, abatement is a remedy for breach of contract when one party does not provide the other party with the full benefit under that contract. In general, it is confined to contracts for the sale of goods. For example, a purchaser has contracted with a seller to purchase 100 widgets for a total of \$200 but only 70 widgets are provided, the cost is abated accordingly and the purchaser only has to pay \$140. The doctrine operates as a remedy for breach of contract. The House of Lords has extended the doctrine to employment contracts in the United Kingdom (*Miles v Wakefield*). However, in New Zealand, the Employment Relations Authority determined that it could not apply the common law doctrine as it is inconsistent with the statutory scheme.

The application of *Miles v Wakefield* and abatement in employment cases in New Zealand was considered in passing by the Employment Court, prior to the two recent Employment Relations Authority cases discussed above. In *Bickerstaff v Healthcare Hawkes Bay Ltd* Chief Judge Goddard stated:<sup>7</sup>

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<sup>5</sup> Ibid, at 1098.

<sup>6</sup> Ibid, at 1099.

<sup>7</sup> *Bickerstaff v Healthcare Hawkes Bay Ltd* [1996] 2 ERNZ 680 at 11.

The doctrine of abatement announced by the House of Lords in *Miles* was based on the premise that the employer could sue the striking employees for damages for breach of contract but should not have to wait so long and could make deductions from their wages at their source in respect of any non-performance resulting from concerted industrial action. The underlying premise of ability to sue for damages in such situations has been rendered unreliable for New Zealand by s68 and accordingly the right to abate at source may have been abolished as well. However, I will reserve the expression of a concluded view on the precise effect of s68 for a case in which the point is argued.

The reference to s 68 is to the now repealed Employment Contracts Act (ECA) 1991. The underlying intent of s 68 was materially similar to the intent of the current s 85 of the ERA 2000. Section 68 required the Tribunal or the Court to dismiss any proceedings brought under the ECA relating to participation in a lawful strike for breach of contract. Chief Judge Goddard's obiter comment was, to the effect, that the reason given by the House of Lords for applying the doctrine of abatement could not be similarly applied in New Zealand due to the statutory scheme preventing breach of contract claims due to participation in lawful strikes.

In taking part in a partial strike by refusing to fulfil all their duties while at work, an employee is breaching their employment agreement. Employers are prevented under New Zealand law for taking any action for breach of an employment agreement against an employee for lawful participation in a strike. The doctrine of abatement is a remedy for a breach of contract action. To the extent that a breach of contract action is statutorily barred, then it does seem that abatement is not available under the present ERA 2000. However, there remains an argument that the employer is not making a 'deduction' from employees' wages, which may be in breach of the Wages Protection Act. Rather, the employer is making a 'reduction' resulting from the employee not being entitled to pay for work that they did not perform.

## Different Approaches

### *New Zealand*

The New Zealand cases discussed above demonstrate an increasingly sophisticated approach to industrial action. The aim of the parties is to cause maximum inconvenience or damage to the other party, whilst minimising the adverse impact on themselves. However, the increasing use of partial strike action does arguably skew the natural balance of power in industrial action in favour of employees. The effect is that employees have the ability to engage in strategic strike action indefinitely, if necessary, without suffering any adverse consequence in terms of loss of pay.

Whilst employers may counter this type of activity by suspending striking workers, this depends firstly on the employer having notice of the strike action. In the *New Zealand Post* case, the employer did not become aware of the employees' actions until it was too late to suspend. Secondly, the employer has to then decide whether to suffer the drop in output which will occur if it is forced to suspend employees outright. The same considerations are applicable to any decision by an employer to lock out.

It is noted that the decision in *Southern Local Government Officers Union Inc v Christchurch City Council* relating to "technical" lockouts provides employers with the option of locking employees out of some but not all of their duties,<sup>8</sup> provided it can ring fence the pay which relates to the specific duties of which the employees are locked. However, this option is not a direct match or counter

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<sup>8</sup> *Southern Local Government Officers Union Inc v Christchurch City Council* [2007] ERNZ 739.

balance to the ability of employees to engage in partial strikes, as the employer still suffers a corresponding adverse consequence in the form of a loss of productivity.

### ***United Kingdom***

In the United Kingdom, employers may deduct pay from employees taking part in full or partial strike action. An employer is entitled to refuse partial performance by an employee of their duties. The employer can instruct employees that they should only attend work when they are prepared to work in full compliance with their employment agreement. Until they do so, they will have no entitlement to be paid. Alternatively, an employer may accept partial performance and reduce pay accordingly. This raises the question of how an employer may assess the level of deduction to be made from an employee's wages in the event of a partial strike.

*Miles v Wakefield* found that the reduction in wages does **not** have to be proportionate to the reduction in performance of the employee. Although Mr Miles was carrying some of his duties on Saturdays, he was not paid for any work that he undertook on Saturdays. This principle was also exemplified in the 1989 case of *Wiluszynski v London Borough of Tower Hamlets*.<sup>9</sup> In that case, employees were instructed by their union not to answer elected members' queries. Responding to such queries formed only a very small part of the employees' roles. The London Borough of Tower Hamlets warned the employees, including Mr Wiluszynski, that until they were prepared to work normally and undertake all of their duties, any work carried out would be regarded as voluntary and would not be paid. The employees were not suspended from duty, but were told that their presence on the Council's premises was not required until they were prepared to resume normal working. Mr Wiluszynski was one of the partially striking employees. Consequently, the Council withheld Mr Wiluszynski's whole salary for the duration of the partial strike.

Following the House of Lords in *Miles v Wakefield*, the Court of Appeal found that the fundamental principle is that an employee who sues for remuneration under a contract of employment must aver and prove that he was ready and willing to discharge his own obligations under that contract. The Court of Appeal held that, as *Miles v Wakefield* had established that an employee is not entitled to remuneration under the contract of employment unless he is willing to perform that contract, the Council was entitled to say to Mr Wiluszynski that if he did not fulfil his full range of duties, he would not be paid and should not attend work.

Mr Wiluszynski was not entitled to pick and choose what work he was willing to do under his contract. The Court of Appeal held that he could not have it both ways – he could not refuse to comply with his contract yet demand payment under that contract. The Court of Appeal also held that the Council could not have it both ways – having told Mr Wiluszynski that he did not have to attend work; the Council could not give him directions to work and refuse to pay him. Managers at the Council had been instructed not to pass work on to the striking employees and striking employees were reminded daily that any work they did was voluntary.

The Court found, however, that it was reasonable for the Council to allow staff involved in the dispute to come and go as they wished. The Council could not be expected to take action physically to prevent staff from entering the premises – a lockout was impractical and would simply have worsened relations. Ultimately, the Court of Appeal held that Mr Wiluszynski was in breach of his contractual obligations and the Council was, therefore, entitled in refusing to pay him and had done nothing by way of giving him directions to work or otherwise which disentitled it from asserting that position.

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<sup>9</sup> *Wiluszynski v London Borough of Tower Hamlets* [1989] IRLR 259.

Mr Wiluszynski had only refused to undertake a very small portion of his duties. Nonetheless, the Court of Appeal accepted the Council's position that Mr Wiluszynski was entitled to no pay at all for the days on which he refused to undertake his full duties. This case has very particular circumstances in that the Council specifically informed the striking employees that they would not be paid, continued to inform them of this daily, did not require their presence at work, and did not direct them to undertake any work. However, it demonstrates that the situation in the United Kingdom is the polar opposite from New Zealand. Under New Zealand law, a partially striking employee is entitled to full wages. Under United Kingdom law, a partially striking employee is entitled to no wages.

### *Australia*

On the face of it, the situation in Australia is much less complicated than in either New Zealand or the United Kingdom as it is specifically dealt with in statute. Under Australia's Fair Work Act 2009, if employees undertake "partial work bans" the employer has a range of options from which to choose how to respond. A partial work ban is the Australian term for what we refer to as a partial strike – employees performing part of their duties but refusing to undertake others.

Under s 471 of the Fair Work Act, an employer can dock an employee's wages due to the employee refusing to perform part of their duties. The employer must give the employee written notice that, because of the industrial action, the employee's pay will be reduced by a specified proportion. The employer is then entitled to reduce the employee's pay in accordance with that written notice. Regulation 3.21 of Australia's Fair Work Regulations 2009 outlines how the proportionate reduction in payment is to be determined:

- **Step 1:** identify the work that the employee is failing or refusing to perform.
- **Step 2:** estimate the usual time that the employee would spend on performing that work during a day.
- **Step 3:** calculate the time estimated in step 2 as a percentage of the employee's usual hours of work for a day.

The solution is the proportion by which the employee's payment will be reduced for a day.

A second option open to the employer is to inform the employee that they will not be paid at all and refuse to accept the performance of any work by the employee until the employee is prepared to perform all of his or her normal duties. This is equivalent to the ability under New Zealand legislation to suspend the employee for the duration of the strike, but appears to be framed in a less confrontational manner.

Australian employers are, therefore, able to respond effectively to a partial strike. The employee's wages can be reduced in direct proportion to the work that they are not undertaking; or the employee can be suspended on no pay until they agree to fulfil all of their duties. This means that the traditional balance in industrial action between the interests of the employer and employee is maintained during a partial strike. There is equal incentive for both parties to return to the bargaining table.

An employee must be notified of the proposed reduction in wages and is consequently able to decide whether the proposed partial strike action is worth the reduction. If the employee considers that the proposed reduction in wages is not reasonable, the employee may make an application under s 472 of the Fair Work Act and have Fair Work Australia determine the amount by which the payment should be reduced. Fair Work Australia is the Australian national employment relations tribunal (equivalent to New Zealand's Employment Relations Authority).

An employer can only reduce wages from the day *after* written notice is given. Consequently, were the circumstances of the New Zealand Post strike explained above to occur in Australia, the employer would not be able to reduce wages for the day on which the partial strike action occurred. If the Australian employer does not know about the partial strike action – there is still no effective sanction.

It is interesting that whilst the Australian legislation sets out a specific formula for employers to apply in determining the reduction in wages, if the issue is put before Fair Work Australia, that authority has a broad discretion to determine the appropriate reduction in wages. Fair Work Australia's discretion involves taking into account:

- whether the proportion specified by the employer was reasonable having regard to the *nature and extent* of the partial work ban; and
- *fairness* between the parties taking into consideration *all the circumstances* of the case.

Given that the factors to be taken into account by employers and Fair Work Australia are different, it would not be surprising for them to come to different conclusions in relation to the appropriate reduction in wages. The case of *Transport Workers Union v Department of Territory and Municipal Services (ACTION)*<sup>10</sup> demonstrates this. In this case, the employees were bus drivers who gave notice to their employer that they intended to undertake a partial strike by refusing to collect cash fares. In response, the employer issued notices pursuant to s 471 of the Fair Work Act informing employees that their wages for each day, if they took part in the partial strike, would be reduced by two thirds.

The union took the case to Fair Work Australia claiming that a reduction of two thirds was disproportionate and that the collection of fares by drivers would account for no more than five or six minutes of a driver's time on an average shift. The union argued that applying the three step formula in the Regulations would lead to a much smaller reduction in wages.

Fair Work Australia accepted that the employer had to apply Regulation 3.21 but emphasised Fair Work Australia's greater discretion in light of s 472. Fair Work Australia was not required, or allowed, to determine the dispute merely by applying the formula in Regulation 3.21. Ultimately, Fair Work Australia determined that the proportion of two thirds specified by the employer was not reasonable and found that fairness required it to determine a reduction more reasonably representing the "extent" of the action proposed.

This case demonstrates that whilst an employer could undertake an exemplary calculation in applying the formula in Regulation 3.21, Fair Work Australia must take into account different considerations which can substantially alter the final determination. It seems incongruous to have the employer's and Fair Work Australia's calculations being undertaken on substantially different bases.

The second difficulty with the Australian approach is the requirement for employees to appeal the matter to the equivalent of the Employment Relations Authority if they are not happy with the proposed reduction. Industrial action may occur without much notice, and accordingly a more responsive and flexible approach would seem to be preferable.

## Proposed Solution

The obvious solution to the imbalance of power currently created in New Zealand by the ability of employees to undertake partial strikes with no reduction in wages is to provide a mechanism for the proportionate reduction of wages in such situations. The approach taken in the United Kingdom of docking a partially striking employee's wages completely would not fit well in the New Zealand

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<sup>10</sup> *Transport Workers Union v Department of Territory and Municipal Services (ACTION)* [2010] FWA 4558.

context as it does not appear to accord with the principle of good faith. Furthermore, it appears to distort the balance of power between the parties in favour of the employer.

Whilst the Australian scheme provides flexibility and seeks to address the power imbalance issues, the difference in the tests to be applied by the employer and Fair Work Australia in assessing the reduction in pay, appears to encourage litigation. New Zealand needs to find a flexible solution to the problem that fits within the New Zealand context and is relatively easy to implement. Firstly, the solution needs to allow for a reduction in wages that is fair and proportionate to the employee's reduction in work. As the employer and employee are likely to disagree on the appropriate reduction in wages, it is necessary to provide quick access to an independent decision maker.

In the New Zealand scheme, Labour Inspectors are independent experts who already have a statutory role in determining pay issues applying broad discretion. The ERA could be simply amended to enable an employer to reduce the wages of a partially striking employee in the amount to be determined by a Labour Inspector. In making such a decision, the Labour Inspector would hear from both parties and have discretion to determine the issue in accordance with the principles of natural justice.

Rather than allowing one of the parties to make a decision on reduction in the first instance, likely leading to disputes in the majority of situations, the initial decision would be made by an independent authority. Parties wishing to dispute the Labour Inspector's determination could appeal to the Employment Relations Authority. This would allow a fast, effective and flexible response to employees undertaking partial strike action.

Taking this step would redress the current imbalance of power that exists in industrial action, and would create an incentive for both parties to return to the bargaining table. This is surely consistent with the principles of the ERA 2000.

## **Post Script**

Subsequent to writing this paper, there have been two developments. Firstly, the National led Government has announced its intention to amend the ERA to address the issue of partial strikes – the mechanism is still unclear. Second, the Employment Relations Authority has referred a case to the Employment Court which deals directly with this issue.<sup>11</sup> That case is due to be heard in April 2012.

Whether the Employment Court's decision supersedes the need for legislative intervention remains to be seen.

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<sup>11</sup> *NZPSA v Secretary for Justice* [2011] NZERA 528 9428.

## Revisiting *Stokes Valley*: Trial Periods and Statutory Interpretation

SCOTT WORTHY\*

The introduction of up to 90 day trial periods for employees in 2009 and their extension from employers with fewer than 20 employees to cover all employers earlier this year has generated much debate.<sup>1</sup> Those in favour of the change argued that 90 day trials would encourage employers to hire new and possibly jobless employees and provide much needed flexibility in employment arrangements. Those against argued that the change was exploitative of trial employees, destructive to their confidence and denied employees access to basic employment rights. That policy debate is interesting and will, no doubt, continue. However, discussion of the merits of 90 day trials has overshadowed the substantive effect of trial periods and how the relevant legislation has been and should be interpreted. Addressing the effect and interpretation of trial periods is the subject of this paper. Trial periods may, or may not, be here to stay but understanding how the Employment Court has interpreted trial periods and the methodology of that interpretation has lasting implications for employment law.

In *Smith v Stokes Valley Pharmacy (2009) Ltd*,<sup>2</sup> Chief Judge Colgan examined for the first and, until recently the only time in the Employment Court,<sup>3</sup> the interpretation of trial periods. His Honour's judgment, produced under some urgency, carefully examines trial periods in the context of the Employment Relations Act (ERA) 2000 (the Act). In doing so, the Court makes a number of important observations and decisions regarding trial periods while acknowledging that many issues regarding the interpretation of trial periods remain open. This paper explores two aspects of the interpretation of trial periods which are apparent in that judgment. First, the paper considers the strict interpretation given by the Court to the trial period provisions because, the Court argued, they restrict access to justice. Secondly, and relatedly, the paper examines the way legislative history was used to give meaning to the trial period provisions. In both these cases, the paper argues that although the Court was correct to employ strict reading and legislative history to give meaning to trial periods, the Court may, with respect, have erred in aspects of the application of those approaches to trial periods. The paper concludes by discussing how the Court saw the relationship between the trial period provisions and the remainder of the ERA. In this aspect of its decision, the Court gives valuable guidance as to how amendment acts should be reconciled with the primary act.

### The *Stokes Valley* Decision

The facts in *Stokes Valley* are straightforward but they turn out to be decisive. Heather Smith was a 33 year old employee who had worked in a variety of retail positions, including at a supermarket and a chain store. In March 2007, she began work as a retail pharmacy assistant at the Ross Cook Amcal Pharmacy in Stokes Valley. Her employer was Stokes Valley Pharmacy Ltd and she worked under the supervision of Mr. and Mrs. Cook, the pharmacist and his wife. In her 2 and a half years at the pharmacy, Ms Smith developed skills in retail pharmacy and was well regarded by her employer; she enjoyed working at the pharmacy.

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<sup>1</sup> See, for example, the differing perspectives on trial periods in [2010] ELB 79-83. The views expressed in this article are entirely the author's own.

<sup>2</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253.

<sup>3</sup> See the recent decision of *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152.

In August 2009, the Cooks decided to sell their business. The method of sale was that Stokes Valley Pharmacy Ltd would sell the business as a going concern to Stokes Valley Pharmacy (2009) Ltd. Stokes Valley Pharmacy (2009) Ltd was owned by both Mr. Paul Kearns and Ms. Karen King, who would operate the pharmacy, and a large pharmacy operator, Pharmacy Brands. The Cooks informed staff that, in these circumstances, there could be no certainty of ongoing employment but those employees who wished to stay on with the new company were welcome to apply to be interviewed. Ms Smith duly applied and after an interview was offered a position. She was given a letter of offer and an employment contract. Clause 10 of that employment agreement contained a trial period of 90 days which purported to be a trial provision within the meaning of the ERA 2000 as amended. The employment agreement was expressed to be not retrospective and to replace any previous understanding between the parties. Before Ms. Smith signed her employment agreement or Ms. King or Mr. Kearns took over the pharmacy, Ms. Smith had some time to consider the agreement and asked Ms. King some questions about it.

Ms. King and Mr. Kearns took over operation of the pharmacy business on 1 October 2009. Ms. Smith worked, as she normally had on that day. The next day, 2 October 2009, she sat down with Mr. Smith and, after asking some questions about the trial period, she signed the employment agreement.

Within a short time it became clear that Mr. Kearns and Ms. King were dissatisfied with Ms Smith's job performance. On 8 December 2009, Ms. Smith was informed that she was dismissed under the trial provision. Crucially, both employers declined to go into any detail about why they had dismissed Ms. Smith, apart from saying generally that Ms Smith was not what they were looking for and that she was inexperienced. Within 60 days of her dismissal, Ms. Smith's representative wrote seeking reasons for the dismissal pursuant to s 120 of the ERA, which requires reasons to be given in such circumstances. This request was declined, with Ms Smith's former employer relying on the trial period provision s 67B(5)(b) which does not require reasons to be given under s 120 when the dismissal takes place during a trial period.

Summing up the factual situation, the Chief Judge observed:<sup>4</sup>

In many ways this was a not uncommon employment situation. Ms. Smith was an established and experienced retail assistant on a relatively low hourly rate of pay and very dependent on her job and earnings for her economic survival and that of her family. In employment relationships, she was on her own in the sense that she did not have access to advice from a union or from expert knowledgeable friends or family. Ms. Smith accepted at face value what she was told by her employer and was loath to challenge or otherwise rock the boat because of her vulnerable economic circumstances. ... Ms. Smith appreciated that there might be some risk in agreeing to the terms stipulated for by her employer but hoped, based on her past record, that this would be minimal and that things would work out and go well. ... Mr. Kearns and Ms. King were young recent migrants, professionally qualified in their specialist field, but inexperienced in owning and operating their own business and in the employment relations aspect of that in particular.

With these facts in mind, the Chief Judge then went on to interpret and apply the trial provisions as they stood at the time of dismissal in December 2009. Those provisions relevantly provided:<sup>5</sup>

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<sup>4</sup> Ibid at [32]-[34].

<sup>5</sup> Section 67A(4) was deleted by the Employment Relations Amendment Act (No 2) 2010 with effect from 1 April 2011. Thus any sized employer may now make use of trial periods.



**67A When employment agreement may contain provision for trial period for 90 days or less**

- (1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer as defined in subsection (4).
- (2) Trial provision means a written provision in an employment agreement that states, or is to the effect, that—
  - (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
  - (b) during that period the employer may dismiss the employee; and
  - (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- (3) Employee means an employee who has not been previously employed by the employer.
- (4) Employer means an employer who, at the beginning of the day on which the employment agreement is entered into, employs fewer than 20 employees.

...

**67B Effect of trial provision under section 67A**

- (1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.
- (2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.
- (3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).
- (4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.
- (5) Subsection (4) applies subject to the following provisions:
  - (a) in observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and
  - (b) the employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

The effect of these provisions is to remove access to personal grievance procedures for those dismissed under a valid trial period. That trial period must be in writing, not exceed 90 days, commence at the beginning of employment and applies only to an employee who has not been previously employed by the employer. All the normal rights of employees, including the rights not to be dismissed on unlawful discrimination grounds remain, subject to the specific exemptions in s 67B. As the Chief Judge has noted:

The new sections are neither simple nor the very broad and blunt prohibition against bringing legal proceedings that is sometimes portrayed rhetorically. They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded.<sup>6</sup>

## Strict Reading

In deciding *Stokes Valley*, the Chief Judge determined that ss 67A and 67B should be interpreted strictly. His Honour explained the reasoning for that decision in this way:<sup>7</sup>

Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in and dismissals from employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.

The Chief Judge then went on to apply a strict reading of ss 67A and 67B in two ways. First, he held that Ms. Smith was not bound by the trial period because she had been previously employed by her employer on 1 October 2009 before agreeing to the trial period the next day. In addition, the Court considered that because of Ms. Smith's retail work experience, she was not the type of employee for which trial periods had been designed. The Court suggested that this was another reason as to why Ms. Smith could not be subject to a trial period. Secondly, the Court held that Ms. Smith was, notwithstanding the exemption to s 120 provided in s 67B(5)(b), entitled to oral reasons as to why her employment had been terminated because the duty of good faith requires employers and employees to be responsive and communicative with each other.

The Chief Judge began his reasoning for applying a strict reading with a statement that employee access to a personal grievance procedure is a longstanding employee right. The personal grievance procedure in the current ERA was first introduced in a recognisable form into New Zealand law in 1973. That year's Industrial Relations Act introduced, via s 117, the concept of unjustifiable dismissal as distinct from what the common law termed wrongful dismissal. That change was significant as it broadened the ability of employees to challenge dismissals, moving away from the limitations of common law wrongful dismissal.<sup>8</sup> A personal grievance procedure has been carried over throughout the significant changes made to employment law since the 1970s, culminating in s 103 of the current ERA. It is also important to note that the current Act appears to abolish the common law right to sue for wrongful dismissal because s 113 of the Act provides that the only way to challenge a dismissal is through the personal grievance procedure in the Act. This eliminates any possible argument that, in limiting the personal grievance procedure through trial periods, Parliament was merely altering a statutory process that it itself invented. Because access to the personal grievance procedure is the only way to contest a dismissal in a New Zealand judicial body, it is clear that the effect of ss 67A and 67B is to remove previous and longstanding rights of access to the courts for judicial determination and relief.

The Chief Judge also stated that, because the trial provisions remove that access to justice, they should be read strictly. The principle of interpretation that express words are required before a limitation will be imposed on a citizen's access to the courts has a long heritage. Where possible,

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<sup>6</sup> *Stokes Valley*, above n 2, at [83].

<sup>7</sup> *Stokes Valley*, above n 2, at [48].

<sup>8</sup> Bill Hodge "The Exaltation of Procedure" (paper presented to the Employment Law Conference, 1996) at 7-9.

courts will read down or interpret strictly such provisions so as to narrow their effect and preserve access to the courts. This is because, as Chief Justice Elias has put it, “[a]ccess to the Courts for vindication of legal right is part of the rule of law.”<sup>9</sup> As Avory J expressed the principle in *Chester v Bateson*:<sup>10</sup>

In my opinion there is not to be found in the statute anything to authorize or justify a regulation having that result; and nothing less than express words in the statute taking away the right of the King’s subjects of access to the Court of justice would authorize or justify it.

So, ingrained is the principle that it prompted the majority of the Court of Appeal, after referring to *Chester v Bateson*, to state that:<sup>11</sup>

Indeed we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.

The principle has also been employed in the Employment Court. In *Swann v ACI NZ Ltd and NZ Amalgamated Engineering Etc IUOW*,<sup>12</sup> the Employment Court’s predecessor, the Labour Court, accepted the submission that “there is a presumption that clear and express words are required to remove a citizen’s right of access to the Court.”<sup>13</sup> In *Ngapuhi Fisheries v Taurua*, the Court decided that it could not have been Parliament’s intention, at least without using clear words, to remove existing procedural rights in the transitional provisions of the current ERA.<sup>14</sup> Chief Judge Colgan, in his concurring judgment in *Credit Consultants Debt Services NZ Ltd v Wilson (No 4)*,<sup>15</sup> also referred to this principle in expressing his reluctant agreement with his full Court colleagues that the Employment Court had lost its power to grant injunctions except in relation to strikes or lockouts. As this long history of the application of the principle makes clear, a strict reading of provisions with restrict access to the courts is an appropriate and necessary protection of the rule of law and the principle of legality.

My difficulty with the Court’s approach comes not in the Court’s decision to read ss 67A and 67B strictly but in the Court’s application of a strict reading in this case. It is clear that the Court, although not stating so explicitly, gives a strict reading to s 67A(3) which defines an employee who may enter into a trial period as “an employee who has not been previously employed by the employer.” After correctly concluding that Ms. Smith was not an employee as defined in the statute because she had been previously employed by the employer, albeit for one day, the Court went on to state that:<sup>16</sup>

Even ignoring the legal position just determined, Ms Smith could hardly have been described as a “new” employee except in the narrow and technical sense that she had not previously been employed by the defendant company which purchased the business of her previous employer and took on many of its existing staff including her. She was 33 years of age with a history of diverse retail sales experience including, most recently, more than 2½

<sup>9</sup> *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [1].

<sup>10</sup> *Chester v Bateson* [1920] 1 KB 829 at 836.

<sup>11</sup> *New Zealand Drivers’ Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 390 per Cooke, McMullin and Ongley JJ.

<sup>12</sup> *Swann v ACI NZ Ltd and NZ Amalgamated Engineering Etc IUOW* (1990) ERNZ Sel Cas 909.

<sup>13</sup> *Ibid* at 919.

<sup>14</sup> *Ngapuhi Fisheries v Taurua* [2002] 1 ERNZ 562 at [34].

<sup>15</sup> *Credit Consultants Debt Services NZ Ltd v Wilson (No 4)* [2007] ERNZ 446.

<sup>16</sup> *Stokes Valley*, above n 2, at [89]. However, see the Chief Judge’s comment and clarification of the reasoning in this paragraph of *Stokes Valley* in *Blackmore*, above n 3, at [111]-[112].

years working satisfactorily in the actual business that was purchased by the defendant. There is no suggestion on the evidence that there was any element of employment risk for either party of the sort that was said to be the philosophy behind the enactment of ss 67A and 67B.

The Court appears to be saying that, despite the definition of employee which excludes only previously employed employees from the operation of a trial period, Ms. Smith is not eligible for a second reason, namely that she was not, because of her retail experience; the sort of risky employee that trial periods were designed to help into the workforce. In part, that conclusion is based upon a misreading of the legislative history where the Court impermissibly equates the definition in the ERA of a trial period eligible employee with the Court's own conception of a "new employee" which the Court bases on the examples of new employees discussed in Parliament. I will come back to that point in the next section of this paper; but the conclusion is also based on giving the definition of employee a strict reading which reads down the application of the definition to exclude well qualified or experienced employees (based on the legislative purpose of trial periods), not merely employees previously employed by the same employer.

It is well to focus on the words and meaning of s 67A(3), but those words are capable of only one fair meaning and, that is, employees who were previously employed by the employer may not be the subject of a trial period. This has two effects. First, any employee who is a current employee of the employer and, already began the employment relationship, may not be subject to a trial period. This includes employees who have worked for the employer for one day, like Ms. Smith, or 30 years. Second, the definition excludes those who have worked for the employer and then left employment but who now wish to return to the same employer.

Given this clear language, the Court's attempt to further narrow the pool of employees ineligible for a trial period, thus preserving the access of those employees to the courts, is impermissible. As Lord Reid described, the principle of strict interpretation of an ouster clause in *Anisminic Ltd v Foreign Compensation Commission*:<sup>17</sup>

It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly – meaning, I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

With respect to the meaning of employee, the statutory definition is reasonably capable of only one meaning. A strict reading of the definition which narrows the range of employees eligible for a trial period is not possible.

The Court itself makes the point that there must be two possible meanings for the strict meaning to be preferred when it analyses whether an employer is entitled to refuse to give reasons for dismissal to an employee terminated under a trial provision. Section 67B(5)(b) states that an employer is not required to comply with s 120 of the ERA which mandates that employers must provide written reasons for the dismissal on request within 60 days of the dismissal. The effect of s 120 is to put the employee in a position of knowing the real or purported reasons for his or her dismissal before the 90 day limit for raising a personal grievance expires. Section 120 is, therefore, an important provision that is implicated in the decision by an employee whether to raise a personal grievance at all; it is a significant part of the personal grievance mechanism. It affects both decisions about raising a personal grievance and provides a basis for an employee to argue to the Employment Relations Authority or to the Court that the dismissal was unjustified.

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<sup>17</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) at 170.

In interpreting s 67B(5)(b), the Court, in essence, considered that s 67B(5)(b) could have two meanings. First, it could act to exclude the possibility of an employee receiving a reason for his or her dismissal. After all, the whole point of 90 day trials is to allow an employer to dismiss an employee without risk of the employer's reasons being subject to the scrutiny of the courts which could normally occur. However, a second interpretation of s 67B(5)(b) is that it merely removes the requirement under s 120, leaving most of the other requirements of good faith including the requirement to be responsive and communicative in s 4(1A)(b) of the Act in place. The Court, applying a strict interpretation that minimised the intrusion on the rights of employees under the Act, rightly chose the second interpretation.<sup>18</sup> That is, because, in the case of s 67B(5)(b), there were two possible interpretations consistent with the statutory language and purpose and reasonably available to the Court.

To be clear, the Court was correct in holding that Ms. Smith was not eligible for a 90 day trial because she had been previously employed by the employer. However, despite an appropriately strict reading of the statute, the Court was incorrect to suggest that Ms. Smith's experience was also disqualifying. That construction is not a possible meaning of the statute and not a meaning open to the Court; Parliament had expressed itself well enough in its decision to debar trial periods only from those previously employed by the employer.

## Legislative History

The Court in *Stokes Valley* examines the legislative history of the Employment Relations Amendment Act 2008 in detail. It does so in order to flesh out the purpose of the Act in order to comply with the injunction of s 5 of the Interpretation Act 1999 which requires that the "meaning of an enactment must be ascertained from its text and in the light of its purpose." Since the abandonment of the exclusionary rule for legislative history in 1986,<sup>19</sup> New Zealand courts have regularly referred to legislative history to clarify the meaning of statutes. This is both because the courts increasingly view meaning as contextual and because courts are required to address the purpose of the legislation they seek to interpret. As Justice Keith has stated: "meaning is not to be ascertained *only* from the immediate text. The surrounding law and often other material will be relevant ..."<sup>20</sup> and with respect to purpose, Justice Tipping, writing for the Supreme Court, has stated that:<sup>21</sup>

It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. ... Where, as here, the meaning is not clear on the face of the legislation, the Court will regard context and purpose as essential guides to meaning.

In discussing the legislative history, the Chief Judge focused on discerning the reasons that were given in Parliament as to why trial periods were necessary. His Honour quotes from the explanatory note to the bill, the "Bills digest" and from two passages from the Minister of Labour's speeches in

<sup>18</sup> This interpretation is also preferable for the reasons discussed in the third section of this paper.

<sup>19</sup> *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA) at 701.

<sup>20</sup> *R v Pora* [2001] 2 NZLR 37 (CA) at [104] (emphasis original).

<sup>21</sup> *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]-[24].

the House at the first and second readings. The quotation from the explanatory note includes the following passage:<sup>22</sup>

This Bill will provide opportunities for those who might suffer disadvantage in the labour market, for example employees who are new to the workforce or returning to the workforce after some time away or specific groups at risk of negative employment outcomes.

Also excerpted is this passage from the first reading speech by the Minister:<sup>23</sup>

The Bill will give ... new employees the opportunities to get on the employment ladder. It will provide opportunities for those who might suffer disadvantage in the labour market — for example, employees who are new to the workforce or returning to the workforce after some time away, or specific groups at risk of negative employment outcomes.

These passages quoted by the Court are a fair reflection of the justification for trial periods given by promoters of the bill. In essence, trial periods would allow employers to take on employees who suffered from risk factors, such as inexperience, time away from the workplace or employees who had difficult personal histories. As the Chief Judge summed up the legislative history:<sup>24</sup>

The new provisions in ss 67A and 67B were intended to address the circumstances of “new” employees, that is, of people who had not previously been employed or who had not been employed recently or for whom obtaining employment might have proved difficult for any other reason. The scheme of the provisions, as it was promoted, was to allow employers some latitude in engaging and dismissing new employees in respect of whom there might be some risk of compatibility or other work performance issue.

This recourse to legislative history in order to understand the purpose of the bill is both unexceptional in modern New Zealand judgments and unobjectionable.<sup>25</sup> However, the potential difficulties with legislative history usually arise when this parliamentary history and purpose is applied to interpreting the statute. Indeed, the application of the legislative history to the statute in this case reveals some of the inherent dangers that a court can face when using parliamentary history and, in particular, relying on parliamentary debates.

The first difficulty is that by focusing on what was said in Parliament, the court takes its eye off the statutory text. Thus, when considering whether Ms. Smith was an employee previously employed by the employer and, therefore, ineligible for a trial period, the Court in the passage I have previously highlighted above reflects on the fact that Ms. Smith was not an employee with the risk factors used in Parliament to justify the introduction of 90 day trials. Because Ms Smith had substantial retail experience and had not been out of the workforce, the Court suggests she was not the sort of “new employee” that Parliament thought trial periods would apply to and, therefore, not potentially subject to a trial period. Thus, the Court uses the legislative history to fashion an alternate meaning for the statutory definition which it then prefers on the strict reading grounds that this meaning excludes fewer employees from the personal grievance procedures.

The Court has, therefore, used legislative history in a way that strays dangerously far from the text which is being interpreted. This is highlighted by the fact that the discussion of Ms. Smith’s

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<sup>22</sup> *Stokes Valley*, above n 2, at [41].

<sup>23</sup> *Stokes Valley*, above n 2, at [45].

<sup>24</sup> *Stokes Valley*, above n 2, at [49].

<sup>25</sup> For further discussion of the problems of using legislative history see Antonin Scalia *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, Princeton, 1997); Johan Steyn “Pepper v Hart; A Re-examination” (2001) 21 OJLS 59.

eligibility for a trial period is headed “A “new employee”?” In fact, the phrase “new employee” appears nowhere in ss 67A and 67B and where the quotation marks arise from is uncertain. The only possibility is that this phrase is used in the legislative history quoted by the Court. However, the Court’s task is not to establish whether Ms. Smith was or was not a “new employee” but whether she had been previously employed by the same employer. This error is of the type cautioned against by Justice McGrath, writing extra-judicially when he argued that:<sup>26</sup>

I suggest that Judges should always be mindful that *Hansard*, along with other parliamentary materials, can be deceptively alluring in the search for purpose in order to clarify meaning. The extrinsic aid cannot carry more weight than the section itself.

This focus on interpreting “new employee” in the Court’s judgment also illustrates another danger of legislative history: that parliamentary history may be false advertising. It is clear that parliamentary speeches rarely do anything to persuade members opposed to the Bill to change their minds; that is not the purpose of speeches in the House. Rather, the speeches are political and policy arguments designed for public consumption and, in the case of government members, are made to justify the contents of the Bill. Thus, the government argued that trial periods would only apply to “new employees” as a way to sell the Bill irrespective of the precise words of the statute. Similarly, Part 6A of the Act, which provides that some employees may transfer to a new employer after restructuring, was justified as a necessary protection of “vulnerable employees.” In fact, the employee transfer provisions do not apply to “vulnerable employees” but to *all* employees who provide services of the type listed in Schedule 1A of the ERA regardless of their individual pay or conditions.<sup>27</sup> Courts must be careful when cross-checking text with purpose that they are not taken in by potentially misleading political labels such as “new employee” or “vulnerable employee”.

The cross-checking of purpose and text is meant to allow purpose and text to inform each other, not for one to overwhelm the other. Courts must disenthral themselves of any notion that parliamentary history can subsume the text. I would suggest that such caution is particularly appropriate in employment law where the Act contains some lacunae that the Court must do its best to fill in, and examination of purpose and legislative history can be useful sources for interpretation. Parliamentary materials can, therefore, be an important guide in an area of law where sometimes the signposts are few and far between. As Jeffrey Goldsworthy has argued, the literal meaning of a provision is much less substantial than a meaning fleshed out by evidence of intention.<sup>28</sup> However, parliamentary materials must be used carefully and as part of a holistic approach to interpretation which relies, in the end, on the words of the statute, their statutory context and their purpose as gleaned from the statute and its legislative history.

The third difficulty with the use of legislative history that *Stokes Valley* exemplifies is what Professor Jim Evans has described as the danger of “confusing the meaning of the Legislature with its views about application.”<sup>29</sup> The passages of legislative history cited by the Court lead the Court to the conclusion that the legislative purpose of trial periods was to allow employers to take on risky employees, that is, employees who may have had a difficult or non-existent employment history, employees who were returning to the workforce or employees who had no relevant work experience. Trial periods were to allow this employee to get a foot in the door and demonstrate his or her capabilities. The Court then takes this purpose as informing the meaning of the trial period provisions. However, that political justification and the related examples of benefitting employees

<sup>26</sup> John McGrath “Purpose, *Hansard*, Rights, and Language” in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 227 at 231.

<sup>27</sup> *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 44 at [52].

<sup>28</sup> Jeffrey Goldsworthy “Parliamentary Sovereignty and Statutory Interpretation” in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 185 at 191.

<sup>29</sup> Jim Evans “Controlling the Use of Parliamentary History” (1998) 18 NZULR 1 at 26.

do not require a meaning of s 67A(3) which exempts experienced employees from being subjected to trial periods. In suggesting that this is the case, the Court is confusing the examples of the application of the Bill stated in the House with its meaning. As I have argued, the definition of employees exempted from trial periods is clear; the application examples do not define the meaning of the definition, but merely provide examples of its effect. There is no other meaning of previously employed by the employer available and, in the context of the remainder of ss 67A and 67B, the language is unambiguous.

The fact that the meaning of the s 67A(3) definition of employee sweeps wider than the examples given in the House is not surprising if the purpose of trial provisions is correctly understood. As a focus on the text of ss 67A and 67B makes clear, the purpose of those provisions is to exempt employers from the personal grievance procedures in relation to employees who have not been previously employed and who are, therefore, not known to the employer. The purpose of the provisions is to remove the risk that an employee will be unproductive or unsatisfactory for the employer and the associated risk that the employee will contest his or her dismissal. The examples of risky employees given in the House are consistent with this purpose. The examples themselves, however, are not the same thing as purpose or meaning. Interpreted as they must be in light of the text and the purpose, trial periods may be agreed between employers and employees who have not been previously employed and are, therefore unknown, to the employer. While the House may have given examples of risky employees to justify trial provisions, the effect of those provisions is much broader and more than just risky employees may have trial provisions in their employment agreements.

Again, it is important to point out that the Court's decision to have recourse to legislative history is correct. Such history can provide valuable context to the interpretive task. However, as I have argued, legislative history must be carefully used and its limits well qualified.

## **Relationship of Trial Provisions to the Remainder of the Act**

This discussion and elucidation of the purpose of the trial provisions highlights the fact that the ERA has been frequently amended by governments of various political hues and will likely be so again. The Act itself is the latest in a long line of legislative attempts to regulate employment relationships which have ranged from periodic revolution to tinkering with New Zealand's employment law. These acts have each had their own philosophical approaches and purposes. What the recent amendments to the ERA indicate is that, within the same piece of legislation, different parts of the Act may have different purposes. These purposes could even be seen as conflicting with the purposes of other parts of the Act.

In itself, this would not cause any immediate theoretical difficulty. Section 5 of the Interpretation Act 1999 allows for the meaning of an enactment to be interpreted from the text and in light of its purpose. Thus, as in *Stokes Valley*, the meaning and purpose of an enactment is to be obtained from the text of the amending Act and the parliamentary material relating to that amending Act. Such an approach respects the right of Parliaments to make changes to Acts which reflect the different perspective of the new Parliament. Equally, however, once an amending Act is passed, its meaning draws context from the surrounding Act which presumably embodies the purposes of the original legislation. This is consistent with s 23 of the Interpretation Act 1999 which provides that an "amending enactment is part of the enactment that it amends." As the English Court of Appeal has noted: "[W]hat is to be looked at is the amended statute itself as if it were a free-standing piece of



legislation and its meaning and effect ascertained by an examination of the language of that statute.”<sup>30</sup>

In the area of employment law, philosophical and ideological differences that lead to changes to employment law can be relatively stark. At the beginning of this paper, I noted that trial periods were controversial. It can be expected that a change in government would likely lead to their abolition and future governments may then act to reinstate them. At the present time, trial periods sit somewhat uneasily with the requirements of the Act for employees and employees to act in good faith in all aspects of their relationship and for employers to justify both procedurally and substantively their decision to dismiss an employee. It could be said that the purposes of the remainder of the Act which, in the main, place significant burdens on employers and closely regulate employers to address the inherent imbalance of power between employer and employees are not consistent with the trial period provisions. These internal contradictions as to purpose may make reconciliation of the meaning of the statute peculiarly difficult.

In *Stokes Valley*, the Court carefully relates the provisions of the trial periods to the remainder of the Act. As I have noted, the Court concluded that, despite trial period employers being exempt from the requirements of s 120, Ms. Smith had a right to an explanation of the reasons for her dismissal based on the duty of good faith. This gave effect to the good faith duties which pervade the Act. In part, this is justified by an appropriately strict reading of the provision which affects the ability of an employee to access the personal grievance procedure. However, notwithstanding a strict reading, this interpretation of the Act is justified because it reflects the continuing and significant obligations that exist despite the trial period exception. As s 67B(4) states, an employee whose employment agreement contains a trial provision has all the rights of any other employee except with respect to the two matters referred to in subsection 5. While the purpose of the trial provisions was to remove the risk for employers of being subject to the personal grievance procedures in the first 90 days of employment, the text makes clear that good faith duties of communication remained in place and trial employees are generally to be treated no differently than other employees. It is notable that ss 67A and 67B make reference to other provisions of the Act and this is a clear indication that Parliament intended the trial period provisions to sit alongside and interact with existing provisions in the Act. In this respect, *Stokes Valley*'s careful elucidation of the effect of an amending act on existing rights and duties under the principal act is a model as to how to interpret future amending legislation in ways which resolve any potential tension between the old and the new.

## Conclusion

Appropriately, in this employment law context, the legal philosopher, Andrei Marmor, has described courts working to interpret statutes as employees carrying out their duty in good faith for their employers, the legislature. Thus, it is possible to see that, in a “moral-political sense, to some extent courts do work for the legislature, and thus, indirectly, for all of us.”<sup>31</sup> Of course, it would be unwise to push this analogy too far, and perhaps detrimental to the rule of law to do so. In many respects, courts act more like guardians of the law than employees of the legislature and this is especially so when the courts restrain executive action and the executive's interpretation of the law.<sup>32</sup> As the recent Supreme Court decision in *Hamed v R*,<sup>33</sup> which excluded evidence in some prosecutions related to the Urewera raids demonstrates, courts can be inconvenient employees.

<sup>30</sup> *Inco Europe Ltd v First Choice Distribution (a firm)* [1999] 1 All ER 820 at 823.

<sup>31</sup> Andrei Marmor *Law in the Age of Pluralism* (Oxford University Press, New York, 2007) at 204.

<sup>32</sup> Sian Elias, Chief Justice of New Zealand “Fundamentals: a constitutional conversation” (Harkness Henry Lecture 2011, University of Waikato, Hamilton, 12 September 2011).

<sup>33</sup> *Hamed v R* [2011] NZSC 101.

However, Marmor is on to something when he points out that at “some point [courts] must act like a good employee when instructions have run out: use your own judgment and solve the problem [of statutory interpretation] as best you can.”<sup>34</sup> After all, it *is* the function of the courts to say what the law is and, in this respect, it is not too far-fetched to describe courts as acting as an agent of the legislature. In *Stokes Valley*, the Employment Court was faced, for the first time, with new legislation which was complex and substantially affected employee rights. It appropriately resorted to legislative history to create context and purpose for the text and to a strict reading to preserve rights. The decision to use both approaches was correct and protective of both parliamentary sovereignty and individual rights.

The criticisms in this paper have focused on the way legislative history and strict reading were applied. In particular, I have argued that there is no alternative meaning to the definition of employees eligible for a trial period and a strict reading of that definition is impermissible. I have also argued that the Court strayed too far from the text in interpreting the definition and confused the meaning of the statute with the examples of its application envisioned by members of Parliament. I have suggested that when courts make use of legislative history, as they should when interpreting statutes, they must be careful to contextualise parliamentary materials in a way which does not undermine the text of the statute. Cautious, but appropriate use of legislative history can illuminate text and purpose. However, this paper has highlighted the limits of reasoning from legislative history and argued that recourse to parliamentary materials is not a straightforward exercise but a complex dance between parliamentary and statutory texts, purpose and meaning.

At the same time, I have noted the valuable lessons of *Stokes Valley*. The case provides guidance as to how to reconcile amendments to an act with the remainder of a principal act. *Stokes Valley* is also an example of a court acting to strictly read the provisions of an act in a way protective of existing legal rights. Finally, it should be noted that the Court got it right in *Stokes Valley*. Ms. Smith was not eligible for employment under a trial period because she had already been previously employed by the employer. In that conclusion, the Court was itself acting as a good employee faithfully reflecting the parliamentary intent of the legislature and the purpose and meaning of the statute. We can all be grateful that we have such an independent, effective and judicious court as *our* employee.

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<sup>34</sup> Marmor, above n 31, at 204.

## Returning Dignity to Labour: Workplace Safety as a Human Right

JONATHAN BARRETT and LEIGH THOMSON\*

### Abstract

Universal human rights are derived from respect for human life and the inherent dignity of the person. As signatory to all major United Nations' human rights instruments, New Zealand is a 'human rights State'. However, New Zealand workers experience high levels of occupational accidents and workplace death, particularly in the mining industry where, it appears, profit commonly takes precedence over safety. The Pike River mine explosion, in which 29 men were killed, is an egregious example of the quotidian risks many New Zealand workers face. This subordination of human dignity and life to financial considerations is incompatible with basic human rights principles. In this article, we argue that the current reasonably practicable test for workplace safety is insufficient. If the dignity and lives of workers are to be taken seriously, a benchmark akin to the proportionality test of human rights jurisprudence is indicated.

### Introduction

Respect for human life and the inherent dignity of the person fundamentally inform statements of universal human rights. In particular, the preamble to the Universal Declaration of Human Rights (UDHR) (1948) provides that universal human rights are founded on "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family". Human dignity "is concerned with physical and psychological integrity and empowerment".<sup>1</sup> Following the Vienna Declaration and Program of Action:<sup>2</sup>

All human rights are universal, indivisible and interdependent and interrelated ... it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

As signatory to all major United Nations' human rights instruments,<sup>3</sup> New Zealand is a human rights State, and, therefore, required to promote human dignity in all aspects of its citizens' lives.

Despite this comprehensive rights commitment, workers in New Zealand experience high levels of occupational accidents and workplace death that seem inconsistent with respect for human dignity. Indeed, the legislative system for occupational health and safety balances physical and psychological integrity against costs of prevention. Indeed, in the resources industries, financial considerations appear to commonly outweigh worker safety. The 2010 Pike River mine explosion, in which 29 men died, is an egregious example of the quotidian hazards many New Zealand workers face and the ways in which health and safety seem to be subordinate to profit.

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An earlier version of this article was presented as a paper at the New Zealand Labour Law Society Inaugural Conference, Victoria University of Wellington, Wellington, New Zealand, 2 December 2011. The authors would like to thank those who commented on the paper, in particular, Dave Feickert.

<sup>1</sup> *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [5] per Iacobucci J.

<sup>2</sup> Vienna Declaration and Program of Action (25 June 1993), art 5.

<sup>3</sup> Human Rights Commission "New Zealand and the International Instruments" (2008) <[www.hrc.co.nz](http://www.hrc.co.nz)>.

In this article, we argue that subordination of respect for human dignity and life to financial considerations contravenes basic human rights principles, and that the reasonably practicable test for workplace safety used in the Health and Safety in Employment Act (HSEA) shows insufficient respect for human dignity. If the dignity and lives of workers are to be taken seriously, a benchmark akin to the proportionality test of human rights jurisprudence is indicated. This would require express consideration of fundamental human rights when workplace health and safety measures are instituted. The article is structured as follows: health and safety issues in the New Zealand workplace are sketched. Then, the applicability of human rights principles in the workplace is established, using the Pike River mine tragedy as an example. Further, a dignity-based workplace health and safety test is proposed.

## New Zealand's Hazardous Work Environment

New Zealand has approximately 470,000 workplaces and two million workers (Statistics New Zealand, 2010).<sup>4</sup> In the 12 months to June 2011, 85 workplace deaths, 445 serious non-fatal injuries and 30,800 workers' compensation events were recorded.<sup>5</sup> Around 9,600 incidents are reported to the Department of Labour (DoL) annually.<sup>6</sup> Occupational disease is estimated to cause an additional 700-1,000 deaths, and 17,000-20,000 new cases occur each year.<sup>7</sup> The Accident Compensation Corporation (ACC) pays out approximately half a billion dollars a year for work related claims.<sup>8</sup> Injury statistics show certain industry sectors have a high incidence of injury claims and fatalities, and the DoL, in its *Workplace Health and Safety Strategy*, has highlighted agriculture, forestry and fishing, construction and manufacturing in this regard.<sup>9</sup> (Mining was omitted to allow the Department to take into account the outcome of various official investigations and the Royal Commission, 2011.) Underground mining epitomises a very hazardous industry and has a history of "low frequency high consequence events" that result in multiple fatalities – 204 deaths between 1850 and 1998 out of 1,096 deaths in the mining industry.<sup>10</sup> While underground mining is universally hazardous, New Zealand's mining fatality rate is markedly worse than obvious comparators, notably Australia and the United Kingdom.<sup>11</sup>

## Reasonably practicable test

Workplace health and safety in New Zealand legislation uses a basic criterion of practicability. HSEA provides:<sup>12</sup>

In this Act, all practicable steps, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to –

(a) the nature and severity of the harm that may be suffered if the result is not achieved; and

<sup>4</sup> Statistics New Zealand "New Zealand Business Demography Statistics: At February 2010" (2010) <www.stats.govt.nz>.

<sup>5</sup> Department of Labour "The State of Workplace Health and Safety in New Zealand" (2011) <www.dol.govt.nz>.

<sup>6</sup> Ibid.

<sup>7</sup> Tim Driscoll and others "The Burden of Occupational Disease and Injury In New Zealand" (2004) National Occupational Health and Safety Advisory Committee <www.nohsac.govt.nz>.

<sup>8</sup> Department of Labour, above n 6.

<sup>9</sup> Department of Labour "Workplace Health and Safety Strategy for New Zealand to 2015, National Action Agenda 2010-2013" 2011 <www.dol.govt.nz>.

<sup>10</sup> N Gunningham and D Neal "Review of the Department of Labour's Interactions with Pike River Coal Limited 4 July 2011" (2011) Department of Labour <www.dol.govt.nz>; K Warne "A Time to Remember, a Time to Question" (2011) 107 New Zealand Geographic 36, 36-39.

<sup>11</sup> National Occupational Health and Safety Commission *Occupational Injuries – How Does Australia Compare Internationally?* (Canberra, 2004).

<sup>12</sup> Health and Safety in Employment Act 1992, s 2(a)(1).

- (b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
- (c) the current state of knowledge about harm of that nature; and
- (d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and
- (e) *the availability and cost of each of those means.* [Emphasis added]

It is noteworthy that, first, despite establishing a practicable test, this benchmark is qualified and rendered a ‘reasonably practicable’ test; and, second, cost is included in the same calculus as risk of harm to human health or life.

The terms ‘practicable’ and ‘reasonably practicable’ are obviously different. Thus, in *Marshall v Gotham Co Ltd*,<sup>13</sup> Lord Reid observed “there may well be precautions which it is ‘practicable’ but not ‘reasonably practicable’ to take...if a precaution is practicable it must be taken unless in the whole circumstances that would be unreasonable”. Following Asquith LJ in *Edwards v National Coal Board*:<sup>14</sup>

‘Reasonably practicable’ ... seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it can be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.

To reiterate, profits and the risk of workers’ death or injury are elements of a calculus, and must be balanced.

John Hansen J observed in *Buchanans Foundry Ltd v Department of Labour*,<sup>15</sup> under a reasonably practicable test, employers are not expected to provide “a certain, complete protection against all potential hazards”. Furthermore, it is context specific so that:<sup>16</sup>

...what is reasonably practicable for a large organisation employing safety officers or engineers contracting for the services of a small contractor on routine operations may differ markedly from what is reasonably practicable for a small shopkeeper employing a local builder on activities on which he has no expertise. The nature and gravity of the risk, the competence and experience of the workmen, the nature of the precautions to be taken are all relevant considerations.

Deciding whether a particular course of possible action is reasonably practicable involves a weighing of the costs against the benefits, and will be a matter of fact in each situation. And so, while protection should be provided against the ordinary risks associated with a particular, hazardous activity,<sup>17</sup> in *Marshall v Gotham Co Ltd*,<sup>18</sup> it was held that it was not reasonably practicable for the employer to strengthen mine workings to protect against an unusual geographic fault when the cost would have closed the mine. In *Department of Labour v Hanham and Philp Contractors Ltd*, Randerson and Pankhurst JJ, discussing the judge’s sentencing notes in the District Court, observed:<sup>19</sup>

<sup>13</sup> *Marshall v Gotham Co Ltd* [1954] AC 360 at 373.

<sup>14</sup> *Edwards v National Coal Board* [1949] 1 KB 704 at 712.

<sup>15</sup> *Buchanans Foundry Ltd v Department of Labour* [1996] 3 NZLR 112 at 116.

<sup>16</sup> *Department of Labour v Solid Timber Building Systems New Zealand Ltd* HC Rotorua AP464/44/2003, 7 November 2003 at [31].

<sup>17</sup> *Akehurst v Inspector of Quarries* [1964] NZLR 621.

<sup>18</sup> *Marshall v Gotham Co Ltd* [1954] AC 360.

<sup>19</sup> *Department of Labour v Hanham and Philp Contractors Ltd* [2008] 6 NZELR 79 at [95].

...the cessation of mining in area B was a practical step available to Black Reef and one which could have been simply taken. There would of course have been a cost involved but the financial position of the company at that time was satisfactory for the next two years.

The critical point here is that the courts appear to have considered the financial position of the particular mine. If this is a correct consideration, the inference to be drawn is that employees of an undercapitalised employer might expect lower safety standards than those of a better funded employer.

## Dignity and Occupational Safety

Since the UDHR and derivative rights instruments are founded on respect for human dignity, this principle must be the starting point for understanding the rights declared. This idea is recognised by the New Zealand government. Thus, “[t]he main aim of human rights, whatever the form of government prevalent in any particular state, is to protect the dignity of all human beings, no matter what their status or condition in life”.<sup>20</sup> Consequently, when UDHR provides that “[e]veryone has the right to...just and favourable conditions of work”,<sup>21</sup> this guarantee ought to be considered first from a perspective of respect for equal human dignity, as should the right to safe and healthy working conditions guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>22</sup> Naturally, then, the International Labour Organization (ILO), which has become the United Nations’ specialised agency for promoting human and labour rights, espouses respect for human dignity.<sup>23</sup> Thus, according to Juan Somavia, ILO Director-General, “[t]he primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity”.<sup>24</sup>

Cultural, economic and social rights were not expected to be immediately achievable. Nevertheless, a signatory State is obliged “to the maximum of its available resources” to achieve “progressively the full realization of the rights recognized in the present Covenant by all appropriate means”.<sup>25</sup> However, this barely qualified obligation to promote dignity in the workplace appears to be diluted significantly by the relevant ILO Convention. Thus C155 Occupational Safety and Health Convention provides:<sup>26</sup>

Each Member shall, *in the light of national conditions and practice*, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. [Emphasis added]

Furthermore:

The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, *so far as is reasonably practicable*, the causes of hazards inherent in the working environment. [Emphasis added]

<sup>20</sup> Ministry of Foreign Affairs and Trade *The New Zealand Handbook on International Human Rights* (Wellington, 2008) at 10.

<sup>21</sup> Universal Declaration of Human Rights (10 December 1948), art 23(1).

<sup>22</sup> International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976), art 6.

<sup>23</sup> For a history of the ILO, see M Wilson “ILO – Role of New Zealand Government: Reflections of a Former Minister of Labour” (2010) 35(3) NZJER 6.

<sup>24</sup> International Labour Organization “Mission and Objectives” (1996-2011) <www.ilo.org>.

<sup>25</sup> ICESCR, above n 23, art 2.

<sup>26</sup> C155 Occupational Safety and Health Convention (opened for signature 3 June 1981, entered into force 11 August 1983), art 4(1).

Thus, partly through the agency of the ILO, an all encompassing respect for human dignity in the workplace is adulterated by what is reasonably practicable to achieve under national conditions. ILO conventions have different roots from the UDHR;<sup>27</sup> both are concerned with social justice, but the former is specifically about workers' rights while the latter essentially concerns what it is to be a human being. Informed by the ILO conventions, respect for dignity in the workplace tends to be reduced to the narrow sense of freedom from bullying or harassment.<sup>28</sup> These are, of course, critical workplace issues, but health and safety is a far broader consideration than those particular ways of devaluing human beings. Indeed, all employment relations should start from respect for the human person. The most obvious way of devaluing a human being in the workplace is to discount the worth of their life and health.

Writing from a Christian moral philosophical standpoint, specifically Roman Catholic theology, Angelini outlines the moral principles that should inform measures to prevent occupational injuries and illnesses.<sup>29</sup> These principles include: a precise concept of the worker as a human with dignity, not merely a means of production; a clear acknowledgment of fundamental human rights including the right of workers to employment in a production system that does not endanger their physical welfare or jeopardise their moral integrity; and a complete vision of prevention including the capacity to find a balance between absolute principles and concrete reality through the determination of acceptable risk.<sup>30</sup> This approach, which is consistent with the Thomist conception of interdependent, vulnerable individuals living in the society of others,<sup>31</sup> appropriately captures respect for human dignity in a health and safety context. Similarly, Papadopoulos et al. argue that health and safety must be approached as "the promotion and maintenance at the highest degree of physical, mental and social well being of workers, and not only as retention of their work ability".<sup>32</sup>

We have argued so far that management, the holders of "command power",<sup>33</sup> must respect workers' dignity; but workers must also protect and promote their physical and psychological integrity. For Kant, whose conception of dignity predominates in European thought, "human beings are possessed of a will and are capable of exercising it freely".<sup>34</sup> This capacity "is most fundamental to the dignity and worth of human beings because it distinguishes humans from other animals and elevates them above the realm of causally determined nature".<sup>35</sup> Consequently, in the context of workplace health and safety, the worker must behave as an autonomous bearer of human rights, and this expectation has, to some extent, been incorporated into the HSEA.

Two further issues are worthy of consideration in relation to autonomy. The first is an apparent "false consciousness" around the naturalness of certain risks in the mining industry. Hall identifies an "economics of risk theme" in which cost and productivity considerations have a necessary and ongoing influence on the type and level of risks that both managers and miners "voluntarily" accept.<sup>36</sup> Second, workers' own disregard for self may lead to a degree of paternalism being incorporated into the reasonably practicable test. Thus, the duty requires employers to anticipate "irrational, unwitting, intentional or unthinking" behaviour

<sup>27</sup> Contrast Wilson, above n 24; J Maritain *The Rights of Man and Natural Law* (trans Doris C Anson) (G, Bles, London, 1945).

<sup>28</sup> See Department of Premier and Cabinet "M2007-02 Dignity and Respect: Policy and Guidelines on Preventing and Managing Workplace Bullying" (2011) <www.dpc.nsw.gov.au>.

<sup>29</sup> M Angelini "Ethical Behavior for the Prevention of Injuries in the Workplace" (1987) 30 *Ergonomics* 231-237. The influence of social Catholic thinking on human rights instruments is significant: see Maritain, above n 28.

<sup>30</sup> Angelini, above n 30, cited in E Kapp and K Parboteeah "Organizational Ethical Climate and Safety Performance" (2008) 53(7) *Professional Safety* 28-31.

<sup>31</sup> D Bigongiari (ed) *The Political Ideas of St Thomas Aquinas* (Hafner Press, New York, 1953).

<sup>32</sup> G Papadopoulos and others "Occupational and Public Health and Safety in a Changing Work Environment: An Integrated Approach for Risk Assessment and Prevention" (2010) 48 *Safety Science* 943-949.

<sup>33</sup> O Kahn-Freund *Labour and the Law* (2 ed, Stevens & Sons, London, 1977) at 9.

<sup>34</sup> S Mulhall & A Swift *Liberals and Communitarians* (Blackwell, Oxford, 1995) at 43.

<sup>35</sup> *Ibid.*

<sup>36</sup> A Hall "The Ideological Construction of Risk in Mining: A Case Study" (1996) 22 *Critical Sociology* 93-116.

by employees,<sup>37</sup> and to protect employees from “temptation”.<sup>38</sup> Such self-disrespect and reactive paternalism cannot be reconciled with a model of the dignified, autonomous worker.

## Towards a Proportionality Test

If workplace health and safety were approached from a human rights perspective rather than a practicability perspective, some form of proportionality test would be more appropriate than the current reasonably practicable test. Proportionality testing, which assesses the rationality of measures adopted to pursue a legitimate objective, has already been incorporated into New Zealand’s human rights jurisprudence.<sup>39</sup> Consideration is given to impairment of rights, and to the justifiability of any deleterious effects arising from the course of action.<sup>40</sup>

In a context of workplace health and safety, pursuing a legally permitted business activity may be presumed to be a legitimate objective. However, then focus must turn to the impact on individuals’ rights (encapsulated in respect for dignity) and the justifiability of, say, risks posed to workers by carrying on the business activity. In particular, alternatives should be considered. These alternatives may include refraining from the particular activity if workers’ rights are disproportionately affected. This would be the fundamental distinction in practice between practicability and proportionality: when human rights are taken seriously, profit cannot outweigh concerns for human dignity and life. The analogy may be drawn here with a supreme court in a jurisdiction with an entrenched bill of rights, which may strike down a disproportionate law; so a disproportionately risky activity would not be permitted.<sup>41</sup>

How would the proportionality test work in practice? Let us assume that Alpha Ltd wishes to engage in underground mining in an area of geological instability in the West Coast of New Zealand. The reasonably practicable test would require consideration of harm; knowledge, means available, their availability and cost. It is well known that underground mining presents extraordinary risks, and that New Zealand mines have lower safety standards than, for example, Queensland mines which “set a higher benchmark and [require] higher standards in the terms of operations, especially in regard to safety and health”.<sup>42</sup> However, if the best available safety measures were implemented, Alpha might not be profitable and so would not carry on the activity. Under the practicability test, it seems that Alpha must do the best it can within its means, even if this results in workers facing greater risks than they would if Alpha had more capital or if the mining activity were carried on in, say, Queensland. In contrast, a proportionality test would focus on the impact on human rights. A conclusion that Alpha cannot afford Queensland-style safety standards but may still carry on its activities would appear to have a disproportionate effect on workers’ basic human rights.

Despite its focus on rights, proportionality testing does not operate in an abstract realm where money and budgetary constraints do not exist.<sup>43</sup> However, when dignity is taken seriously, human beings can never be considered a means to an end, or a mere factor of production.

## Possibilities

<sup>37</sup> See, for example, *Mair v Regina Ltd* DC Dunedin CRN-304-500-4405, 4 March 1994.

<sup>38</sup> See, for example, *Tranz Rail Ltd v Department of Labour* [1997] ERNZ 316.

<sup>39</sup> M Taggart “Proportionality, Deference, Wednesbury” [2008] NZ Law Review 423.

<sup>40</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>41</sup> Trade unions have similarly supported a safety case regime requiring regulatory approval before a mine could commence operation: see Department of Labour “Summary of Public Submissions of Discussion Paper: Improving Health and Safety Hazard Management in the Underground Mining Industry” (2008) <[www.dol.govt.nz](http://www.dol.govt.nz)>.

<sup>42</sup> Royal Commission on the Pike River Coal Mine Tragedy “Transcript of Phase Two Hearing Held on 6 September 2011 at Greymouth” (2011) at 1121 <<http://pikeriver.royalcommission.govt.nz>>.

<sup>43</sup> On the right to life-saving treatment in the face of finite health budgets: see, for example *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 (1) SA 765 (CC).



For Helen Kelly, Council of Trade Unions president, the rate of workplace injuries and deaths in New Zealand is “shocking” and “appalling”, especially in the mining sector.<sup>44</sup> The Pike River mine disaster has laid bare the risks that workers in the mining industry, in particular, face. Peter Sattler, an Australian mining safety specialist described New Zealand health and safety processes as “backward” compared with Australia, and, on complaining to Pike River mine management was told, “you’re not in Australia, you’re in New Zealand” where, for example, “there were no strict rules limiting who could touch anything electrical, despite the increased fire risk in a coalmine”.<sup>45</sup> Sattler also observed that “monitoring systems to detect highly-explosive methane gas were lacking, and Queensland’s compulsory tube bundling system, which ‘sniffs’ the air to find out what kind of gases are present, didn’t exist at Pike River”.<sup>46</sup> A previous mine manager had proposed a tube bundling system for the Pike River mine at a purchase cost of \$980,000-\$1,000,000 and then investigated a leasing alternative, but the proposals were deferred for consideration by the company to April 2011 because of budgetary issues.<sup>47</sup> Media reports overwhelmingly indicate that the tragedy resulted from cost concerns trumping workers’ health and safety.<sup>48</sup> It is also notable that the laxity at the Pike River mine does not appear to be anomaly: both Burkes Creek mine and Roa mine were shown not to comply with health and safety.<sup>49</sup>

Kelly attributes New Zealand’s high rate of occupational death and injury to a culture of “deference” to employers; she says “[w]orkers don’t challenge, don’t ask. They shut up because they are grateful for a job”.<sup>50</sup> Such subordination would undermine health and safety: as Haworth observes, “the employee participation dimensions of the [HSEA] are particularly important for building a workplace-level co-operative partnership around [health and safety]”.<sup>51</sup>

Dave Feickert, a mines safety consultant, argues that the critical health and safety problem is structural rather than inter-personal:<sup>52</sup>

The tragedy at Pike River will come to be seen as another market failure, I believe. The professional mines inspectorate and the regulatory system that we inherited from the UK, along with Australia, was abolished in the 1990s, along with the worker safety inspectors, elected by the men from among experienced miners. The industry was moved to self-regulation. Pike River represents a spectacular failure of self-regulating companies in a high-risk industry. Why we allowed an economic theory of business competition to persuade us that competing companies would co-operate on mine safety is something else I will never fathom.

Both Kelly’s and Feickert’s conclusions can also be explained by insufficient respect for basic human rights principles. On the one hand, everyone’s dignity ought to be respected “no matter what their status or condition in life”,<sup>53</sup> but, if workers must trade off their safety for the sake of employment, that fundamental equality imperative is discounted. On the other hand, the dominance of market imagery and theory leads to work and, indeed, workers themselves, becoming conceived as

<sup>44</sup> J Weir “Rate of Workplace Injuries and Deaths Falls, but Still Shocking, Says Union Leader” *The Dominion Post* (New Zealand, 20 October 2011) at C1.

<sup>45</sup> T McLean “Aussie Miner ‘Shocked’ by Doomed NZ Mine” *The Sydney Morning Herald* (Australia, 16 June 2011).

<sup>46</sup> Ibid.

<sup>47</sup> Royal Commission on the Pike River Coal Mine Tragedy, above n 43, at 1186, 1189 and 1192.

<sup>48</sup> See, for example, O Carville “Pike River Mine’s Safety Systems Failed Repeatedly” (2011) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>49</sup> B Garland and T Watson “Mine Safety - Audit Report Burkes Creek Mine” (2011) Department of Labour <[www.dol.govt.nz](http://www.dol.govt.nz)>; B Garland and T Watson “Mine Safety - Audit Report Roa Mine” (2011) Department of Labour <[www.dol.govt.nz](http://www.dol.govt.nz)>.

<sup>50</sup> Weir, above n 45.

<sup>51</sup> N Haworth “Beyond the Employment Relationships Act: The Wider Social Agenda for Employment Relations and Social Equity in New Zealand” in E Rasmussen (ed) *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) at 198.

<sup>52</sup> D Feickert “Mine Safety Policy Failed Us” *The New Zealand Herald* (New Zealand, 12 July 2011).

<sup>53</sup> Ministry of Foreign Affairs and Trade, above n 21, at 10.

a commodity like any other and obey[ing] exactly the same rules” of supply and demand.<sup>54</sup> It is noteworthy that the Declaration of Philadelphia 1944 concerning the aims and purposes of the ILO declared as its first principle, “Labour is not a commodity”.<sup>55</sup> Respect for human dignity demands that people lives and health are excluded, as far as possible, from a market calculus.

A conceptual shift in the focus of workplace health and safety from practicability to respect for dignity and proportionality is not, in itself, likely to dramatically impact on occupational injuries. By analogy, citizens of countries with entrenched bills of rights do not necessarily enjoy more freedoms and protections than those without recourse to charters. That depends greatly on the institutions of government, and respect for and enforcement of the rule of law.<sup>56</sup> Likewise, without fundamental attitudinal and behavioural shifts, a proportionality test might prove no more effective than a reasonably practicable test. Conversely, a reasonably practicable test might be formulated that appropriately subordinates the role of money. Thus, Australia’s Model Work Health and Safety Bill provides:<sup>57</sup>

In this Act, reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the hazard or the risk concerned occurring; and
  - (b) the degree of harm that might result from the hazard or the risk; and
  - (c) what the person concerned knows, or ought reasonably to know, about:
    - (i) the hazard or the risk; and
    - (ii) ways of eliminating or minimising the risk; and
  - (d) the availability and suitability of ways to eliminate or minimise the risk; and
  - (e) *after assessing the extent of the risk and the available ways of eliminating or minimising the risk*, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is *grossly disproportionate* to the risk.
- [Emphasis added]

Nevertheless, just as bills of rights “translate into discernible differences in the shape and potency of human rights discourse in terms of its capacity to *defend* and *extend* human rights values”,<sup>58</sup> so of respect for human dignity and life as a starting point for employment relations would inform all discourse on workplace health and safety.

## Conclusion

Having the 23<sup>rd</sup> worst workplace death rate among developed countries,<sup>59</sup> New Zealand’s general performance in protecting its workers’ physical and psychological integrity is self-evidently poor; in the underground mining sector, it is appalling. Despite certain progressive features, notably employee involvement, the HSEA, in using its particular reasonably practicable test, facilitates the subordination of human dignity to profit. This outcome is incompatible with New Zealand’s obligations as a human rights State. Commitment to international human rights conventions requires respect for human dignity to inform employment relations, especially workplace health and safety. Replacing the current reasonably practicable test with a proportionality benchmark would be a significant step towards meeting that commitment.

<sup>54</sup> W Hutton *The State We’re In* (Jonathan Cape, London, 1995) at 99.

<sup>55</sup> Wilson, above n 24, at 6.

<sup>56</sup> J McLean “Legislative Invalidation, Human Rights Protection and s 4 of the New Bill of Rights Act” [2001] New Zealand Law Review 421-448.

<sup>57</sup> Model Work Health and Safety Bill 23 June 2011 (Cth), cl 18.

<sup>58</sup> L McNamara *Human Rights Controversies: the Impact of Legal Reform* (Routledge-Cavendish, Abingdon, 2007) at 262.

<sup>59</sup> P Hämäläinen, KL Saarela and J Takala “Global Trend According to Estimated Number of Occupational Accidents and Fatal Work-Related Disease at Region and Country Level” (2009) 40(2) Journal of Safety Research 125-139.

# New Zealand and the Proposed Australian Model Workplace Health and Safety Act

LEEANNE TEMPLER\*

## Introduction

This paper compares the scope and coverage of the proposed Australian Model Workplace Health and Safety Act (MWHs Act) with the New Zealand Health and Safety in Employment Act 1992 (HSE Act). It contrasts broader coverage of “workers” and “others” under the primary duties of the MWHs Act, including volunteers, children and other people in the workplace with coverage under the HSE Act. It identifies other key points of difference, including:

- (a) Key “General” or “Primary” Duties of the HSE and MWHs Acts;
- (b) The Requirement for Risk Management;
- (c) Directors’ and Officers’ Duties; and
- (d) Consultation, Worker Participation and Discrimination / Victimisation.

## The Scope of “General” or “Primary” Duties

### *Key General or Primary Duties*

The MWHs Act imposes very broad duties in comparison with the HSE Act, some of which seem very open-ended and undefined.<sup>1</sup> The new duties pursuant to the MWHs Act will be held by a “Person Conducting a Business or Undertaking” (PCBU) rather than an “Employer” pursuant to the HSE Act.

The “General” or “Primary” Duties are to protect the health and safety of “employees” (in the HSE Act) or “workers” (in the MWHs Act), framed in terms of what is “reasonably practicable.”

Section 19 of the MWHs Act provides that a PCBU must ensure, as far as is reasonably practicable, the health and safety of workers who are:<sup>2</sup>

- (a) directly engaged to carry out work for their business or undertaking;
- (b) placed with another person to carry out work for that person; or
- (c) influenced or directed in carrying out their work activities by the person, while workers are at work in the business or undertaking.

Pursuant to s 19(2), a PCBU must also ensure, as far as is reasonably practicable, that the health and safety of *other persons* is not *put at risk* from work carried out as part of the business or undertaking. The employer’s primary duty under the HSE Act does not extend to “other persons”

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<sup>1</sup> Section 16 of the HSE Act limits general duties to a warning for some non-employees. See also *Department of Labour v Berryman* [1996] DCR 121; *River Valley Adventures v Maritime NZ* HC Palmerston North CRI 2010-454-15, 17 December 2010; *Department of Labour v Dominion Bookbinders Ltd* DC Manukau CRI 2009-092-503893, 31 March 2010. See also ss 16 and 18 HSE Act regarding contractors, subcontractors and their employees.

<sup>2</sup> SafeWork Australia “Explanatory Memorandum – Model Work Health and Safety Bill 2010” (2010) at [77] <[www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au)>.

like the duty in the MWSH Act. Rather, s 15 of the HSE Act merely sets out that every employer shall take “all practicable steps” to ensure that no action or inaction of any employee while at work harms any other person.

The key things a person must do to satisfy the duty of care are listed, and includes providing and maintaining a work environment without risks to health and safety, and provision and maintenance of safe systems of work and safe plant and structures. The phrase “put at risk” is similar to “expose to risks.” A United Kingdom case applying duties not to “expose [the public] to risks” has held that bacteria causing legionnaire’s disease which escaped from a cooling tower could expose members of the public within 450 metres to risks to their health and safety. The prosecutor did not have to show that members of the public actually inhaled the bacteria, it was sufficient that there was a risk the bacteria were in the 450m range.<sup>3</sup> The HSE Act would probably not allow this outcome as the requirement is that the hazard does not harm any person therefore, actual harm must be proven.

A limiting factor in the MWSH Act may be the Object of the Act of “protecting workers and others against harm...through the elimination and minimisation of risks.” This may be interpreted as requiring actual harm to be shown in order to obtain a remedy pursuant to the MWSH Act. Section 17 of the MWSH Act sets out that a duty imposed on a person to ensure health and safety requires the person to eliminate risks to health and safety so far as is reasonably practicable, and if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks as far as is reasonably practicable.

### ***Duty of a “Person Who Controls a Place of Work”***

Pursuant to s 20 of the MWSH Act, a “person with management or control of a workplace” must ensure so far as is reasonably practicable that the workplace, the means of entering or exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person. Section 20 also makes it clear that the duty holder may control the place of work in whole or in part.

Section 16 of the HSE Act provides considerable divergence from the levels of protection under the MWSH Act. Pursuant to s 16, a person who controls a place of work must take all practicable steps to ensure that no hazard that is or arises in the place harms people in the vicinity of the place (including people in the vicinity of the place solely for recreation or leisure) or people who are lawfully at work in the place. People who are at the place of work with the express or implied consent of the person who controls the place of work, and have paid the person to be there or undertake activity there, or are there to undertake activities that include buying or inspecting goods, are protected in the same way as people lawfully at work in the place.

A person who controls a place of work must only take all practicable steps to warn other people who have been expressly authorised to be in the place of work; and people who are working at the place of work under the authority of any enactment of any significant hazard that is or arises in the place of work. This hazard must also arise from work that is or has been carried out for gain or reward in the place of work and not, in the ordinary course of events, be reasonably expected to be in or likely to arise in a place of work of that type. The person controlling a place of work must have also oral advice of the presence of the above people.

There is no duty in respect of any person who is in the place of work solely for the purposes of recreation and leisure. This leads to the odd situation in which people in the vicinity of the place of

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<sup>3</sup> Richard Johnstone “Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking” (1999) 12 AJLL 73 at 82.

work are offered greater protection than to those working at the place of work pursuant to an enactment or who have been expressly authorised to be there, and those people who are there solely for the purposes of recreation and leisure.

The original s 16 imposed on every person, who controlled a place of work (not being a home occupied by the person), a duty to take all practicable steps to ensure that people in the place of work and people in the vicinity of the place of work were not harmed by any hazard that was or arose in the place of work.<sup>4</sup> Following the case of *Department of Labour v Berryman*, there was concern about the extent of farmer liabilities. In that case, a farmer was prosecuted under the HSE Act after a beekeeper was killed when his truck went through a bridge maintained by the Berrymans. Hughes points out that there is now a lacuna in protection given to children and volunteers.<sup>5</sup>

He makes the point that a farmer would not usually be liable to warn authorised recreational visitors of “natural” hazards which do not arise from work, but would be liable to warn such people of significant hazards created through work activity, such as spray drift. He notes that trespassers, visitors to public facilities such as council parks, reserves and public hospitals and school grounds outside school hours are excluded. He also comments that children are not generally protected under the HSE Act while visiting workplaces.<sup>6</sup>

### ***The limiting requirement for “control” pursuant to the HSE Act***

The definition of “control” also limits the general duties under the HSE Act. Cases such as *River Valley Adventures v Maritime New Zealand*<sup>7</sup> and *Department of Labour v Diveco Limited*<sup>8</sup> have strictly interpreted the “control” requirement in the duty held by persons controlling a place of work pursuant to s16. In the *River Valley Adventures* case, an experienced river rafting guide drowned after two rafts collided in a set of dangerous rapids. One of the charges against River Valley Adventures was not “being in control of a workplace and failing to take all practicable steps to ensure that no hazard arose which harmed people.”

In relation to the latter charge, the Court referred to the case of *Department of Labour v Diveco Limited* in which a diver supplied by the defendant company suffered decompression illness after collecting sediment samples from the seabed. The Court of Appeal held that controlling a place of work requires something more than mere occupation of a particular area for a short period of time in circumstances where the occupier does not assert and has no right to exclude others from the area.<sup>9</sup>

In reliance on the authority of the *Diveco* case, the Court in *River Valley* held that the length and nature of occupation of the place and the fact that River Valley did not and could not control the flow or conditions or who used or went through the rapid were relevant considerations. River Valley did not control the rapid as it could not give directions in relation to it, nor exercise authority over it.<sup>10</sup>

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<sup>4</sup>John Hughes, “Public Safety in Places of Work” [1998] ELB 46. See also John Hughes “Volunteers under the Health and Safety in Employment Act 1992” [2003] ELB 43 at 45.

<sup>5</sup> Ibid at 48.

<sup>6</sup> Ibid at 50.

<sup>7</sup> *River Valley Adventures v Maritime New Zealand* HC PMN CRI 2010-454-15, 17 December 2010.

<sup>8</sup> *Department of Labour v Diveco Limited* (2004) 2 NZELR 72 (CA).

<sup>9</sup> *River Valley Adventures v Maritime New Zealand* HC PMN CRI 2010-454-15, 17 December 2010 at [28].

<sup>10</sup> Ibid, at [45]-[46]. However see also *Department of Labour v Dominion Bookbinders Ltd* DC Manukau CRI 2009-092-503893, 31 March 2010.

However in contrast to the above decisions, *Department of Labour v Dominion Bookbinders Ltd*<sup>11</sup> held that a gate was a place of work under the control of the defendant. In that case, the young child of a part-time cleaner at the defendant's premises was killed when a gate fell on her. Dominion Bookbinders was charged under s 15 with failing to take all practicable steps to ensure that no one was harmed by any action or inaction of one of its employees while at work. Dominion Bookbinders argued that the gate was not under its control because the gate was not the employee's place of work, and Dominion Bookbinders only had the right to use the gate under the terms of its lease. Further, it was argued that since the first defendant was not legally obliged to maintain the gate, it could not be said to have been "in control" of it.<sup>12</sup>

The decision in *Berryman* was notable since the gate was not a "transitory" place but a fixed location and subsequent legislative amendments widened the definition. The *Diveco* decision was also notable since the emphasis on exclusive possession or occupation in that decision was seen to have stemmed again from the transitory nature of the seabed. However, the Court held that, because the gate was intended as part of the first defendant's lease, it could be deemed to be a lessee of the gate. As occupier, the first defendant had the right to use the gate and to pass through it. In addition, there was physical control over the gate and an element of exclusivity arising from possession of a key and the power to prevent passage through the gate and entry to its premises. The gate was held to be a place of work, over which the first defendant had control for the purposes of the HSE Act.

In Australia, the position is quite different. As stated above, s 20 of the MWS Act makes it clear that a duty holder may control the place of work in whole or in part. The cases on the definition of control confirm that more than one person may have control over a workplace at one time and control may shift from one person to another.<sup>13</sup> In addition, a workplace is defined in s 8 as including a vehicle, vessel, aircraft or other mobile structure and any waters and any installation on land, on the bed of any waters or floating on any waters. Therefore, the decisions in the *Diveco* and *River Valley* cases would probably be quite different had the incidents occurred in Australia.

### ***Application of the HSE Act to volunteers***

In 2002, amendments to the HSE Act created two classes of volunteers. The first is volunteers doing regular work to whom s 3C of the HSE Act applies and who have limited coverage as "deemed employees." The second is "other volunteers" who are covered by an unenforceable "duty of care" under s 3D.<sup>14</sup>

Under subs (1), s 3C applies if a volunteer does work for another person (i.e: an employer or self-employed person) with that other person's knowledge or consent, and the volunteer does the work for that other person on an "ongoing and regular basis" and the work is an integral part of the business of the other person. The relevant aspects of the HSE Act that apply are ss 6-12, covering the employer's general duties in relation to the provision of a safe workplace, s 19 which covers the employee's duties in relation to safety, and Part IV, concerning, amongst other things, enforcement.

<sup>11</sup> *Department of Labour v Dominion Bookbinders Ltd* DC Manukau CRI 2009-092-503893, 31 March 2010.

<sup>12</sup> Anderson and others (eds) *Mazengarb's Employment Law* (looseleaf ed, LexisNexis) at 6002.15.4.

<sup>13</sup> *Inspector Dall v Brambles Australia Ltd* [2006] NSWIRComm 213. National Review into Model Occupational Health and Safety Laws "Second Report to the Workplace Relations Ministers' Council" (January 2009) at 70. See also *McMillan Britton & Kell Pty Ltd v WorkCover Authority (NSW)* (1999) 89 IR 464 at 480, *WorkCover Authority (NSW) (Inspector Callaghan) v Rowson* (unreported, Industrial Relations Commission, NSW, CT93/1156, 30 June 1994), referred to in *McMillan Britton & Kell Pty Ltd v WorkCover Authority (NSW)* (1999) 89 IR 464 at 479; *WorkCover (NSW) v Rowson* [1994] NSWIRC 76.

<sup>14</sup> John Hughes "Volunteers under the Health and Safety in Employment Act 1992" [2003] ELB 43 at 45.

Section 3C does not apply to a volunteer participating in a fundraising activity or assisting with sports and recreation for a sports club, a recreation club, an educational institution, assisting with activities for an educational institution outside the premises of an educational institution or providing care for another person in the volunteer's home. These people are covered by s 3D, together with volunteers who fail the test of "ongoing and regular" work under s 3C (1).<sup>15</sup>

### ***The application of the MWS Act to volunteers***

Pursuant to s 7(1) a "worker" is defined as carrying out work in any capacity for a person conducting a business or undertaking, including work as a volunteer. However, pursuant to s 5 (9) of the MWS Act, a volunteer association does not conduct a business or undertaking for the purposes of that Act. A volunteer association is defined in s 5(8) as a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

Therefore, the situation in Australia is quite different; there is no lacuna in protection for people whose volunteer work is not "ongoing and regular" when voluntary work is done for a PCBU. The authors of a leading text on the MWS Act believe that it should be amended to provide clearer guidance as to when a charitable, social or sporting organisation may be considered to be a PCBU. They believe that provision for an exemption for an organisation or specific activities may be one way of achieving an appropriate balance between the need to ensure safety at work while not discouraging charitable or social activities.<sup>16</sup>

## **The Requirement for Risk Management**

Both the definition of "all practicable steps" in the HSE Act and the general duties under that Act have been held by the courts to require "risk assessment".<sup>17</sup> Risks arising from the organisation of work, stress and peoples' behaviour must be assessed as well as those arising from physical hazards. However, risk management encompasses controlling and preventing the risk and not just assessing it.<sup>18</sup> This seems to have been accepted in *Gilbert v Attorney-General*<sup>19</sup> where the Court stated ss 7 – 10 of the HSE Act set out a minimum hierarchy of action in relation to the elimination of hazards in the workplace and that complements the general duty to take "all practicable steps."

The requirement for risk management is likely to be confusing and unclear to many employers as the word "risk" is not used in the HSE Act, and neither is the risk management process made clear. A clearer approach is taken under the MWS Act. The management/elimination of risks is referred to in sections 17 and 19. Although it does not specify or require a process of hazard identification or risk assessment in the Act, it seems to be accepted that the general duties in all Australian workplace safety acts effectively require duty holders to engage in systematic OHS [risk]

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<sup>15</sup> Ibid at 45.

<sup>16</sup> Barry Sherriff and Michael Tooma *Understanding the Model Work, Health and Safety Act* (CCH Australia, 2010) at 23.

<sup>17</sup> *McKee Feh Constructors Ltd v Department of Labour* HC Wellington AP 180/97, 25 September 1997; *Cadrona Ski Resort Ltd v Department of Labour* HC Invercargill CRI-2009-425-000016, 11 Sept 2009 at 21.

<sup>18</sup> Elisabeth Bluff and Richard Johnstone "The Relationship Between Reasonably Practicable and Risk Management Regulation" (2005) 18 AJLL 25 at 5.

<sup>19</sup> *Gilbert v Attorney-General* [2000] 1 ERNZ 332; *Attorney-General v Gilbert* [2002] NZCA 55 at 131. The requirement for risk assessment and management in cases of workplace stress was further clarified in *Rosenberg v Air New Zealand* ERA Auckland, AA 311/09 50500651, September 2009 at [196]; *Alo v NZ Customs Service* [2012] NZEmpC 47.

management.<sup>20</sup> The legislation instead allows for a process to be established via regulation with guidance from a code of practice.<sup>21</sup> The Code of Practice is clear and provides the sort of guidance that would also assist duty holders in New Zealand.

## Directors' and Officers' Duties

Pursuant to s 56 of the HSE Act, any directors or agents of a corporate body who “directed, assented to, acquiesced in, or participated in” any failure to comply with the provisions of the Act is a party to and guilty of the failure.<sup>22</sup> The Department of Labour has indicated that they may prosecute any officer, director or agent of a company “primarily where the person(s) in question had clear knowledge that the situation in question was unsafe or otherwise contrary to the health and safety legislation”.<sup>23</sup>

Cases which have resulted in convictions under this provision include *Department of Labour v Latham Construction*,<sup>24</sup> *Department of Labour v Dominion Bookbinders Ltd*,<sup>25</sup> and *Department of Labour v Ian Roebuck Crane Hire Ltd*.<sup>26</sup> The duties of officers and directors are much more stringent under the MWHs Act than the HSE Act. Clause 27 imposes a positive duty on officers of a PCBU to exercise “due diligence” to ensure that a PCBU complies with any duty or obligation under the Act.<sup>27</sup> Due diligence is defined in s 4 of the MWHs Act and requires active steps to be taken by the director or officer, taking reasonable steps:

- (a) To acquire and keep up-to-date knowledge of occupational health and safety matters;
- (b) To gain an understanding of the nature of the operations of the trade, business or other undertaking of the corporation and generally of the hazards and risks associated with those operations;
- (c) To ensure that the corporation has available, for use and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the trade, business or other undertaking of the corporation;
- (d) To ensure that the corporation has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
- (e) To ensure that the corporation has and implements processes for complying with any duty or obligation of the corporation under the relevant provisions of the Act.

However, there have been divergent decisions on the liability of Directors, in *Workcover Authority of NSW (insp Dowling) v Barry John Coster*,<sup>28</sup> and *Inspector Ken Kumar v David Aylmer Ritchie*.<sup>29</sup>

<sup>20</sup> National Review Into Model Occupational Health and Safety Laws “Second Report to the Workplace Relations Ministers’ Council” (January 2009) at 31.

<sup>21</sup> Ibid at 171.

<sup>22</sup> Mazengarb above n 12 at 6000.11.

<sup>23</sup> Department of Labour *Keeping Work Safe* 2009.

<sup>24</sup> *Department of Labour v Latham Construction* (2004) Ltd DC Auckland CRN 07004503883, 12 March 2009.

<sup>25</sup> *Department of Labour v Dominion Bookbinders Ltd* DC Manukau, CRI 2009-092-503893, 31 March 2010.

<sup>26</sup> *Department of Labour v Ian Roebuck Crane Hire Ltd* DC New Plymouth CRI-2009-043-1927, 25 November 2009.

<sup>27</sup> SafeWork Australia *Explanatory Memorandum – Model Work Health and Safety Bill 2010* <[www.safeworkaustralia.gov.au/ABOUTSAFEWORKAUSTRALIA/WHATWEDO/PUBLICATIONS/Pages/ExplanatoryMemorandum.aspx](http://www.safeworkaustralia.gov.au/ABOUTSAFEWORKAUSTRALIA/WHATWEDO/PUBLICATIONS/Pages/ExplanatoryMemorandum.aspx)> at 119.

<sup>28</sup> *Workcover Authority of NSW (insp Dowling) v Barry John Coster* [1977] NSWIRComm 154.

<sup>29</sup> *Inspector Ken Kumar v David Aylmer Ritchie* [2006] NSWIRComm 323. See also National Review into Model Occupational Health and Safety Laws, above n 20 at 60, quoting M Tooma Tooma’s *Annotated Health and Safety Act* (2 ed, Thomson Reuters, Sydney, 2004) at 130.



## Consultation, Representation and Discrimination

Both the HSE and MWSH Acts make provision for employee participation through (inter alia) the election of Health and Safety Representatives (HSRs) and formation of Health and Safety Committees. This section of the paper will focus on:

- (a) Consultation requirements;
- (b) The powers of HSRs; and
- (c) Discrimination, victimisation and coercion.

### *The nature and extent of consultation under the HSE and MWSH Acts*

#### *Consultation under the HSE Act*

The consultation provisions of the HSE Act are included in the section covering general worker participation. Pursuant to s 19B, there is a general duty to involve employees in health and safety matters. Pursuant to subs (1), every employer must provide reasonable opportunities for the employer's employees to participate effectively in ongoing processes for improvement of health and safety in the employees' places of work.

Subs (5) defines reasonable opportunities. Pursuant to s 19C organisations with less than 30 staff must only have an employee participation system if one or more employees or a union representing them requires the development of an employee participation system. Unlike the MWSH Act, the HSE Act does not define the nature of consultation. This has been established by case law.<sup>30</sup> The *Maritime Union* case considered consultation requirements. Chief Judge Colgan stated:<sup>31</sup>

The length of the consultative process, the numbers of meetings, the discussion of the object and content of the intended policy, the correspondence between the parties on these topics and the employer's preparedness to alter aspects of the policy as suggested by the union, all point together to a sufficient consultation, both statutory and contractual. The initial formulation of the policy by the employers does not mean that there was a failure of consultation.

Chief Judge Colgan considered that, having consulted about the issue, the defendants were entitled in law to decline to agree with the union's proposal for ownership of the policy.<sup>32</sup>

In *New Zealand Steel v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc*,<sup>33</sup> the new requirements pursuant to the HSE Act were taken into account. The fact that the HSE Amendment Act 2003 extended hazard to include a person's behaviour was noted. The Employment Relations Authority was satisfied NZ Steel did not have a fixed mind in relation to the final content of the drug and alcohol policy. This was supported by the changes made to the original document and the fact is that the summary of changes set out in the minutes from the final

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<sup>30</sup> *Maritime Union of New Zealand Inc v TLNZ* (2007) 5 NZELR 87; *NZ Steel Ltd v NZ Amalgamated Engineering Printing and Manufacturing Union Inc* ERA Auckland, BC200770511, 24 July 2001; *NZ Amalgamated Engineering Printing and Manufacturing Union v Air New Zealand Ltd* (2004) 2 NZELR 5 at [143]. Both former cases applied the *Air New Zealand* case in which the Court agreed to the reasonableness of drug and alcohol testing provisions depending on whether employees were engaged in safety sensitive areas or operations but left the identification of these employees to the parties to determine in consultation.

<sup>31</sup> *Maritime Union of New Zealand Inc v TLNZ* (2007) 5 NZELR 87 at [25].

<sup>32</sup> *Ibid*, at [49].

<sup>33</sup> *NZ Steel Ltd v NZ Amalgamated Engineering Printing and Manufacturing Union Inc* ERA Auckland, BC200770511, 24 July 2001.

meeting of the joint consultation committee show there were at least 10 key changes made from the original document.<sup>34</sup>

However, the result in *Corrections Association of NZ v Chief Executive of the Department of Corrections* was quite different.<sup>35</sup> The case involved the Corrections Department's decision to introduce a new roster pattern and other arrangements for staff at Mt Eden and Auckland Central remand prisons. The Employment Relations Authority held the evidence and established that any consultation that may have occurred with the Corrections Association was clearly inadequate and that it was not given a reasonable opportunity to consider the proposal.

On the basis of the preceding decisions, the Courts do not consider the decision whether or not drug test in safety sensitive areas at all should be a matter for consultation, rather that consultation should take place about which areas of a safety sensitive business should drug test. On the other hand, the Courts have held that any substantial changes to rosters in the prison sector should be the subject of employee consultation.

### *Consultation under the MWS Act*

Part 5 of the MWS Act covers consultation, representation and participation. Employee participation measures are set out in Division 3-6 relating to Health and Safety representatives. Pursuant to s 46 of the MWS Act, if more than one person has a duty, they must consult and co-operate with all other persons who have a duty in relation to the same matter. This duty of "horizontal engagement" is subject to the qualifier of what is reasonably practicable, as defined in s 17 of the MWS Act.<sup>36</sup> Section 47 sets out the duty of a person conducting a business or undertaking to consult so far as is reasonably practicable... with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety. Both of these duties are enforceable by way of penalties.

Section 48 sets out the nature of consultation, including that relevant information is shared with workers; workers are given a reasonable opportunity to express their views and raise health or safety issues in relation to the matter and are able to contribute to the decision making process in relation to the matter, that workers views are taken into account and they are advised of the outcome in a timely manner. Pursuant to s 48 (2), consultation must involve the HSR if workers are represented by one.

This is basically a codification of consultation requirements illustrated in case law. The requirement to consult does not mean that a PCBU has to reach agreement with other workplace participants on the actions they take for compliance.<sup>37</sup> Section 49 sets out the health and safety matters in respect of which consultation is required. These are:

- a. when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking;
- b. when making decisions about ways to eliminate or minimise those risks;
- c. when making decisions about the adequacy of facilities for the welfare of workers;
- d. when proposing changes that may affect the health or safety of workers;
- e. when making decisions about the procedures for:

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<sup>34</sup> Ibid at [63].

<sup>35</sup> *Corrections Association of NZ v Chief Executive of the Department of Corrections* ERA Auckland AA488/10 5324954, 18 November 2010.

<sup>36</sup> Sherriff, above n 16, at 74.

<sup>37</sup> Sherriff above n 16 at 68. Cases illustrating the requirement to consult include *TVW Enterprises v Duffy* (1985) 62 ALR 63; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Others v Queensland Rail and Others* (2010) 268 ALR 514.

- i. consulting with workers; or
- ii. resolving work health or safety issues at the workplace; or
- iii. monitoring the health of workers; or
- iv. monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking; or
- v. providing information and training for workers; or
- f. when carrying out any other activity prescribed by the regulations for the purposes of this section.

This differs from previous legislation and the HSE Act, in that duties to consult under the HSE Act apply to employers and employees, therefore, excluding people who are outside this relationship. The HSR has a right to stop unsafe work and to issue provisional improvement notices pursuant to the new Act. In Western Australia, employers have an obligation to protect the health and safety of employees through drug testing. The issue was considered in *BHP Iron Ore Ltd v Construction, Mining Energy etc Union of Australia, Western Australian Branch*.<sup>38</sup>

### ***The powers of Health and Safety Representatives***

The functions of health and safety representatives are set out in Part 2 (2) of Schedule 1A of the HSE Act. They include identifying and bringing to the employer's attention hazards in the place of work and discussing with the employer ways the hazards may be dealt with. The MWHs Act gives broad powers to HSRs under s 68 aimed at facilitating effective consultation and issue resolution, monitoring the compliance of the PCBU, inspecting the workplace, investigating complaints from members of the work group relating to health and safety and inquiring into the risks to the health and safety of workers in the work group arising from the conduct of the business or undertaking.<sup>39</sup>

### ***Discrimination***

Section 104 of the Employment Relations Act (ERA) 2000 provides that, for the purposes of s 103(1)(c) of the ERA, a person is discriminated against (inter alia), or if they refuse to do work under s 28A of the HSE Act 1992 or involved in the activities of a union. Section 107 sets out the definition of involvement in the activities of a union for the purposes of s 104, and this includes an employee who is representing employees under the HSE Act 1992, whether as a health and safety representative or otherwise, is to be treated as if he or she were a delegate of other employees for the purposes of s 107(1)(g).<sup>40</sup>

The MWHs Act prohibits discrimination in s 104, sets out prohibited reasons in s 106, and what constitutes discriminatory conduct is set out very clearly in s 105. Discriminatory conduct includes when a person dismisses a worker, terminates a contract for services, puts a worker to their detriment in the engagement of the worker, alters the position of a worker to the worker's detriment and fails or refuses to engage a potential worker. Prohibited reasons include the person being, having been or proposing to be a HSR.<sup>41</sup>

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<sup>38</sup> *BHP Iron Ore Ltd v Construction, Mining Energy etc Union of Australia, Western Australian Branch* [1988] WAIRComm 130.

<sup>39</sup> Sherriff, above n 16, at 82.

<sup>40</sup> In *Yukich v Carter Holt Harvey* [2004] 1ERNZ 78, the plaintiff successfully claimed unjustified constructive dismissal, although he did not succeed in his discrimination claim.

<sup>41</sup> A case which involved discrimination against an Authorised Union Representative and Health and Safety Representative was *Michael Watts v Australia Post* [2002] AIRC 1141.

## Conclusion

The WHS and HSE Acts are designed to provide protection from industrial or commercial hazards and risks that stem from workplaces. Pursuant to these statutes, duties are imposed to protect health and safety framed in terms of what is “reasonably practicable.” Both statutes protect employees but the extent to which other types of workers, volunteers and other members of the public are protected differs markedly. The employer’s primary duties under the HSE Act do not extend to “other persons” like the duty in the MWHs Act. Section 16 creates a complicated and confusing hierarchy of duties to non-employees. Children and recreational visitors to public facilities are excluded from coverage pursuant to the HSE Act. Volunteers whose work is not “ongoing or regular” are excluded from coverage under the HSE Act whereas volunteers are included in the definition of worker under the MWHs Act.

While a positive step in many respects, the MWHs Act has been criticised for the resulting uncertainties created by the wide duties it imposes. The new definition of PCBU together with the broad approach to what is “workplace related” in the MWHs Act, mean the liabilities of duty holders will be much wider than under the HSE Act. The MWHs Act explicitly covers work that takes place in rivers and the sea whereas the HSE Act has been held not to, due to a requirement for exclusive occupation and control. The MWHs Act also makes it clear a duty holder may control a place of work in whole or in part. The position in New Zealand is less clear about partial control of a workplace, although it does depend on the extent of exclusivity of control.

The MWHs Act places greater emphasis on risk management and clarifies this process with a comprehensive regulation and code of practice. The MWHs Act imposes more stringent “due diligence” requirements than the HSE Act on all directors and officers, irrespective of whether they are directly involved in the management of the company. Consultation and employee participation are important components of the WHS and HSE Acts. The HSE Act sets out clearly what must be taken into account when determining reasonable opportunities for employees to participate in the improvement of health and safety processes at work. The MWHs Act defines the nature of consultation whereas in New Zealand this has been established by case law. The requirements under the MWHs Act to consult with multiple duty holders may prove overly onerous and complicated.

HSRs in Australia have a function that encompasses greater monitoring of and liaison with PCBUs whereas the HSE Act includes identification and monitoring of hazards as a HSR function. Although both the HSE Act and MWHs Act prohibit discrimination against HSRs, the MWHs Act sets out what constitutes discriminatory conduct more clearly in s105. Australian Courts have also been historically prepared to enforce anti-discrimination provisions.

# **An Evaluation of Whether New Zealand's Occupational Health and Safety Law Adequately Addresses the Risks to Workers Exposed to Nanotechnology and Nanoparticles**

JENNIFER MOORE\*

## **Introduction**

Nanotechnologies use processes to create novel materials and particles sized between one to 100 nanometers, although this metrology is not uncontested.<sup>1</sup> Nanoparticles (NPs) have different physical, chemical and biological properties from their equivalent macro counterparts. There is concern that the special properties of some nanoscale materials will present unforeseen human and environmental health and safety risks.<sup>2</sup> Nanoparticles can be categorised as natural or engineered/manufactured. Naturally occurring NPs include particles in our atmosphere such as salt at the beach. Engineered NPs are the newer phenomenon of intentionally/deliberately created manufactured nanomaterials (mNMs). This article is concerned with mNMs.

The key issue explored in this paper is whether New Zealand (NZ) occupational health and safety (OHS) legislation provides adequate protection for workers who are exposed to NPs. I evaluate the suitability of NZ regulation of NP exposure in the workplace and the current scientific data on occupational disease attributed to NPs.

Approximately NZ\$6 million of public money per annum is invested in nanotechnology research and development.<sup>3</sup> Nanoparticles are used in a broad range of consumer products (nanoproducts) such as cosmetics, sunscreens, food packaging, paints, textiles and herbal remedies.<sup>4</sup> There are over 1000 manufacturer-identified nanoproducts currently on the market and new nanoproducts are entering the market at a rapid pace.<sup>5</sup> An estimated US\$2.6 trillion worth of manufactured goods are expected to incorporate manufactured nanomaterials (mNMs) by 2014.<sup>6</sup> The increasing numbers of nanoproducts are creating occupational exposures, some of which may be harmful to human health.

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Dr Moore and Associate Professor Colin Gavaghan co-authored the New Zealand government commissioned report on the ability of New Zealand's regulatory systems to manage the possible impacts of manufactured nanomaterials. This paper is based on that report.

<sup>1</sup> Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) *Risk Assessment of Products of Nanotechnologies* (SCENIHR, EU, January 2009) at 7; Melanie Auffan and others "Towards a Definition of Inorganic Nanoparticles from an Environmental, Health and Safety Perspective" (2009) 4 *Nature Nanotechnology* 634.

<sup>2</sup> Milind Kandlikar, Ramachandran Gurumurthy and Andrew Maynard "Health Risk Assessment for Nanoparticles: A Case for Using Expert Judgment" (2007) 9 *Journal of Nanoparticle Research* 137; Andrew Maynard "Nanotechnology: The Next Big Thing or Much Ado About Nothing?" (2007) 51 *Annals of Occupational Hygiene* 1; Andrew Maynard "Safe Handling of Nanotechnology" (2006) 444 *Nature* 267; Eva Oberdorster and others "Nanotoxicology: An Emerging Discipline Evolving from Study of Ultrafine Particles" (2005) 113 *Environmental Health Perspectives* 823.

<sup>3</sup> Ministry of Research, Science and Technology *Nanoscience and Nanotechnology Roadmap* (MORST, Wellington, 2006) at 28.

<sup>4</sup> For further examples of products containing nanomedicines see Nanotechnology Project "Consumer Products: An Inventory of Nanotechnology-based Consumer Products Currently on the Market" (2011) Woodrow Wilson International Centre for Scholars <[www.nanotechproject.org](http://www.nanotechproject.org)>.

<sup>5</sup> *Ibid.*

<sup>6</sup> Lux Research *The Nanotechnology Report* (4 ed, 2006).

Given the potential market for nanoproducts, the occupational exposures and the growing evidence that “certain applications of nanotechnology will present risks unlike any we have encountered before”,<sup>7</sup> it is important to have adequate regulation of NP exposure in the workplace in order to prevent or minimise adverse public health ramifications.

Workers involved at any point throughout the lifecycle of nanoproducts (from laboratories to manufacturing facilities) are potentially being exposed to NPs. The exact size of the exposed workforce in NZ, Australia or the United States (US) is currently unknown, but studies are being conducted.<sup>8</sup> Numerous organisations have highlighted the OHS concerns raised by NPs. For example, the European Agency for Safety and Health at Work recently identified NPs among the top ten emerging risks from which workers need protection.<sup>9</sup> The US National Nanotechnology Advisory Panel concluded that OHS is the most serious and immediate health and safety concern raised by mNMs.<sup>10</sup> The NZ Council of Trade Unions,<sup>11</sup> the Australian Council of Trade Unions<sup>12</sup> and the Australian Manufacturing Workers Union<sup>13</sup> have demanded nano-specific regulation of NP exposure and more research into the health risks of NP exposure. Non-government organisations such as the Friends of the Earth (FoE) have called for a moratorium on the research, development and manufacture of NPs.<sup>14</sup>

FoE has warned that nanotechnology could present “a repeat of the asbestos tragedy”<sup>15</sup> and, specifically that carbon nanotubes (CNTs), a new form of carbon molecule, may be the new asbestos.<sup>16</sup> The Department of Labour’s annual report on OHS identifies asbestos related cancer as one of the most prevalent occupational diseases with the highest toll.<sup>17</sup> The similarity between some NPs and asbestos fibres could, therefore, present a significant potential OHS burden.

Despite these potential risks, NZ regulation of workers’ exposure to hazardous materials does not address the specific risks associated with NP exposure in the workplace. Other jurisdictions such as Australia and the United States face similar regulatory challenges. Reviews initiated by governments

<sup>7</sup> Andrew Maynard and ED Kuempel “Airborne Nanostructured Particles and Occupational Health” (2005) 7 Journal of Nanoparticle Research 587.

<sup>8</sup> Paul Schulte “Progress in Understanding and Preventing Work Related Disease and Injury from Nanomaterials” (paper presented to the Global Regulation of Nanotechnologies Conference, Northeastern University United States, 7 May 2010); Michael Methner and others “Nanoparticle Emission Assessment Technique (NEAT) for the Identification and Measurement of Potential Inhalation Exposure to Engineered Nanomaterials – Part B: Results from 12 Field Studies” (2010) 7 Journal of Occupational and Environmental Hygiene 163; Kaspar Schmid and others “Nanoparticle Usage and Protection Measures in the Manufacturing Industry – A Representative Survey” (2010) 7 Journal of Occupation and Environmental Hygiene 224.

<sup>9</sup> European Agency for Safety and Health at Work “Report: Expert Forecast on Emerging Chemical Risks Related to Occupational Safety and Health” (Belgium, 2009) <<http://osha.europa.eu>>.

<sup>10</sup> President’s Council of Advisers on Science and Technology (Podcast) “The National Nanotechnology Initiative at Five Years: Assessment and Recommendations of the National Nanotechnology Advisory Panel” (2005) <[www.nano.gov](http://www.nano.gov)>.

<sup>11</sup> Letter from the NZ Council of Trade Unions to Jennifer Moore regarding the regulation of workers’ exposure to NPs (12 October 2010).

<sup>12</sup> Australian Council of Trade Unions “Factsheet: Nanotechnology – Why Unions are Concerned” (2009) <[www.actu.org.au](http://www.actu.org.au)>; Hall Ashley “Nanotechnology is the Next Asbestos, Union Says” (2009) ABC News <[www.abc.net.au](http://www.abc.net.au)>.

<sup>13</sup> W Birnbauer “Nano Could be a Huge Future Health Crisis” *Sunday Age* (Melbourne, Australia, 30 October 2005) at 4.

<sup>14</sup> Friends of the Earth Australia and Friends of the Earth United States *Nanomaterials, Sunscreens and Cosmetics: Small Ingredients, Big Risks* (Friends of the Earth, Sydney, 2006) at 5.

<sup>15</sup> Georgia Miller “Nanotechnology Risks a Repeat of the Asbestos Tragedy” Friends of the Earth Australia <[www.foe.org.au](http://www.foe.org.au)>.

<sup>16</sup> Friends of the Earth Australia *Mounting Evidence that Carbon Nanotubes may be the New Asbestos* (Friends of the Earth, Melbourne, Australia, 2008).

<sup>17</sup> Department of Labour “The State of Workplace Health and Safety in New Zealand” (2011) <[www.dol.govt.nz](http://www.dol.govt.nz)>.

in several jurisdictions (the United States,<sup>18</sup> England,<sup>19</sup> the European Union,<sup>20</sup> Australia<sup>21</sup> and NZ<sup>22</sup>) have recommended changes to the existing legislation to ensure that the instruments adequately regulate nanoproducts. Likewise, other commentators have reviewed the suitability of the legislative status quo and called for amendments.<sup>23</sup>

In contrast to the “do nothing” regulatory and policy approach,<sup>24</sup> I argue that the inadequacy of the current regulatory regimes for safeguarding human health has been demonstrated. Existing regulations will “function only as a filter – allowing particles smaller than the relevant pore size to escape through the regulatory process”.<sup>25</sup> This often occurs because some legislative triggers fail to fire when applied to workers’ exposure to NPs.

## What are NPs and their potential risks?

### *Nanoparticles*

A NP is a particle with all three external dimensions in the nanoscale: 1-100 nanometers. One nanometre is one billionth of a metre. Scientists have been working with nanoscale materials for centuries but the relatively recent development of special microscopes, capable of displaying tiny particles, has improved researchers’ ability to work with these materials.

Due to their tiny sizes, NPs have a high surface area to volume ratio. There is an increase in the percentage of atoms at the surface and, therefore, more sites for bonding or reacting with surrounding materials. The considerably larger surface area per unit mass increases their potentials for biopersistence (how long it exists in living tissue) and reactivity. All nanoparticles are ‘nanosized’ (small) but they are not all the same. They can differ in actual size, shape (some are tubes, others spheres etc), surface properties (e.g: charge and porosity) and biopersistence. The nano features of these particles include not only size, but also other parameters such as shape, surface chemistry, composition, solubility and aggregation.

Approximately 44 elements in the periodic table are commercially available in nano form.<sup>26</sup> Nanoparticles, because of their size and the effect that size has on their other properties, exhibit different properties from their bulk counterparts. In science, a ‘property’ describes how a material acts

<sup>18</sup> Food and Drug Administration *Nanotechnology – A Report of the US Food and Drug Administration Nanotechnology Task Force* (FDA, Washington DC, 2007); Environmental Protection Agency *EPA Nanotechnology White Paper* (EPA, Washington DC, 2007).

<sup>19</sup> Quasim Chaudhry and others *Final Report: A Scoping Study to Identify Gaps in Environmental Regulation for the Products and Applications of Nanotechnologies* (Department for Environment, Food and Rural Affairs, London, 2006).

<sup>20</sup> European Commission *Regulatory Aspects of Nanomaterials: Summary of Legislation in Relation to Health, Safety and Environment Aspects of Nanomaterials, Regulatory Research Needs and Related Measures* (Commission of the European Communities, Brussels, 2008).

<sup>21</sup> Karinne Ludlow, Diana Bowman D and Graeme Hodge *A Review of Possible Impacts of Nanotechnology on Australia’s Regulatory Framework (The Monash Report)* (Monash Centre for Regulatory Studies, Melbourne, Australia, 2007).

<sup>22</sup> Colin Gavaghan and Jennifer Moore *A Review of Possible Impacts of Manufactured Nanomaterials on New Zealand’s Regulatory System* (Faculty of Law University of Otago, New Zealand, 2011) <www.msi.govt.nz>.

<sup>23</sup> George Kimbrell “Nanomaterial Consumer Products and FDA Regulation: Regulatory Challenges and Necessary Amendments” (2006) 3 *Nanotechnology Law and Business* 329; JC Davies *Managing the Effects of Nanotechnology* (Woodrow Wilson International Center for Scholars, Washington DC, 2006).

<sup>24</sup> Joel D’Silva and Diana Megan Bowman “To Label or Not to Label? – It’s More than a Nano-Sized Question” (2010) 4 *EJRR* 420 at 427. See also LB Moses “Regulating Beyond Nanotechnology: Do Nano-specific Problems Require Nano-specific Solutions?” (2010) *IEEE International Symposium on Technology and Society* 68, for arguments against enacting nano-specific legislation.

<sup>25</sup> Karinne Ludlow “Nanoregulation – Filtering Out the Small Stuff” (2008) 2 *Nanoethics* 183 at 184.

<sup>26</sup> ETC Group “No Small Matter II: The Case for a Global Moratorium, Size Matters!” 7(1) *Occasional Paper Series*, (Action Group on Erosion, Technology and Concentration, Canada, April 2003) <www.etcgroup.org>.

under certain conditions. Examples of properties are: optical (e.g: colour transparency), electrical (e.g: conductivity), physical (e.g: hardness, melting point), chemical (e.g: reactivity). For instance, in terms of optical properties, bulk gold appears yellow whereas nanosized gold appears red. Also, gold as a bulk material is nontoxic, but gold particles below two nanometres have shown unexpectedly high toxicity in a variety of cell lines.<sup>27</sup>

Examples of mNMs include fullerenes (C<sub>60</sub> or Buckyballs), carbon nanotubes and metal oxides. These are examples of first generation nanoproducts.<sup>28</sup> Subsequent generations of nanoproducts may change in response to electric fields, light or in the presence of specific molecules. Subsequent generations of mNMs will create further regulatory challenges because the OHS regulations are not designed to deal with the novel properties of these new particles, nor are the standard methodologies adequate for testing nanotoxicity in the workplace.

### ***Defining Nanotechnology – Legislative Drafting Difficulties***

Nanotechnology has been touted as the “next industrial revolution”.<sup>29</sup> Defining nanotechnology is difficult<sup>30</sup> but most commentators describe ‘nanotechnologies’ as a multidisciplinary and heterogeneous field involving molecular engineering. It can have many applications in, for example, medicine, food, and electronics.

Definitions are crucial to the operation of legislation as they assist in establishing the subject matter to be regulated and the regulatory scope. The heterogeneity of nanotechnology and NPs has presented problems for the drafters of legislation. There is no generally accepted definition within the international community. No jurisdiction has a definition for nanotechnology or NPs in OHS legislation.

The EU is one of the few jurisdictions that include a legislative provision that defines nanomaterials, but this does not appear in OHS law. The EU is attempting to regulate particular product areas in which mNMs are used; specifically, foods and cosmetics. The EU’s Regulation on Novel Foods proposes a nano-specific provision which states that “novel food should include foods derived from plants and animals, produced by non-traditional breeding techniques, and foods modified by new production processes, such as nanotechnology and nanoscience, which might have an impact on food.”<sup>31</sup> The EU Cosmetics Directive 2009 defines NM as “an insoluble or biopersistent and intentionally manufactured material with one or more external dimensions, or an internal structure from 1-100 nanometres”.<sup>32</sup>

<sup>27</sup> Willi Jahnan-Dechent and Ulrich Simon “Function Follows Form: Shape Complementarity and Nanoparticle Toxicity” (2008) 3 *Nanomedicine* 601 at 602.

<sup>28</sup> MC Roco “Nanoscale Science and Engineering: Unifying and Transforming Tools” (2004) 50 *AIChE Journal* 890. Roco’s conceptualization of nanotechnologies as generations has been influential.

<sup>29</sup> Robert Sparrow “Talkin’ Bout a (Nanotechnological) Revolution” (2008) 2 *IEEE Technology and Society Magazine* 37.

<sup>30</sup> Reaching agreement on fundamental terms such as ‘nanotechnology’, ‘nanoscale’, ‘nanomaterial’ and ‘nanoparticle’ is complex and contested. For example, see Graeme Hodge, Diana Bowman and Karinne Ludlow “Introduction: Big Questions for Small Technologies” in Hodge, Bowman and Ludlow (eds) *New Global Regulatory Frontiers in Regulation: The Age of Nanotechnology* (Edward Elgar, Cheltenham, 2007) at 10; Graham Hunt “Nanomaterials: Nomenclature, Novelty and Necessity” (2004) 56 *Journal of Materials* 13; Diana Bowman, Joel D’Silva and Geert van Calster “Defining Nanomaterials for the Purpose of Regulation within the European Union” (2010) 2 *The European Journal of Risk Regulation* 115; WG Kreyling, MK Semmler-Behnke and Qasim Chaudhry “A Complementary Definition of Nanomaterial” (2010) 5 *Nano Today* 165.

<sup>31</sup> Regulation (EC) 258/97 concerning Novel Foods and Novel Food Ingredients.

<sup>32</sup> EU Cosmetics Directive 2009 76/768/EEC, Article 2(1)(k).



In November 2011, the New Zealand Environmental Protection Authority (NZEPA) released its Proposals for Amendments to the Cosmetic Products Group Standard (the Standard).<sup>33</sup> The NZEPA may issue group standards under section 96B of the New Zealand Hazardous Substances and New Organisms Act 1996 (HSNO). The Standard follows the definition of NM that is used in the EU Cosmetics Directive. Proposal 3 proposes introducing a labelling requirement for nanomaterials which is in line with Article 19 of the EU Cosmetics Directive (76/768EEC).<sup>34</sup> These definitions of NM are not perfect; for example, they focus on size instead of including other physio-chemical characteristics such as shape, charge and surface properties. These provisions represent the first attempt by a Parliament to define nanotechnology or mNMs. It is possible that legislative instruments in other jurisdictions will be similarly amended to include nano-specific provisions. In my opinion, nano-specific legislative provisions should be drafted to help protect NZ workers from the risks of exposure to NPs.

### ***Characterisation and Measurement of NPs Pose Regulatory Challenges***

In addition to the regulatory difficulties in defining NPs, these tiny particles also present other hurdles in terms of characterisation and measurement. Effective regulation of NP exposure involves the ability to accurately describe and measure the matter being regulated. Under NZ's Hazardous Substances and New Organisms Act 1996, hazardous substances such as chemicals are conceptualised as 'new' or 'existing'.<sup>35</sup> How should the nanoscaled version of a chemical be categorised? For example, should nanoscaled carbon be distinguished from macroscale carbon? The nanosized version exhibits different properties from its macro counterpart; therefore, in my opinion, it should be considered 'new'.

However, the difficulty is that even within one form of nanoscale carbon, there are an array of forms and shapes including tubes and spheres. These different surface properties can generate different behaviours. To what extent can and/or should any legislative definition include these finer distinctions? There is an urgent need for the development of standardised reference NMs. These persistent difficulties in the description and definition of NPs will continue to hinder effective regulation and risk assessment.

Another regulatory challenge is the difficulties in measuring NPs. The story of asbestos regulation also includes difficulties caused by measurement. Inadequate measurement devices should not delay the introduction of nano-specific OHS provisions. It is preferable to prevent harm to workers rather than to wait for measurement techniques to become available. Also, like asbestos-related disease, there may be a long latency (possibly of many decades) before disease symptoms appear.

### ***NPs and Potential Risks to Workers' Health***

Detailed discussions about the health risks and toxicity<sup>36</sup> of NPs have been undertaken in the academic literature. Not all NPs are the same, nor are they all potentially harmful to human and

<sup>33</sup> NZEPA "Proposed Amendments to the Cosmetic Products Group Standard" (2011) <[www.epa.govt.nz](http://www.epa.govt.nz)>.

<sup>34</sup> NZ Environmental Risk Management Authority "Group Standards" <<http://archive.ermanz.govt.nz>>.

<sup>35</sup> HSNO Act, ss 28 and 28A(2)(a).

<sup>36</sup> Andrew Maynard *Nanotechnology: A Research Strategy for Addressing Risk* (Woodrow Wilson Project on Emerging Technologies, Washington DC, 2006); RJ Aitken, KS Creely and CL Tran *Nanoparticles: An Occupational Hygiene Review* (Institute of Occupational Medicine for the Health and Safety Executive, London, 2004); Therapeutic Goods Administration *A Review of the Scientific Literature on the Safety of Nanoparticulate Titanium Dioxide and Zinc Oxide in Sunscreens* (Therapeutic Goods Administration, Canberra, 2006); Ken Donaldson and others "Nanotoxicology" (2004) 61 *Occupational Environmental Medicine* 727; Eva Oberdorster "Manufactured Nanomaterials (Fullerenes, C60) Induce Oxidative Stress in the Brain of Juvenile Largemouth Bass" (2004) 112 *Environmental Health Perspective* 1058; MC Powell and MS Kanarek "Nanomaterial Health Effects – part 1: Background and Current Knowledge" (2006) 2 *Wisconsin Medical Journal* 16; MC Powell and MS Kamarek "Nanomaterial Health Effects – part 2: Uncertainties and Recommendations for the Future" (2006) 2 *Wisconsin Medical Journal* 18; Joel D'Silva and Geert van Calster "Taking

environmental health and safety. There is growing evidence that the novel properties of some NPs will bring unforeseen human and environmental health and safety risks.<sup>37</sup> The large surface area and related increased reactivity of some NPs may mean unpredictable and different reactions with biological systems. Generally, the smaller the particles, the more reactive and toxic are their effects.<sup>38</sup> The smaller size of NPs means that they can deposit deeper in the respiratory tract than larger particles. Nanoparticles may take longer to settle in the air and, therefore, have more chance to travel and spread in the workplace, thereby coming into contact with workers.

Carbon nanotubes have been identified as a particularly troubling type of mNM. There are many variants of CNTs but they have been broadly categorised as single-walled (consisting of a single layer of carbon atoms arranged in a cylinder) and multi-walled (comprising multiple concentric layers of single walled tubes with diameters up to tens of nms).<sup>39</sup> Although further evidence is required, preliminary research on CNTs suggests that their structural similarity and low solubility may exhibit similar pathology to asbestos.<sup>40</sup> CNTs are increasingly used in industry because they are 100 times stronger than steel but very light. They are, thus, useful in electronics and display devices such as LCDs. The size and fibre shape of CNTs may lead to health effects similar to asbestos.<sup>41</sup> CNTs can cause adverse health effects such as inflammation and fibrosis (scarring).<sup>42</sup> However, the lack of data on exposure pathways of certain NPs, combined with uncertainty about the suitability of some existing testing methods, is widely recognised as a barrier to the effective implementation of regulations.<sup>43</sup>

## NZ OHS Regulation

### *The Legislative Framework*

NZ workers' OHS is regulated by the Health and Safety in Employment Act 1992 (HSE Act), the Approved Code of Practice for the Management of Substances Hazardous to Health in the Place of Work 1997 (the Code) and the Hazardous Substances and New Organisms Act 1996 (HSNO Act). The HSE Act applies to places of work. Duties are imposed on employers (and others) to take all practicable steps to ensure healthy and safe workplaces. The concept of 'hazard' is central to the Act. Employers must identify hazards and eliminate, isolate or minimise them. Employers must follow this

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Temperature – A Review of European Union Regulation in Nanomedicine” (2009) 16 European Journal of Health Law 249.

<sup>37</sup> Milind Kandlikar, Ramachandran Gurumurthy and Andrew Maynard “Health Risk Assessment for Nanoparticles: A Case for Using Expert Judgment” (2007) 9 Journal of Nanoparticle Research 137; Andrew Maynard and others “Safe Handling of Nanotechnology” (2006) 444 Nature 267; Eva Oberdorster and others “Nanotoxicology: An Emerging Discipline Evolving from Study of Ultrafine Particles” (2005) 113 Environmental Health Perspectives 823.

<sup>38</sup> US National Institute of Environmental Health Sciences research presented in a paper by T Hampton “Researchers Size Up Nanotechnology Risks” (2005) 294 JAMA 1881 at 1882.

<sup>39</sup> Robert J Aitken and others “Regulation of Carbon Nanotubes and Other High Aspect Ratio Nanoparticles: Approaching this Challenge from the Perspective of Asbestos” in Hodge, Bowman and Maynard (eds) *International Handbook on Regulating Nanotechnologies* (EE, 2010) 205.

<sup>40</sup> CA Poland and others “Carbon Nanotubes Introduced into the Abdominal Cavity of Mice Show Asbestos-like Pathogenicity in a Pilot Study” (2008) Nature Nanotechnology 423.

<sup>41</sup> EE Knowles “Nanotechnology: Evolving Occupational Safety, Health and Environmental Issues” (2006) Professional Safety 20 at 24; Robert Service “Nanotechnology’s Public Health Hazard?” (2008) Science Now <<http://news.sciencemag.org>>; CL Tran, SM Hankin, B Ross *An Outline Scoping Study to Determine Whether High Aspect Ratio Nanoparticles (HARN) Should Raise the Same Concerns as do Asbestos Fibres* (Institute of Occupational Medicine, Edinburgh, 2008).

<sup>42</sup> CW Lam and others “Pulmonary Toxicity of Single-Wall Carbon Nanotubes in Mice 7 and 90 days after Intratracheal Instillation” (2004) 77 Toxicological Science 126.

<sup>43</sup> Robert Falkner, Linda Breggin, Nico Jaspers, John Pendergrass and Read Porter “International Coordination and Cooperation: The Next Agenda in Nanomaterials Regulation” in Graeme Hodge, Diana Bowman and Andrew Maynard (eds) *International Handbook on Regulating Nanotechnologies* (Edward Elgar, Cheltenham, 2010) at 513.

process for hazards, whether or not the hazards involve NPs. The Code applies to all workplaces in which hazardous substances are being used or produced, whether or not they contain NPs.

The HSE Act and the Code are administered by the Department of Labour (DoL). Under section 20 of the HSE Act, the Minister may approve codes of practice. Compliance with codes is not mandatory but they have “powerful persuasive authority”.<sup>44</sup> One of the DoL’s roles is to ensure that the HSNO Act is complied with in workplaces. The HSNO Act’s stated purpose is “to protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms”.<sup>45</sup> The Act applies to everyone who imports, manufactures, uses or stores hazardous substances. The HSNO Act’s provisions relating to hazardous substances have the most significance for OHS.

Section 14 of the HSNO Act provides for the establishment of the Environmental Risk Management Authority (ERMA). However, following the recent introduction of the Environmental Authority Protection Act 2011 (EPA Act), ERMA was disestablished and the Environmental Protection Authority (EPA) was established.<sup>46</sup> The EPA will now administer the HSNO Act.

### ***Regulating ‘Hazard’, ‘Risk’ and ‘Exposure’***

Various workplace tasks, such as working with NMs in liquids without adequate protection, will increase exposure to NPs. Seven young female Chinese workers developed severe lung damage (and two died) after inhaling nanoparticles produced in their factory.<sup>47</sup> However, the US National Institute for Occupational Safety and Health contended that the tragedy could have been avoided by the use of proper industrial hygiene procedures.<sup>48</sup> Debate continues about whether the deaths of the workers can be directly linked to their exposure to nanoparticles.

Such incidents have generated increasing debate about the risks to human health posed by NPs and how they should be regulated.<sup>49</sup> In NZ, the regulation of occupational exposures involves quantifying and evaluating scientific risk by assessing the relationship between a person’s exposure and the harm caused by that exposure. Risk management involves identifying hazards, assessing exposure and risk, and managing those risks.

Hazard identification and characterisation refers to the toxicology of NPs. Although there is limited information about the adverse occupational human health effects of NPs, there is cause for concern about the health effects of NMs on the basis of three main streams of evidence. Firstly, research on inhaled dusts and fibres recognises their potential respiratory toxicity.<sup>50</sup> There is a difference between large and nano-sized particles. Air pollution epidemiological studies show that particles less than 2.5 µm are responsible for respiratory and cardio effects. Research on industrial fibres, such as asbestos has established that fibres longer than 15-20 µm with diameters less than 3µm and are biopersistent in

<sup>44</sup> Richard Rudman *New Zealand Employment Law Guide* (CCH, Auckland, 2009) at 234.

<sup>45</sup> HSNO Act, s 4.

<sup>46</sup> Environmental Protection Authority Act 2011, s 7.

<sup>47</sup> See Y Song, X Li and X Du “Exposure to Nanoparticles is Related to Pleural Effusion, Pulmonary Fibrosis and Granuloma” (2009) 34 *European Respiratory Journal* 559; Alok Dhawan and Vyom Sharma “A Cautious Approach to Nanotechnology” *Cosmos Online* (2011) <www.cosmosmagazine.com>; Reuters “Deaths, Lung Damage Linked to Nanotech” (2009) *Stuff* <www.stuff.co.nz>.

<sup>48</sup> Reuters “Deaths, Lung Damage Linked to Nanotech” (2009) *Stuff* <www.stuff.co.nz>.

<sup>49</sup> Royal Commission on Environmental Pollution *Novel Materials in the Environment: The Case of Nanotechnology* (London, RCEP, 2008); Royal Society and Royal Academy of Engineering *Nanoscience and Nanotechnologies: Opportunities and Uncertainties* (London, RSRAE, 2008).

<sup>50</sup> Robert Aitken and others “Regulation of Carbon Nanotubes and Other High Aspect Ratio NPs: Approaching this Challenge from the Perspective of Asbestos” in Graeme Hodge, Diana Bowman and Andrew Maynard (eds) *International Handbook on Regulating Nanotechnologies* (Edward Elgar, Cheltenham, 2010) 205.

the lungs, are hazardous to human health.<sup>51</sup> Hazard identification and assessment needs to consider the role of particle size, chemical properties, shape and dose. Secondly, some familiar materials, when nanoscaled, demonstrate heightened biological reactivity. The United States National Institute for Occupational Safety and Health (NIOSH) has indicated that low solubility NPs are more toxic than larger particles on a mass for mass basis.<sup>52</sup> Thirdly, initial animal inhalation studies of engineered NPs have shown findings of pulmonary fibrosis, granulomas, inflammation, lung cancer, mesothelioma-like effects and cardiovascular effects.<sup>53</sup> In these studies, NPs have been shown to translocate from the nose to the brain and from the lungs to other organs.<sup>54</sup>

This research provides evidence of the potential occupational hazards of some NPs, but there will only be risks to human health if there is exposure at levels in which harm can occur. The most likely route of exposure to NPs is through inhalation,<sup>55</sup> but ingestion and dermal penetration may also occur.<sup>56</sup> Detailed discussion of exposure routes has been outlined elsewhere.<sup>57</sup> There are currently no occupational exposure limits governing workplace exposure to NPs. Therefore, NPs present new challenges to understanding, predicting and managing potential health risks to workers. It is likely, for example, that current personal protective equipment will be of limited effectiveness in reducing dermal exposure to NPs because NPs will “more readily be able to penetrate the material from which the protective clothing is made than macro-sized particles.”<sup>58</sup>

Studies are being conducted to establish the workforce’s exposure.<sup>59</sup> It is possible that workers are currently experiencing relatively low levels of exposure, but because the toxicity of all NPs is unknown, even low exposure could be potentially harmful to human health. Dose metrics besides mass concentration may be a better measure when evaluating the health effects of exposure to NPs. Currently commercially available air sampling instrumentation can characterise nanoscale aerosols based on a number of metrics, but none are sufficiently small to be worn by workers to allow the estimation of NP concentration in their personal breathing zone.<sup>60</sup> Information on exposure remains basic and there are many outstanding knowledge gaps.<sup>61</sup>

What are the procedures to minimise exposure? At present, there are no standardised or validated methodologies or equipment to enable routine measurement of NPs in the workplace. However, it is good public health practice to keep exposures to new and uncharacterised particles as low as possible. The NIOSH recently published the results of 12 field studies using the Nanoparticle Emission

<sup>51</sup> National Institute of Occupational Safety and Health (NIOSH) “Workplace Safety and Health Topics: Nanotechnology” Centres for Disease Control and Prevention (CDC) <www.cdc.gov>.

<sup>52</sup> NIOSH “Strategic Plan for NIOSH Nanotechnology Research and Guidance: Filling the Knowledge Gaps” <www.cdc.gov>.

<sup>53</sup> AA Shvedova and others “Unusual inflammatory and fibrogenic pulmonary responses to single-walled carbon nanotubes in mice” (2005) 289 *American Journal of Physiology* L698.

<sup>54</sup> Tracy Hampton “Researchers Size Up Nanotechnology Risks” (2005) 294 *JAMA*. 2005 1881.

<sup>55</sup> CC Daigle and others “Ultrafine particle deposition in humans during rest and exercise” (2003) 15 *Inhalation Toxicology* 539.

<sup>56</sup> Sally Tinkle and others “Skin as a route of exposure and sensitization in chronic beryllium disease” (2003) 111 *Environmental Health Perspectives* 1202; James Brown and others “Ultrafine particle deposition and clearance in the healthy and obstructed lung” (2002) 166 *American Journal of Respiratory Critical Care Medicine* 1240.

<sup>57</sup> Karinne Ludlow “One Size Fits All? Australian Regulation of Nanoparticle Exposure in the Workplace” (2007) 15 *Journal of Law and Medicine* 136 at 142.

<sup>58</sup> *Ibid.*

<sup>59</sup> Paul Schulte “Progress in Understanding and Preventing Work Related Disease and Injury from Nanomaterials” (paper presented to Global Regulation of Nanotechnologies conference, Northeastern University United States, 7 May 2010); Methner, above n 8; K Schmid, B Danuser and M Riediker “Nanoparticle Usage and Protection Measures in the Manufacturing Industry – A Representative Survey” (2010) 7 *Journal of Occupation and Environmental Hygiene* 224.

<sup>60</sup> D Brouwer, J Gijsbers, and M Lurvink “Personal exposure to ultrafine particles in the workplace: Exploring sampling techniques and strategies” (2004) 48 *Ann Occup Hyg* 439.

<sup>61</sup> CDC “Strategic Plan for NIOSH Nanotechnology Research and Guidance: Filling the Knowledge Gaps.” <www.cdc.gov>.

Assessment Technique to characterise emissions during processes where engineered nanomaterials were produced or used.<sup>62</sup> The NIOSH believes that there is sufficient evidence to suggest that it is theoretically possible to control workplace exposure to NPs, but that there will be costs involved.<sup>63</sup> A precautionary approach to the prevention and control of workplace exposures should be adopted.<sup>64</sup> It may be a challenge adopting such an approach because of the way that NZ regulations define and address occupational health risks.

### *Application of Legislative Instruments to Nanoparticles*

#### *HSNO Act*

##### (1) The 'substance' threshold

Before any particular form of mNM or object containing mNMs will require EPA approval, it must satisfy three separate criteria, each of which poses certain challenges with regard to mNMs. The three criteria are: 1) is it a 'substance'? 2) is it 'hazardous'? 3) does it present a 'new' hazard? The HSNO Act applies only to "substances" that are "hazardous" and both of those criteria have been subject to interpretation and controversy. A "substance" is defined as:<sup>65</sup>

- a) any element, defined mixture of elements, compounds or defined mixture of compounds, either naturally occurring or produced synthetically, or any mixtures thereof;
- b) any isotope, allotrope, isomer, congener, radical, or ion of an element or compound which has been declared by the Authority, by notice in the *Gazette*, to be a different substance from that element or compound;
- c) any mixtures or combinations of any of the above;
- d) any manufactured article containing, incorporating, or including any hazardous substance with explosive properties.

A substance will be considered hazardous if it meets or exceeds one of the thresholds set down in the Hazardous Substances (Minimum Degrees of Hazard) Regulations 2001 for any of the relevant properties. These relate to:<sup>66</sup>

- i. explosiveness;
- ii. flammability;
- iii. a capacity to oxidise;
- iv. corrosiveness;
- v. toxicity (including chronic toxicity);
- vi. ecotoxicity, with or without bioaccumulation.

Where it is possible that a substance may trigger more than one threshold, it should be evaluated against the thresholds established for each hazardous property, e.g. a substance that may have both flammable and toxic properties must be evaluated against both relevant thresholds.

If a substance does not trigger any of the section 2 thresholds, it is not "hazardous" and does not need an approval from the Authority. However, if a substance does trigger a threshold level, then it cannot be imported or manufactured in NZ other than in accordance with an approval from the Authority.

<sup>62</sup> Methner and others, above n 8.

<sup>63</sup> Ibid.

<sup>64</sup> N Jackson and others "Engineered Nanomaterials: Evidence on the Effectiveness of Workplace Controls to Prevent Exposure" (2009) < <http://nanotech.law.asu.edu/?rgn=cau>>.

<sup>65</sup> HSNO Act, s 2.

<sup>66</sup> HSNO Act, s 2.

The manufacture or importation of a hazardous substance without an approval is an offence.<sup>67</sup> Some nano-chemicals will trigger the legislative thresholds and be deemed hazardous.

However, the existence of quantity-based regulatory triggers is a significant regulatory gap. The Monash Report reached the same conclusion and its opinion has led the National Industrial Chemicals Notification and Assessment Scheme, the Australian industrial chemicals regulator to propose “to administratively exclude nanomaterials which are new chemicals from low volume/low concentration exemptions, thereby shifting a post-market audit activity to a pre-market assessment (i.e. new nanomaterials to be assessed under permit or certificate categories prior to commercialisation).”<sup>68</sup>

The quantity-based exception under the HSNO Act relates to ‘small-scale use of hazardous substances in research and development or teaching’.<sup>69</sup> The adequacy of training and practice within laboratory environments to ensure safe handling of mNMs is critical. Research conducted by Canterbury University in 2009 suggested that complacency in this regard should be avoided.<sup>70</sup> The report identified a number of issues of potential concern, specifically:<sup>71</sup>

- There is limited information on the effectiveness of engineering controls and personal protective clothing to minimise exposure to unbound NPs.
- Ensuring that researchers have access to best practice safety information for working with nanomaterials and that risk or safety assessments are completed.
- A lack of documented training for new researchers in safe practices for working with nanomaterials.
- Not all nanomaterials research is undertaken in dedicated facilities. A mechanism is needed to ensure that other researchers in shared facilities are aware of any hazards and associated precautionary measures.
- The lack of readily available funding for upgrading research facilities to meet health and safety requirements.

## (2) Is the substance ‘new’?

Even if something is agreed to be a “hazardous substance”, an application will only be required if it has not already received approval. The question inevitably arises as to whether a nano-form of a previously approved substance would be regarded as a new substance, requiring its own approval, or alternatively, would be deemed to be covered by the existing approval. The Monash Report referred to this as “possibly the most significant potential gap”, pointing out that “uncertainty exists as to whether the nanoentity would be considered as ‘new’ or ‘different’ from or as the same as its’ [sic] conventional counterpart.”<sup>72</sup> The Australian toxic dust Senate Committee inquiry recommended that there be an urgent consideration of whether materials already classified as safe at the macroscale should be reassessed to see if they are safe at the nanoscale.<sup>73</sup>

Similar uncertainty may be said to apply to applications for nanoforms of substances already present in NZ. As ERMA has said:

<sup>67</sup> HSNO Act, s 25(1).

<sup>68</sup> NICNAS *Proposal for Regulatory Reform of Industrial Nanomaterials. Public Discussion Paper* (NICNAS, November 2009).

<sup>69</sup> HSNO Act, s 33.

<sup>70</sup> Sally Gaw *Identification of Potential Health and Safety Issues Associated with MacDiarmid Institute Funded Nanomaterial Research in University Laboratories* (MacDiarmid Institute, Wellington, 2009).

<sup>71</sup> Ibid.

<sup>72</sup> Ludlow and others, above n 21, at 92.

<sup>73</sup> Recommendation 13, Senate Community Affairs References Committee *Workplace Exposure to Toxic Dust* (May 2006).

if the hazards of the nanomaterial are the same as the ‘conventional’ substance, then they are covered by the approval for the ‘conventional’ substance. It is only where the hazards differ between the ‘conventional’ substance and the nano substance that the nano substance would need to be treated differently under HSNO.<sup>74</sup>

A question inevitably arises as to how a nanoform of an existing substance will be classified where there is uncertainty about the hazard profile. Should it be assumed that the hazards are identical until data exists to prove otherwise? Or should the default position be that the nano-form may have distinct hazardous properties, meriting a separate approval? These issues raise the question of where the burden of proof should lie and what standard of proof should be required. These regulatory gaps in HSNO may mean that workers exposed to hazardous substances and NPs are not receiving adequate protection. These gaps could potentially be addressed by the regulators without need to amend the legislation. EPA could, for example, modify its Group Standards<sup>75</sup> to require that nano-forms of existing substances could be subject to new assessments, or at least that they must be notified to EPA.

### *HSE Act*

The HSE Act enacts an extensive statutory regime to ensure the health and safety of employees and other people in the workplace. The Act is less concerned with prescribing how to make workplaces safe and more concerned with putting obligations on employers and employees to ensure that workplaces and work practices meet defined standards of health and safety. NZ has a ‘no fault’ scheme for dealing with accidental injury.

The HSE Act’s object is to promote the prevention of harm to all persons at work as well as others in, or in the vicinity of, a place of work.<sup>76</sup> The Act covers ‘places of work’ which is given a broad definition in section 2. Therefore, the HSE Act will apply to places of employment whether or not those workplaces involve employees working with mNMs or exposed to NPs. The Act applies to employers, employees, self-employed people, contractors and subcontractors<sup>77</sup> and will, therefore, apply to all these people whether or not they work with mNMs.

The Act imposes duties on employers to ensure the safety of employees at work. Most duties under the HSE Act are not absolute, but require “all practicable steps”<sup>78</sup> to have been taken. This phrase recurs throughout the Act. The “all practicable steps” requirement is interpreted strictly.<sup>79</sup> It is reasonable to expect an employer to do anything that it is practicable to do.<sup>80</sup> Employers are expected to be proactive in identifying both existing and potential hazards and taking steps to prevent harm to workers. Employers may be expected, therefore, to be proactive in identifying potential hazards associated with mNMs and NPs.

An assessment of whether or not all reasonable steps have been taken analyses:<sup>81</sup>

- the nature and severity of the harm that may be suffered if the result is not achieved;
- the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved;
- the current state of knowledge about harm of that nature;

<sup>74</sup> Letter from ERMA Chief Executive to Colin Gavaghan and Jennifer Moore regarding HSNO Act (9 July 2010).

<sup>75</sup> ERMA, Cosmetic Products Group Standard (ERMA, 2006).

<sup>76</sup> HSE Act, s 5.

<sup>77</sup> HSE Act, s 2.

<sup>78</sup> HSE Act, ss 2A and 6.

<sup>79</sup> Rudman, above n 41, at 242.

<sup>80</sup> Ibid.

<sup>81</sup> HSE Act, s 2A.

- the current state of knowledge about the means available to achieve the result and the likely efficacy of those means; and
- the availability and cost of each of those means available.

A person required by the Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.<sup>82</sup> Therefore, a person is required to take all practicable steps to ensure the safety of employees working with NMs or exposed to NPs only in respect of circumstances that the person knows or ought reasonably to know about. The issue is whether a person required by the Act to take all practicable steps would be aware of the presence of NPs and their potential health risks.

There is a potential regulatory gap in that the “current state of knowledge”<sup>83</sup> regarding harm attributed to some mNMs is preliminary. Although initial studies indicate that adverse health consequences are possible from some mNMs and NP use and exposure, some of the OHS implications of mNMs and NPs are currently unknown.<sup>84</sup>

The HSE Act sets out specific duties on employers in relation to hazards in the workplace. Employers must identify hazards;<sup>85</sup> take all practicable steps to eliminate them;<sup>86</sup> and if they cannot be practicably eliminated, isolate hazards.<sup>87</sup> If hazards cannot be isolated, they must be minimised.<sup>88</sup> Employees exposed to them must be monitored.<sup>89</sup> The general language of the Act requires a broad approach by employers to potential hazards. It is clear that employers must identify specific hazards and then do whatever they can to ensure that the hazards do not cause harm.

The concept of ‘hazard’ is vital to the working of the Act. Hazard means any activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or *substance* that is an actual or potential cause or source of harm, whether it arises or is caused within or outside a workplace.<sup>90</sup> “Substance” means a thing that is an organic material, whether living or not.<sup>91</sup> The definition of hazard in the HSE Act is broad and may be physical, biological or mental.

“Significant hazard” means a hazard that is an actual or potential cause or source of:<sup>92</sup>

- serious harm;
- harm (that is less than trivial) for which the severity of the effect on a person depends on the extent or frequency of the person’s exposure to the hazard; or
- harm that does not usually occur or that is not easily detectable until a significant time after the exposure to the harm.

“Harm” means illness, injury or both and includes physical or mental harm caused by work-related stress.<sup>93</sup> “Serious harm” means death or some other harm declared to be serious harm by the

<sup>82</sup> HSE Act, s 2A(2).

<sup>83</sup> HSE Act, s 2A.

<sup>84</sup> Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) *Risk Assessment of Products of Nanotechnologies* (European Commission, Brussels, 2009); SCENIHR *Opinion on the Appropriateness of the Risk Assessment Methodology in Accordance with the Technical Guidance Documents for New and Existing Substances for Assessing the Risks of Nanomaterials* (European Commission, Brussels, 2007); Safety of Nano-Materials Interdisciplinary Research Centre (SnIRC) <[www.snirc.org](http://www.snirc.org)>.

<sup>85</sup> HSE Act, s 7.

<sup>86</sup> HSE Act, s 8.

<sup>87</sup> HSE Act, s 9.

<sup>88</sup> HSE Act, s 10.

<sup>89</sup> Ibid.

<sup>90</sup> HSE Act, s 2.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.



Governor-General.<sup>94</sup> Any illness, injury, physical or mental harm, or death, whether or not attributable to exposure to NPs may be caught by these definitions, provided that the harm caused is deemed sufficiently serious. The current gaps in public health knowledge about NP hazards and exposure mean that some NPs may not be considered a significant hazard. Also, there may be a prolonged latency period between first exposure to NPs and onset of the first symptoms of the disease, particularly for CNTs with their asbestos-like pathogenicity. If the deficiencies in nanotoxicology prevent a potentially harmful NM from being identified as a significant hazard, this is a significant regulatory gap. However, significant hazard is defined in the HSE Act as an actual or *potential* cause or source of serious harm.<sup>95</sup> If the mNM is deemed a potential cause of harm, it could theoretically be identified as a significant hazard and, therefore, trigger the hierarchy of action.

This definition of ‘hazardous’ raises the question of standard of proof. How compelling must the evidence be before such triggers are activated? Whether carbon nanotubes, for example, should be deemed “hazardous substances” within the terms of the HSNO Act seems at present to be uncertain.<sup>96</sup> For some commentators with whom I spoke during the review, existing evidence about CNTs is sufficient to justify a moratorium on their use, or at least on certain uses to which they could be put while for others, the studies published to date are preliminary and inconclusive.

The limited state of current knowledge about the risks posed by some NPs presents a number of obstacles to any attempt to regulate in this area. Regulatory triggers requiring “significant hazard” to be demonstrated may fail to fire for some NPs. It is obviously important that regulators remain apprised of the most recent reliable information with regard to the possible hazards presented by NPs. More challenging, however, is the question of how to proceed in situations of uncertainty. With regard to burden of proof, should regulators assume that a nanoform of an existing product is safe until reliable evidence shows otherwise? Or should they operate on the contrary assumption: that a new product is unsafe until the contrary can be demonstrated?

Some regulatory frameworks offer some guidance in this regard. The HSNO Act, for example, adopts a “precautionary approach”, which emphasises “the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects”.<sup>97</sup> However, a range of opinions can be found as to how ‘caution’ is to be understood. ERMA’s view is that “while the HSNO Act provides for decisions to be precautionary where there is scientific or technical uncertainty ... it does not empower ERMA to act when there are suspicions but little or no evidence.”<sup>98</sup> This understanding of the precautionary remit is likely to be controversial, not least because it may be thought that many of the situations in which there is ‘scientific or technical uncertainty’ will arise precisely because ‘there are suspicions but little or no evidence’.

This is far from a straightforward matter. As one leading commentator on the regulation of emerging technologies has said, “there is scope for endless argument about just how strong the evidence needs to be before precaution kicks in.”<sup>99</sup> Insofar as existing OHS regulations are not specific about the level of proof that would be required to trigger regulatory action, this is a regulatory gap which may compromise workers’ health.

“Health” and “healthy” have restricted meanings; they simply mean unharmed.<sup>100</sup> The definition of health under the HSE Act is different from the broad World Health Organisation definition of health.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid, my emphasis.

<sup>96</sup> As per correspondence with Sustainability Council, 30 November 2010, and ERMA, 21 December 2010.

<sup>97</sup> HSNO Act, s 7.

<sup>98</sup> Letter from ERMA to Gavaghan and Moore about HSNO Act (10 August 2010).

<sup>99</sup> Roger Brownsword *Rights, Regulation, and the Technological Revolution* (Oxford University Press, Oxford, 2008) at

106

<sup>100</sup> HSE Act, s 2.

Health, according to the WHO, is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.<sup>101</sup> The legislative definition of healthy has implications for the level of protection available to workers exposed to NPs. Given the uncertainties, risks assessors and regulators could address the issue by “considering the lowest toxic dose values, and/or a worst-case exposure scenario, to be on the safe side.”<sup>102</sup>

### *The Code 1997*

The Code is a statement of preferred work practices and arrangements. The Code is a practical guide on how to comply with the applicable sections of the HSE Act and Regulations 1995 in order to minimise the risk of occupational illness or injury due to exposure to substances hazardous to health.<sup>103</sup> The Code applies to all workplaces in which substances hazardous to health are used or produced and to all persons with potential exposure to substances hazardous to health in those workplaces.

The Code does not apply to asbestos and materials containing asbestos because asbestos is covered by other regulatory instruments. Given the potential structural and pathogenic similarity between some NPs and asbestos, and the potential adverse health effects, it may be prudent to draft a nano-specific Code or include nano-specific provisions in the HSE Act, The Code and/or the HSNO Act.

A substance hazardous to health is defined as any substance, or product containing a substance, to be used or produced in a workplace that is known or suspected to cause harm to health.<sup>104</sup> This includes:<sup>105</sup>

- Those substances that are classified as hazardous under the HSNO Act, excluding micro-organisms;
- Scheduled toxic substances under the HSNO Act; and
- Those substances that are listed in the Workplace Exposure Standards publication currently applicable in New Zealand.

Therefore, many substances that may be or may incorporate NMs such as paints, heavy metals and solvents will trigger The Code.

Under The Code there is no provision for formal approval of hazardous substances from DoL prior to supply, sale, use or import because such approval is covered by the HSNO Act. In order to achieve compliance with sections 6 and 8 to 10 of the HSE Act, The Code provides a hierarchy of prevention and control measures. Where a significant hazard has been identified, the HSE Act requires that the hazard be managed by considering the following hierarchy of action:

- Elimination;<sup>106</sup> then
- Isolation;<sup>107</sup> and finally
- Minimisation.<sup>108</sup>

<sup>101</sup> World Health Organisation <www.who.int>

<sup>102</sup> Quasim Chaudhry and others “The Current Risk Assessment Paradigm in Relation to the Regulation of Nanotechnologies” in Hodge G, Bowman D, Maynard A (eds) *International Handbook on the Regulation of Nanotechnologies* (Edward Elgar, Cheltenham, 2010).

<sup>103</sup> The Code, at 8.

<sup>104</sup> The Code, p 10.

<sup>105</sup> OSH “Workplace Exposure Standards” (1994, revised in 2002) <www.osh.govt.nz>.

<sup>106</sup> HSE Act, s 8.

<sup>107</sup> HSE Act, s 9.

<sup>108</sup> HSE Act, s 10.

If NPs are identified as a significant hazard, they could be eliminated, isolated or minimised. A potential regulatory gap may exist if the deficiencies in nanotoxicology prevent a potentially harmful NP from being identified as a significant hazard.

Minimisation of the risk of substances hazardous to health may be achieved by a variety of practices such as personal protective equipment (PPE). However, it is likely that NPs will be able to penetrate the material from which the protective clothing is made more readily than macro particles.<sup>109</sup> Another regulatory gap is that, under The Code there, is no legal requirement for the supplier of a substance hazardous to health to provide specific health and safety information under the requirements for labelling and SDS under the HSNO Regulations. The Code states that suppliers should have SDS available for all substances hazardous to health that they supply.<sup>110</sup>

The SDS describes the identity of the substance, relevant health hazard information, precautions for use and safe handling, disposal and emergency response information. Identification of the hazardous substance requires suppliers to detail the chemical identity and CAS Number of the substance. This identification will not necessarily reflect the fact that the chemical is in nanoform. The Code does not expressly distinguish between nano and conventional forms of substances.

The physical and chemical properties of the substance are to be included. The supplier could describe the particle size of the substance in these sections of the SDS, but the supplier is not required to do so. Toxicological information is required but the deficiencies in the toxicological data for NPs, particularly for chronic exposure, may preclude inclusion of such information. In addition to SDS, The Code states that suppliers should ensure that any container supplied for use in a place of work carries sufficient information for the safe use of the product it contains, and is labelled in a way that allows for positive identification of the product. The HSNO Act requirements are now applicable. Labelling requirements will apply to containers of hazardous substances whether or not they incorporate NMs. However, whether users are alerted of the presence of NPs depends on whether the product name, number or identifier used on the label references nano and there are currently no requirements to do so.

Nano-specific labelling is a contentious topic.<sup>111</sup> The EU recently legislated for compulsory labelling of cosmetics containing mNMs<sup>112</sup> while a proposal to require nano-specific labelling of novel foods is currently the subject of conciliation proceedings involving the EU Parliament, Council and Commission.<sup>113</sup> At present, the only potential nano-specific labelling requirement in NZ is the proposed amendment to the NZ Cosmetic Products Group Standard discussed earlier.<sup>114</sup> This proposal has not been approved. This lack of labelling could be argued, in some contexts, to be a regulatory gap. In relation to OHS regulation, for example, lack of nano-specific labelling could compromise workers' health and safety. Due consideration would have to be paid to the appropriate wording of any such labels if they are to impart genuinely useful information to workers without causing unjustified alarm.

## Challenges in Safety Assessment for NPs

<sup>109</sup> Ludlow, above n 54, at 142.

<sup>110</sup> The Code, at 34.

<sup>111</sup> Joel D'Silva and Diana Bowman "To Label or Not to Label? – It's More than a Nano-sized Question" (2010) 4 EJRR 420.

<sup>112</sup> Council of the European Union "Regulation of the European Parliament and of the Council on cosmetic products" (2009) <www.europa.eu>.

<sup>113</sup> European Union Committee : Environment, Public Health and Food Safety "MEPs flag potentially hazardous substances in electrical and electronic equipment" (press release, 2 June 2010) <www.europa.eu>.

<sup>114</sup> See the section on 'Defining Nanotechnology'.

The HSE Act does not specify a particular method of hazard identification. Various hazard identification methods are used in industry. Information from manufacturers, designers, safety data sheets, product labelling should be reviewed as part of the hazard identification process.

Risk assessment, including hazard identification methods, may not be appropriate for NPs. It may be necessary to amend the Safety Data Sheets (SDS) and labelling systems to recognise that NPs have different properties from their bulk counterparts. This presents a challenge to effective risk assessment of NPs because current regulatory requirements for risk assessment are based on knowledge of bulk/conventional particles. The toxicity of NPs is related to properties such as surface area rather than weight. Current processes may not consider the high surface area and increased reactivity of NPs. The relationship between volume of material and exposure (used in chemicals regulation such as the HSNO Act) is not appropriate for assessing the risks of NPs. Therefore, the current methods and procedures will be inadequate for the safety of workers. Hazard assessments for NPs need to consider shape, chemical properties, functionality, and the role of particle size.

There are further difficulties in protecting New Zealand workers from adverse health effects of nanoparticle exposure. Firstly, there is no national or international agreed definition to describe nanoparticles. There are, however, attempts to develop an international terminology for nanotechnology.<sup>115</sup> Secondly, equipment and methods to enable routine measurements of nanoparticles are not yet available. The tiny size of NPs poses special challenges of exposure. NPs can penetrate deep into the lungs when inhaled and may circulate throughout the human body when they enter a single part of the body. When NPs get into the environment it “may be impossible to contain them.”<sup>116</sup>

The HSE Act includes provisions for recording, reporting, reviewing and monitoring hazards in workplaces and workers’ health and safety. For example, Workplace Exposure Standards enable monitoring. When sufficient nanotoxicological and exposure data become available, nano-specific workplace exposure standards should be developed. The HSE Act confers powers on inspectors who may monitor conditions in workplaces.<sup>117</sup> It is important that these monitoring and reporting procedures enable the timely and proper collection of information about exposure to NPs which has caused harm, incidents and injuries.

The Code describes an assessment process for employers to meet their duty to manage substances hazardous to health. The assessment aims to achieve compliance with section 7 of the HSE Act. The purpose of an assessment is to gain adequate information on the use of substances hazardous to health in the workplace.<sup>118</sup> The assessment process involves:

1. Identifying substances hazardous to health in the workplace;
2. Reviewing the information about the hazards they pose to health;
3. Determining the degree of exposure;
4. Assessing the risk to health; and
5. Reviewing the assessment.

There are currently no effective methods available in the workplace to measure nanoparticles or exposure to nanoparticles, nor are there currently effective methods for assessing particle surface area. Therefore, the assessment process described in The Code will be difficult for hazardous substances that contain NMs or for nanoparticles. The Code describes a process if the outcome of an assessment

<sup>115</sup> International Organisation for Standardisation on Nanotechnology <www.iso.org.>

<sup>116</sup> Davies J Clarence “A New Approach to Regulating Nanotechnology Products” in Graeme Hodge, Diana Bowman, Andrew Maynard (eds) *International Handbook on Regulating Nanotechnologies* (Edward Elgar, Cheltenham, 2010).

<sup>117</sup> HSE Act, s 33(1).

<sup>118</sup> The Code, at 16.

is uncertain. If an assessment indicates that harm to health may result from exposure to substances hazardous to health, but there is some uncertainty about the degree and extent of the exposure, then further work such as monitoring, workplace exposure monitoring<sup>119</sup> and biological exposure monitoring<sup>120</sup> is required.

Assessments should be revised at least every two years, or if:<sup>121</sup>

- The process, plant or substance related to exposure to the substances hazardous to health is modified;
- New information on the hazards of substances becomes available;
- Monitoring indicates inadequate exposure control...

Hazardous substances containing NPs may trigger a revision if the substance is modified or if new information on the substance becomes available. For instance, new epidemiological information on human exposure and nanotoxicological data may prompt a revision.

The Code also provides for health surveillance as a measure directed at controlling exposure to substances hazardous to health to ensure the health and safety of people at work.<sup>122</sup> Therefore, monitoring is required, but this depends on the assessment showing that monitoring and surveillance is required. The current deficiencies in public health knowledge about NPs mean it is unclear whether assessments will identify NPs. Further, this limited knowledge means that health surveillance and monitoring processes under The Code may not be suitable or adequate for NPs.

## Suggestions for the Nano-specific Regulation

Given that workers are being exposed, it is important that Parliament acts now. There should be compulsory reporting of any incidents of adverse health outcomes experienced by workers exposed to NPs. Such a reporting scheme should be national and use standardised identification and hazard assessment processes. Any OHS legislation provision which defines NP should refer to size and other relevant physio-chemical properties such as shape. The definition should be sufficiently flexible to allow for adaptation as nanoscience develops and new public health data on NPs and their health effects becomes available.

At the time of writing, neither ERMA nor the EPA had formally assessed the potentially hazardous nature of CNTs, as no application involving them has been under the HSNO Act. There is merit in the suggestion that, for the time being, CNTs be classified “as if” they are hazardous, thereby bringing them within the remit of the relevant legislation and regulator.<sup>123</sup>

## Conclusion

Although more work is needed to measure the health and safety risks that NPs pose to NZ employees, workers are currently being exposed. This paper has demonstrated that NZ’s OHS regulation of NPs contains the following specific regulatory gaps:

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<sup>119</sup> The Code, at 29.

<sup>120</sup> The Code, at 28.

<sup>121</sup> The Code, at 22.

<sup>122</sup> The Code, at 27 and 39.

<sup>123</sup> Mark Phillbrick “An Anticipatory Governance Approach to Carbon Nanotubes” (2010) 30 Risk Analysis 1708.

- Legislative thresholds such as “significant hazard” and “current state of knowledge” may not be triggered because of the current limited public health data on exposure to NPs;
- NZ OHS regulations are not specific about the level of proof that would be required to trigger regulatory action for hazardous substances or particles and this regulatory gap may compromise workers’ health;
- Despite the risks posed by some NPs, there is not necessarily any requirement for the special properties of NPs to be identified in the occupational context;
- The regulatory deficiencies presented by SDS, labelling and PPE pose health risks to workers exposed to NPs;
- The quantity based thresholds under the HSNO Act are inappropriate for NPs;
- The uncertainty about whether a nano-form of a substance will be considered ‘new’ or ‘existing’ may mean that workers exposed to hazardous substances and NPs are not receiving adequate protection; and
- There is no NZ regulatory definition of NP, despite the potential need for a definition to ensure effective oversight of occupational exposure to NPs.

The deficiencies identified in NZ OHS law are particularly troublesome for NPs because of their fundamental differences from standard particles, and due to their unpredictable behaviours when interacting with the human body and (in the case of some CNTs) their structural and pathogenic similarity to asbestos.

There is current uncertainty in the scientific literature and limited occupational exposure data. However, preliminary research does highlight the need to adopt a precautionary approach. NZ’s regulatory risk assessment approach tends to deal retrospectively with well-established occupational hazards. We could learn from the regulatory story of asbestos and, without delay, use the steadily emerging evidence of the potential asbestos-like pathogenicity of some CNTs to enact OHS law to help protect NZ’s exposed workforce.

## **Acknowledgements**

Thank you to John Hughes (an expert on the HSE Act) for his feedback on the HSE Act analysis. I am grateful to the Department of Labour and ERMA (now the EPA) for their assistance while I worked on the NZ review of the impact of mNMs on our regulatory environment. I also wish to thank Dr David Robinson for his excellent comments on earlier drafts.

# Hunting for Happy Feet in Honolulu: The Elusive Struggle for Pay Equity – A Comparative View

JOHN GODDARD\*

## Introduction

The National-led Government campaigned during the 2008 election campaign on closing the income gap with Australia.<sup>1</sup> Shortly after being elected as Prime Minister, John Key stated:<sup>2</sup>

I am horrified that the gap between our wages and those in Australia are now wider than they have been in our history – at more than 35 per cent. How can we hope to hold on to our young people, the educated, the talented, the motivated, if on the Monday you can earn \$50,000 for doing one job and on the Friday earn \$80,000 by simply moving across the ditch?

As part of their confidence and supply agreement, the National Party and the Act Party agreed on the “concrete goal of closing the income gap with Australia by 2025.”<sup>3</sup> In furtherance of this goal, the 2025 Taskforce (the Taskforce) was established to make recommendations on policy that would enable the New Zealand Government to close the income gap with Australia.<sup>4</sup> None of the Taskforce’s recommendations included changing any legislative or executive measures in relation to pay equity between men and women and none have been adopted. Another way for the New Zealand labour market to compete more effectively with our Australian counterparts would be to implement effective measures that promote pay equity.

The purpose of this paper is to consider whether, and to what extent, the three branches of government in New Zealand have complied with their international obligations in relation to pay equity by comparing the actions and omissions of the legislative, executive and judicial branches of government with the actions and omissions of their Australian counterparts. It is suggested that competing effectively with Australia requires the New Zealand government to take much more positive steps to achieve pay equity.

In Part II of this paper, “pay equity” will be defined and the rationale for implementing measures that promote pay equity will be evaluated. In Part III, a comparative analysis of the relevant acts and omissions of the legislative, executive and judicial branches of government will be undertaken.

In New Zealand, the median hourly rate of pay that women receive is 89.4% of the remuneration that men receive. The median weekly wage of women in full-time employment equates to 86% of the median male wage. The median hourly earnings of women in fulltime employment amounts to 93.2% of the male rate.<sup>5</sup> These improvements in the remuneration of women represent the culmination of 116 years of struggle. Describing the history of pay equity is beyond the scope of this paper.<sup>6</sup> However, the struggle for pay equity in New Zealand and Australia has been broadly similar, at least until 2009.

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<sup>1</sup> New Zealand Centre for Political Research “Prosperity or Poverty” (2009) <www.nzcprr.com>.

<sup>2</sup> John Key provided the inspiration for the title when he stated that the Green Party’s Equal Pay Amendment Bill had “as much chance of being considered as Happy Feet the penguin having a holiday in Honolulu” Otago Daily Times “Pay Equity Bill on Ice” <www.odt.co.nz>.

<sup>3</sup> National-Act Confidence and Supply Agreement (2008) <www.act.org.nz>.

<sup>4</sup> 2025 Taskforce “Answering the \$64,000 Question: Closing the income gap with Australia by 2025” (2009) <www.2025taskforce.govt.nz>. As at 4 June 2011, the Taskforce was disestablished.

<sup>5</sup> Statistics New Zealand *New Zealand Income Survey: June 2010 Quarter* (2010).

<sup>6</sup> A brief summary of the history of pay equity in New Zealand is contained in Appendix A.

The current position is that New Zealand women have comparatively better rates of pay than their Australian counterparts. However, this gap is likely to narrow because Australia has recently introduced a range of measures at state and federal level that have the potential to reduce the gender pay gap. In addition, Australian women currently receive higher wages than their New Zealand counterparts because remuneration in Australia is approximately one third higher than in New Zealand.

## The Rationale for Pay Equity

The purpose of this part is to establish whether there are sound reasons for promoting and achieving pay equity. If there are, then effective measures should be introduced by domestic governments to provide for pay equity. If there are not sound reasons, then the international obligations requiring measures that promote pay equity should be reconsidered. Before the merit of rationales for promoting pay equity can be evaluated, it is necessary to establish a working definition of pay equity for the purposes of this paper.

### *A Definition of Pay Equity*

“Pay equity”, “comparable worth” and “equal pay for work of equal value” all describe a principle of fair and equitable remuneration. However, their meanings require clarification in order to determine what measures would suffice to achieve the principle that they represent. “Pay equity” is not defined in any current New Zealand legislation. However “equal pay” is defined in s 2 of the Equal Pay Act 1972 (the EPA) as “a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees”. “Employment equity” was defined in the Employment Equity Act 1990 (the EEA) as:<sup>7</sup>

the elimination from all forms of paid employment of –

...

(b) Inequality of remuneration for women:

However, the EEA was repealed two months after being enacted. Accordingly, there is no current legislative guidance in relation to the meaning of “pay equity”.

New Zealand has ratified a number of international instruments that shed more light on the principle. The International Covenant on Economic, Social and Cultural Rights (ICESCR) requires State parties to provide just and favourable conditions of work which include:<sup>8</sup>

[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.

The International Labour Organisation (ILO) Convention on Equal Remuneration for Work of Equal Value describes pay equity as “the principle of equal remuneration for men and women workers for work of equal value.”<sup>9</sup> This is wider than the principle of equal pay for equal work. The ILO has subsequently expanded on this principle:<sup>10</sup>

<sup>7</sup> Employment Equity Act 1990, s 2. Note that the EEA was repealed in December 1990 just two months after its introduction.

<sup>8</sup> International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976), art 7.

<sup>9</sup> ILO Equal Remuneration Convention 1951 (opened for signature 29 June 1951, entered into force 23 May 1953). Hereafter referred to as ILO (100).

<sup>10</sup> *Gender Equality at the Heart of Decent Work* ILC98, 98<sup>th</sup> sess, ILC98-VI[2008-12-0081-1(Rev.1)]-En (2009).



[t]he scope and implications of “work of equal value” are poorly understood. The notion goes beyond equal remuneration for “equal”, the “same” or “similar” work: it also encompasses work of an entirely different nature, but nevertheless of equal value. This concept is essential in order to address occupational segregation where men and women often perform different jobs, in different conditions, and even in different establishments.

Last year, the ILO noted that “the concept of ‘work of equal value’ goes beyond ‘similar work’ and encompasses work that is of an entirely different nature, but which is nevertheless of equal value.”<sup>11</sup> These provisions require a new definition of “pay equity” that is consistent with the international obligations that New Zealand has ratified. For this reason in itself, new pay equity legislation is required. In 2002, the Ministry of Women’s Affairs noted that:<sup>12</sup>

*[e]qual pay for work of equal value* means that women get the same pay as men for doing a comparable job – that is, a job involving comparable skills, years of training, responsibility, effort and working conditions. This is often referred to as *pay equity* ... In the USA and Canada, equal pay for work of equal value is called *comparable worth*.

Thus, the New Zealand government has recognised a wider concept of equal remuneration that includes comparable worth and is synonymous with the concept of equal pay for work of equal value. The next step for the New Zealand government will be express recognition of the wider concept in legislation.

The wider concept has been recognised in Australian legislation. The New South Wales Legislature has defined “pay equity” as “equal remuneration for men and women doing work of equal or comparable value”.<sup>13</sup> In federal legislation, “equal pay for work of equal or comparable value” is defined as “equal remuneration for men and women workers for work of equal or comparable value.”<sup>14</sup> This definition appears circular in that the definition closely resembles the defined term. Nevertheless, it serves to incorporate the broader concept of pay equity.

For the purposes of this paper, “pay equity” refers to equal remuneration for work of equal or comparable value. The work may be different in nature provided that its value is equal or of comparable value. In other words, the interpretation suggested by the ILO is adopted.

### ***Formative or Substantive Equality?***

Equal remuneration may be provided for in both formal and substantive ways. It is suggested that both formal and substantive equality are required to close the gender pay gap. It is necessary to distinguish between measures that appear to promote pay equity and measures that actually do so. This requires developing an understanding of the concepts of formal equality, substantive equality and transformative equality.

Hepple refers to each of these concepts, identifying their distinguishing features. He suggests that formative equality does not adequately address indirect discrimination.<sup>15</sup> The United Nations Committee on Economic, Social and Cultural Rights (the Committee) states that formal equality assumes that equality will result if

<sup>11</sup> *Conference Committee on the Application Of Standards: Extracts from the Record Of Proceedings* ILC99, 99<sup>th</sup> sess, 2010-09-0040-2-En (2010).

<sup>12</sup> Ministry of Womens Affairs “Next Steps Towards Pay Equity: A Discussion Document” (2002) <[www.mwa.govt.nz](http://www.mwa.govt.nz)>.

<sup>13</sup> Industrial Relations Act 1996 (NSW), s 4.

<sup>14</sup> Fair Work Act 2009 (Cth), s 302.

<sup>15</sup> B Hepple *Equality: The New Legal Framework* (Oxford and Portland, Oregon, 2011) at 18.

measures treat men and women in a neutral way and typically maintain existing and inherent disadvantage.<sup>16</sup> Caldwell notes that formative equality is derived from the Aristotelian concept that like should be treated alike.<sup>17</sup> She criticises this “normative aspiration” as presenting barriers to social justice in the context of anti-discrimination law by providing remedies which are limited to direct discrimination.<sup>18</sup> Butler suggests that both direct and indirect discrimination should be proscribed by anti-discrimination provisions.<sup>19</sup>

Substantive equality has been described by the European Union as “full equality in practice” and emphasises providing individuals with equal opportunities. According to the Committee, substantive equality intends to mitigate the effects experienced by inherently disadvantaged groups.<sup>20</sup> This concept encompasses provision of remedies for indirect discrimination by focussing on procedural equality.<sup>21</sup> Hepple notes that indirect discrimination focuses on the effects to the individual as opposed to equal treatment. Undervaluing of women’s work through occupational segregation is an example of indirect discrimination. Providing for equal pay for work of equal value requires implementing measures that address indirect discrimination as well as direct discrimination. It is suggested that state parties fulfil their obligations under international instruments by providing for substantive equality.

Transformative equality aims to ensure that there exists among individuals an “equality of capabilities”.<sup>22</sup> This is achieved by the dismantling of systemic inequalities and the “eradication of poverty and disadvantage”.<sup>23</sup> Under the transformative principle, institutions are burdened with a positive obligation to remove barriers faced by disadvantaged groups and to provide them with resources as required. Laugesen argues that only a transformative approach will result in the narrowing of the gender pay gap.<sup>24</sup> Whether transformative equality is attainable in the current social, economic and political climate is beyond the scope of this paper.

Having clarified these categories of equality, it is appropriate to consider the merit of the rationale for adopting measures that promote pay equity.

### ***Why Should the New Zealand or Australian Governments Adopt Pay Equity Measures?***

The purpose of this part is to explore the rationale underlying the current policy directions of the two jurisdictions. It is suggested that there are four key justifications for promoting pay equity: (1) a normative basis which is supported by broad concepts of economic and social justice; (2) a merit-based rationale whereby employees are remunerated according to their worth; (3) an economic justification that employees should be remunerated according to the value of their work in contradistinction to remuneration which is influenced by direct or indirect discrimination; and (4) political justifications based on both the ratification of international instruments by Australia and New Zealand that require those countries to ensure that employees receive equal pay for work of equal value in combination with the enactment of domestic legislation that goes some way towards meeting international obligations in relation to pay equity.

<sup>16</sup> Committee on Economic, Cultural and Social Rights *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General comment No. 16* UN ESC, 34<sup>th</sup> sess, at [7], E/C 12/2005/4 (2005).

<sup>17</sup> N Caldwell “Workplace Appearance Standards: Undressing the Law” (2009) 15 *Canta LR* 1 at 25.

<sup>18</sup> *Ibid*.

<sup>19</sup> A Butler & P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Limited, Wellington, 2005) at 502-503.

<sup>20</sup> Committee on Economic, Cultural and Social Rights, above n 16.

<sup>21</sup> Hepple, above n 15, at 18-19.

<sup>22</sup> A Sen *Development as Freedom* (Oxford University Press, Oxford, 1999).

<sup>23</sup> Hepple, above n 15, at 22.

<sup>24</sup> Ruth Laugesen “All Aboard” *New Zealand Listener* (New Zealand, 27 August 2011) 18 at 23. Laugesen argues that “only [when flexible jobs become respectable in the workplace], when women and men are seeking the same things from their work and their lives, will there be real hope that the gender gap can close.”

### *The Normative Rationale*

The justification of the normative rationale is derived from the concept of human worth and dignity. Pursuant to this justification, promotion of pay equity assists in affirming the concept of human dignity. As Barak observes:<sup>25</sup>

[m]ost central to all human rights is the right to dignity. It is the source from which all other rights are derived. Dignity unites the other human rights into a whole.

Thomas J observed that “the dignity and worth of the human person is the key value underlying the rights affirmed in the Bill of Rights.”<sup>26</sup> Affirming human dignity has the potential to improve the quality of human experiences. Promoting pay equity is a part of this. Any initiatives that affirm and strengthen human dignity are justified. To the extent that pay equity achieves this, it is justified.

Alternatively, pay equity should be promoted as a means of eliminating direct and indirect discrimination in relation to the remuneration of employees. Employees should be remunerated based on the value of their work in contradistinction to their gender or other characteristics which are generally immutable. Discrimination “assails a person’s dignity” and erodes a person’s sense of their worth.<sup>27</sup> Therefore, discriminatory practices are inherently unfair, counter-productive and should be abandoned.

In short, pay equity measures provide opportunities to both affirm human dignity and to eliminate and/or minimise conduct that erodes human dignity. For these reasons, there exists a normative justification for implementing pay equity.

### *The Merit-based Rationale*

Merit as a concept is complex and contested. It may be argued that currently the recognition of qualifications, skills and experience by employers is merit-based. It follows that any interference with current remunerations practices will distort the current meritocracy. Proponents of the liberal meritocracy suggest that affirmative action programmes or attempts to redefine merit will distort practices that are fair, transparent and market-driven. Accordingly, it is possible for a meritocracy to maintain the status quo and the inherent inequality of disadvantaged groups. For this reason, the merit-based rationale may support or undermine pay equity. Therefore, merit-based arguments require careful analysis.

To measure the cogency of this argument, it is necessary to define the concept of merit. The *Oxford Dictionary* defines “merit” as the “quality of deserving well; excellence, worth”. Thornton suggests that the two components of merit (excellence and deserts) have become conflated.<sup>28</sup> Merit appears to provide an objective means for defining remuneration so that remuneration based on merit cannot be discriminatory.

The problem is defining the objective criteria that guide merit-based decision making. According to Thornton, merit is constructed by an “essential subjectivity”.<sup>29</sup> The lack of a definition of merit allows every decision-maker the opportunity to choose characteristics and attributes to construct his or her version of

<sup>25</sup> A Barak *The Judge in a Democracy* (Princeton University Press, New Jersey, 2006) at 85.

<sup>26</sup> *Brooker v Police* [2007] NZSC 30; [2007] 3 NZLR 91 at [180].

<sup>27</sup> *Ibid.*

<sup>28</sup> M Thornton “Otherness’ on the Bench: How Merit is Gendered” [2007] SydLawRw 16.

<sup>29</sup> M Thornton, “Affirmative Action, Merit and the Liberal State” (1985) 2(2) *Australian Journal of Law and Society* 28, 33.

merit.<sup>30</sup> The amorphous nature of the concept gives rise to the possibility of “arbitrary” and “idiosyncratic” selections of personal attributes in determining the merit of particular employees. In the context of judicial appointments, Thornton argues that the “masculinist” construction of merit makes it extremely difficult for women to meet the standard.<sup>31</sup> Malleeson has observed that “[t]he criteria are rarely articulated and often unconscious, and may vary”.<sup>32</sup> Williams and Davis assert that “merit” cannot be a neutral phenomenon<sup>33</sup> and Bartlett questions whether the construction of merit can either be said to be neutral or objective.<sup>34</sup> Malleeson agrees with Thornton that the concept of merit is influenced by the relevant social context and suggests that constructing merit is a “reflexive and dynamic” process.<sup>35</sup>

For the purposes of this paper, the question is whether remuneration based on merit is free from discrimination or sufficiently objective to ensure that employees will not be undervalued on account of gender. It is suggested that merit is such a flexible concept that the possibility that remuneration according to merit is discriminatory cannot be eliminated. The meritocratic approach has the tendency to maintain the status quo because decisions based on merit must follow precedent if they are to be justified. The practical consequence is that work that has historically been undervalued will continue to be undervalued.

Thornton observes that decisions based on merit are inherently uncertain because they represent future predictions based on past performance.<sup>36</sup> It follows that merit-based remuneration may not be optimal remuneration and re-constructing merit or modifying merit-based remuneration is a viable alternative. In this light, the contention that pay equity measures distort merit-based remuneration is weak because it is impossible to measure the discriminatory or inequitable nature of merit-based remuneration.

In short, “[w]hat is merit? Don’t ask Alice... ask the March Hare... because women are not good enough. Lacking the magic quality, merit, women do not rate.”<sup>37</sup> Accordingly, it is suggested that the rationale for implementing pay equity measures is not weakened by the suggestion that such measures amount to a distortion of fair, merit-based remuneration. Further, merit should be reconstructed so that merit-based arguments support the principle of pay equity.

### *The Economic Rationale*

It is acknowledged that equal remuneration programmes are implemented in an economic context. While programmes provide benefits, they require resources. Costs could potentially outweigh the benefits. On this basis, economic arguments are made in opposition to the implementation of pay equity programmes. These arguments flow from the notion that the sanctity of the free market is, and should be, paramount. If women are undervalued and/or discriminated against in the workplace, this will be remedied by the operation of market forces because the pressures of supply and demand will ensure that employees are appropriately remunerated. In a competitive marketplace, an employee who was insufficiently remunerated would simply choose to work for an employer who would provide the employee with more competitive remuneration. For this reason, if women are undervalued, then the cause cannot be free market economic policy.<sup>38</sup> Therefore,

<sup>30</sup> R Davis & G Williams “Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia” [2008] MULR 12.

<sup>31</sup> Thornton, above n 28, at 33.

<sup>32</sup> Kate Malleeson, “Rethinking the Merit Principle in Judicial Selection” (2006) 33 Journal of Law and Society 126 at 127.

<sup>33</sup> Ibid.

<sup>34</sup> F Bartlett “Model Advocates or a Model for Change? The Model Equal Opportunity Briefing Policy as Affirmative Action” [2008] MULR 12.

<sup>35</sup> Kate Malleeson, “Diversity in the Judiciary: The Case for Positive Action” (2006) 33 Journal of Law and Society 376, at 391.

<sup>36</sup> Thornton, above n 28.

<sup>37</sup> J Scutt “No merit to endemic sexism in legal system” *The Australian* (Australia, 19 July 2000) at 13.

<sup>38</sup> New Zealand Treasury *Treasury Comments on the Report of the Working Group on Equal Employment Opportunities and Equal Pay, Toward Employment Equity*. (Wellington, 1990) at 3.

the causes of unequal remuneration must be interference with free market policies. This could result, for example, when a professional group is able to maintain a monopoly or when monopsonistic employment practices are followed.<sup>39</sup>

According to this neo-liberal analysis, policies that implement pay equity may have undesirable consequences by distorting the labour market. Unsurprisingly, the Treasury concluded that the Working Group's proposal for pay equity could potentially reduce "efficiency, flexibility and responsiveness", result in increased unemployment of women and provide a perverse incentive for employers to discriminate against women.<sup>40</sup>

These economic arguments lack merit. The period of greatest shift to free market policies existed during the decade when the Employment Contracts Act 1991 was in force. In 1990, women in New Zealand received 81% of men's average hourly earnings and 77.6% of men's average weekly earnings. By 2001, these figures had increased to 84.3% and 86% respectively. To the extent that market forces improved the remuneration of women, the improvement was negligible.<sup>41</sup> The Working Group found that it was impossible to provide an effective remedy for the gender pay gap without targeted legislation.<sup>42</sup> Failure to address pay equity requires inherently disadvantaged groups to bear the costs of discriminatory employment practices. The reality is that the market is inherently unfair. This explains why the sanctity of the free market is an ineffective mechanism for mitigating the adverse effects of unfair outcomes.

Free market forces are limited in a number of ways in New Zealand. For example, the Fair Trading Act 1986 and the Credit Contract and Consumer Finance Act 2003 are two examples of legislation that protects consumers. Bodies such as the Commerce Commission and the Securities Commission have been created to regulate the market. The illusion of the sanctity of free market principles has been starkly revealed by the collapse of a number of finance companies in New Zealand and by the recession that occurred as a result of the global financial crisis.

The Government has intervened in financial markets on several occasions. These include becoming a significant shareholder in Air New Zealand, repurchasing shares in New Zealand Rail, bailing out South Canterbury Finance at substantial cost and providing state-funded compensation to owners of leaky buildings. More recently, the Government has enacted the Financial Markets Authority Act 2011 that has established the Financial Markets Authority (FMA). The main objective of the FMA is "to promote and facilitate the development of fair, efficient, and transparent financial markets."<sup>43</sup> Its functions include ensuring compliance with specified legislation.<sup>44</sup> This analysis shows that intervention in the market occurs when it is shown to be necessary.

In the employment context, the Employment Relations Act 2000 (the ERA) has introduced good faith industrial relations. This includes creation and recognition of a mutual statutory duty of good faith between employees and employers.<sup>45</sup> The object of the Act is to build productive employment relationships and one

<sup>39</sup> A monopsonist is a very dominant buyer.

<sup>40</sup> New Zealand Treasury, above n 38, at 15.

<sup>41</sup> Ministry of Womens Affairs, above n 12, at 6.

<sup>42</sup> Working Group on Equal Employment Opportunities and Equal Pay *Towards Employment Equity : Report of the Working Group on Equal Employment Opportunities and Equal Pay* (Wellington, 1988) at 23. This position is supported by the conclusions of the Human Rights Commission in their recently released report *Tracking Equality at Work* (2011) at 29 and the Commission's drafting of a Pay Equality Bill which is incorporated into the report.

<sup>43</sup> Financial Markets Authority Act 2011, s 8.

<sup>44</sup> Financial Markets Authority Act 2011, s 9 and Schedule 1.

<sup>45</sup> Employment Relations Act 2000, s 4. The duty is a positive duty and requires parties to an employment relationship to "be active and constructive in establishing and maintaining a productive employment relationship" and requires the parties to be "responsive and communicative". The duty amounts to a limitation on freedom of contract in the labour market.

way of achieving this is “by acknowledging and addressing the inherent inequality of ... power in employment relationships”.<sup>46</sup> Thus, the Act seeks to remedy the “inherent inequality” by intervening in the labour market. This demonstrates that there are no barriers to state intervention in labour markets in circumstances where intervention is required.

Any argument based on economic grounds needs to balance the costs and benefits of implementing and achieving pay equity. A recent report concluded that the cost to the Australian economy of maintaining the gender pay gap was \$93 billion.<sup>47</sup> Given that the arguments in favour of implementing pay equity are powerful, any economic argument that had the effect of delaying or preventing the implementation of pay equity would need to be compelling. In the absence of compelling arguments, economic considerations ought not to prevent the implementation of pay equity programmes.

Historically, the Employers Federation relied on economic arguments to argue that pay equity would be too expensive for the private sector. However, the Treasury established that the Federation’s costings were unjustified and provided economic arguments in favour of equal pay that were “totally convincing”.<sup>48</sup> Consequently, economic considerations did not prevent the enactment of the EPA. Further, the closer New Zealand and Australia come to implementing pay equity, the smaller the costs are for employers in providing pay equity for their employees. Economic considerations have not prevented the Australian federal government and the New South Wales and Queensland state governments from introducing pay equity measures.

In any event, economic considerations may be relevant in terms of devising the appropriate means of implementing pay equity measures. However, it is suggested that they cannot be relied on to prevent the introduction of effective measures.

### *The Political Rationale*

The justifications for implementing pay equity measures are also political. There are international and domestic limbs to this rationale. Pursuant to the international limb, if countries have undertaken to implement programmes that promote pay equity, then that undertaking should be honoured. Pursuant to the domestic limb, if domestic measures have been shown to be weak or ineffective, they should be modified.

Both New Zealand and Australia have ratified the key international instruments that promote equal pay for work of equal value: the ICESCR, the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) and ILO 100. New Zealand ratified the ICESCR in 1978, ILO 100 in 1983 and the CEDAW in 1985. Australia ratified ILO 100 in 1974, the ICESCR in 1975 and the CEDAW in 1983. Both countries have consistently undertaken to provide for pay equity. Although it is acknowledged that state parties are afforded a margin of appreciation which entitles them to meet their international obligations in different ways,<sup>49</sup> the obligations should be effectively discharged even if this is achieved using different mechanisms.

<sup>46</sup> Employment Relations Act 2000, s 3.

<sup>47</sup> NATSEM *Report to the Office for Women, Department of Families, Community Services, Housing and Indigenous Affairs: The Impact of a Sustained Gender Wage Gap on the Australian Economy* (2010) at 5 <[www.eowa.gov.au](http://www.eowa.gov.au)>.

<sup>48</sup> Trade Union History Project *50 Years of Struggle: The Story of Equal Pay* (Trade Union History Project, Wellington, 1997) at 16. Note that economic concerns can be met by implementing equal pay initiatives in stages. The GSEPA was implemented over three years and the EPA was implemented over five years.

<sup>49</sup> See *Huang v Minister of Immigration* [2009] 2 NZLR 700 (CA) at 714. For example, the EEA relied on legislative intervention whereas the Plan of Action was based on conducting reviews and implementing recommendations.

Incorporation of international obligations requires domestic legislation.<sup>50</sup> Therefore, the political rationale for implementing pay equity is strengthened if domestic legislation has been enacted to ensure performance of international obligations. Accordingly, it is worthwhile to consider relevant domestic legislation. In New Zealand, while the New Zealand Bill of Rights Act 1990 (BORA) provides for civil and political rights, there is no specific legislation in respect of social and economic rights. However, there is specific legislation in relation to equal pay and discrimination as well as general employment legislation.

The specific legislation relating to equal pay includes the Government Service Equal Pay Act 1960 (GSEPA) and the Equal Pay Act 1972 (EPA). The principle of equal remuneration is recognised in the long title to the EPA: “to make provision for the removal and prevention of discrimination based on the sex of the employees, in the rates of remuneration of males and females in paid employment”. This purpose demonstrates the intention of Parliament to meet its international obligations.

The specific legislation relating to discrimination includes s 19 of BORA and ss 20I and 22 of the Human Rights Act 1993 (HRA). The long title to BORA relevantly provides: “to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights (ICCPR).”<sup>51</sup> Section 19 of BORA, the long title to the HRA and ss 20I and 22 illustrate Parliament’s intention to fulfil its international obligations.<sup>52</sup> In other words, the cumulative effect of the NZBORA and the HRA is to incorporate New Zealand’s international obligations into domestic law. This effect is underlined by s 104 of the Employment Relations Act 2000 which provides that an employee may bring a personal grievance claim against her or his employer based on discrimination in employment on any of the prohibited grounds contained in s 21 of the HRA.<sup>53</sup>

In Australia, the same international instruments have been ratified. These instruments have been incorporated into domestic federal legislation in a number of ways. The Industrial Relations (Reform Act) 1993 enabled the Australian Industrial Relations Commission (AIRC) to make orders to provide for equal remuneration for work of equal value. “Equal remuneration” was defined as remuneration without discrimination based on sex.<sup>54</sup> Subsequently, the Work Relations Act 1996 continued similar equal remuneration measures and aligned the Australian definition of equal remuneration with the definition contained in ILO 100. The Workplace Relations Amendment (Work Choices) Act 2005 makes references to the concept of equal remuneration for work of equal value and the international instruments from which the concept is derived. The current federal legislation is the Fair Work Act 2009. This legislation recognises the wider principle by making repeated references to “the principle of equal remuneration for work of equal or comparable value”.<sup>55</sup>

The Australian federal domestic legislation has expressly recognised a principle of equal remuneration that is consistent with that country’s obligations pursuant to the relevant international instruments to implement pay equity policies. Consequently, the ratification of the ICESCR, CEDAW and ILO 100 and the enactment of domestic legislation in Australia and New Zealand constitutes a very persuasive political rationale for implementing effective pay equity programmes. In the words of the Human Rights Commission, “[t]hat battle [for the right to equal pay for work of equal value] has been won”.<sup>56</sup>

<sup>50</sup> *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 (PC) at 347.

<sup>51</sup> International Convention on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) art 26.

<sup>52</sup> New Zealand Bill of Rights Act 1990, s 19 and Human Rights Act 1993, ss 20I and 22.

<sup>53</sup> Employment Relations Act 2000, s 104.

<sup>54</sup> Industrial Relations (Reform) Act 1993 (Cth), s 21.

<sup>55</sup> Fair Work Act 2009 (Cth), s 302.

<sup>56</sup> Human Rights Commission *Tracking Equality at Work* (2011) at 29 <www.hrc.co.nz>.

Having considered the merits of normative, merit-based, economic and political rationales, it is clear that both New Zealand and Australia ought to implement programmes that promote pay equity. The remainder of this paper will assess the effectiveness of the pay equity implemented by the legislative, judicial and executive branches of the New Zealand and Australian governments.

## Assessing the Effectiveness of Pay Equity Measures

The effectiveness of pay equity measures will be assessed in New Zealand and Australia. This will be done by considering (1) the relevant legislation and case law; and (2) measures adopted by the executive.

### *Legislation and Case Law in New Zealand*

The first piece of legislation is the Government Service Equal Pay Act (GSEPA). The GSEPA has three sections and only one substantial section. It provided for equal pay for women in the public sector to be implemented in three annual stages.<sup>57</sup> It is difficult to assess the difference the GSEPA made to pay equity because statistics are unavailable prior to 1972 but its effect is likely to have been significant while falling short of eradicating the gender pay gap in the public sector. For example, it has been shown that women social workers currently receive 9.5% less than their male counterparts.<sup>58</sup> The review of workers in the education sector revealed that female support staff were also undervalued.<sup>59</sup> Since 2005, 38 reviews have been conducted of public service departments. In 37 reviews, gender pay gaps were identified ranging from three to 35%.<sup>60</sup> Despite the enactment of the GSEPA, a gender pay gap remains in the public sector. No case law arose under the GSEPA. The GSEPA remains in force.

The Equal Pay Act 1972 (the EPA) is credited with bringing about the most significant erosion of the gender pay gap from 69.9 per cent to 78.8 per cent between 1972 and 1978.<sup>61</sup> The EPA has resulted in the elimination of separate pay rates for men and women performing the same work but has not addressed the wider concept of equal pay for work of equal value.<sup>62</sup> The purpose of the EPA is:<sup>63</sup>

to make provision for the removal and prevention of discrimination, based on the sex of the employees, in the rates of remuneration of males and females in paid employment.

This purpose appears to be sufficiently broad to encompass pay equity. However, the provisions of the EPA appear to favour a narrow interpretation. For example, “equal pay” is defined as:<sup>64</sup>

a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees.

Therefore, the provision eliminates differentiation in rates of pay but does not allow for comparisons of comparable work. Section 3 provides for the criteria to be applied in relation to making determinations

<sup>57</sup> Government Service Equal Pay Act 1960, s 3.

<sup>58</sup> Letter from Ministry of Social Development, 18 June 2010. The Review into the pay of social workers found that female staff were paid 9.5 percent less than male staff.

<sup>59</sup> Tripartite Steering Group *Pay and Employment Equity Review: Compulsory Schooling Sector Project Report* (2008) Ministry of Education <www.minedu.govt.nz>.

<sup>60</sup> Public Service Association “Stalling on Pay and Employment Equity” in the PSA journal (June 2009) at <www.psa.org.nz>.

<sup>61</sup> Working Group, above n 42, at 43.

<sup>62</sup> See *NZ Clerical Administrative etc IAOW v Farmers Trading Co Ltd* [1986] ACJ 203 [*Clerical Workers case*].

<sup>63</sup> Equal Pay Act 1972, long title.

<sup>64</sup> Equal Pay Act 1972, s 2.



under the EPA. A distinction is drawn between work which is exclusively or predominantly performed by female employees and work that is not exclusively or predominantly performed by female employees. It follows that the EPA recognises two labour markets: a predominantly male labour market and a predominantly female labour market. Yet, the outcome of a literal interpretation of the EPA is that employees in the predominantly female labour market are unlikely to obtain a remedy even if their work is undervalued and the undervaluing of their work is caused by discriminatory employment practices. Since the majority of women work in women-dominated industries, once different pay rates for the same work have been eliminated, the EPA is unlikely to further reduce the gender pay gap.

Other relevant provisions are ss 6, 9, 17 and 18. Section 6 provides for the elimination of differentiation in rates of pay in five annual steps. Section 9 enables the court to state the principles for the implementation of equal pay. If “equal pay” only refers to equal rates of pay, then this provision is an empty vessel because separate female rates have ceased to exist since 1978. Given that the Arbitration Court interpreted “equal pay” narrowly, then it is not surprising that the Court (or its successors) has not stated any principles in relation to the implementation of equal pay either of its own motion or on the application of a party to proceedings. Section 17 requires employers to keep records of all equal pay determinations made by the employer under the EPA. Under section 18, it is an offence to fail to comply with the provisions of the EPA.

Coleman argues persuasively that the EPA applies to pay equity claims based on a purposive approach to the legislation.<sup>65</sup> Even if this is correct, it remains an untried remedy. In practical terms, the authors of *Mazengarbs Employment Law* identify four scenarios where provisions of the EPA may be invoked: (1) an employment agreement complies with the EPA but a female employee has not been paid at the specified rate; (2) an employee brings a claim against an employment agreement that does not comply with the EPA; (3) an employee brings a claim because even though her employment agreement complies with the EPA, a superimposed ruling rate does not;<sup>66</sup> and (4) the written employment agreement complies with the EPA but an additional oral agreement does not.<sup>67</sup> In short, remedies are limited.

The Working Group concluded that eradication of discrimination required legislative intervention and that the EPA was insufficient to provide an adequate remedy. The Human Rights Commission has recently concluded that: “[c]urrent legal remedies have not resulted in systemic change”.<sup>68</sup> The EPA has failed to fulfil its purpose of removing and preventing discrimination based on sex. This failure has made claims under the EPA very difficult. This failure is illustrated by the *Clerical Workers’ Case*.<sup>69</sup>

In the *Clerical Workers Case*, the applicant applied for a declaration that the terms of settlement of an award did not comply with the EPA on the grounds that 90 per cent of clerical workers were female whereas most employees in comparable occupations were male. The Court declined to make a declaration on the ground that it lacked jurisdiction to do so. Judge Finnigan stated:<sup>70</sup>

[i]t is thus our view that the choice of the Equal Pay Act 1972 as the vehicle for remedy of the perceived problems in the present case is an error of law. The Equal Pay Act 1972 contains no powers or other provisions by which the Court can address the issue raised by the union and

<sup>65</sup> Martha Coleman “The Equal Pay Act 1972: Back to the Future” (1997) 27 VUWLR 517, 521-528. This will be discussed in greater depth below.

<sup>66</sup> A ruling rate is a rate of pay for work in excess of work contemplated in the employment agreement.

<sup>67</sup> *Mazengarbs Employment Law* (online looseleaf ed, LexisNexis) at [1803]. Note that most remedies are made pursuant to s 131 of the Employment Relations Act 2000.

<sup>68</sup> Human Rights Commission, above n 55, at 29.

<sup>69</sup> *Clerical Workers Case*, above n 61.

<sup>70</sup> *Clerical Workers Case*, above n 61, at 207.

gives no powers to the Court to do what the union asks. The Court can take no action on the present application and that must be the end of the matter.

In other words, the Court's jurisdiction under the EPA was limited to circumstances where an award contained different rates of pay for the same work. It did not extend to different rates of pay for comparable work. This was because the Court only had jurisdiction where an instrument made separate provision for remuneration of female employees or where an instrument made provision for female employees only. The fact that the female employees were undervalued could not assist them in this case.

Coleman suggests that the case no longer represents the law since the decision is confined to the implementation of awards and the enactment of the ECA deregulated the labour market.<sup>71</sup> She argues persuasively that a broad approach to interpreting the EPA should be favoured on the following grounds: (1) that a correct interpretation of s 3(1) of the EPA does not oust jurisdiction; (2) that the EPA is human rights legislation requiring purposive interpretation; (3) that there are external indications; (4) that such an approach achieves consistency with international instruments; (5) that the approach achieves consistency with NZBORA; and (6) that such an approach is consistent with international trends in interpreting equal pay provisions.<sup>72</sup>

Generally, Coleman is correct. An interesting question arises if we assume that the literal meaning of s 3 ousts jurisdiction to determine comparable worth claims whereas the long title of the EPA appears to recognise them. In a similar scenario, the Court observed:<sup>73</sup>

[s]ection 5(1) of the Interpretation Act 1999 says that the meaning of an enactment must be ascertained from its text and in the light of its purpose. Obviously, the purpose of s 66 is to provide a mechanism for clearance of acquisitions which fall outside s 47, and to provide that no clearance should be given to an acquisition which falls foul of s 47 or in respect of which there is doubt as to whether it falls foul of s 47. In order to achieve that purpose, it is necessary to interpret the words 'would be likely' as 'would not be likely'.

Even if the Court was literally correct that s 3 of the EPA ousted jurisdiction, a purposive interpretation would have enabled the Court to make a determination. This approach is supported by clear authority.<sup>74</sup> In terms of BORA, the provisions of BORA apply to any acts done by the judiciary.<sup>75</sup> This imposes a positive obligation on the court. Cooke P stated:<sup>76</sup>

[s]ection 3 also makes it clear that the Bill of Rights applies to acts done by the Courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed.

In 2011, a court would be under a positive obligation to ensure that the right to freedom from discrimination was protected. This positive obligation requires "discrimination" to include "indirect discrimination". Clearly, such an interpretation would be open to a court. Therefore, a court would have jurisdiction unless it considered s 3 of the EPA to be a reasonable limitation on the s 19 right. It would be absurd for a statute whose purpose is expressed as being "the removal and prevention of discrimination" to be interpreted as a limitation on the right to freedom from discrimination. This interpretation supports the view that the

<sup>71</sup> Coleman, above n 65, at 533.

<sup>72</sup> Ibid, at 534-544.

<sup>73</sup> *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 (HC), at 878.

<sup>74</sup> See *R v Cara* (2004) 21 CRNZ 283 at [142] and *McKenzie v Attorney-General* [1992] 2 NZLR 14 (CA) at 17.

<sup>75</sup> New Zealand Bill of Rights Act 1990, s 3.

<sup>76</sup> *Simpson v Attorney General* [1994] 3 NZLR 667; (1994) 1 HRNZ 42 (CA), at 676.

Arbitration Court failed to give effect to the purpose of the EPA. In so doing, it breached New Zealand's positive obligations as a member of a branch of the New Zealand government under ILO 100, CEDAW and the ICESCR.

Even if Coleman is correct and claims can be brought under the EPA, it would still be preferable to have express legislation in unequivocal terms that provides for pay equity, gives clear guidance to courts and provides substantive redress to claimants.<sup>77</sup> Similar concerns resulted in the enactment of the Employment Equity Act (the EEA).

The Employment Equity Act 1990 (EEA) is the most impressive legislative attempt to provide for pay equity. The proposed introduction of the EEA was based on the Report of the Working Group which was informed by two equal pay studies.<sup>78</sup> Between 1988 and 1990, there was a vigorous debate in response to the Working Group's Report and the proposed introduction of the Employment Equity Bill. Participants to the debate included the Business Roundtable, the Human Rights Commission, the New Zealand Treasury, the Employers Federation, the PSA and the Economic Development Commission. In many ways, this period was the golden era of the struggle for pay equity in New Zealand.

As a result of a change in government following the general election in November 1990, the EEA was repealed in December 1990, just two months after its enactment. It contained four parts. Part I concerned the establishment of an Employment Equity Commissioner. Part II provided for equal employment opportunities. Part III provided for pay equity and Part IV contained miscellaneous provisions. "Employment equity" was defined as including: "the elimination from all forms of paid employment of...inequality of remuneration for women".<sup>79</sup> In relation to pay equity, the EEA contained three objects: (1) to provide a system which would enable gender-based discrimination to be identified and removed; (2) to provide for additional pay equity payments to be included in industrial awards and agreements; and (3) to provide for implementation over a period of time that accounted for the economic conditions of New Zealand as a whole and the ability of employers to pay.<sup>80</sup>

The EEA provided for a procedure for unions, employers or 20 or more female workers in a female occupation to lodge a claim for pay equity.<sup>81</sup> Any of these parties could make a request to the Employment Equity Commissioner (the Commissioner) for a pay equity assessment.<sup>82</sup> The Commissioner would determine whether an occupation was a female occupation and whether to carry out a pay equity assessment after receiving submissions from interested parties.<sup>83</sup> At the conclusion of the assessment, the Commissioner would provide a copy of the report to the interested parties.<sup>84</sup> If a report concluded that female employees were underpaid, then a pay equity claim could be lodged in the form of supplementary pay equity payments.<sup>85</sup> If parties are unable to settle a claim within 60 days, the claim could be referred to the Arbitration Commission (AC) for determination.<sup>86</sup> Then the AC would have held a hearing where interested

<sup>77</sup> Note that the Human Rights Commission has drafted a Pay Equality Bill which would address these concerns. The bill is reproduced in full in Appendix C.

<sup>78</sup> Working Group on Equal Employment Opportunities and Equal Pay, above n 42; Urban Research Associates *Equal Pay Study: Phase One Report* (1987); and the Equal Pay Steering Committee *Equal Pay Study: Phase Two Report* (1987).

<sup>79</sup> Employment Equity Act 1990, s 2.

<sup>80</sup> Employment Equity Act 1990, s 37.

<sup>81</sup> Employment Equity Act 1990, s 38.

<sup>82</sup> Employment Equity Act 1990, ss38 and 39.

<sup>83</sup> Employment Equity Act 1990, ss 40,41 and 46.

<sup>84</sup> Employment Equity Act 1990, s 54.

<sup>85</sup> Employment Equity Act 1990, s 56.

<sup>86</sup> Employment Equity Act 1990, s 57. The Arbitration Commission would have consisted of the Commissioner and two lay members who had expertise in the pay equity field.

parties could make submissions.<sup>87</sup> The AC would have based any determination on the Commissioner's report and any evidence presented by the interested parties.<sup>88</sup> The AC would have made a further determination in relation to the timeframe and manner of implementation.<sup>89</sup>

This procedure had the potential to provide an effective remedy for the gender pay gap. However, the effectiveness of the procedure was never tested. Hyman observes that both proponents and opponents of the EEA had their doubts as to its effectiveness and makes express references to "loopholes" in the EEA.<sup>90</sup> However, if the EEA was ineffective, any deficiencies could have been cured when the EEA was reviewed.<sup>91</sup> In any event, the EEA was likely to be much more effective than either the EPA or the Human Rights Commission Act 1977 (the HRCA).<sup>92</sup> The threat it posed to employers probably explains why it was repealed so soon after the National government was elected in November 1990.

Since it was difficult to obtain remedies under the specific equal pay legislation, claimants turned to anti-discriminatory legislative provisions. These included the HRCA (until it was repealed in 1994) and the Human Rights Act 1993 (the HRA). The Human Rights Commission Act 1977 (HRCA) outlawed discriminatory employment practices<sup>93</sup> and outlawed discrimination by subterfuge.<sup>94</sup> This meant that the HRCA was more likely to provide a remedy in relation to discriminatory employment practices that did not result in any differentiation of rates of pay. In *Proceedings Commissioner v Air New Zealand Limited*,<sup>95</sup> the Equal Opportunities Tribunal approved the following comment from an earlier case:<sup>96</sup>

[w]e observe in passing that if any act ever called for a liberal and enabling interpretation, the Human Rights Commission Act must be it.

If this approach had been taken to the *Clerical Workers* case, the outcome may well have been different. The *Air New Zealand* case deserves some comment. In that case, the Equal Opportunities Tribunal (EOT) held that Air New Zealand had failed to afford or offer the female cabin crew the same promotional opportunities that were offered or afforded to male cabin crew who had substantially the same qualifications. The EOT made a declaration that Air New Zealand was in breach of s 15(1)(b) of the HRCA and ordered the airline to take steps to place each complainant in her appropriate position of seniority.<sup>97</sup> The EOT had to consider whether the HRCA encompassed continuing discrimination that had commenced before the HRCA was in force. The EOT approved the following statement from an earlier case:<sup>98</sup>

[i]n our view, the treatment of women in the workplace should be no less fair and enlightened in New Zealand than elsewhere in the common law world. Had we felt obliged to record a narrow and restrictive interpretation of the legislation, we would have regarded such a result as out of step with the temperament of modern society.

The EOT held that the HRCA applied to continuing discrimination. Notwithstanding this decision, the Working Group considered that the HRCA was insufficient to provide an adequate remedy. The HRCA was

<sup>87</sup> Employment Equity Act 1990, s 60.

<sup>88</sup> Employment Equity Act 1990, s 62.

<sup>89</sup> Employment Equity Act 1990, s 63.

<sup>90</sup> P Hyman *Women and Economics: A New Zealand Feminist Perspective* (Bridget William Books, Wellington, 1994) at 87.

<sup>91</sup> Employment Equity Act 1990, s 74.

<sup>92</sup> This is discussed below.

<sup>93</sup> Human Rights Commission Act 1977, s 15.

<sup>94</sup> Human Rights Commission Act 1977, s 27.

<sup>95</sup> *Proceedings Commissioner v Air New Zealand Limited* (1988) 7 NZAR 462 (EOT).

<sup>96</sup> *H v E* (1985) 5 NZAR 333 (EOT).

<sup>97</sup> *Proceedings Commissioner v Air New Zealand Limited*, above n 96, at 483.

<sup>98</sup> *H v E*, above n 96, at 347.

repealed by the Human Rights Act 1993 (HRA).<sup>99</sup> The HRA has been described as “no ordinary statute”.<sup>100</sup> According to its long title, the purpose of the HRA is “to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights.” According to the High Court,<sup>101</sup>

[i]t is the responsibility of the Commission, the Tribunal and, on appeal, this Court to give full effect to what Thorp J ... called “the special nature and purpose of human rights legislation”. It is special because it bears on the very essence of human identity.

The substantive provision of the HRA relating to employment is s 22. This provision outlaws employment-related discrimination by reason of any of the prohibited grounds of discrimination. Sex is one of the prohibited grounds.<sup>102</sup> “Discrimination” is not defined in the HRA but has been defined in subsequent case law as “difference of treatment in comparable circumstances”.<sup>103</sup> It is not necessary for a claimant to prove that discrimination was intended but he or she must establish a causal connection between a particular ground and the discriminatory conduct.

A claimant or the Proceedings Commissioner may bring civil proceedings in the Human Rights Review Tribunal (HRRT) once a complaint has been made to the Commissioner.<sup>104</sup> In *Lewis v Talleys Fisheries Ltd*<sup>105</sup>, the HRRT appeared to limit the scope for claims. On appeal, the High Court adopted a broader view and stated:

[i]n our view the need to approach the statute in a generous sense and to adopt an approach that facilitates its important purposes cannot be questioned.

In *Lewis*,<sup>106</sup> the High Court allowed an appeal against a decision of the HRRT which held that the distinct jobs of trimming and filleting fish were not substantially similar and that the appellant had not been discriminated against by reason of her sex.<sup>107</sup> The Court noted that it was beyond question that human rights statutes require a generous and purposive interpretation.<sup>108</sup> The Court proceeded to identify an essential similarity between the two positions in that both filleting and trimming involved the use of a knife, both positions required limited training and both roles are performed to a higher standard with experience.<sup>109</sup> Accordingly, the Court held that the appellant succeeded in proving that she was appointed to a lower-paid position by reason of her sex.<sup>110</sup>

This case is an example of indirect discrimination. The employer could have argued that the plaintiff was not paid less by reason of her sex but because she was employed as a trimmer. A strict application of the “but for” test would have resulted in her claim failing. Further, the respondent’s motive or intent was not an

<sup>99</sup> Human Rights Act 1993, s 146.

<sup>100</sup> *Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc* [2002] 3 NZLR 333 (CA) at 339.

<sup>101</sup> *Director of Human Rights Proceedings v Cropp* HC Auckland AP7-SW03, 12 May 2004 at [18].

<sup>102</sup> Human Rights Act 1993, s 22.

<sup>103</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

<sup>104</sup> Human Rights Act 1993, s 92B.

<sup>105</sup> *Lewis v Talleys Fisheries Ltd* 18/7/05, HRRT 019/05; HRRT54/02; HRRT03/03.

<sup>106</sup> *Talleys Fisheries Ltd v Lewis* (2007) 8 HRNZ 413; (2007) 4 NZELR 447 (HC).

<sup>107</sup> Trimmers were predominantly female employees whereas filleters were predominantly male employees and filleters were remunerated at a higher rate.

<sup>108</sup> *Talleys Fisheries Ltd v Lewis*, above n 106, at [32].

<sup>109</sup> *Ibid*, at [43].

<sup>110</sup> *Ibid*, at [52].

element of discrimination requiring proof. This illustrates that the Court followed through in adopting a purposive interpretation of s 22 of the HRA.<sup>111</sup>

However, a complicating feature of claims based on discrimination is that the definition of discrimination remains uncertain. The leading case on discrimination is *Quilter v Attorney General*.<sup>112</sup> In that case, the Court of Appeal issued five separate judgments. Tipping, Thomas, Gault and Keith JJ provided different definitions of discrimination. Thomas J described discrimination as “a nebulous and complex concept”.<sup>113</sup> Unfortunately, the precise meaning of the nebulous and complex concept has not been clarified. This could present a significant barrier to potential claimants in that the definitional uncertainty makes the assessment of whether a claim is likely to succeed more difficult. For this reason, the HRA remedy is not significantly more effective than remedies that were available under the previous legislation.

General employment legislation enables claimants to lodge personal grievance claims based on discrimination. The Employment Contracts Act 1991 (ECA) effectively deregulated the labour market in New Zealand by providing for individual employment contracts and making membership of unions voluntary.<sup>114</sup> Hyman suggested that the ECA has made pay equity claims more difficult and that making a claim under the HRA is more attractive than making claims under the discrimination provisions of the ECA or under the EPA.<sup>115</sup> Wright considered that the effects of the ECA included reducing the size of groups suitable for job evaluation comparisons and placing responsibility for bringing claims on employees.<sup>116</sup> These effects probably operated as barriers to achieving pay equity. Hume considered that the enactment of the ECA made the introduction of pay equity legislation less likely.<sup>117</sup> Between 1991 and 2001, women’s average hourly earnings increased from 81% to 84%.

The leading discrimination case brought under the ECA is *Trilford v Car Haulways Limited*.<sup>118</sup> In that case, the Employment Court overruled a decision of the Employment Tribunal which held that the plaintiff had not been discriminated against in circumstances where an application for promotion had been refused because the position was “more male oriented”. The Court held that this was a case of direct discrimination and that in any event, s 28(1) of the ECA encompassed indirect discrimination.<sup>119</sup> In adopting this approach, the Court favoured a purposive approach over a narrow, literal approach.

Coleman criticises the Court’s endorsement of *Sarita*<sup>120</sup> where the Labour Court held that an employer’s intention and motive was relevant in relation to whether discrimination has occurred. In addition, Coleman highlights practical difficulties in implementing the “but for” test in relation to indirect discrimination.<sup>121</sup> These criticisms have merit although they should be viewed in the context that the Court recognised that discrimination had occurred, provided the affected employee with a remedy and has subsequently reconsidered its stance in relation to the causal requirement for proving discrimination.<sup>122</sup>

<sup>111</sup> It is a matter of concern that the HRRT, a specialist tribunal, failed to do so.

<sup>112</sup> *Quilter v Attorney General*, above n 103.

<sup>113</sup> *Ibid*, at 530.

<sup>114</sup> Employment Contracts Act 1991, ss 6, 18 and 19.

<sup>115</sup> Employment Contracts Act 1991, s 28 and the Equal Pay Act 1972, ss 2A, 4 and 13.

<sup>116</sup> Fran Wright “Equal Pay and the Employment Contracts Act 1991” (1993) 7 AULR 501 at 507.

<sup>117</sup> Rochelle Hume “Paid in Full? An Analysis of Pay Equity in New Zealand” (1993) 7 AULR 471 at 481.

<sup>118</sup> *Trilford v Car Haulways Limited* [1996] 2 ERNZ 351 (EmC).

<sup>119</sup> *Ibid*, at 377.

<sup>120</sup> *New Zealand Workers IUOW etc v Sarita Farm Partnership* [1991] 1 ERNZ 510 (EmC).

<sup>121</sup> Coleman, above n 65, at 538-539.

<sup>122</sup> *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 (EmC) at 497.

The Employment Relations Act 2000 (ERA) repealed the ECA.<sup>123</sup> The ERA does not contain any pay equity provisions. However, discrimination on the grounds of sex may entitle an employee to bring a personal grievance against an employer.<sup>124</sup> A breach of the EPA may entitle an employee to be paid arrears.<sup>125</sup> Significantly, the ERA heralded the introduction of good faith employment relations. Good faith employment relations are expressly provided for by the statutory duty of good faith which requires parties to an employment relationship to be “active and constructive” in maintaining the employment relationship and requires the parties to be “responsive and communicative”.<sup>126</sup> This is relevant because under the statutory duty, an employer may be required to provide an employee with information in relation to wages so that an employee can assess whether he or she is being discriminated against.<sup>127</sup> Once an employee requests increased remuneration to achieve pay equity with other employees, it may be difficult for an employer to refuse his or her request unless there is a genuine reason for disparity in remuneration.

Good faith employment relations work effectively because if an employer dismisses an employee without good cause, the employer runs the risk that an employee will make a personal grievance claim against the employer if the dismissal was unjustified. Similarly, if the employer asks the employee for an explanation in response to allegations of serious misconduct, the employee may fail to provide an explanation. However, if this happens, the employee risks being dismissed. In contrast, if an employer fails to offer an employee equal remuneration for work of equal value, the employee has a choice of accepting unequal remuneration or lodging a claim which is unlikely to succeed. In this scenario, the employee carries the risk and there is little incentive for employers to review remuneration practices. Therefore, a risk analysis underlies the need for effective legislative intervention.<sup>128</sup>

Case law concerning other legislation may also promote pay equity. In two decisions, the Employment Court considered whether remuneration of a community support worker should conform to the requirements of the Minimum Wage Act 1983 (MWA) when a worker was engaged in a sleepover in a community home. In its first decision, the Court held that “sleepovers” were work in terms of the MWA because the employer imposed constraints on the worker’s freedom that were “significant and substantial” such as preventing him from carrying on a normal family life, socialising with friends and limiting his privacy. Accordingly, the sleepovers were work in terms of the MWA.<sup>129</sup> In a subsequent decision, the Court held by a majority that an employer was required to pay every employee at a rate no less than the minimum rate for every hour worked.<sup>130</sup> Both decisions have been upheld on appeal although the Supreme Court has granted leave to appeal.<sup>131</sup>

The decisions potentially affect large numbers of employees. Community support workers are predominantly female so that if the decision is implemented, the employees’ wages of a predominantly female workforce are likely to increase.<sup>132</sup> The Government has responded by placing Idea Services Limited into statutory management, questioning how the expected \$500 million in back pay could be funded and

<sup>123</sup> Employment Relations Act 2000, s 241.

<sup>124</sup> Employment Relations Act 2000, ss 104 and 105.

<sup>125</sup> Employment Relations Act 2000, s 131.

<sup>126</sup> Employment Relations Act 2000, s 4.

<sup>127</sup> See for example *Vice-Chancellor of Massey University v Wrigley* [2010] NZEmpC 37 where the Court held that an employer was required to provide an employee information about other employees in the context of restructuring.

<sup>128</sup> This view is supported by EEO Commissioner Dr Judy McGregor in her article “Confidentiality Deals Targeted in Move for Equal Employment Opportunities” *The Dominion Post* (Wellington, 4 July 2011).

<sup>129</sup> *Idea Services Ltd v Dickson* [2009] ERNZ 116; (2009) 9 NZELC 93,305; (2009) 6 NZELR 666 (EmC) at [71] and [83].

<sup>130</sup> *Idea Services Ltd v Dickson* [2009] ERNZ 372; (2010) 9 NZELC 93,403; (2009) 7 NZELR 121 (EmC), at [100]. Note that in his dissent, Judge Travis would have allowed averaging of wages based on a purposive interpretation of the MWA.

<sup>131</sup> *Idea Services Limited v Dickson* [2011] NZCA 14, at [24] and [52] and *Idea Services Ltd v Dickson* [2011] NZSC 55.

<sup>132</sup> K Burke & S Nicholls “Underpaid Female Workers Win Big Pay Rise” *The Sydney Morning Herald* <www.smh.com.au>.

awaiting the outcome of the Supreme Court appeal.<sup>133</sup> This litigation highlights that pay equity is not solely a women's issue. In this litigation, the defendant employee was a male community support worker.

In summary, this analysis reveals the extent of the limitations of New Zealand legislation. The EPA ensured the elimination of a separate female rate of pay. In this way, the EPA has eliminated direct discrimination and provided for formal equality. In addition, between 1972 and 1978, the EPA provided for substantive equality by significantly reducing the gender pay gap. After 1978, the EPA ceased making a substantive difference to pay equity. From 1986 onwards, the New Zealand government was aware that more legislation was required in order to achieve substantive equality. This awareness increased until the EEA was passed. Despite doubts of both its supporters and critics, the EEA had the potential to provide for substantive equality. However it was repealed before it could deliver any benefits.

In 1990, the incoming National government was not under an obligation to implement the EEA. It could have provided for pay equity in a different way. For example, the EPA could have been amended to encompass the wider principle or pay equity provisions could have formed part of the ECA. The repeal of the EEA combined with the failure of any government to enact similar legislation post-repeal has made implementing pay equity measures problematic.

Anti-discrimination measures remain in the HRA, the EPA and the ERA but these may only be invoked by individuals. The deregulation of the labour market has virtually guaranteed that these provisions will have no more than a negligible effect on the gender pay gap. Human rights legislation does not directly address pay equity. In fact, the discrimination provisions appear to be more closely aligned with ILO 111 than ILO 100.<sup>134</sup> There are no provisions in human rights legislation that provide for equal pay for work of equal value.

The current legislative framework consisting of the GSEPA, the EPA, the ERA and the HRA is not effective. This has prompted the Human Rights Commission to draft a Pay Equality Bill. The Bill has merit in that it would provide disadvantaged employees with substantive remedies. However, the Bill could be simplified by adopting the relevant provisions in the Fair Work Act 2009 and would be more effective if it was drafted as an amendment to the ERA because this would result in the provisions being interpreted consistently with the statutory duty of good faith. The prospects of the Bill being supported seem remote.<sup>135</sup>

The limited effectiveness of legislative provisions constrains the judiciary from giving full recognition to the principle of pay equity. Within these limitations, the judiciary has largely recognised New Zealand's international obligations in respect of equal pay for work of equal value. The most striking exception is the *Clerical Workers Case* which was clearly decided incorrectly. It is also concerning that the Employment Tribunal and the HRRT failed to interpret discrimination provisions correctly. Both the High Court and the Employment Court have recognised that discrimination includes indirect discrimination and have provided substantive redress in response to discrimination. In this respect, the judicial branch of Government has recognised and implemented the pay equity principle. However, this judicial recognition has been limited by

<sup>133</sup> Stuff "IHC Firms in Statutory Management" <[www.stuff.co.nz](http://www.stuff.co.nz)>. Subsequently, the government has settled the claim.

<sup>134</sup> ILO 111 refers to the Discrimination (Employment and Occupation) Convention, 1958 and requires parties to provide for equality of treatment and equality of opportunity (Article 2). New Zealand ratified ILO 111 in 1983.

<sup>135</sup> To date, only the Green Party has indicated that they will support the Bill. The Green Party drafted a similar Bill and Prime Minister John Key remarked that it had "as much chance of being considered as Happy Feet the penguin has of a holiday in Honolulu" Otago Daily Times "Pay Equity Bill on Ice" <[www.odt.co.nz](http://www.odt.co.nz)>. Note that the Bill has received some strong support in G Barhava Monteith and S Wilshaw-Sparkes "Bridging the Pay Divide" *The Business Herald* (Auckland, 29 July 2011) at 14 as well as strongly-worded criticisms. "Caution Vital over Gender Pay Reforms" *New Zealand Herald* (Auckland, 11 July 2011) at 10.



the inadequacy of the legislation. Further, it is suggested that the *Clerical Workers Case* should be revisited at the earliest opportunity.

### *The Executive in New Zealand*

The executive branch of Government has played a critical role in New Zealand. Many of these initiatives featured in New Zealand's Third Periodic Report to the United Nations Committee on Economic, Social Cultural and Rights. They included the establishment of the Pay and Equity Employment Unit in the Department of Labour, the implementation of a Plan of Action and the completion of pay and employment equity reviews in the public sector.<sup>136</sup> In addition to these initiatives, a considerable volume of research has been undertaken at different times in New Zealand by the executive government.<sup>137</sup> However, there has been limited research since 2003. For example, there is no research about recent developments in Australia or the United Kingdom.<sup>138</sup>

The establishment of the Human Rights Commission has contributed to countering the effects of discrimination generally. However, the HRC lacks authority to address pay equity issues. Under the EEA, the establishment of the office of the Equity Employment Commissioner and the Arbitration Commission was promising but their potential was never fulfilled due to the swift repeal of the EEA.<sup>139</sup>

In 2004, the Government established the Pay and Employment Equity Unit (PEEU). The PEEU had responsibility for implementing the Pay and Employment Plan of Action (the Plan). The purpose of the Plan was to ensure that remuneration of women in New Zealand was free of gender bias. The Plan was to be implemented in three phases. In the first phase, pay equity reviews were carried out in the public sector, public health and public education. The second phase would have extended the reviews to state-owned enterprises and Crown entities. The third phase would have extended the programme to private employers.<sup>140</sup>

In the first phase, 27 Pay and Employment Equity Reviews were completed. They revealed that the average gender pay gap in public bodies ranged from 18% to 30%. The gap in starting rates ranged from 3% to

<sup>136</sup> New Zealand Government *Third Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: New Zealand* UN ESC, E/C.12/NZL/3 (2009) at [151] – [152]. In 1999, the Committee of CEDAW recommended "...further efforts by government, including considering development of a strategy for equal pay for work of comparable value" cited in Ministry of Women's Affairs, above n 13, at 15. In response to New Zealand's Second Periodic Report submitted in 2001, the Committee recommended an intensification of programmes to reduce gender-based inequality in employment: New Zealand Government, above n 136 at [150].

<sup>137</sup> See for example *Equal Pay in New Zealand, Report of the Commission of Enquiry* (1971), *Progress of Equal Pay in New Zealand* (1975), *Equal Pay Implementation in New Zealand* (1979), *Equal Pay Study: Phase One Report* (1987), *Equal Pay Study Phase Two Report* (1987), *Towards Employment Equity: Report of the Working Group on Equal Employment Opportunities and Equal Pay* (1988), *Gender Wage Gap: Scenarios of the Gender Wage Gap: Report* (1997), *Gender Wage Gap: An Assessment of the Relative Impact of Each Industry: Report for Ministry of Women's Affairs* (1997), *Performance Pay Systems and Equity: A Research Report* (1999), *Next Steps Towards Pay Equity: A Background Paper on Equal Pay for Equal Work of Equal Value* (2002), *Next Steps Towards Pay Equity: A Discussion Document* (2002), *Report on Public Submissions to Next Steps Towards Pay Equity: A Discussion Document* (2003), *Report of the Taskforce on Pay and Employment Equity in the Public Service and the Public Health and Public Education Sectors* (2004)<sup>137</sup> and *Working Towards Pay and Employment Equity for Women in Public Health, Public Education and Public Service* (2006).

<sup>138</sup> Recently, the Human Rights Commission released *Tracking Equality at Work*, above n 56 which contained a Pay Equality Bill. However, the report was a general report on equality and did not consider recent developments overseas.

<sup>139</sup> The EEA was repealed under urgency on 19 December 1990 while the Ministry of Women's Affairs was holding a Christmas party: M Cook *Just Wages: History of the Campaign for Pay Equity, 1984-1993* (Colation for Equal Pay, Wellington, 1994) at 35.

<sup>140</sup> Queensland Industrial Relations Commission "Pay Equity: Time to Act" (2007) at 89-90 <www.qirc.qld.gov.au>.

5%.<sup>141</sup> Phases two and three were never implemented. In 2009, the Government terminated the Plan, disbanded the PEEU and abandoned two pay and employment equity investigations.<sup>142</sup> The recommendations in the phase one reviews were not implemented.

In 2007, the Queensland Industrial Relations Commission noted the “renewed energy and commitment” shown by the New Zealand government. However, the Commission noted that the effectiveness of the Plan was limited by the low number of public sector employees (18%) and the threat to the Plan and the PEEU posed by a change in Government.<sup>143</sup> It is suggested that the Plan would have been more effective if it was given statutory recognition and an equal remuneration principle had been adopted. Without legislation, it was an easy task for the incoming Government to dismantle the well-intentioned initiatives embodied in the Plan.<sup>144</sup> The failure of the National-led government to give any reasons for disbanding the PEEU, terminating the pay equity initiatives and to provide alternative solutions to remedy the gender pay gap amounts to a breach of New Zealand’s international obligations. This breach is compounded by the fact that, in relation to public employees, the Government has the dual role of being an employer in addition to its broader governance role.

The initiatives undertaken between 2004 and 2009 demonstrated an intention on the part of the New Zealand government to provide for equal remuneration. However, the scope of the initiatives was limited and the outcomes were ultimately disappointing. The plethora of pay equity research has failed to deliver substantive outcomes. There is a dearth of current academic research and no specialist body promoting pay equity in New Zealand. The Government has not only failed to intensify its pay equity programmes but has abandoned them. In this respect, the Government is in breach of this country’s international obligations.

### ***Legislation and Case Law in Australia***

Currently, Australia has effective pay equity legislation and a landmark case has recently been released.<sup>145</sup> However, this state of affairs is the culmination of many years of struggle. Before any legislation was enacted, the principle of equal pay was promoted as a result of case law affecting industrial awards. The cumulative effect of the 1969 *Equal Pay Case*, the *National Wage and Equal Pay Cases 1972* and the *National Wage Case, 1974* was that equal pay for equal work was introduced in three stages.<sup>146</sup> This replicated the position in New Zealand in 1978.

In *Re Private Hospitals and Doctors’ Nurses (ACT) Award 1972*,<sup>147</sup> the Australian Conciliation and Arbitration Commission affirmed that the equal pay principle could be enforced in all industrial awards in which it was not recognised by invoking the anomalies provisions in the Principles of Wage determination. In effect, this broadened the application of the equal pay principle and led to successful equal pay claims brought by nurses, dental therapists, social workers and childcare workers.<sup>148</sup>

Since 1993, federal legislation has expressly recognised the wider principle in four separate enactments. These are the Industrial Relations (Reform) Act 1993 (IRRA), the Workplace Relations Act 1996 (WRA),

<sup>141</sup> Public Service Association “Its Time: Pay and Employment Equity – Five Years On” (2008) <[www.psa.org.nz](http://www.psa.org.nz)>.

<sup>142</sup> These concerned the education sector and social workers.

<sup>143</sup> Queensland Industrial Relations Commission, above n 140, at 92.

<sup>144</sup> The government could still have repealed the legislation but at least there would have been more public discussion and scrutiny before this occurred.

<sup>145</sup> Fair Work Act 2009 (Cth) and the *Equal Remuneration Case* [2011] FWAFB 2700.

<sup>146</sup> 1969 *Equal Pay Case* (1969) 127 CAR 1142; *National Wage and Equal Pay Cases 1972* (1972) 147 CAR 172; and *National Wage Case, 1974* (1974) 157 CAR 293.

<sup>147</sup> *Re Private Hospitals and Doctors’ Nurses (ACT) Award 1972* (1986) 13 IR 108.

<sup>148</sup> *Equal Remuneration Case*, above n 145 at [196].

the Workplace Relations Amendment (Work Choices) Act 2005 (WRAWCA) and the Fair Work Act 2009 (FWA).

The IRRA empowered the Australian Industrial Relations Commission (AIRC) to make orders to provide for equal remuneration for work of equal value.<sup>149</sup> These provisions were largely unaffected when the WRA was enacted three years later.<sup>150</sup> However, claimants struggled to obtain remedies under the WRA because before a claim could succeed, it was necessary to establish that discrimination was a cause of wage inequalities, there was uncertainty around the meaning of “discrimination” and there were difficulties in applying the test of discrimination.<sup>151</sup> It followed that these claims were rarely successful despite the “considerable promise” of the legislation to deliver substantive remedies.<sup>152</sup> For example, in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries*,<sup>153</sup> the AIRC rejected a claim that female process workers and female packers were underpaid because the claimants failed to satisfy the AIRC that their lower remuneration was caused by discrimination notwithstanding that they were paid at a different rate than male employees who performed similar work.

In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd*,<sup>154</sup> the AIRC struck out a claim by female clerical employees on the discrimination ground on the basis that an alternative remedy was potentially available and the claimant’s failure to refute the employer’s submission that a successful claim would result in inequities between male and female clerical workers.<sup>155</sup>

The WRAWCA limited the equal remunerations further by requiring applicants to explicitly refer to a comparator group in an application and ousting jurisdiction where the effect of equal remuneration orders would be to increase minimum wage orders. WRAWCA gave the Australian Fair Pay Commission (AFPC) jurisdiction to determine minimum wages. The AFPC made no adjustments or variations to pay scales on the basis of equal remuneration and no pay equity claims were brought under the legislation.<sup>156</sup>

The FWA attempts to remedy the defects of its predecessors. According to its explanatory memorandum:<sup>157</sup>

The principle of equal remuneration for men and women workers for work of equal or comparable value requires there to be (at a minimum) equal remuneration for men and women workers for the same work carried out in the same conditions. However, the principle is intentionally broader than this, and also requires equal remuneration for work of comparable value. This allows comparisons to be carried out between different but comparable work for the purposes of this Part. Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques.

The Bill also removes the current requirement for the applicant to demonstrate (as a threshold issue) that there has been some kind of discrimination involved in the setting of remuneration. Instead, an applicant must only demonstrate that there is not equal remuneration for work of equal or comparable value.

<sup>149</sup> Industrial relations (Reform) Act 1993 (Cth), s 21.

<sup>150</sup> See Workplace Relations Act 1996 (Cth), ss 620 -634.

<sup>151</sup> Fair Work Australia *Research Report 5/2011 Review of Equal Remuneration Principles* (2011) at 22-23 <www.fwa.gov.au>.

<sup>152</sup> *Ibid*, at 22.

<sup>153</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* (1998) 94 IR 129.

<sup>154</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd* (1999) 97 IR 374.

<sup>155</sup> *Ibid*, at 380.

<sup>156</sup> *Equal Remuneration Case*, above n 145, at [201].

<sup>157</sup> Fair Work Bill 2008 (Cth), Explanatory Memorandum, at [1191] to [1192].

Equal remuneration orders are provided for in Part 2-7 of the FWA.<sup>158</sup> Section 302 confers power on Fair Work Australia (FW Australia) to make equal remuneration orders, defines equal remuneration for work of equal or comparable value and provides for employees, employee organisations or the Sex Discrimination Commissioner to apply to FW Australia for equal remuneration orders.<sup>159</sup> An equal remuneration order may increase but must not decrease rates of remuneration.<sup>160</sup> An equal remuneration order may be implemented in stages.<sup>161</sup> Contravention of an equal remuneration order gives rise to a civil claim.<sup>162</sup>

It seems likely that the FWA will fulfil the promise that its predecessors failed to deliver. In so doing, the Australian Federal Legislature has enacted effective legislation that is likely to reduce the gender pay gap. The FWA is superior to the EPA and comparable to the repealed EEA but more efficient than that legislation would have been.

The trend of unsuccessful litigants has come to an abrupt halt in the recently released *Equal Remuneration Case*.<sup>163</sup> The scale of the case is nothing short of impressive. There were 22 parties to the litigation represented by 46 counsel. FW Australia heard submissions over a nine month period in Melbourne, Brisbane, Perth, Sydney, Ballarat and Adelaide either in person or via video link. There was extensive witness evidence and it was estimated the decision would affect up to 153,000 employees.<sup>164</sup>

The case concerned an application made by the Australian Municipal, Administrative, Clerical and Services Union (ASU) for an equal remuneration order for employees of non-government employers in the social, community and disability services industry throughout Australia (SACS).<sup>165</sup> The ASU sought an order on the same terms as the Queensland SACS award.<sup>166</sup> Relevant features of the application included increased remuneration for sleepovers and higher commencement rates for employees with tertiary qualifications and other specified qualifications.<sup>167</sup>

Fair Work Australia (FW Australia) made a number of important findings. Firstly, FW Australia has a discretion to make Equal Remuneration Orders (ERO). Even if unequal remuneration exists, orders are not mandatory.<sup>168</sup> Secondly, gender-based undervaluation may be established by reference to a male comparator group. However, the absence of a male comparator is not fatal to a claim.<sup>169</sup> Thirdly, even though the essence of a successful claim is that wage rates are discriminatory, claimants are not required to prove that discrimination occurred because this requirement would have been “difficult to prove” and “somewhat artificial” in the present context.<sup>170</sup> Fourthly, SACS employees are predominantly female and remunerated at a lower rate than employees employed by state or local authority organisations. Accordingly, FW Australia concluded that there is not equal remuneration for male and female employees for work of equal or comparable value and a relevant factor, but not the only factor, is gender-based undervaluation of work.<sup>171</sup>

<sup>158</sup> Fair Work Act 2009 (Cth), ss 302-306. See Appendix B.

<sup>159</sup> Fair Work Act 2009 (Cth), s 302(3).

<sup>160</sup> Fair Work Act 2009 (Cth), s 303.

<sup>161</sup> Fair Work Act 2009 (Cth), s 304.

<sup>162</sup> Fair Work Act 2009 (Cth), s 305.

<sup>163</sup> *Equal Remuneration Case*, above n 145.

<sup>164</sup> *Ibid*, at [18] and [225].

<sup>165</sup> *Ibid*, at [1].

<sup>166</sup> *Ibid*, at [5].

<sup>167</sup> *Ibid*, at [4].

<sup>168</sup> *Ibid*, at [227].

<sup>169</sup> *Ibid*, at [232]. This was relevant because the ASU did not rely on a male comparator group in its submissions.

<sup>170</sup> *Ibid*, at [233].

<sup>171</sup> *Ibid*, at [285].

FW Australia invited the parties to make further submissions in relation to the appropriate form of the ERO.<sup>172</sup>

This decision appears to remove many barriers that have previously prevented claims from being successful. There is no longer a requirement to prove that discrimination has occurred or to identify a male comparator group. In reaching its decision, FW Australia considered key developments in state jurisdictions, especially New South Wales and Queensland. In particular, Equal Remuneration Principles (ERPs) and decisions made in accordance with ERP's were significant.<sup>173</sup> To date, librarians,<sup>174</sup> dental assistants,<sup>175</sup> childcare workers,<sup>176</sup> social, community and disability services industry employees<sup>177</sup> and disability support workers<sup>178</sup> have successfully pursued equal remuneration claims.

This analysis reveals that the judiciary recognised the equal pay for equal work principle at a relatively early stage. However, recognising the wider principle of equal remuneration was more difficult. Between 1993 and 2009, the federal jurisdiction appeared to falter in the face of seemingly insurmountable difficulties. During this period, equal pay provisions were much more effective in Queensland and New South Wales.<sup>179</sup> Since 2009, there has been a sudden and dramatic change that may herald “a new dawn for pay equity” by providing for substantive equality.<sup>180</sup>

#### A. *The Executive in Australia*

The executive branch of the Australian federal government has recently played an active role in promoting pay equity. While there has not been much research at federal level, pay equity enquiries have been initiated by state governments in New South Wales, Tasmania, Queensland, Western Australia and Victoria between 1998 and 2005.<sup>181</sup> In February 2011, Fair Work Australia released its report on equal remuneration principles. The report is comprehensive and provides current information, including historical and international perspectives.<sup>182</sup>

Fair Work Australia appears to be performing a wide degree of functions including conducting research, hearing equal remuneration claims and providing information to employers, employees and the public. The federal government has established the office of the Fair Work Ombudsman (FWO) and expanded the role of the Sex Discrimination Commissioner.<sup>183</sup> The purpose of the FWO is “to promote harmonious,

<sup>172</sup> Ibid, at [286].

<sup>173</sup> See Appendices D and E.

<sup>174</sup> *Re Crown Librarians, Library Officers and Archivists Award Proceedings – Applications Under the Equal Remuneration Principle* (2002) 111 IR 48; (2002) EOC 93-197.

<sup>175</sup> *Liquor, Hospitality and Miscellaneous Union (Qld Branch) v Australian Dental Assoc (Qld Branch)* (2005) 180 QGIG 187; (2005) EOC 93-414; [2005] QIRComm 139.

<sup>176</sup> *Liquor, Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Servicers Employers Association* (2006) 182 QGIG 318 and *Re Miscellaneous Workers Kindergartens & Child Care Centres Etc (State) Award (NSW)* (2006) 150 IR 290; (2006) EOC 93-434; (2006) NSWIRComm 64.

<sup>177</sup> *Queensland Services, Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19.

<sup>178</sup> *Australian Workers' Union of Employees, Queensland v Queensland Community Services Employers Association Inc* (2009) 192 QGIG 46.

<sup>179</sup> Meg Smith & Andrew Stewart “A New Dawn for Pay Equity? Developing an Equal Remuneration Principle under the Fair Work Act” [2010] AJLL 12.

<sup>180</sup> Ibid.

<sup>181</sup> *Equal Remuneration Case*, above n **Error! Bookmark not defined.** at [202].

<sup>182</sup> Fair Work Australia, above n 145.

<sup>183</sup> Fair Work Act 2009 (Cth), s 302.

productive and cooperative workplace relations and ensure compliance with Commonwealth workplace laws.”<sup>184</sup>

To date, the federal government has not adopted an equal remuneration principle (ERP) although two ERPs have been developed at state level.<sup>185</sup> Smith and Stewart acknowledge that there is no necessity for a national ERP. However, the authors suggest that adoption would be desirable.<sup>186</sup> There is no necessity because the two main benefits of an ERP are that an ERP could clarify that there is no requirement to prove sex-based discrimination and that comparison with a male group is not essential. These two features have been established in the *Equal Remuneration Case*.<sup>187</sup> Recently, the federal government stated that it would:<sup>188</sup>

support the development of an appropriate equal remuneration principle for the federal jurisdiction drawing on the Queensland Equal Remuneration Principle of 2002 and explanatory notes and relevant New South Wales jurisprudence.

The development of a federal ERP is expected. This analysis shows that since 2009, the federal government has implemented a broad range of measures to provide for pay equity in fulfilment of its international obligations. The federal jurisdiction is making significant progress towards substantive equality.

## Conclusion

There is a compelling rationale for the Australian and New Zealand governments to implement measures that promote pay equity. Historically, New Zealand has been seen as “progressive” in its approach to pay equity.<sup>189</sup> However, this view should be revisited given the repeal of the EEA and the abandonment of the Plan. In contrast, Australia is becoming increasingly progressive.

In response, the New Zealand government should amend the ERA to enable the employment institutions to make EROs. This could be achieved by allowing an employee, an employee’s organisation or the EEO Commissioner to bring a claim for personal grievance on the grounds that an employer’s failure to provide equal remuneration based on equal or comparable value amounts to an unjustified disadvantage.<sup>190</sup> The employment jurisdictions could be expected to interpret the amendment generously given its fundamental importance and the requirement for employment institutions to acknowledge and address “the inherent inequality of ... power in employment relationships”.<sup>191</sup> The New Zealand government should also develop an ERP to express its intention to honour New Zealand’s international obligations and to provide guidance to the employment institutions.<sup>192</sup> The role of the EEO Commissioner should be expanded and sufficiently resourced to encompass monitoring implementation of pay equity measures and should report to government on a regular basis. If these measures were adopted, the New Zealand government would achieve compliance with its international obligations under ILO 100, CEDAW and the ICESCR.

<sup>184</sup> Fair Work Ombudsman “About Us” (2012) <[www.fairwork.gov.au](http://www.fairwork.gov.au)>.

<sup>185</sup> An ERP is a statement of principle that provides guidance in terms of disputes concerning equal remuneration. See appendices D and E.

<sup>186</sup> Smith and Stewart, above n 179.

<sup>187</sup> *Equal Remuneration Case*, above n 145.

<sup>188</sup> Australian Government cited in Smith and Stewart, above n 179.

<sup>189</sup> Queensland Industrial Relations Commission, above n 14040, at 88.

<sup>190</sup> Employment Relations Act 2000, s 103.

<sup>191</sup> Employment Relations Act 2000, s 3.

<sup>192</sup> Examples of ERP’s are located in Appendices D and E.

Until that happens, the gender pay gap is likely to widen in New Zealand and to narrow in Australia. Accordingly, the Key government has failed to fulfil its mandate and to honour New Zealand's international obligations. For women in New Zealand to achieve pay equity, the most effective short-term strategy appears to be emigration to Australia. If New Zealand women follow this course of action, the Prime Minister's horror will become a self-fulfilling prophecy.

## Postscript

Recently, Chief Executive of the Employers and Manufacturers Association (EMA), Alasdair Thompson, has provoked outrage by suggesting that one of the reasons for the gender pay gap is that women are less productive because they take more time off work due to period-related illness.<sup>193</sup> In defence, Thompson stated that he supported equal pay for equal work. This comment has been repeated like a mantra as a justification for the present arrangements in New Zealand. The subtext is that because the EPA is on the books, New Zealand is fulfilling its international obligations and no further actions are required. If that is the message, it is out-dated and plainly incorrect.

The dictum of Lee J is apposite:<sup>194</sup>

It is well known that lay people often wrongly conclude that because a person has repeatedly said that something has occurred therefore it must for that reason be true. They are often inclined to the view that mere assertion, particularly if repeated, necessarily means that what is asserted is true. Lewis Carroll's statement in "Hunting of the Snark" that "What I tell you 3 times is true", is quite incorrect. Merely saying something does not necessarily make it so.

Thompson has subsequently resigned. The EMA has not altered its position on pay equity.

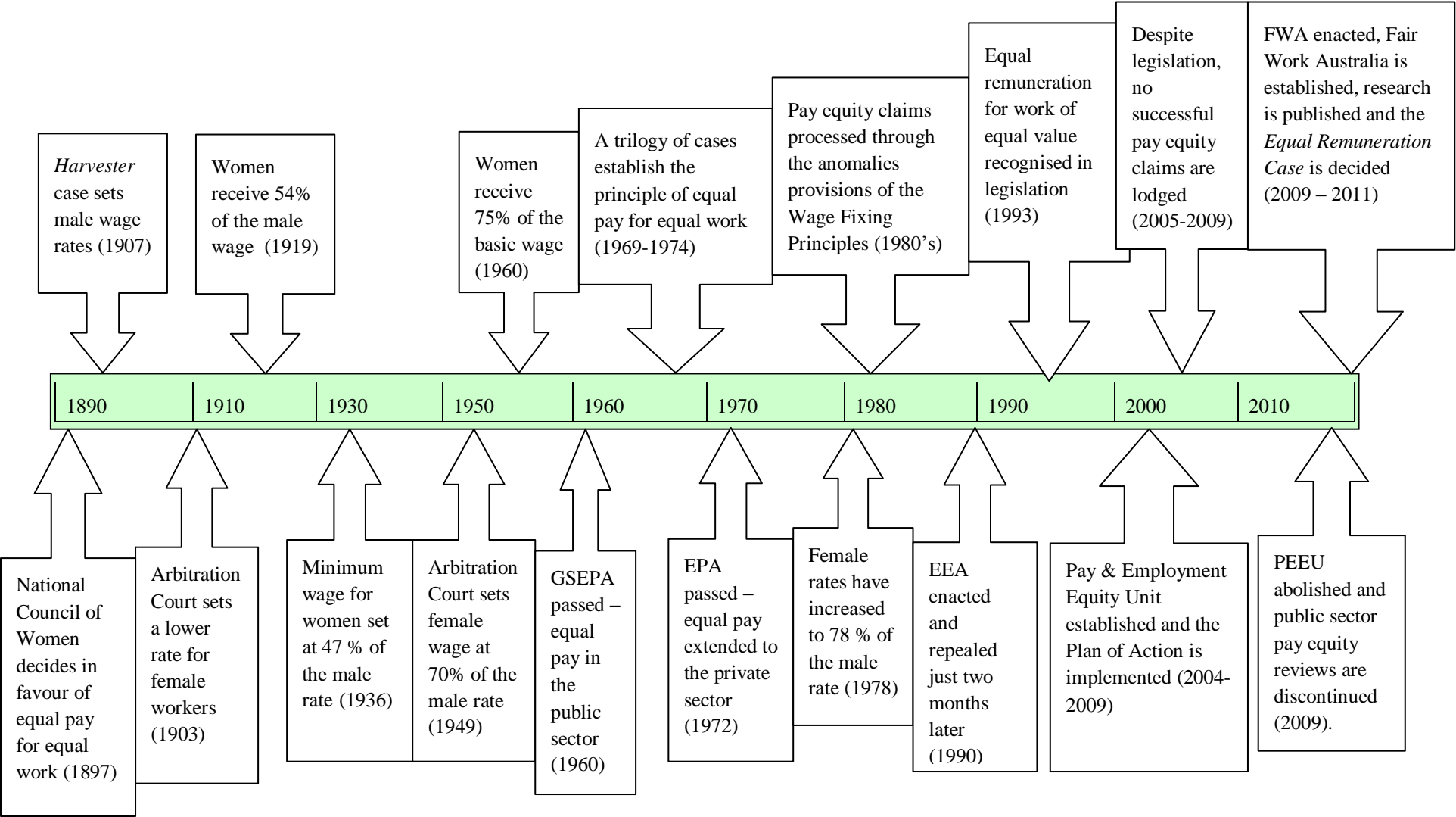
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<sup>193</sup> New Zealand Herald "Alasdair Thompson Walks Off Interview Over 'Sexist' Claims" <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

<sup>194</sup> *R v Robinson* [1998] QCA 50 at 70.

Appendix A

Timeline of the History of the Struggle for Pay Equity in Australia and New Zealand





## Appendix B

### Division 2—Equal remuneration orders

#### 302 FWA may make an order requiring equal remuneration

##### *Power to make an equal remuneration order*

(1) FWA may make any order (an equal remuneration order) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

##### *Meaning of equal remuneration for work of equal or comparable value*

(2) Equal remuneration for work of equal or comparable value means equal remuneration for men and women workers for work of equal or comparable value.

##### *Who may apply for an equal remuneration order*

(3) FWA may make the equal remuneration order only on application by any of the following:

- (a) an employee to whom the order will apply
- (b) an employee organisation that is entitled to represent the industrial interests of an employee to whom the order will apply;
- (c) the Sex Discrimination Commissioner.

##### *FWA must take into account orders and determinations of the Minimum Wage Panel*

(4) In deciding whether to make an equal remuneration order, FWA must take into account:

- (a) orders and determinations made by the Minimum Wage Panel in annual wage reviews; and
- (b) the reasons for those orders and determinations.

##### *Restriction on power to make an equal remuneration order*

(5) However, FWA may make the equal remuneration order only if it is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value.

#### 303 Equal remuneration order may increase, but must not reduce, rates of remuneration

(1) Without limiting subsection 302(1), an equal remuneration order may provide for such increases in rates of remuneration as FWA considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

(2) An equal remuneration order must not provide for a reduction in an employee's rate of remuneration.

#### 304 Equal remuneration order may implement equal remuneration in stages

An equal remuneration order may implement equal remuneration for work of equal or comparable value in stages (as provided in the order) if FWA considers that it is not feasible to implement equal remuneration for work of equal or comparable value when the order comes into operation.

#### 305 Contravening an equal remuneration order

An employer must not contravene a term of an equal remuneration order.

*Note: This section is a civil remedy provision (see Part 4-1).*

#### 306 Inconsistency with modern awards, enterprise agreements and orders of FWA

A term of a modern award, an enterprise agreement or an FWA order has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of an equal remuneration order that applies to the employee.

## Appendix C

### Pay Equality Bill

A Bill to make provision for equality through the removal and prevention of discrimination in rates of pay of males and females in paid employment to promote observance in New Zealand of the principles underlying International Labour Convention 100 on Equal Remuneration and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women.

#### 1. Short Title

This Act may be cited as the Pay Equality Act.

#### 2. Objects

The objects of the Act are –

- (1) To provide for the inclusion in all employment agreements, individual and collective, of an equality clause;
- (2) To identify equal work and provide for equal pay for equal work and work of equal value;
- (3) To provide for the right to be free from the discrimination of inequality of pay.

#### 3. Interpretation

In this Act, unless the context otherwise requires, –

“Agreement” means –

- (a) a contract of employment;
- (b) an individual employment agreement entered into by one employer and one employee who is not bound by a collective agreement;
- (c) a collective agreement as defined in the Employment Relations Act.

“Authority” means the Employment Relations Authority constituted under the Employment Relations Act 2000

“Court” means the Employment Court constituted under the Employment Relations Act

“Employee” includes a person who has entered into or works under a contract of employment or apprenticeship with an employer

“Employer” includes a person employing any employee or employees

“Labour Inspector” means an employee of the department designated under section 223 of the Employment Relations Act to be a Labour Inspector

“Pay” includes the salary or wages actually paid and legally payable and includes bonus and other special payments, allowances, fees, commissions, and any other benefits or privileges whether paid in money or not

“Union” means a union registered under Part 4 of the Employment Relations Act

“Work of Equal Value Unit” means a unit established within the Department of Labour with persons qualified and experienced in the Gender-Inclusive Job Evaluation Standard (P8007/2006)

#### 4. Application of the Act

The Act will apply to both the public and the private sectors.

#### 5. Equal Work

(1) For the purposes of this Act, A’s work is equal to that of B if it is–

- (a) like B’s work,
- (b) rated as equivalent to B’s work,
- (c) of equal value to B’s work.

(2) A’s work is like B’s work if–

- (a) A’s work and B’s work are the same or broadly similar; and
- (b) Such differences as there are between their work are not of practical importance in relation to the terms of their work.

- (3) A's work is rated as equivalent to B's work if a job evaluation study-
  - (a) gives an equal value to A's job and B's job in terms of the demands made on an employee, or
  - (b) would give an equal value to A's job and B's job if the evaluation did not include values different for men from those set for women.
- (4) A's work is of equal value to B's work if it is-
  - (a) neither like B's work nor rated as equivalent to B's work, but
  - (b) nevertheless equal to B's work in terms of the demands made on A by reference to the Gender-Inclusive Job Evaluation Standard (P8007/2006).

## **6. Equality Clause**

- (1) Every employment agreement, individual and collective, shall be deemed to include an equality clause.
- (2) An equality clause is a provision that provides for equal work as defined in section 5 and has the following effect-
  - (a) if a term of A's agreement is less favourable to A than a corresponding term of B's agreement, A's term is modified so as to have the same effect as the term in B's agreement;
  - (b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

## **7. Defence of Material Factor**

- (1) The equality clause in A's terms has no effect in relation to a difference between A's term and B's terms if it is shown that the difference is because of a material factor, reliance on which-
  - (a) does not invoke treating A less favourably because of A's sex than B is treated, and
  - (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.
- (2) A material factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.
- (3) For the purpose of subsection (1), the long-term objective of reducing inequality between men and women's work is always to be regarded as a legitimate aim.
- (4) A material factor includes evidence that a Job Evaluation Scheme that is consistent with the Gender-Inclusive Job Evaluation Standard (P8007/2006) has been undertaken and implemented by the employer.

## **8. Obligation to Provide Information**

- (1) Every employer must at all times keep a record showing that all employees are paid in accordance with the equality clause.
- (2) Every employer must record any differences in the remuneration of male and female employees.
- (3) Any clause in any individual or collective agreement that prevents or restricts the disclosure of information relating to remuneration is unenforceable against the individual who wishes to disclose the information in the course of establishing discrimination in the rates of pay on the grounds of sex inequality.
- (4) A Labour Inspector (or person authorised by a Labour Inspector to do so) may serve on an employer a demand notice, if an employee makes a complaint to the Labour Inspector or the Labour Inspector believes on reasonable grounds, that an employee has not received pay or other money payable by the employer under the Pay Equality Act.
- (5) Before issuing the demand notice the procedure laid down in section 224 of the Employment Relations Act must be followed.
- (6) A Labour Inspector may commence an action in the name and on behalf of an employee to recover any money payable under the Pay Equality Act.

## **9. Assessment of Whether Work is of Equal Value**

- (1) This section applies to proceedings before the Authority on a complaint relating to a breach of an equality clause.
- (2) Any party to an employment agreement, individual or collective, may lay a complaint for breach of the equality clause.

(3) Where a question arises in the proceedings as to whether A's work is equivalent to B's work or A's work is of equal value to B's work, the Authority may, before determining the question, require the Department of Labour (Work of Equal Value Unit) to prepare a job evaluation study that is consistent with the Gender-Inclusive Job Evaluation Standard (P8007/2006) on the question.

(4) If the determination of the complaint requires a comparator occupational group to be identified, the Authority will require the Department of Labour (Work of Equal Value Unit) to identify an appropriate comparator group and prepare a job evaluation study consistent with the Gender-Inclusive Evaluation Standard (P8007/2006). The comparator occupational group(s) may be identified within the enterprise itself, or from another enterprise or the same or another industry. The comparator groups are to have same or comparable job evaluation points as determined in accordance with the Gender-Inclusive Job Evaluation Standard (P8007/2006).

(5) If the Authority requires the preparation of a study, it must not determine the question unless it has received the job evaluation study.

(6) On receipt of the job evaluation study the Authority will make it available to the parties and after receiving submissions from the parties will determine the matter.

#### **10. Inclusion of Equality Clause in Collective Agreement**

(1) A collective agreement has no effect unless it contains an equality clause.

(2) The form and nature of the equality clause may be negotiated through the collective bargaining process in accordance with the provisions of the Employment Relations Act.

(3) In the event of dispute over the form and nature of the equality clause the matter will be referred to the Department of Labour (Work of Equal Value Unit) for a job evaluation study consistent with the Gender-Inclusive Job Evaluation Standard (P8007/2006).

(4) The job evaluation study will be referred to the parties but if agreement cannot be reached the matter may be referred by one or both of the parties to the Authority for a determination that will be binding.

#### **11. Jurisdiction**

(1) The Authority has jurisdiction to determine a complaint relating to or arising out of a breach of the equality clause.

(2) Where an employee would be entitled to make a complaint under the Human Rights Act 1993, the employee may choose to pursue a complaint under the Pay Equality Act or the Human Rights Act but not both.

(3) The Authority has jurisdiction to determine an application for a declaration as to the rights of an employee or employees or employer or employers in relation to a dispute about the effect of an equality clause.

(4) The Authority may, at any time, before or during the hearing or before delivering its decision, on the application of any party to the proceedings or on its own motion, state a case for the opinion of the Employment Court on any question of law arising in any proceedings before the Tribunal.

(5) The Employment Court shall hear and determine any question submitted to it under this section, and shall remit the case with its opinion to the Authority.

#### **12. Remedies**

(1) If the Authority is satisfied on the balance of probabilities that the defendant has committed a breach of the equality clause, the Authority may grant 1 or more of the following remedies:

- (a) a declaration that the defendant has committed a breach of the equality clause;
- (b) an order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order;
- (c) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant;
- (d) an order that the defendant undertake any specified training or programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of this Act.

(2) Any order made under this section of the Act may be filed in any District Court, and shall be then enforceable in the same manner as an order made or judgment given by the District Court.

### **13. Offences**

(1) Every person commits an offence against this Act and is liable on summary conviction to a fine not exceeding \$5000 who, either alone or in combination with any other person or group or body of persons, does any act with the intention of defeating any provision of the Act.

(2) Every person commits an offence who, wilfully obstructs or hinders any Inspector in the performance of the functions under section 8 of this Act.

### **14. Codes of Practice**

(1) The Authority may issue codes of practice-

- (a) that ensure or facilitate compliance with a provision of the Act;
- (b) that ensure or facilitate the provision of an equality clause in a collective agreement.

(2) The Department of Labour shall issue a code of practice that is consistent with the Gender-Inclusive Job Evaluation Standard (P8007/2007) for the identification of appropriate comparator occupational groups to facilitate the determination of complaint(s) relating to work of equal value.

(3) The Human Rights Commission shall establish procedures for the advocacy and promotion of pay equality by education and publicity and the dissemination of information.

### **15. Department of Labour**

The Act is to be administered by the Department of Labour.

## **Appendix D**

### **New South Wales Equal Remuneration and Other Conditions Principle**

#### **15 Equal Remuneration and Other Conditions**

(a) Claims may be made in accordance with the requirements of this principle for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required or the conditions under which the work is performed have been undervalued on a gender basis.

(b) The assessment of the work, skill and responsibility required under this principle is to be approached on a gender neutral basis and in the absence of assumptions based on gender.

(c) Where the undervaluation is sought to be demonstrated by reference to any comparator awards or classifications, the assessment is not to have regard to factors incorporated in the rates of such other awards which do not reflect the value of work, such as labour market attraction or retention rates or productivity factors.

(d) The application of any formula, which is inconsistent with a proper consideration of the value of the work performed, is inappropriate to the implementation of this principle.

(e) The assessment of wage rates and other conditions of employment under this principle is to have regard to the history of the award concerned.

(f) Any change in wage relativities which may result from any adjustments under this principle, not only within the award in question but also against external classifications to which the award structure is related, must occur in such a way as to ensure there is no likelihood of wage leapfrogging arising out of changes in relative positions.

(g) In applying this principle, the Commission will ensure that any alteration to wage relativities is based upon the work, skill and responsibility required, including the conditions under which the work is performed.

(h) Where the requirements of this principle have been satisfied, an assessment shall be made as to how the undervaluation should be addressed in money terms or by other changes in conditions of employment, such as reclassification of the work, establishment of new career paths or changes in incremental scales. Such assessments will

reflect the wages and conditions of employment previously fixed for the work and the nature and extent of the undervaluation established.

- (i) Any changes made to the award as the result of this assessment may be phased in and any increase in wages may be absorbed in individual employees' over award payments.
- (j) Care should be taken to ensure that work, skill and responsibility which have been taken into account in any previous work value adjustments or structural efficiency exercises are not again considered under this principle, except to the extent of any undervaluation established.
- (k) Where undervaluation is established only in respect of some persons covered by a particular classification, the undervaluation may be addressed by the creation of a new classification and not by increasing the rates for the classification as a whole.
- (l) The expression 'the conditions under which the work is performed' has the same meaning as in Principle 6, Work Value Change.
- (m) The Commission will guard against contrived classification and over classification of jobs. It will also consider:
  - (i) the state of the economy of New South Wales and the likely effect of its decision on the economy;
  - (ii) the likely effect of its decision on the industry and/or the employers affected by the decision; and
  - (iii) the likely effect of its decision on employment.
- (n) Claims under this principle will be processed before a Full Bench of the Commission, unless otherwise allocated by the President.
- (o) Equal remuneration shall not be achieved by reducing any current wage rates or other conditions of employment.

## Appendix E

### Queensland Industrial Relations Commission's Equal Remuneration Principle

#### EQUAL REMUNERATION PRINCIPLE

This principle applies when the Commission:

- (a) makes, amends or reviews awards;
- (b) makes orders under Ch 2, Pt 5 of the *Industrial Relations Act 1999*;
- (c) arbitrates industrial disputes about equal remuneration; or
- (d) values or assesses the work of employees in 'female' industries, occupations or callings.

In assessing the value of work, the Commission is required to examine the nature of work, skill and responsibility required and the conditions under which work is performed as well as other relevant work features. The expression 'conditions under which work is performed' has the same meaning as in Principle 7 'Work Value Changes' in the Statement of Policy regarding Making and Amending Awards.

The assessment is to be transparent, objective, non-discriminatory and free of assumptions based on gender.

The purpose of the assessment is to ascertain the current value of work. Changes in work value do not have to be demonstrated. Prior work value assessments or the application of previous wage principles cannot be assumed to have been free of assumptions based on gender.

In assessing the value of the work, the Commission is to have regard to the history of the award including whether there have been any assessments of the work in the past and whether remuneration has been affected by the gender of the workers. Relevant matters to consider may include:

- (a) whether there has been some characterisation or labelling of the work as 'female';
- (b) whether there has been some underrating or undervaluation of the skills of female employees;
- (c) whether remuneration in an industry or occupation has been undervalued as a result of occupational segregation or segmentation;
- (d) whether there are features of the industry or occupation that may have influenced the value of the work such as the degree of occupational segregation, the disproportionate representation of women in part-time or casual work, low rates of unionisation, limited representation by unions in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements and other considerations of that type; or
- (e) whether sufficient or adequate weight has been placed on the typical work performed and the skills and responsibilities exercised by women as well as the conditions under which the work is performed and other relevant work features.

Gender discrimination is not required to be shown to establish undervaluation of work. Comparisons within and between occupations and industries are not required in order to establish undervaluation of work on a gender basis. Such comparisons may be used for guidance in ascertaining appropriate remuneration. The proper basis for comparison is not restricted to similar work.

Where the principle has been satisfied, an assessment will be made as to how equal remuneration is to be achieved. Outcomes may include but are not limited to the reclassification of work, the establishment of new career paths, changes to incremental scales, wage increases, the establishment of new allowances and the reassessment of definitions and descriptions of work to properly reflect the value of the work.

There will be no wage leapfrogging as a result of any changes in wage relativities arising from any adjustments under this principle. The Commission will guard against contrived classifications and over classification of jobs.

The Commission may determine in each case whether any increases in wages will be absorbed into overaward payments. Equal remuneration will not be achieved by reducing current wage rates or other conditions of employment. The Commission may decide to phase in any decision arising from this principle. Any affected employer may apply to have any decision phased in. The merit of such application will be determined in the light of the particular circumstances of each case and any material relating thereto will be rigorously tested.

Claims brought under this principle will be considered on a case by case basis.

# Time, Work, and Law: a New Zealand Perspective

AMANDA REILLY\*

## Abstract

New Zealand is popularly perceived as a laid back place where individuals might choose to live to enjoy a slower paced life style. However, the reality is that New Zealanders work some of the longest days and the most hours per annum in the OECD.

In this article, it is argued that existing legal mechanisms for limiting work time are rooted in increasingly obsolete work patterns premised on strong unions and a workforce of permanent full-time employees who are supported by an unpaid female workforce who carry the burden of reproductive care work. However, in New Zealand, as elsewhere, these legal mechanisms have been undermined by de-unionisation, the emergence of precarious work and the growing numbers of women in the workforce. Consequently, the ability of workers to limit their work time has been significantly compromised. In the final part of the article, it is suggested that a Guaranteed Basic Income could, given the changing nature of work, be a more effective and flexible mechanism for controlling working time than current law.

## Introduction

New Zealand claims to be the first country in the world to introduce the eight hour working day dating from 1840 when carpenter Samuel Parnell went on strike insisting he would only work eight hours a day on a carpentry job. He famously said

There are twenty-four hours per day given us, eight of these should be for work, eight for sleep, and the remaining eight for recreation and in which for men to do what little things they want to do for themselves.

To this day, New Zealand is popularly perceived as a laid back place where individuals might choose to live to enjoy a slower paced life style. However, the reality is that New Zealanders work some of the longest days and the most hours per annum in the OECD.<sup>1</sup> One survey indicates that 40% of New Zealanders have some or a lot of difficulty getting the work life balance they want and 46% experience some degree of work-life conflict.<sup>2</sup> A recent Department of Labour study into those who work long hours reported that 22.68% of the total workforce work long hours (defined as 50 hours per week.) Notably, the longest working hours are found among the poorest working people with income distribution skewing downwards among those working over 60 hours a week.<sup>3</sup> 20.1% of those working 60 or more hours a week report themselves as dissatisfied or very dissatisfied with their work-life balance.<sup>4</sup>

Historically, legal norms and mechanisms have operated to allow people to exercise control over their time by limiting working hours. This article proposes that a Guaranteed Basic Income (BI) might be a better option than existing labour and employment law mechanisms (i.e. informal workplace norms, collective

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<sup>1</sup> Organisation for Economic Co-Operation and Development "Clocking In and Clocking Out: Recent Trends in Working Hours, Policy Brief" (2004) <[www.oecd.org](http://www.oecd.org)>.

<sup>2</sup> New Zealand Department of Labour "Work-Life Balance in New Zealand: A Snapshot of employee and employer attitudes and experiences" (2006) <[www.dol.govt.nz](http://www.dol.govt.nz)>.

<sup>3</sup> L Fursman "Working Long Hours in New Zealand: A Profile of Long Hours Workers Using Data from the 2006 Census" (2008) New Zealand Department of Labour <[www.dol.govt.nz](http://www.dol.govt.nz)>.

<sup>4</sup> Statistics New Zealand *Survey of Working Life March 2008 Quarter* (2008) at 19.



bargaining and restrictions on working time embodied in statute and regulation) in terms of allowing workers to limit and control their time working time.

As a preliminary, it is necessary to define BI. One definition is that it is “an income unconditionally granted to all on an individual basis without means test or work requirement.”<sup>5</sup> This idea may seem somewhat radical but it is an idea with a long lineage and it is a concept that has been the subject of much discussion internationally<sup>6</sup> in recent times.<sup>7</sup> A variety of ways of structuring this entitlement have been proposed, but most fall under one of two categories: the Basic Income or the Negative Income Tax. Advocates propose that it should be set at a level sufficient to sustain “a modest but decent standard of living”.<sup>8</sup> The idea has been raised in New Zealand,<sup>9</sup> most recently in Gareth Morgan’s “Big Kahuna” proposal that everybody should get a basic income of \$10,000 regardless of whether they are employed or not.<sup>10</sup>

The article is structured in three parts: in the first section the main legal mechanisms for controlling work time are located within a historical context, in the second section it is suggested that the emergence of post-Fordist work patterns and the subsequent growth in precarious work and the increasing participation of women in the paid workforce make these mechanisms less effective than previously. In the second and final section, the suggestion is made that a BI could be a more effective and flexible mechanism than current law of allowing workers to limit their working time. In particular, it is suggested that a BI could be a better alternative in terms of allowing individuals to regain control of their time by virtue of:

- 1) The bargaining power a BI would confer on individuals in their working lives.
- 2) The options a BI might provide with regard to the distribution of reproductive work.
- 3) The enhanced ability a BI would potentially confer to participate in the wider political sphere.

The legal mechanisms for controlling work time in New Zealand are now located in their historical context. Following that, they are critiqued within the present day context which is characterised by firstly post-Fordist work patterns and an associated growth in precarious work and secondly increased participation of women in the paid workforce.

## A Brief History of Time and Law

In pre-industrial times “reproductive” work, that is the work of caring for dependants and the physical needs of a household, and “productive work,” which is market work, were not separate conceptually, geographically or temporally.<sup>11</sup> To a great extent, the rhythm of work varied according to natural time cycles (day, season, life).

In New Zealand, prior to colonial contact, the Māori concept of time was rooted in Māori cosmology. Traditional beliefs delineated three periods of time from which emerged man beginning with Te Kore i.e. the nothingness. This was a necessary period of chaos where order was neither evident nor required, from there Te Po, which was an evolution from nothingness into darkness. This was, in turn, followed by the broad

<sup>5</sup> This is the definition adopted by the Basic Income Earth Network <<http://www.basicincome.org/bien/>>.

<sup>6</sup> For example, see John Cunliffe and Guido Erreygers (eds) *The Origins of Universal Grants: an Anthology of Historical Writings on Basic Capital and Basic Income* (Palgrave Macmillan, Basingstoke, 2004).

<sup>7</sup> For a bibliography containing more than 2000 books and articles relating to a guaranteed basic income see the US Basic Income Network: Bibliography <<http://www.usbig.net/bib.html>>

<sup>8</sup> Carole Pateman “Freedom and Democratization: Why Basic Income is to be Preferred to Basic Capital” in K Dowding, J De Wispelaar and S White (eds) *The Ethics of Stakeholding* (Palgrave MacMillan, London England, 2003).

<sup>9</sup> M Goldsmith “Universal Basic Income and the Concept of Citizenship” (1997)9 Social Policy Journal 45; K Rankin “Revisiting the UBI” (1998) 7(2) New Zealand Political Review 12.

<sup>10</sup> Gareth Morgan “What to Watch Out for in 2010” *New Zealand Listener* (New Zealand, 6 February 2010).

<sup>11</sup> See J Williams “From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition” (2001) 76 Chicago Kent Law Review 1441 at 1443.

daylight of Te A Marama. Associated with this cosmology the Māori sense of time and the Māori way of life and work ethic is rooted in lunar cycles and the growing periods of plants and the fertility cycles of fish and mammals. Time in a Māori sense is not necessarily chronological. Its measurement is established by the meaning of related events rather than the period between events with periods of birth and death requiring specific responses according to tribal lore and tradition.<sup>12</sup>

However, Enlightenment thinking posited humans as ecologically distinct from the natural world and as a consequence time perceptions, in Western culture, became “increasingly mechanised in both physical and conceptual representation”.<sup>13</sup> This process of mechanisation of time was continued and exacerbated with the advent of the industrial revolution where the transition to Industrial Capitalism and wage labour imposed work patterns characterised by regularity. Thompson describes this as movement from task orientation to timed work as the labouring classes were forced to assume new time compliant working habits.<sup>14</sup> In conjunction with this, productive work and reproductive work begin to be conceived as separately gendered activities. As certain types of production were time disciplined, and moved into factories, they were gendered masculine. Other types of production (such as production of food and clothing) were coded as “caring” rather than “work” and were gendered feminine.<sup>15</sup>

This transition was not an instantaneous one. Thompson states “in the first stage we find simple resistance. But in the next stage, as the new time discipline is imposed so the workers begin to fight not against time but about it.”<sup>16</sup> Thus, for much of the nineteenth century, working time was a central focus of political and legal struggle.<sup>17</sup> This struggle resulted in the implementation of a number of measures aimed at shaping time for the benefit of workers and, in particular restricting work hours.

Although there were aspects unique to New Zealand’s particular cultural mix and history, the local mechanisms that evolved to regulate time were similar to those which evolved internationally, i.e. customary norms, norms derived from collective bargaining which operate alongside standardised limits on the working day/week/year or limits on working hours embodied in statute and regulations.<sup>18</sup> The nature of these protections can best be illustrated by a brief overview of how they operated historically in New Zealand:

Samuel Parnell, as mentioned above, is credited with being the driving force behind the introduction of the eight hour day to New Zealand. This norm was perhaps less than ideally enforced by means of a dunking in Wellington Harbour for any who worked longer than eight hours but subsequently, albeit informally, the eight hour day became the standard working day. To the present day, relatively informal workplace norms play a role in limiting working time and may in some circumstances be given legal recognition and enforced by the courts.<sup>19</sup>

Unions have historically also been very important in terms of negotiating and enforcing limits on the hours workers could be required to work. For example, in 1936, the Industrial Conciliation and Arbitration Act required that the Court of Arbitration should fix at not more than 40 the maximum number of hours,

<sup>12</sup> Gail Whitford and Mike Barnes “Te Ao Hurihuri New Zealand’s First Time in W Pental and A Harvey et al (eds) *Time Use Research in Social Science* (Springer, New York, 1999) 212 at 214.

<sup>13</sup> Ibid at 216.

<sup>14</sup> EP Thompson *Customs in Common: Studies in Traditional Popular Culture* (Merlin Press, London, 1991) at 383.

<sup>15</sup> See Williams, above n 11, at 1443.

<sup>16</sup> Thompson, above n 14, at 388).

<sup>17</sup> J Conaghan “Time to Dream? Flexibility, Families, and the Regulation of Working Time” in J Fudge and R Owens (eds) *Precarious Work, Women, and the New Economy* (Hart Publishing, Oxford, 2006) 101 at 111.

<sup>18</sup> For discussion of international developments see G Bosch “Working Time: Tendencies and Emerging Issues (1999) 138 “ International Labour Review 135; Conaghan, above n 17, 102.

<sup>19</sup> *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v The Christchurch Press, A Division of Fairfax New Zealand Ltd* [2005]1 ERNZ 288 is an example of where the courts gave formal legal recognition to an informal work custom and did not allow Christchurch press to require employees to work longer night shifts as this would be contrary to a custom of 30 years standing.

exclusive of overtime, to be worked in any one week by any worker bound by the award (i.e. union negotiated agreements concerning terms and conditions of employment). With this, the 40-hour five-day week became almost universal at least for a time.

Statutory protections are another key legal mechanism that has evolved to control and restrict working time. In New Zealand, perhaps more than other countries, collectivisation and union negotiated awards were historically the central source of these protections.<sup>20</sup> However, in more recent years statutory protections restricting working time have become more significant.<sup>21</sup>

It is important to note that the protective mechanisms described above have never benefited all workers. As well as serving a protective purpose, labour and employment law has a gate keeping function; it provides rights to some workers and then it limits access to those rights. In general, the legal status of “employee” is an important prerequisite to accessing rights to statutory protection and the right to legally strike or collectively bargain.<sup>22</sup> Those who cannot fit themselves within the definition of employee, such as the self-employed cannot access these rights.<sup>23</sup> Furthermore, in New Zealand unions have, at least historically, generally operated for the benefit of union members, i.e. predominantly male full-time breadwinners rather than for the benefit of all workers.<sup>24</sup>

For a long time, however, the legal mechanisms for regulating time were, if not perfect, arguably good enough in terms of outcome for a majority of workers in New Zealand. However, two critical changes in organisation and distribution of work have emerged over the past years which make these mechanisms increasingly less effective at allowing workers to control their time. These are:

- a) The trend towards post-Fordist patterns of production and the corresponding rise in precarious work
- b) The increasing participation of women in paid work

### *The Trends towards Post-Fordist patterns of production*

Post-Fordism, as the next stage after Industrial Capitalism, entails a different mode of production: one that is more flexible and specialised, where employers respond to market conditions by retaining a core of skilled employees supplemented on an as-needed basis by a periphery of less secure workers who may be part-time, short term contract or casual employees together with subcontractors, agency temps and the self-employed who provide flexibility. In New Zealand, as elsewhere,<sup>25</sup> a growing number of workers now find themselves in what is known as precarious or contingent work, i.e. jobs characterised by insecurity, low wages, and few benefits.<sup>26</sup> These jobs are also characterised by variable hours that can make day-to-day time management and long-term planning extremely problematic.

<sup>20</sup> For example, historically, there was no statutory right to sick leave until a three day entitlement was mandated by Section 30 of the Holidays Amendment Act 1991. Nonetheless, most workers would effectively have had a right to sick leave by virtue of the applicable union negotiated award. M Wilson “The Employment Relations Act: A Framework for a Fairer way” in E Rassmussen (ed) *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) 9 at 11.

<sup>21</sup> Some examples are s 11 of the Minimum Wages 1983; The Parental Leave and Employment Protection Act 1987; the Holidays Act 2003; the Employment Relations (Flexible Working Arrangements Amendment Act 2007; the Employment Relations (Rest Breaks, Infant feeding and Other Matters) Amendment Act 2009.

<sup>22</sup> These rights which are established by the Employment Relations Act 2000 are only available to employees who fall within the definition of s 6.

<sup>23</sup> For example under the Holidays Act 2003, only employees are entitled to at least four weeks paid annual holidays a year. Similarly for employees, there is a minimum provision of five days’ paid sick leave after the first six months of continuous employment.

<sup>24</sup> For some historical discussion see S Robertson “Women Workers and the New Zealand Arbitration Court” (1991) 61 Labour History 30.

<sup>25</sup> J Fudge and R Owens (eds) *Precarious Work, Women, and the New Economy* (Hart Publishing, Oxford, 2006).

<sup>26</sup> D Tucker “Precarious Non-Standard Employment- A Review of the Literature” (2002) New Zealand Department of Labour at 66 <www.dol.govt.nz>.

Data on the extent of precarious work in New Zealand is thin however, the number is not insignificant with one study suggesting that at least one third of New Zealand employees are in non-standard jobs.<sup>27</sup> Such workers are frequently un-unionised,<sup>28</sup> have low awareness of any legal rights they may have<sup>29</sup> and limited ability to use legal processes to resolve employment related disputes.<sup>30</sup>

While existing legal mechanisms for limiting working time may work adequately for employees in secure, long-term permanent employment, they are necessarily less effective for those on the low paid, casualised periphery of the workforce who are either not entitled to legal rights due to their legal status,<sup>31</sup> or not in a position to enforce the rights they are theoretically entitled to. Mechanisms which limit working time pertaining to the status of employee are also not accessible to the self-employed and here it should be noted that New Zealand has relatively high levels of self-employment.<sup>32</sup>

Customary norms have in the past operated as a mechanism for controlling and restricting work time, whether formally or informally enforced. However, such norms can only develop in work sites populated by permanent, long-term employees. They are a product of stability and ongoing association between workers and employers. Long standing customs concerning limitation of working hours can neither develop nor be enforced in workplaces staffed by transient, casualised workers.

Collective bargaining, too, is problematic as a means of controlling working hours. The substantial decline in union membership that began in the 1990s has not been reversed. Although the Employment Relations Act 2000 has the stated objective of promoting collective bargaining,<sup>33</sup> collective bargaining is at an historic low,<sup>34</sup> and union membership is particularly low in sectors where the incidence of casual and temporary employment is high.<sup>35</sup> While the union movement is making commendable efforts to extend the benefits of collective bargaining to these excluded workers,<sup>36</sup> it must be said that the grim scenario regarding union membership in New Zealand reflects world wide trends of falling union membership. The reasons are complex but the fact that workers tend to be more transient and insecure, and workplaces and jobs more fluid in a post-Fordist environment as opposed to under industrial capitalism does not make organisation of unions easy.<sup>37</sup> All things considered, failing some other drastic intervention, collective bargaining, for most workers, cannot be seen as a mechanism to rely on in terms of restricting working hours in the current conditions.

<sup>27</sup> C Allan and others "From Standard to Non Standard Employment: Labour Force Change in Australia, New Zealand and South Africa" (2001) 22 International Journal of Manpower 735.

<sup>28</sup> Tucker, above n 26, at 49.

<sup>29</sup> Ibid, at 45.

<sup>30</sup> New Zealand Department of Labour "Casual and Temporary Employment: Report on Phase One Research" (2007) <[www.dol.govt.nz](http://www.dol.govt.nz)>.

<sup>31</sup> The self-employed are generally unable to access statutory rights to time away from work. However, employees in precarious, short-term, irregular work may also not be able to access statutory protection. For example, under the Holidays Act 2003, there is a minimum provision of five days paid sick leave after the first six months of continuous employment. The Employment Relations (Flexible Working Arrangements) Amendment Act 2007 provides certain employees with a statutory right to request a variation of their working arrangements, including hours of work and days of work if they are responsible for the care of any person. However, as with sick leave this is only an option after six months of continuous employment).

<sup>32</sup> A recent survey reports that, of the people employed in the March 2008 quarter, 12% were self-employed and not employing others. Statistics New Zealand, above n 4.

<sup>33</sup> Employment Relations Act 2000, s 3(a)(iii).

<sup>34</sup> In 1990, public sector bargaining density was 97% and private sector density 48%. In 2009, public sector density is 49% and private sector density is 9%: Stephen Blumenfeld, Peter Ryall and Graeme Kiely *Employment Agreements: Bargaining Trends and Employment Law Update 2008/2009* (Victoria University of Wellington Industrial Relations Centre 2008/2009) at 14.

<sup>35</sup> New Zealand Department of Labour, above n 30, at 12.

<sup>36</sup> For New Zealand Council of Trade Unions proposals for legal and union change to improve the availability of collective bargaining to currently unionised, marginalised workers see Helen Kelly "Union Change" (paper presented to Unions Creating Alternatives Biennial Conference, October 2009).

<sup>37</sup> For discussion of the problems facing unions in the new working environment engendered by post-Fordism see Katherine Stone *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, Cambridge, 2004) 196.

Statutory protection of working hours tied to the status of employee is also problematic in the more precarious working environment engendered under post-Fordist norms. Increasing numbers of workers do not fit the legal criteria of employee as workplaces are organised along more flexible lines.<sup>38</sup> This problem is exacerbated by the fact that some employers camouflage employees as contractors to cut costs by circumventing the statutory protections employees are entitled to. Even those workers who may theoretically be entitled to the rights pertaining to employees will frequently not have the backing of a union to assist in enforcing these rights.

All in all, the trends towards post-Fordist working patterns leave increasing numbers of workers unable to access legal mechanisms which limit working time. The problem of difficulty in accessing legal protection of time is compounded by the fact that more and more New Zealand women now work in the paid workforce which puts greater time pressure on individuals and families. This point is now discussed in greater depth.

## The Increasing Participation of Women in Paid Workforce

While there is no doubt that, in general, collective bargaining and statutory control of work time historically succeeded in reducing working hours or at least contributed towards shaping them in accordance with workers desires, they are not unproblematic. Supiot suggests that the legal regulation of time reinforced an idea of time as an objective commodity capable of regulation. Effectively, this ratified “the economic fiction that work is detachable from the worker” and it effectively created a false dichotomy between working time and free time.<sup>39</sup> The distinction between working time and free time is, however, artificial. Even though reproductive work occurs in so-called free time, it is essential that it occurs for the worker to take his or her place in the workforce. Indeed paid work is parasitic on reproductive work. Most obviously, if one is to be productive in the workforce, washing will have to be done, meals prepared and eaten, and health (both emotional and physical) maintained. Dependants, young and old, must also be cared for.

Under the model of industrial capitalism, the apparent dichotomy between work and free time resulted in reproductive work being unvalued and invisible. There was no need to take reproductive work into account in work design and time regulation as it was invisibly taken care of elsewhere. This distinction, while problematic in many respects,<sup>40</sup> was perhaps tenable under historic social norms. These were predicated on a “gender contract” whereby women took care of the reproductive work in return for men assuming the breadwinner role.<sup>41</sup>

However, reproductive work and paid work can no longer be treated as dichotomised worlds where never the twain shall meet. For a variety of reasons, increasing numbers of women have joined the paid workforce. In New Zealand in 1959, approximately 29% of working age women participated in the job market. By contrast in March 2008, the female participation rate was 61.7%.<sup>42</sup> Reproductive work still needs to be done

<sup>38</sup> The legal concept of employee is widely viewed as problematic in the new working environment. For discussion see H Collins “Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws” (1990) *Oxford Journal of Legal Studies* 10; J Conaghan “Labour Law and ‘New Economy’ Discourse” (2003) 16 *Australian Journal of Labour Law* 9; B Creighton “Employment Security and Atypical Work in Australia” (1994-1995) *Comparative Labor Law Journal* 16; P Spoonley “Is Non Standard Work becoming Standard? Trends and Issues” (2004) *NZJER* 29; G Standing, “The Australian Charter of Employment Rights: the Missing Dimensions” (2008) *JIR* 355.

<sup>39</sup> Alain Supiot *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, Oxford, 2001) 64.

<sup>40</sup> See generally M Waring *If Women Counted: A New Feminist Economics* (Harper Collins, San Francisco, 1988); J Williams *Unbending Gender* (Oxford University Press, New York, 2000).

<sup>41</sup> See Judy Fudge “A New Gender Contract? Work/Life Balance and Working Time Flexibility in J Conaghan and K Rittich (eds) *Labour Law, Work and Family* (Oxford University Press, Oxford England, 2005) at 261 for discussion of this concept and its evolution.

<sup>42</sup> New Zealand Department of Labour “Female Labour Market Fact Sheet” (2008) <[www.dol.govt.nz](http://www.dol.govt.nz)>.

but with more women involved in the workforce, there is no longer an invisible unpaid workforce standing ready to undertake this. Increasingly, it must be fitted in around paid work. Inevitably, there is less time in which to carry it out, which creates time pressure on individuals and families.

New Zealand has introduced some positive initiatives to attempt to manage the intrusion of the needs of reproductive life onto working life and no doubt these have helped some women and families.<sup>43</sup> However, these concessions largely remain the preserve of employees, i.e. those already privileged in permanent positions who have the confidence to ask employers for them. They do little for those at the periphery of the workforce, i.e. the struggling self-employed, or the casual on-call non-unionised worker hoping to be offered enough work to make the rent. For example, at present, new mothers who can establish that they have worked a certain number of hours for the same employer in the immediate preceding 12 months are entitled to 52 weeks of unpaid extended leave.<sup>44</sup> The precarious worker is likely to struggle to meet the necessary criteria of having worked a minimum hours for the same employer in the immediate preceding 12 months; and for the low waged or the self-employed individual trying to get a business off the ground, taking a year off work may not be remotely financial feasible.

It thus seems that the legal mechanisms of informal norms, collective bargaining and statutory right tied to the status of employee are not sufficiently addressing the issues of work and time. Arguably, this is because they are rooted in increasingly obsolete work patterns premised on strong unions, a workforce of permanent full employees, supported by an unpaid female workforce who carried the burden of reproductive work and caring for dependents. These mechanisms have been undermined by de-unionisation, the emergence of precarious work and the growing numbers of workers unable to access the protections pertaining to employees as well as by the growing numbers of women in the workplace.

It is possible that ways might be sought to reinvent existing mechanisms for controlling time and to somehow extend statutory protection and collective bargaining to those workers who are currently excluded.<sup>45,46</sup> However, here a more radical option is explored and a question is posed: Could a BI be a better option?

### ***Would BI be a Better Option?***

In this section it is suggested that a BI could be a better, more flexible alternative to existing labour and employment law mechanisms in terms of allowing individuals to regain control of their time in the new working environment by virtue of:

- 1) The bargaining power a BI would confer on individuals in their working lives.
- 2) The options a BI might provide with regard to the distribution of reproductive work.
- 3) The enhanced ability a BI would potentially confer to participate in the wider political sphere.

## **Bargaining Power**

The idea of flexibility and variation in working time is not a bad thing. The primal, pre-industrial rhythms of seasons and of birth, life and death are still inherent to human life despite the more recent overlays of the work patterns and the rules associated, firstly, with industrial capitalism and latterly post-Fordism. The reality is that the patterns of rural working time, following seasonal imperatives, are different from those of

<sup>43</sup> i.e. The Parental Leave and Employment Protection Act 1987; the Holidays Act 2003; the Employment Relations (Flexible Working Arrangements Amendment Act 2007; the Employment Relations (Rest Breaks, Infant feeding and Other Matters) Amendment Act 2009.

<sup>44</sup> The Parental Leave and Employment Protection Act 1987

<sup>45</sup> The extension of paid parental leave to the self-employed under the Paid Parental Leave Act is an example where this occurred.

<sup>46</sup> See for example the ideas discussed in Helen Kelly "Union Change" (paper presented to Unions Creating Alternatives Biennial Conference, October 2009).

urban commuters or to the patterns of caregivers of babies and small children. At various life stages people may have different preferences as to how they wish to organise their working time; parents with young children require a different life rhythm to that of a collective of late-night jazz musicians. Overly rigid time regulation such as a hypothetical law or a union negotiated contractual term requiring everyone to down tools at 5pm cannot take account of the varying needs of different institutional settings and of different lives.<sup>47</sup>

As long as there is ample freedom to choose and to move between rhythms of life, arguably individuals and the community are better served by encouraging diversity and freedom of choice rather than by enforcing repressive conformity to one constructed time. What is important is that the ideal of flexibility is not permitted to operate solely for the benefit of employers or the powerful driven solely by the needs of production. What is needed by workers is bargaining power. Historically, informal norms, unions and statutory regulation provided this to a majority of workers but, as has been suggested above, too many workers are, in real terms, unable to access these provisions in the new working environment.

If, however, a BI sufficient to live on at a modest yet decent standard was available as of right, regardless of participation in the labour market, then exiting the labour market would become a viable option for workers.<sup>48</sup>

A worker with a guaranteed BI who needs to negotiate reduced hours or more flexible hours or more regular hours or time away from work is inherently in a stronger bargaining position than one who is solely dependent on their wage for the support of themselves and their families.

A BI also has the benefit of assisting not just employees as existing legal mechanisms predominantly do, but potentially also those who are not employees to manage their time in accordance with their own particular needs and wishes. For example, a struggling small self-employed dairy owner in receipt of a BI would, should she choose, be able to close up her shop and take a day off safe in the knowledge that her ability to pay that weeks rent would not be compromised. Hence, the evidential and legal difficulties surrounding the shoehorning into, or the exclusion of workers from, the category of employee could be circumvented as the ability to control ones working time becomes the right of all workers.

A BI will also have the advantage of a being a mechanism that will most often more easily allow for individualised negotiations and solutions crafted to suit individual circumstances than any general law could hope to be. While not a return to a pre-industrial lifestyle, a BI would make it more possible for individuals to live their lives in ways in keeping with the rhythms of the seasons. It could also potentially create spaces for individuals to respond appropriately to significant events such as birth and death rather than such events having to be fitted into a timeframe constructed around the demands of the workplace and the imperative of financially supporting oneself and one's dependents

A further advantage of a BI is that it has the advantage of improving the likelihood of compliance with any specific law that seeks to limit work hours for particular public policy or safety reasons. Legal limitations of working hours are of no use if individuals do not have the power to insist on compliance. A restriction on the number of continuous hours a truck driver can drive without a rest stop is meaningless if the truck driver is un-unionised, vulnerable and financially dependent on an unscrupulous employer who does not care about the law. Studies have shown that those in precarious, insecure jobs tend to risk their health and safety in order to maintain good relationships with their employers.<sup>49</sup> The same individual in receipt of a BI has the power to walk away from unsatisfactory, unsafe arrangements or to insist on the need for adherence to the letter of the law.

<sup>47</sup>Todd Rackoff *A Time for Every Purpose: Law and the Balance of Life* (Harvard University Press, Cambridge, 2002) at 163.

<sup>48</sup> On the potential of a Basic Income to enhance bargaining power by securing the ability to exit the labour market place see R Jubb "Basic Income, Republican Freedom, and Effective Market Power" (2008) 3(2) Basic Income Studies 4.

<sup>49</sup> P Spoonley "Is Non Standard Work becoming Standard? Trends and Issues" (2004) NZJER 29.

## Addressing the Issue of Reproductive Work

A solution addressing the problem of lack of time for workers must take into account the reproductive work which underpins participation in the paid workforce. Existing legal mechanisms attempted to address these but they are limited in their ability to address the varied needs of workers and families. For example, the Holidays Act 2003 provides that, for most employees, there is a minimum provision of five days sick leave after the first six months of continuous employment. This may be a generous allowance for a single healthy adult but for a solo parent responsible for a child with serious health problems, five days would be woefully inadequate. The point is that family and individual circumstances are subject to vast variation and it is hard to see how any law could adequately accommodate this.

By contrast, a BI could be a very useful means of enabling individuals and families to manage the essential reproductive work which underpins participation in paid work in a flexible way that genuinely takes account of each family's and each individual's actual needs and desires.<sup>50</sup> If set at a high enough level, a BI would make reducing to part-time work or periods away from the paid workforce a practical option for money and time pressed individuals or families without driving them into poverty.

Finally, for some families and individuals, a BI might enable some greater redistribution of some reproductive work such as child care and meal preparation, to the market. While not all such work is capable of commodification the option of being able to commodify some of it could reduce time pressure on many families.

## Political Power

Thus far, discussion of the legal mechanisms designed to limit working time has focused primarily on the direct controls on individual working relationships. In fact, this is not the only mechanism available to control working time. Legal regulation of time outside individual work relationships is also an option.

Supiot suggests that while it is important to allow for the possibilities of diversity, creativity, and the possibility of social experimentation, there are larger societal interests at stake in the regulation of working time, so it should not be entirely determined by negotiations between individuals.<sup>51</sup> He expresses this concern because he is concerned that fragmentation of time may come at a cost to communal time.<sup>52</sup> Civic involvement is a collective endeavour. Individuals not only need leisure time in which to become involved, but they need shared leisure time, that is, similarly co-ordinated schedules. With all its faults, the regulated working time associated with earlier industrial collectivism gives a sort of collective tempo to life. For example, after-work socialising could be expected to occur in the evening as the majority were understood to be employed 9 to 5. Under a more individualised and subjective system of apportioning working time, there is a danger that time devoted to all forms of social and civic life, already under pressure, will be squeezed even further as everyone struggles with different schedules.

One possibility which would limit work time is the introduction of more statutory public holidays.<sup>53</sup> Indeed, if the goal is purely to limit working time it would be theoretically possible to impose draconian legal

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<sup>50</sup> For an overview of the various strands in Basic Income literature on the effect of a BI on the distribution of reproductive work see I Robeyns "Introduction: Revisiting the Feminism and Basic Income Debate" (2008)3(3) Basic Income Studies 1.

<sup>51</sup> Alain Supiot *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, Oxford, 2001) 93.

<sup>52</sup> Ibid, at 90.

<sup>53</sup> For example, in New Zealand, there has been some discussion about creating a mid-winter public holiday celebrating Matariki which is the time at which the Pleiades star cluster is visible and which traditionally established the correct time to plant crops.



measures such as the compulsory enforced closing of all businesses, shopping malls, libraries, swimming pools and other public facilities on Sunday. The question would then become whether this would really be a genuine quality of life improvement and whether rigidly enforced time norms such as these are fair to people who, for whatever personal reasons, want to, for example, work 80 hour weeks or keep their business open over the weekend?

Law alone cannot resolve such questions. The issues are complex and there are many competing interests. What is required is discussion and debate in the wider political sphere.<sup>54</sup> However, a prerequisite of participation in such discourse is the time in which to do so; too little free time results in disempowerment and civic disengagement.<sup>55</sup> Overworked and overtired workers will struggle to participate in any political dialogue about time, yet theirs are the voices that most need to be heard.

A mechanism is needed for ensuring that the demands of work are not permitted to crowd out the right and opportunity to participate politically in the dialogue surrounding time norms. Could a BI provide such a mechanism? Arguably, a BI could potentially enhance participation in social and political life as it will be possible, at least for those who wish it, to reduce working hours somewhat so that fitting in such activity around working life will no longer require heroic efforts.<sup>56</sup> <sup>57</sup>As such, a BI would seem to be a mechanism ideally suited to enabling workers to take part in the political processes and dialogues that will shape the time norms that they will live by both now and in the future.

## Conclusion

Time, work and law are intimately connected. As the organisation of work changes, the tools for limiting working time must change and evolve. In this article it has been argued that just as a transition occurred from pre-industrial working patterns to industrial working patterns, new working patterns that existing legal mechanisms are not adjusting adequately to are also emerging. The poorest working people are working the longest hours and unable to access the protections that the law purports to provide. The result of this is that improving individuals' ability to limit their work time is an issue that needs to be addressed. It has been suggested that BI could be a better method of achieving this than existing legal mechanisms: A BI would be a more flexible way than law to empower individuals to manage their working time in ways that takes account of the varying needs of both different institutional settings and of different life stages; a BI also offers more promise than law as a way of allowing individuals to negotiate how to manage the reproductive work that underpins paid work; a BI would also potentially allow otherwise time pressed individuals to take part in the political discourses surrounding the development and implementation of any agreed on communal time norms.

All that said, it must be conceded that while there is some interest in the idea of a BI in New Zealand it is not a concept likely to be taken seriously in the current political environment. Of the political parties currently represented in Parliament, only the minority Green Party have expressed openness to the concept. Their stated policy is that they "support...a full and wide ranging public debate on...[BI]".<sup>58</sup> New Zealand does, however, have a history of innovation and progressiveness; for example, it was the first country in the world to introduce women's suffrage, the eight hour day and to legalise collective bargaining, so a time may come when the arguments presented here might be seriously entertained.

<sup>54</sup> Todd Rackoff *A Time for Every Purpose: Law and the Balance of Life* (Harvard University Press, Cambridge, 2002) 183.

<sup>55</sup> *Ibid.*, at 47–48.

<sup>56</sup> This point is frequently argued in Basic Income literature. For example, see Carole Pateman "Freedom and Democratisation: Why Basic Income is to be Preferred to Basic Capital" in K Dowding, J de Wispelaar and S White (eds) *the Ethics of Stakeholding* (Palgrave MacMillan, London, 2003) 15.

<sup>57</sup> For a recent work on the possibilities of linking basic income to participation in civil and political society see Guy Standing *Work After Globalization: Building Occupational Citizenship* (Edward Elgar, Cheltenham, 2009)

<sup>58</sup> Sue Bradford *Income Support Policy* (Green Party of Aotearoa New Zealand 2008)

<<http://www.greens.org.nz/policy/incomesupport>>

# **Equality and family responsibilities: a critical evaluation of New Zealand law**

AMANDA REILLY\*

## **Abstract**

The causes of women's persistent inequality in the workplace are complex but work-family conflict and gendered patterns of care-giving undoubtedly play a role. This paper describes existing New Zealand law designed to prevent discrimination against those with family responsibilities and utilises regulatory scholarship to critically evaluate it. It concludes that stronger enforcement mechanisms and positive duties to promote workplace cultures where those with family responsibilities are not disadvantaged would be helpful additions to the existing legal framework.

## **Introduction**

New Zealand women earn less than New Zealand men. Statistics New Zealand recently reported that the median weekly wage of women in full-time employment equates to 86% of the median male wage.<sup>1</sup> Measured by average hourly earnings, the gender pay gap has persisted at 12% for the last 10 years.<sup>2</sup> There are a number of reasons for this pay gap which include systemic under compensation of female dominated occupations and overt sex discrimination. This paper concentrates on one aspect of the underlying causes of the pay gap, i.e. work-family conflict and gendered patterns of care giving, and it evaluates New Zealand's legal responses thereto.

The paper is structured as follows: In the first part, the relationship between women's disadvantage in the workplace and the ideal worker norm is discussed. In the second part, some concepts drawn from regulatory scholarship are summarised with a few examples providing criteria against which to evaluate New Zealand law. In the third part, New Zealand law is analysed and found wanting.

## **How do gendered care work norms contribute to women's disadvantage?**

Williams argues that women will remain disadvantaged and marginalised in workplaces for as long as the norm of the ideal worker is someone unconstrained by care-work responsibilities, i.e. somebody who is able to work 40 hours or more a week, all year round with no career breaks.<sup>3</sup> As long as this norm prevails, anyone who deviates from it will find themselves disadvantaged.

The ideal worker norm is problematic because it does not sufficiently take account of care-work. Historically, this work was largely carried out, unpaid, in the private sphere by women. However, as increasing numbers of women have moved into paid work, the need for care-work has not diminished. Care-work is intrinsic to the continuation and sustenance of human life. The labour intensive nurture of babies and children is the most obvious manifestation of this but it is not the only one. Childless, single people have care-giving calls on their time too, more particularly if they have elderly relatives for whom they are responsible. Moreover, the current understanding of work as work-for-pay or as

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<sup>1</sup> Statistics New Zealand "New Zealand Income Survey: June 2010 Quarter" (2010) <[www.stats.govt.nz](http://www.stats.govt.nz)>.

<sup>2</sup> Human Rights Commission "Tracking Equality at Work" (2011) at 26 <[www.hrc.org.nz](http://www.hrc.org.nz)>.

<sup>3</sup> Joan Williams *Unbending gender: Why Family and Work Conflict and What to Do About it* (Oxford University Press, Oxford, 2000).

employment rather than as the whole sum of the labour it takes to keep a household functioning is highly artificial. Paid work is, in fact, parasitic on care-work. Most obviously, if one is to be productive in the workforce, washing will have to be done, meals prepared and eaten, and health (both emotional and physical) maintained.

Mere formal equality for women to compete as an ideal worker can never promote substantive equality for women because care-work is simply not going to disappear. Somebody will have to do it and that person is most often a woman.<sup>4</sup> The fact that women carry this burden is a major contributor to their disadvantaged and marginalised status in the workplace. While individual women's decisions to de-prioritise workplace participation in order to accommodate care-work are often framed as a consequence of individual choice, gender equality is not an individual issue. It is a social and structural issue linked to women's disproportionate responsibility for family care-work.

The current distribution of care-work and ideal worker norm also impacts on men. As noted by Williams:<sup>5</sup>

Hegemonic masculinity [has come to be] defined in terms of work roles...masculine dignity is linked with success at work...Gender pressures on men are a key reason for the "stalled revolution" in work and family life...a key to jump starting the revolution is to change gender pressures on men by changing the way we define the ideal worker.

The idealisation of the unencumbered worker contributes to pressure on men to fulfil the primary breadwinner role. Overseas studies suggest that men who compromise their paid work participation to take on a greater share of family responsibility care work are *more* disadvantaged than their female equivalents as they are punished for deviating from established gender roles.<sup>6</sup> As long as men are effectively discouraged from taking on a greater share of care-work, women will continue to carry this load and accordingly be disadvantaged in the workplace.

The heart of the problem is the fact that workplaces are structured around an ideal worker who is not a care-worker.<sup>7</sup> This, in conjunction with gender role expectations, means that all too frequently men and women end up respectively in ideal worker and marginalised care-worker roles.<sup>8</sup> As a matter of fairness this needs to change; workplaces should be structured in ways that allow individuals to meet the legitimate needs of those dependent on them as well as their own needs. In order to achieve this, the norm of the ideal worker, as one unencumbered with responsibilities, must be replaced by the norm of the worker with care-work responsibilities.

While shifting entrenched norms is difficult and complex, Smith suggests that "around the world law is being used to provide worker rights designed to challenge the ideal worker norm and facilitate the integration of workers who have family responsibilities."<sup>9</sup> The question posed here is how well New Zealand law is adapted to meeting this challenge? In the next section, some concepts drawn from regulatory theory on what makes law effective are summarised with a view to providing some criteria against which New Zealand law can be analysed.

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<sup>4</sup> Around two-thirds of unpaid work in English-speaking countries is performed by women, see Human Rights Commission, above n 2, at 10.

<sup>5</sup> Joan Williams "From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition" (2001) 76 Chicago Kent Law Review 1441 at 1444.

<sup>6</sup> Belinda Smith "Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict" (2006) 28 Sydney Law Review 689.

<sup>7</sup> Williams, above n 5, at 1474.

<sup>8</sup> Ibid, at 1471.

<sup>9</sup> Smith, above n 6, at 691.

## What makes law effective?

The mere fact that a law prohibiting discrimination exists is not enough to ensure that people with family responsibilities are not discriminated against or disadvantaged as a consequence of deviating from the ideal worker norm. As Murray states “law does not work by automatic fiat, but requires some kind of internalisation to ensure its effectiveness.”<sup>10</sup> There are a range of strategies regulators can use to make law effective and to ensure that the law’s goals are internalised by individuals and organisations.<sup>11</sup> Ayres and Braithewaite most influentially developed the idea of an enforcement pyramid that reflects the range of regulatory strategies.<sup>12</sup>

At the bottom of the pyramid is “soft touch” mechanisms designed to educate and persuade organisations to adopt desired behaviours. In the case of work family issues, this might include making both the moral and business case for equality for people with care-work responsibilities. At the next level, reporting requirements on practices and initiatives encourage both organisational reflection and accountability external stake holders. Reporting can also encourage comparisons and learning between organisations.

Effectively, the law and state institutions at the bottom of the pyramid help organisations to self-regulate. However, the soft persuasive tools at the bottom of the pyramid are most effective when, at the top of the pyramid, there are also punitive sanctions. The regulator must have access to “a big stick” and the ability to punish those on whom the softer approaches have proven ineffective. These might include penalties for non-compliance or, where appropriate, corrective orders which require an organisation to self review and develop and report upon a compliance programme.

Another relevant development in regulatory theory that is reflected in the legislative provisions in other jurisdictions is a movement towards imposing positive duties on employers and institutions to proactively promote equality.<sup>13</sup> This trend is a response to weaknesses identified in the individual complaints led model based around negative rights such as the right not to be discriminated against. Some of these weaknesses, as summarised by Fredman, are as follows.<sup>14</sup> Individual actions alleging discrimination are not suited to achieving significant or systematic progress towards gender equality goals. In order for an individual complainant to succeed, they must be able to prove a perpetrator, however, inequality is largely institutional and not necessarily the fault of any particular person. Even if claim is successful and while this may provide compensation of individuals, it will not trigger any ongoing obligations to correct the institutional structure. Furthermore, reliance on individual complainants to bring an action puts excessive strain on the victim as the process can be lengthy, expensive and uncertain. Courts can only intervene on random and ad hoc basis as many individuals, especially if un-unionised, will be unable to pursue claims.

## Critical Evaluation of New Zealand Law

New Zealand has various strategies from the bottom of the regulatory pyramid (i.e. soft tools of education and persuasion) in place concerning the need for gender equality and family-friendly workplace practices in place. These include the Department of Labour’s Work-Life Balance project which

<sup>10</sup> Jill Murray “Corporate Social Responsibility: An Overview of Principles and Practices: Working Paper No 34” (2004) International Labour Organisation at 5 <[www.ilo.org](http://www.ilo.org)>.

<sup>11</sup> This summary draws heavily on Smith’s discussion (Smith, above, n 6, at 705-707).

<sup>12</sup> I Ayres and J Braithewaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Oxford, 1992).

<sup>13</sup> For discussion, see Human Rights Commission, above n 2, at 27.

<sup>14</sup> Sandra Fredman “Changing the Norm: Positive Duties in Equal Treatment Legislation” (2005) 12 Maastricht Journal of European and Comparative Law 369.

makes a number of Best Practice Resources available on its website.<sup>15</sup> The Human Rights Commission, in partnership with the EEO Trust, also works to promote equal employment opportunities by disseminating information and resources to interested parties.<sup>16</sup> Such initiatives may well have achieved some normative change in individual work-places and are not to be disparaged.

However, as discussed earlier, according to Ayres and Braithwaite, effective regulation requires a regulator with access to a full pyramid of regulatory responses with the possibility of punitive sanctions for those who fail to respond to soft law initiatives. Here, New Zealand's legal framework falls short. Beyond provision of information, these bodies have limited capacity to motivate or prompt commitment from employers. No regulatory agency in New Zealand has access to punitive sanctions with which to punish employers who discriminate against workers with family responsibilities.

*Individuals* who have been discriminated against because they are responsible for children or other dependents may have a remedy against their employer under the Human Rights Act.<sup>17</sup> This is so whether the discrimination is direct or indirect. Direct discrimination would include being denied a job, equal pay or opportunities for progression on the grounds of prejudices or stereotypes. A failure to reasonably accommodate a person's family and caring responsibilities by agreeing to flexible hours may amount to indirect discrimination.<sup>18</sup> The Employment Relations Act also allows employees to bring a personal grievance against an employer where they have been discriminated against on family status grounds.<sup>19</sup>

However, the fact that complaints have to be initiated and pursued by the individual victims of discrimination limits the value of these provisions in terms of their ability to effect systemic change as discussed above. The value of these provisions is also limited by the fact that complaints against employers under both the Human Rights Act and the Employment Relations Act are directed at first instance to mediation, the proceedings of which are not widely reported on or freely available in the public domain.

The Human Rights Commission reports that in the period 2005-2010 6.1% of the discrimination complaints they received concerned family responsibilities discrimination.<sup>20</sup> Clearly, the law is being utilised to a limited extent by individuals, but the paucity of recent reported cases on family responsibilities discrimination suggests that these complaints are largely being settled at mediation.<sup>21</sup> While mediation may have some advantages in terms of keeping the costs of litigation down, it also has disadvantages. Employers who discriminate against workers with family responsibilities run little risk of being publically identified. Fiss argues that the primary purpose of adjudication is the reiteration of societal norms by authoritative decision makers;<sup>22</sup> if there were widely publicised court decisions on family responsibilities discrimination, this would both punish individual employers for discriminatory practices and raise awareness of the need to avoid such practices among other employers. Such decisions would also feed into a broader societal dialogue and inform various civil

<sup>15</sup> Department of Labour "Work-life balance in New Zealand" <[www.dol.govt.nz](http://www.dol.govt.nz)>.

<sup>16</sup> National Equal Opportunities Network "About Us" (2012) <[www.neon.org.nz](http://www.neon.org.nz)>.

<sup>17</sup> *Proceedings Commissioner v Howell* [1993] 2 ERNZ 130, (1993) 4 NZELC 98,210 establishes that discriminating against a woman with children because of her childcare responsibilities amounts to discrimination on the grounds of family status.

<sup>18</sup> *Drfyhout v New Zealand Guardian Trust Ltd* (1997) 3 HRNZ 572

<sup>19</sup> Employment Relations Act 200, s 103(1)(c). Section 105 (1)(l) mirrors the prohibited grounds of discrimination set out in section 21(1) of the Human Rights Act 1993.

<sup>20</sup> Human Rights Commission, above n 2, at 20.

<sup>21</sup> The only recent reported case is *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537(HC) which concerned the resignation of a part time-legal employee who had family care responsibilities. The appellant employer successfully argued the resignation was not caused by direct or indirect family status discrimination. However, the court commented that the case was unsuitable to set precedent as the Tribunal had not discussed family status.

<sup>22</sup> Owen Fiss "Against Settlement" (1984) 93 Yale Law Journal 1073.

groups who would in turn be better placed to be involved in the monitoring and enforcement of appropriate standards

There are other legislative provisions which provide individual workers with rights intended to enhance their ability to participate in the work place.<sup>23</sup> Part 6AA of the Employment Relations Act provides certain employees with the care of any person a right to request a variation of their working hours. It also set out a process employers must follow in terms of considering the request. If following this an employee is unhappy he or she must first approach a Labour Inspector from the Department of Labour before it is possible to proceed to mediation. After this, there is a possibility of an application to the Employment Relations Authority; however, there is no possibility of appeal to the Employment Court. The maximum penalty the Authority can order is \$2000, which is payable to the employee concerned.

This provision may be helpful to some employees. However, the fact that any complaint must be individually driven by an individual (who is almost certainly time-pressed) and the lack of any significant penalty or possibility of name and shaming of employers who fail to follow correct process must limit its efficacy. The extent to which carers are aware of this right is also questionable. A recent survey found that most PSA women (59%) were not familiar with the legislation.<sup>24</sup>

New Zealand does not impose any positive duty on employers to actively implement policies which assist workers with family responsibilities. The exception to this is the good employer obligation in the Crown Entities Act.<sup>25</sup> This requires each Crown Entity to operate a personnel policy that complies with the principle of being a good employer which takes into account the employment requirements of women. The Human Rights Commission has identified seven key elements of the personnel policies of good employers; element four is as follows:

#### 4. Flexibility and Work Design

Workplace design and organisation takes account of the need to assist employees to balance work with the rest of their lives and ensures managers relate to employees in a respectful and flexible way, considering the employment requirements of all groups including parents and other carers.

In addition to operating a personnel policy which complies with the good employer obligation, Crown entities have annual reporting requirements. The EEO Commissioner assesses these annual reports looking for references to being a good employer, EEO and the seven key good employer elements.

The combination of a positive duty to be a good employer and the requirement to report on progress go some way towards encouraging Crown entities to self regulate to create family-friendly working environments where those who have family responsibilities are not discriminated against. However, this initiative does not go far enough. Neither the good employer duty nor the associated reporting requirements apply to the private sector which employs around 80% of the workforce. The Human Rights Commission has recommended that the Employment Relations Act (2000) be amended to include a positive duty to be a good employer in both the public and private sectors and this would be a significant improvement on the existing state of affairs.<sup>26</sup>

<sup>23</sup> See for example, the Parental Leave and Employment Act 1987. This is not discussed here as this paper is concerned with the accommodations needed for care givers in general across a life cycle rather than the specific needs arising out of pregnancy, child birth and breast feeding.

<sup>24</sup> Sarah Proctor-Thomson, Noelle Donnelly, Geoff Plimmer *Constructing Workplace Democracy: Women's Voice in New Zealand Public Services* (Industrial Relations Research Centre and Management School Victoria University of Wellington April 2011) at 21-22.

<sup>25</sup> Crown entities with employees are required to be 'good employers.' See Crown Entities Act 2004, ss 118 and 151 (1)(g).

<sup>26</sup> Human Rights Commission, above n 2, at 4.

However, more is needed. McCrudden identifies it as a pre-condition of effective reflexive regulation that there be some mechanism whereby firm and public bodies are required to engage with other stakeholders.<sup>27</sup> He comments on the experience of Northern Ireland where, under the equality duty public, authorities are required to engage with civil society in detailed ways. He concludes that forced engagement with a “truculent and well-informed civil society” is fundamental to the operation of reflexive regulation. This suggests that reporting requirements should be more extensive than they currently are so that a wide range of interested parties can play a role in rewarding good employers and pressurising bad employers.

## Conclusion

A common thread runs through New Zealand law with regard to the prevention of family responsibilities discrimination and integrating care-givers into the workforce: there is no big stick. Employers who do not respond to education and persuasion need not fear punishment or public shaming. While individual workers have rights, it is up to these individuals to enforce these rights, which may come at a high personal cost and which, at best, will provide individual compensation rather than systemic change. The lack of effective enforcement mechanisms weakens the impact of soft law educative mechanisms as it reduces incentives for employers to change their behaviours. The lack of publicised cases and of strong visible enforcement mechanisms also detrimentally impact on consciousness raising in wider civil society which is, thus, stymied in terms of being able to put pressure on organisations to adopt policies which give those with family responsibilities a fair deal. The vast majority of employers are not subject to positive duty to create non discriminatory, family-friendly work places. Law change is necessary if the ideal worker norm is to be replaced in New Zealand workplaces. Until such time as this happens, New Zealand women are likely to remain disadvantaged in the workplace and will probably continue to earn less than men.

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<sup>27</sup> Christopher Mc Crudden “Equality Legislation and Reflexive Regulation: a Response to the Discrimination Law Review’s Consultative Paper” (2007) 36 *Industrial Law Journal* 255 at 265.

# **New Zealand Journal of Employment Relations**

## **Best Article Competition for Postgraduate Students**

The purpose of the *New Zealand Journal of Employment Relations* Best Article Competition is to support postgraduate students studying in the area of Employment Relations and who wish to publish a paper based on their research undertaken in 2012. Prizes will be awarded to the top three papers submitted to the *New Zealand Journal of Employment Relations* by the **1<sup>st</sup> February, 2013**.

First prize of \$1,000 will be awarded to the best judged paper and the next two best papers will be awarded \$500 each.

### **Criteria are as follows:**

- The competition is open to full-time and part-time students who are enrolled in a thesis or dissertation component of a research Honours, Masters, or PhD degree;
- The submitted paper must be located in the discipline of Employment Relations (including Human Resource Management) and be relevant to New Zealand.
- The paper must conform to the *New Zealand Journal of Employment Relations*' Submission Guidelines (see the website <http://www.nzjournal.org/>)
- Applications will not be accepted after the closing date of **1<sup>st</sup> February, 2013**.

### **Selection**

Submitted papers will be considered by a selection panel from the editorial board of the *New Zealand Journal of Employment Relations*. No prizes will be awarded if the panel is of the opinion that there is no paper of sufficient merit. Prize winners will be notified by the Editors of the *New Zealand Journal of Employment Relations* and it is expected that winning papers will be published in one of the forthcoming issues of the *New Zealand Journal of Employment Relations*.