Introducing the Forum

The emergence of this Issue

High profile disputes bring less-recognised employment relations topics to the forefront of public attention. The 2010 dispute surrounding the Hobbit production involved one of the world's major screen productions, an international boycott by actors, and the possibility of the production being relocated to another country. As such, it formed a major event in employment relations. The passion and controversy associated with the dispute gained international attention, creating a renewed interest in the relationships between business, Government, and unions as well as rekindling the debates surrounding non-standard employment and collective representation. The dispute formed a vital case study that warrants dedicated coverage in an employment relations journal.

The full nature of the employment relations issues involved in such public debates is not always well articulated or understood. This Special Issue provides a forum for exploring the issues raised by the Hobbit case in greater detail. The motivation for a journal issue emerged from the discussion surrounding a paper presented by Cecile Rozuel and Julie Douglas (2011) earlier this year. A number of researchers and commentators indicated that they were already working independently on accounts of the dispute. While several isolated opinions and accounts of the Hobbit dispute have been published (Barret 2011; Kelly 2011), this Issue serves as a broader forum that brings together a wide range of perspectives into one volume. The Hobbit events, thus, become the focus of a case study that permits contributors to explore the events from a range of angles, charting the broader contextual dimensions of non-standard employment.

The development of this Special Issue reflects the rather unusual events of 2011. An open call for submissions was issued to all persons interested in contributing to the Issue. Invited comment was sought directly from the core parties that were either directly involved or interested in the events: the Minister of Labour, the Opposition Spokesperson on Labour, the Council of Trade Unions and Business New Zealand. The aim was to create a balanced yet diverse set of commentaries. This was, however, tempered by the availability of contributors; several writers became unable to take part and seismic developments interrupted the Issue's progress. The Issue, thus, represents the contributions of those able to participate at this time[1].

The views expressed in this forum are those of the contributors. The Editors have taken a neutral stance, simply providing a forum for this discussion. Similarly, the content does not purport to be exhaustive, and if there are other aspects that warrant coverage there is potential for contributing articles in subsequent issues of the journal.

The Hobbit dispute and non-standard employment

Somewhat ironically, an earlier article described the New Zealand screen production industry as epitomising non-standard employment (de Bruin & Dupuis 2004). The authors noted that workplace flexibility was a necessary prerequisite in this project-based industry, with its high concentration of independent contractors and freelancers. Those precise topics later formed the key topics in the legal and ideological debates as the Hobbit dispute became synonymous with non-standard employment.

[1] As a consequence some areas have less coverage; for example, the withdrawal of the original Business NZ contributor meant that there is less discussion of recent developments within the ILO regarding contracting arrangements (McKeown and Hanley, 2009).

The Hobbit events were significant at a number of levels. The New Zealand filming of the two-part Warner Bros' production was expected to provide a major boost to the local film industry and benefit the country's economy. The dispute involved a very distinctive set of dynamics; it was an uncommon instance of a direct political intervention in an employment dispute as Crown Ministers and the Prime Minister negotiated with an overseas corporation, and the episode culminated in the passing of legislation under urgency. Union action drew attention to little-recognised matters regarding the conditions of workers within the film industry. The issues under contention in the dispute include questions concerning the rights of business owners and workers, the legal issues associated with trade unions and commercial legislation, and the social and legal consequences of non-standard employment. The first article, by Fiona Tyson, draws on media coverage and other sources to provide a chronological overview of these events, setting the scene for the analysis and commentaries that follow.

A central issue in the dispute was the question of employment status and whether workers are, or should be, contractors or employees. The topic of contracting, as an aspect of non-standard employment, is not particularly new. Recent decades have seen the conversion of many permanent workers to contractors and the topic is contentious. The definition of a contractor centres on the distinction between employees who are engaged under a contract *of* service, and contractors engaged under a contract *for* services. Legally, this classification of a person's employment status is pivotal, influencing a range of issues. Employees gain a range of protections under in the ERA 2000, the minimum code, and common law. Independent contractors lack those protections, but instead have more autonomy, organising their own work, and theoretically, being able to determine their remuneration.

The topic has evolved over recent decades. The era of the Employment Contracts Act saw the growth of contracting arrangements. Employee advocates, however, expressed concern that although workers were classified as "contractors", their real working arrangements were more consistent with an employer-employee situation. Where the worker was dependent on one organisation the practice was known as "dependent contracting". Those workers were seen as being deprived of both the legal protections that accrue from employee status and also of the wider theoretical benefits of a "non-dependent" contracting arrangement. The intent of those drafting the ERA 2000 was to address this issue and ensure that the reality of the arrangement was also taken into account when determining employment status, so that it reflected the "real nature of the relationship" (s6(2)). The application of this legislation was publicly tested in *Bryson v Three Foot Six* [2005] NZSC 34 where a model maker on a film production set contested his classification as a contractor; a decision that had significant implications for the Hobbit dispute.

A central question in the debate surrounding contracting and non-standard employment concerns the consequences for workers in these non-standard roles. Critics allege that the outcomes are negative, hence these people are disadvantaged. As background to this Special Issue, the second article explores recent developments in the literature to ascertain whether such claims are supported or refuted by existing research. The article objectively surveys recent studies that are of direct relevance for the Hobbit case, as well as the broader international literature, but proposes that the answer is not straightforward. The research findings tend to be inconsistent and inconclusive and any answer depends on the measures used and the population studied. While there is considerably more work to be done in this area, the findings also highlight the need to expand the agenda to include exploration of the contextual factors associated with the introduction and use of non-standard employment.

The focus, then, moves beyond those individual-level outcomes and enters into a relatively less-explored direction, addressing the legal and political processes. This becomes the distinctive feature of the Issue which sets the direction for the remainder of the articles.

The first set of articles that follows comprises invited comment from those key parties either involved in, or having an interest in, the Hobbit dispute. Helen Kelly leads with a brief comment from the Council of Trade Unions (CTU), highlighting the limited protections available outside of ERA 2000 and minimum code, and arguing that protections available in employment legislation should be available to all workers. Kelly also proposes that the rights to collective bargaining and freedom of association in ILO Conventions 87 and 98 do extend to contract workers, outlining her views regarding the debate surrounding the application of the Commerce Act and Trade Union Act for contract workers.

The Hon. Kate Wilkinson offers a similarly brief, invited comment as Minister of Labour, explaining the Government's actions. Her article points to the economic value of the film industry, the immediate consequences of losing the Hobbit production as well as the potential longer term harm to reputation affecting future work new projects. The article argues that the 'Hobbit law' brings greater certainty regarding employment status, and reflects the nature and practice of the industry.

Barbara Burton comments from a Business New Zealand perspective, arguing that globalisation, trade liberalisation, and international competition all require flexibility and new ways of working. Burton proposes that non-standard work is an economic necessity which brings advantages for both employers and workers. The article points out that many forms of non-standard work, such as labour hire agencies, part-time, and casual work do afford workers legislative protection as employees and those workers are free to join unions and work under collective agreements.

Darien Fenton MP provides comment from her role at the time as the Opposition Spokesperson, Labour. Her article offers an opposing view, outlining the adverse effects of contracting on workers, providing four case studies from differing industries as illustrations. Fenton outlines a proposed solution to the perceived problems of non-standard employment, outlining the move to introduce a Parliamentary Bill to extend the provisions of the Minimum Wage Act to contractors, and discussing the range of submissions in the Select Committee stage.

The legal dimensions of the Hobbit events and non-standard employment form the focus of the next set of articles. Peter Kiely, senior partner at Kiely Thompson Caisley, offers a practitioner account. This commences with an overview of the traditional tests used to determine the status of a worker and then considers the ongoing relevance of these tests in relation to the Employment Contracts Act and ERA 2000, as well as case law associated with *Bryson v Three Foot Six*. The article, then, explores the practical implications for businesses of the differing types of employment status, including the risks associated with engaging independent contractors.

Pam Nuttall provides further comprehensive analysis addressing three areas; the legislation at the time of the dispute, the Bryson case, and the Hobbit amendment. The article explores the various misconceptions about the law that were expressed in the public debate at the time of the dispute, and contrasts these with the actual legislative provisions and their interpretation. The Bryson case is, then, examined in terms of the legislation and the principles of employment law that were applied. Finally, the article reviews the Hobbit law, that is, the amendment to the ERA 2000 concerning the employment status of workers in the film industry, and its potential interpretation.

Margaret Wilson explores the constitutional implications of the process by which the Hobbit law was introduced. The article questions the tension between the stated need for urgency in relation to

preserving jobs on the Hobbit production, and the need to follow normal parliamentary procedure. It argues that he exercise of Government power bypassed the normal select committee processes and made changes that affected the workers' ability to negotiate their remuneration and conditions of work, without offering the workers an opportunity for consultation or participation. Wilson proposes that this represented an abuse of power and highlights the current lack of constitutional protections, leaving citizens vulnerable to swings in lawmaking, depending on whichever party is in Government at a given time.

The final contribution, by Nigel Haworth, sets the Hobbit dispute in a broader international context, exploring the interaction between the New Zealand government, international corporations, the film industry, local and international unions. The article proposes that the Hobbit dispute was not a single isolated event but part of a chain of events going back to 2009 and beyond. The analysis frames the dispute as being characterised by the power of the major corporations in film industry, coinciding with features of the New Zealand Government such as its attitude to foreign direct investment (FDI), its stance with regard to the film industry and its anti-labour agenda. Alongside this are questions concerning the role of unions, with contrasting views over whether unions can function in a similarly internationalised mode to the international corporations they deal with.

Collectively, this set of articles offers an intriguing account of the many dynamics involved in a specific case study concerning the use of non-standard employment. There are challenging and innovative discussions. A number of articles present explicit criticisms of the events from legal and employment relations perspectives while others defend and support the actions that occurred. Together, they provide new angles on the question of non-standard employment and open up new areas of debate. The topic of non-standard employment is likely to remain as an area of continued discussion and exploration, both in this journal and other forums.

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