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# New Zealand's Employment Law Agenda 2014: Collective Bargaining and Unions in an Election Year

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This paper considers changes made to the ERA (ERA) 2000 since the election of a National-led Government in 2008 as well as the recently proposed changes to New Zealand's employment legislation. Analysis of the impact or likely impact of those changes is offered in light of the original object of the Act: "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship". This paper considers, further to this, that any advancement towards balancing of relative bargaining power between employers and employees represents an improvement in employment relations. This is to suggest that any assessment of the changes made over the previous six years to New Zealand's legislative regime for regulating collective bargaining, as well as those statutory amendments to the country's employment legislation proposed by the current Government, should focus on the question of whether those changes have resulted – or and will result, as the case may be – in genuine improvements to collective bargaining and employment relations more generally.

## Introduction

As enshrined in the Employment Contracts Act (ECA) 1991, the National Party's industrial relations policy following the 1990 general election in New Zealand resulted in the total abandonment of compulsory unionism and removal of the monopoly in wage bargaining that trade unions had enjoyed in most sectors for nearly a century (Geare, 2001). This, in turn, precipitated a sharp decline in union membership and density as well as in the share of the country's workforce represented in collective bargaining. It is ironic, therefore, that collective bargaining did not become an effective mode of determining wages, hours and working conditions in New Zealand until enactment of the ECA. Rather, for most of the last century, the predominant system for determining wages and conditions of work in this country was one of conciliated and, if required, arbitrated bargaining for awards, and that system remained essentially intact until 1991 (Dannin, 1997).

Since that time, New Zealand employment relations system has progressed from one which provided virtually no protections for trade unions and in particular collective bargaining, to a system that now relies on the duty of good faith to protect and promote collective bargaining (Davenport & Brown, 2002). Under its core conventions, collective bargaining is recognised by the International Labour Organisation (ILO) as an effective tool to protect those in weak bargaining positions. It is also acknowledged internationally as a means of overcoming any power imbalance between employers and employees which may result in unjust employment terms and conditions. An essential component for effective collective bargaining, therefore, is that the representative bodies on both sides have relatively equal bargaining power. This typically necessitates appropriate legislative support to enhance the bargaining power of the weaker party (Goldberg, Sander & Rogers, 1992).

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With this purpose in mind, both key pieces of employment legislation enacted in New Zealand in the past quarter century were, in large measure, intended to enhance the relative bargaining power of either the employer party, in the case of the ECA, or the employee party, with enactment in October 2000 of the ERA. Often, the means by which these opposing policy goals is effected is either by making it easier or more difficult for trade unions to organise workers, depending on where those setting the policy believe the balance of power in collective bargaining falls. In this context, legislation enacted to amend those statutes in that period has, likewise, frequently been aimed at giving greater influence to one party or the other (Blumenfeld, 2010).

## Freedom of Association and the Right to Collective Bargaining Under the ERA

Freedom of association and the right to organise, as enshrined in the ILO's core conventions on those matters, form the *conditio sine qua non* for effective collective bargaining to take place. The viability of collective bargaining as an institution rests on the existence of a process of representing groups of workers who share a common interest in its outcomes (Blanpain & Colucci, 2004). To that end, in nearly all industrialised and developing countries, trade unions fulfil this role by negotiating their members' terms and conditions of employment. Nonetheless, if collective bargaining is to have a meaningful impact on those terms and conditions, its 'reach' or influence must extend to a significant proportion of the workforce. For this to happen, both parties to collective bargaining – unions and employers – must be free to exercise the right to form and join representative organisations of their own choosing (Traxler, 1998).

Yet, notwithstanding that the law surrounding 'good faith' in collective bargaining was placed as the centrepiece of the country's employment relations system, the employment law reforms undertaken following election of a Labour-Alliance coalition overnment in November 1999 did little to change either the form or extent of collective bargaining in New Zealand (Anderson, 2010). Those reforms, as enshrined in the original ERA, were aimed at augmenting trade union recognition and power by restoring unions' pre-ECA monopoly rights to bargain collectively and regulating the behaviour of the parties in collective bargaining. In this regard, the ERA introduced a number of changes to New Zealand's law regulating bargaining, including:

- requiring 'good faith' bargaining;
- extending coverage to all union members falling within the coverage clause of a collective employment agreement(CEA);
- enhancing access rights for unions to workplaces;
- limiting 'direct dealing' and communication with employees during bargaining;
- restricting strike-breaking by employers;
- extending the right to strike to secure a multi-employer collective agreement;
- allowing unions a 20-day advantage when initiating bargaining of an existing CEA; and
- extending terms and condition up to 12 months during renegotiation of an expired CEA.

Early in its second term, the Labour Government initiated further legislative reforms aimed at bolstering support for 'good faith' bargaining by placing restrictions on employers' ability to 'pass on' terms and conditions determined through collective bargaining, as well as imposing specific requirements on employers during restructurings. Legislation enacted in December 2004 made 'passing on' terms and conditions agreed in collective bargaining to employees covered under individual employment

agreements with the same employer unlawful if done where the employer's intention is to undermine the union's effort to achieve a collective agreement. In addition, new rules were imposed on employers restructuring of their business where the restructure involves 'vulnerable workers' and mandate that all employment agreements – collective or individual – contain an employment protection provision.

Amendments to the ERA which were enacted in 2004 also augment the 'good faith' requirements by requiring parties involved in bargaining to conclude a collective agreement in the absence of a genuine reason not to do so, notwithstanding any deadlock over particular matters. At the same time, the Employment Relations Authority was empowered, upon referral from either party, to 'facilitate' bargaining where bargaining has reached an impasse. As part of this process, the Authority was also granted the power to make recommendations about the bargaining process and to stipulate provisions that must be included in the new collective agreement. This implies that, where a serious and sustained breach of the duty of good faith has occurred, the Authority now has jurisdiction to determine and fix provisions of the CEA.

## Holidays Act Amendments Under National

Notwithstanding its promise during the run up to the 2008 general election that it would not make any significant change to New Zealand's employment laws during its first term, changes were made to the by the National to the Holidays Act 2003, in particular, during that time. These changes include allowing employees to negotiate the transfer of a public holiday to another day, allowing employees to take a week's pay in lieu of their fourth week entitlement to annual leave under the Act, and doubling the penalties for employers who breach the Act. Changes under the Holidays Amendment Act 2010 also allow employers to require proof of sickness or injury from first day of illness or injury, albeit at the employer's expense.

With respect to employer policies ruling out transferring a public holiday to another day, an employer may now adopt a policy that the whole or part of its business will not enter into an agreement to transfer a public holiday. Employees now also have the option, upon agreement with their employer, to cash in their fourth week of annual leave, an entitlement extended to all employees under the previous government, hence allowing employees to take three weeks' holiday and be paid for the fourth while still working. The maximum penalties for non-compliance with the Holidays Act increased from $5,000 to $10,000 if the employer is an individual, and from $10,000 to $20,000 if the employer is a company or other body corporate. These changes all took effect on 01 April 2011.

Additionally, for work on public holidays, alternative holidays, sick leave and bereavement leave an employee is now entitled to be paid either their *'relevant daily pay'* or '*average daily pay*'. An employer may now use the latter where it is not possible or practicable to determine relevant daily pay, or where the employee's daily payment varies within the pay period in which the holiday or leave falls. In addition, the calculation of average daily pay has also changed, from the average of the four calendar weeks before the end of the pay period immediately before the calculation is made, to an average over the 52 calendar weeks before the calculation is made. As of 1 April 2011, where an employer and employee cannot agree on what day the alternative holiday should be taken, employers now have the final say, on a reasonable basis, as to when an alternative holiday is taken. Employers will be able to give employees 14 days' notice of when they require them to take the alternative holiday.

In spite of these changes made in its first term to the Holidays Act, along with its coalition partner Act, National did not support a private member's bill introduced by Labour MP David Clark to 'Mondayise' Waitangi day and ANZAC day during its second term. Nevertheless, in April last year, the Holidays (Full Recognition of Waitangi Day and Anzac Day) Amendment Bill narrowly passed its third reading by 61 votes to 60, with the effect that, if either Waitangi Day or Anzac Day should fall on a Saturday or Sunday, for those employees who would not work otherwise work on that day, the public holiday must be treated as falling on the following Monday. While the Transport and Industrial Relations Select Committee, which had a National party majority, had recommended that the Bill not be passed, the Labour and Green select committee members released minority views in support of the legislation, which will not have any practical effect until 2015, with that year being the next time either Waitangi Day or ANZAC Day will fall on a weekend.

## 90-day Trial Periods Legislation

Also in its first term, John Key's National-led Government introduced 90-day grievance-free trial periods. Under the changes enacted under the Employment Relations Amendment Act 2008, workers employed in New Zealand by small and medium enterprises of fewer than 20 workers are permitted to hire workers on a grievance-free trial basis without the right of appeal against unfair dismissal in first 90 days, regardless of the reason for the dismissal. In fact, no reason need be provided by the employer for the dismissal. The 2008 Act also repealed the right of an employee to bring a personal grievance if the employee is treated on a different basis as a result of being a member of Kiwisaver. Two years later, under changes enacted in the Employment Relations Amendment Act 2010, the 90-day trial period provisions were extended to include all employers, in particular those with 20 or more employees. As a consequence, all employers in New Zealand are now entitled to include a 90-day trial period in a new employee's employment agreement.

## Changes to Collective Bargaining Under National

Under the Government's package of proposed reforms, employers would be permitted to opt out of multi-employer bargaining at the beginning of the bargaining process, if they elect to do so. Specifically, the Employment Relations Amendment Bill 2013 provides that, where an employer is an intended party to such an agreement and has received a notice initiating bargaining for that agreement, the employer may opt out of bargaining by giving a written opt-out notice to all other intended parties identified in the notice initiating bargaining not later than 10 days following receipt of that notice. The notice would take effect on the date this notice is given, whereupon the employer is no longer a party to bargaining for the collective agreement and ceases to have any further obligations under the ERA.

National also has proposed equalising the timeframes in which the parties have to initiate bargaining, making it more difficult for unions to determine the form and scope of collective bargaining. In addition, National intends to remove employees' automatic entitlement to meal and refreshment breaks, although the legislation would still require the employer to offer compensatory measures. If the employer and employee cannot agree on those measures in terms of other breaks, though, the employer will maintain the right to unilaterally decide what compensatory measures will be provided.

Another Labour-backed private member's bill, the Parental Leave and Employment Protection (Six Months' Paid Leave) Amendment Bill, extending paid parental leave from 14 to 26 weeks, was successfully blocked by National from passing in this Parliament, with National holding Peter Dunne's proxy on procedural matters. Both the Maori Party and United Future MP Peter Dunne, who usually vote with National, had previously supported the Bill, introduced by Labour MP Sue Moroney. Finance Minister Bill English had indicated that, had the bill passed, the Government would have used its special financial veto power to stop it becoming law. Despite this, earlier this year, the Government's Budget included extending parental leave from the current 14 to 18 weeks, and the Government has recently released a discussion document on its proposal to make paid leave available to non-parent carers and parents in casual or new jobs, along with more flexibility around unpaid leave.

The changes proposed in the collective bargaining regime by the current Government in its most recent Employment Relations Amendment Bill, which is currently stalled in Parliament and unlikely to be acted upon until after the general election in September, are aimed at removing what it contends are some of the obstacles employers presently face when engaged in collective bargaining. In particular, the Government proposes a return to the original position in the ERA where the duty of good faith does not require the parties to conclude a collective agreement. The Act currently provides that the duty of good faith requires a union and an employer bargaining for a collective agreement to conclude a collective agreement, unless there is a genuine reason, based on reasonable grounds, not to. The 2013 bill provides that the duty of good faith does not require those parties in those circumstances to enter into a collective agreement or to agree on any matter for inclusion in a collective agreement.

In proposing this change to the country's employment laws, the Government has highlighted what it perceives are the destabilising effects of the requirement to conclude bargaining. It is perhaps ironic, therefore, that the requirement to settle was given greater emphasis a decade ago – albeit under a Labour-led Government – when the Act was amended at the end of 2004 an effort to further promote the virtues of '*good faith*' employment relationships. The Employment Relations Amendment Act (No 2), which came into effect on 1 December 2004, more than four years after the initial enactment of the ERA, offered greater legislative support for collective bargaining by requiring that:

- employers not discourage employees from participation in collective bargaining or from being covered by a CEA;
- employers and unions who are deadlocked on a specific issue must continue bargaining on other issues; and
- collective bargaining must lead to a CEA unless there are '*genuine reasons*' not to; these reasons must be based on '*reasonable grounds*'.[1]

The ERA was also amended at that time to prevent employers from automatically passing on collectively-bargained terms and conditions to employees who are not part of the collective bargaining process or covered by the CEA. This particularly includes non-union employees whose work falls under the coverage clause of that agreement. A breach of good faith can occur, though, only if the employer has deliberately sought to undermine the bargaining process or the CEA. As such, most employers negotiate, *ex post* collective bargaining, very similar if not the same terms and conditions with their non-union employees. Through emphasising the application of the '*good faith*' requirement to individual

[1] Grounds that are not reasonable include opposition or objection in principle to collective bargaining or agreements, or disagreement about the inclusion of a bargaining fee clause in a CEA.

agreements, the 2004 amendments require that those agreements be based on '*genuine*' individual bargaining.

Under the Government's proposed changes to New Zealand's collective bargaining regime, the Employment Relations Authority would be empowered, in certain circumstances, to declare that collective bargaining has ended. Currently, the law requires that that the parties conclude a process of collective bargaining, unless there is 'a genuine reason, based on reasonable grounds' not to. This is what prevented the employer in the long-running dispute at the Ports of Auckland from declaring all its workers jobs redundant and effectively sacking striking dock workers at the Port. This change, though, will afford employers the right throw in the towel at any point during bargaining at which they are frustrated in their efforts to reach agreement with a union, and the union and its members will have no recourse. Equally, employers will be able use the threat of contracting out the jobs of striking workers to compel agreement on their terms.

National contends that this law change would result in less protracted interest disputes, as bargaining will simply be declared to be at an end in such situations. Under this proposal, either party bargaining for a collective agreement may apply to the Employment Relations Authority for a determination as to whether the bargaining has concluded. The Authority may then make such a determination if it is satisfied that the parties have attempted to resolve all issues in dispute by way of mediation and, where applicable, facilitation under the Act, that that those attempts have failed, and that further attempts are unlikely to be successful.

When called upon to make such a determination, the Authority may make a declaration that bargaining has concluded or that bargaining has not concluded, in which case it may make a recommendation to the parties as to the process they should follow to resolve the difficulties. Where the Authority determines that the bargaining has concluded, none of the parties to the bargaining may initiate further bargaining earlier than 60 days after the date of the declaration, unless the other parties agree to this. Where the Authority determines that bargaining has not concluded, none of the parties may make another application for such a determination from the Authority, until the recommended process has been followed or until 60 days after the Authority's determination unless the other parties agree.

The Employment Relations Amendment Bill 2013 would effectively remove the wording in the Act which prevents employers from refusing to engage in collective bargain, preferring instead to place all of their employees on individual employment agreements. If enacted, these changes will significantly impact collective bargaining, as it implies employers can engage instead in 'surface bargaining', a strategy in collective bargaining in which one of the parties merely goes through the motions of bargaining, with no intention of reaching an agreement. Further to this, where bargaining is deemed to have ended, the expired collective agreement is likewise deemed to be no longer in effect, the union cannot reinitiate bargaining for at least 60 days, and the employer can place all of its employees on individual agreements and restructure its business, as the good faith bargaining rules no longer apply.

## Workplace Access and Union Delegate Rights

The 2010 reforms to the ERA also reduced rights of union to access workplaces in order to meet either with their current members or with prospective members. These changes imply that employers can refuse a union access to the workplace, at least for a period of time. Union representatives now must ask for the employer's consent before entering a workplace, and the employer must respond by the

following working day. If denied access, the union representative must be given written reasons no later than the following working day. An employer who fails to respond to an access request within two working days is taken to have given their consent, though, and penalties can be imposed if consent is unreasonably withheld or written reasons for withholding consent are not provided.

Other legislative reforms under National during its first term impacted workers and employment relations in New Zealand. Among the more controversial changes, the Employment Relations (Film Production Work) Amendment Act 2010 effectively removes the right of those working in the film industry to query whether their contract is in fact a contract of service and the worker technically an employee, rather than a contractor under a contract for service. As a consequence of this legislation, workers in New Zealand's film industry have less protection than workers in other industries, who are still able to challenge their employment status on the grounds that, despite the wording of their contract suggesting the contrary, they are in fact an employee and have the rights and entitlements which flow from that, including entitlement to be paid at least the statutory minimum wage and holiday pay in accordance with the Holidays Act.

## Changes to the Rules Pertaining to Industrial Action

Under National MP Tau Henare's member's bill on secret ballots for strikes, the Employment Relations (Secret Ballots for Strikes) Amendment Act 2012, which took effect on 15 May 2013, all proposed strikes must be voted upon with a majority of members of the union potentially affected by the strike voting in favour of the proposed industrial action before that action is considered lawful. This change to the legislation governing strikes, which does not apply to strikes that relate to health and safety issues, requires union rules to provide for secret ballots for any strike. Where a union's rules do not provide a process for holding a secret ballot, transitional provisions require a union to amend their rules no later 14 May 2014.

Despite this change to the legislation governing a union's conduct when considering recommending strike activity, it has long been the case that most trade unions in New Zealand have imposed upon themselves these same requirements on strike ballots of their members. Yet, while most unions have not needed to change their rules as a consequence of this change to the ERA, the passing of a law requiring unions to conduct a secret ballot of their members before going on strike points to yet another example of the Government attempting to gain greater control over union affairs. Further to this, this change to the Act does not impose a similar restriction on company boards or employer associations in a lockout.

National also supported a National MP Jami-Lee Ross's private member's bill, the Employment Relations (Continuity of Labour) Bill, which would allow employers to bring in other workers who do not normally do that work when there is a strike. The purpose of this bill was to repeal Section 97 of the ERA, which currently prevents the use of volunteers, contractors, or other casual employees by an employer during a strike or lockout. While unions would maintain the ability to strike, if this bill had passed, the law change would have given employers the ability to replace striking workers temporarily and maintain business continuity during a work stoppage. Its impact would have been to weaken bargaining strength of workers and reduce the effectiveness of strikes. The bill was, nevertheless, voted down by Parliament by the narrowest of margins, 61 to 60, at its first reading in November last year.

Despite failure of the Employment Relations (Continuity of Labour) Bill, as part of its package of proposed changes to the ERA under the Employment Relations Amendment Bill 2013, National

continues to support changes to strike notice requirements. At present, the ERA places strict notice requirements on unions representing workers in essential industries, such as hospitals. The Government's proposed change in this regard would impose a requirement on unions in all industries to provide written notice of their intention to strike and further written notice if they decide to withdraw the notice. This would apply to all forms of industrial action by unions, regardless of duration or form.

National has also proposed allowing for partial pay reductions where employees have engaged in partial strike action, such as work-to-rule or work slowdowns. It remains unclear, though, how employers might determine any pay reduction. Currently, employers typically make this assessment on a 'time-lost' basis, but this is feasible only where some or all employees wholly withdraw their labour services, as in the case of 'rolling' strikes, a partial strike tactic employed in the past across the education sector, including at several ITPs and universities. The impact of this proposed change will depend on whether any such pay reduction is measured purely on a 'time lost' basis or whether employers are somehow able to take account of the 'quality' of the work not performed. To the extent to which employers are able to do this, the new rules pertaining to industrial action could potentially be used to hinder work-to-rule efforts or other situations where employees are able to structure their work so as to cause maximum disturbance for minimum time off.

National's proposed change implies that an employer would be able to deduct an estimated amount of pay where workers are still working but refuse to do any part of their normal work, for example when workers have decided as a form of lawful strike action during collective bargaining that they would not answer phones for a period. The union could challenge the rate of deduction through a legal process. However, the employer could instead opt for a standard deduction of 10 per cent. This will obviously discourage workers from taking even limited strike action. The employer, however, can suspend striking workers or lock them out. Hence, this proposed change, if enacted, would add another sanction to employers arsenal of economic actions they have available to impose in a strike situation.

## Proposed Changes to Part 6A

Another area where change has been proposed is in Part 6A of the ERA, under which 'vulnerable workers' have the right to elect to transfer to a new employer on their same terms and conditions of employment in sale-of-business or contracting situations. At present, although a new employer is required to take on the old employer's annual and sick leave liability, the Act is silent with regard which employer, the predecessor or successor, should bear any cost involved in the transfer. Previously, the High Court had ruled that a predecessor employer bears the onus of paying the cost of these accrued liabilities, and it is likely that the change process established under these administrative amendments to Part 6A will comply with this ruling. The Government's proposed changes also will impose a requirement that the predecessor employer provide individual employee information, including any operative employment agreement and PAYE records, to the successor employer, as well as a requirement that employees must transfer to a new employer within five working days. Additional penalties and compliance orders for non-compliance with Part 6A will also apply.

In addition to these other proposed changes to the requirements under Part 6A, the most significant change proposed in this regard is an exemption for successor employers employing fewer than 20 employees from the provisions of Part 6A. On the face of it, this change in the legislation appears to benefit small and medium size businesses, which will now face lower compliance costs, hence giving those employers an advantage in tender situations. A likely unintended consequence of this change,

however, would be to encourage larger employers to franchise, as there appears to be nothing in the new legislation which would stop larger contracting firms from forming small or medium-sized subsidiaries in an effort effectively to skirt the law. Therefore, while additional penalties and compliance orders for non-compliance with Part 6A will also be introduced as part of this package of legislative changes, for the most vulnerable of workers in New Zealand, this one change may effectively remove any protection they may have gained when Part 6A was first introduced into the legislation in 2004.

Other changes to the Act proposed by National are ostensibly intended to clarify that employers can directly communicate with employees during collective bargaining and can include details of any settlement offer. Under Section 4 of the ERA, which concerns good faith employment relations, an employer may communicate with employees during collective bargaining, provided the requirement that the parties deal with each other in good faith is observed. These include that the employer recognises the role and authority of its employees' chosen union representative, that it does not attempt to bargain directly or indirectly with those employees, and that it does nothing to undermine the bargaining or the authority of the union or its representative. In these respects, any communication by the employer must be consistent with the employer's overriding duty of good faith under the ERA. Despite this requirement, an employer is permitted to provide employees with factual material about the bargaining such as the employer's proposals for the collective agreement.

## Removal of Protection for New Workers

A further change proposed by the Government in its stalled Employment Relations Act amendments is removal of the '30-day rule', which requires non-union members to be employed under the terms and conditions of any collective agreement in force which covers their work for the first 30 days of their employment. Currently, under s 62 of the ERA, a new employee appointed to a position covered by a CEA has two options, depending on their union membership status. On the one hand, if the employee is a member of a union that is party to the CEA and that agreement covers the position in which the employee is employed, the employee is bound by the CEA. Alternatively, where the employee is not a member of a relevant union, for the first 30 days they are employed on an individual agreement with terms and conditions identical to those found in the collective. Only at the expiry of this 30-day period, and providing the employee does not subsequently become a union member, can the new employee's terms and conditions be varied without regard to the terms of the collective agreement.[2]

Notwithstanding this status quo, repeal of the 30-day rule for new employees will allow employers covered by a collective agreement to employ new non-union employees on individual terms and conditions, offered by the employer and accepted by the employee, *at the onset of employment.* This change will force a new worker to choose straight away whether to join the union and be covered by the collective or to agree to the employer's terms and conditions under an individual employment agreement, hence making them vulnerable to pressure from the employer to accept a worse offer. All any non-union employee needs do in order to gain access to the terms and conditions of any collective agreement covering their work, though, is simply join the union that negotiated that agreement. Hence, there remains little incentive for employers to alter terms and conditions negotiated with their unionised

[2] By contrast, the ECA did not require that existing collective employment contracts be extended to cover new employees. The matter of extension was yet another issue over which the parties to a collective contract could negotiate (Foster, Murrie & Laird, 2009).

employees' union representatives when determining what terms and conditions to offer to their non-union employees or, in particular, those who are newly hired.

## Flexible Working Conditions

Cabinet has also approved, as part of these changes to New Zealand's employment laws, extension to all employees of the right to request, from their first day on the job, flexible working arrangements for work/life balance reasons – such as shortened days, working from home, job sharing and compacted weeks. Previous to now, this entitlement was limited to those with caregiving responsibilities. The primary drawback to this proposed change is, therefore, that workers with caregiving responsibilities will henceforth have to compete for this benefit along with all other employees desiring greater work-life balance. Given that employers are under no obligation to grant any request made under this legislation as it currently stands, this change will obviously render it less likely that those whom the law was originally intended to help will in fact get that assistance. Changes to the process that employees must follow when making a flexible working request have also been proposed, including a reduced one-month period within which employers must make a decision on any request.

The legislation, if enacted, will also provide employers with more flexibility in determining rest and meal breaks. If the employer and employee cannot agree upon when a rest or meal break is to be taken or for how long, the employer may specify times and durations that best suit the employer's operational environment or resource needs. Rest and meal breaks need not be provided if the employer and employee can agree on compensatory measures or if the employer cannot reasonably provide break periods, given the nature of the employee's work. Nevertheless, where rest and meal breaks are not provided, reasonable compensatory measures must be available, such as time off work.

## Individual Terms and Conditions and Due Process

If an employer and employee have entered into an individual employment agreement or have bargained for individual terms and conditions, the employer must keep a signed copy of the agreement or of the current terms and conditions under which the employee is working. If the employee has given the employee a copy of an intended agreement, the employer must keep a copy even if the employee has not signed it, or has not agreed to any of its terms and conditions. ('Intended agreement' also includes part of an intended agreement.) The employer must not treat an intended agreement as the employee's employment agreement if the employee has not signed it or agreed to any of its terms and conditions. In such cases, the employee's terms and conditions will be governed by common law. This particular provision came into force on 1 July 2011. An employee who asks for a copy of either a signed or unsigned intended agreement (or of any signed or unsigned terms and conditions) must be given a copy 'as soon as is reasonably practicable'. Failure to comply can result in an action brought by a labour inspector and a penalty imposed by the Authority. Before bringing an action, the labour inspector must give the employer seven days to remedy the breach.

The due process requirements of dismissal have also steadily eroded under National Government. The 2011 amendments to the ERA, which ostensibly add clarification of the process requirements, set out factors the Employment Relations Authority or Court must consider in unjustifiable dismissal cases. In particular, the range of reasons an employer could use to justifiably dismiss a worker was broadened by

changing the test of justification from what a reasonable employer 'would' have done to what a reasonable employer 'could' have done. The specific areas that must be considered in weighing up if the test of justification has been met are:

- whether having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee;
- whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee;
- whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee;
- whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee; and,
- any other factors the Authority or Court considers appropriate.

Other factors that may be considered are likely to include issues such as advising the employee of their right to representation and indicating how seriously the employer views the matter. Importantly, amendments to the good faith disclosure of information provisions in National's package of reforms mean employers will be able to withhold evaluative material that formed the basis of an employer's decision to dismiss the employee, either on the grounds of redundancy or for any other cause. To this end, the new legislation would effectively overturn the Employment Court's 2011 decision in *Vice-Chancellor of Massey University v Wrigley*, in which two employees of Massey University and members of the TEU were determined to have the right to access confidential information during a restructuring.

## Changes to the Minimum Wage and Minimum Wage Review Process Under National

With regard to the statutory minimum wage, in its first term, the fifth National Government increased this from $12.00 to $13.00 an hour, and to $14.25 an hour in its second term, which amounts to an average annual increase in the nominal minimum employers in New Zealand must pay employees of 3.1 per cent, far short Helen Clark's Government's nominal 7.9 per cent average annual increase in the adult minimum wage. In 2012, Cabinet also agreed to adopt a cyclical process for the review of the minimum wage rate. The process comprises a comprehensive review to be completed every fourth year, with a streamlined process in the intervening three years focussing on fewer key factors and with limited formal consultation. Under this streamlined process, the issues under consideration each year will be limited to cost of living and effect on employment, and equity considerations may be made only every fourth year.

Furthermore, with enactment of the Minimum Wage (Starting-out Wage) Amendment Act 2013, which took effect on 01 April 2013, National reduced the minimum wage for workers aged 16 to 19 to 80 per cent of the adult rate. For those of either 16 or 17 years of age, this applies for any six month period from when they start a job. For those aged 18 or 19 years who have been on a benefit continuously for at least six months prior to commencing employment, this alternative minimum wage applies for a period of six months. The implication of this is that an 18-year-old who had previously worked for two years but was then on a benefit for six months can be paid 80 percent of the minimum that a new worker of 18

years of age with no experience can be paid.

## An Assessment of National's Proposed Changes on Collective Bargaining

In general, the changes to the collective bargaining regime approved by Cabinet last year aim to remove provisions crucial to unions and union security in New Zealand. In particular, the Government intends to remove the 'good faith' requirement that the parties to collective bargaining conclude a collective agreement. In 'certain circumstances', the Employment Relations Authority will be empowered to declare collective bargaining has ended. What 'circumstances' in which the Authority will elect to intercede is anyone's guess, although negotiations that extend beyond 12 months – a seemingly growing phenomenon in New Zealand – would seem to be what the Government most desires to curtail with this change. Yet, despite National's proposed changes to the wording of the Section 4, because direct communication with employees was never prohibited under the Act, it is unlikely those changes will have any real impact on collective bargaining or on either party's conduct and communications during collective bargaining.

Another change proposed by the current Government will undermine the ERA's support for multi-employer bargaining, such as the Nurses' multi-employer collective agreement (MECA), which covers all District Health Boards. The Government contends its proposal to allow employers to opt out of MECA bargaining is intended to expedite the time devoted to bargaining with unwilling employer parties. Nevertheless, by allowing employers to opt out of multi-employer collective bargaining, bargaining in the public sector, where most multi-employer bargaining currently takes place, will likely be impacted. In addition, this change would remove the right of union members to strike to secure a multi-employer collective agreement, marking a return to the position under the ECA. This, of course, is a double-edged sword: unions will no longer have – if they ever did – the ability to compel employers into MECAs to which they have no desire to be party, but neither will employers be able to compel unions into undesirable multiparty bargaining arrangements.

Yet, despite the fact that unions have had this right, experience has proven that it is nigh impossible for unions to compel intransigent employers to agree to a bargaining process which would lead to a MECA, let alone engage in multi-employer bargaining beyond those initial meeting of the parties. Achieving such agreements is ultimately dependent upon the wilful acquiescence of all parties to the proposed multiparty bargaining structure (Foster et al., 2009).

In addition, National's proposal to change the strike notice requirements would allow a period of time for employers to influence the work environment to avert the impact of industrial action and make pay deductions from the onset of industrial action. As it would apply to unions in all industries, the purpose of this change does not appear to relate to public interest, as does the current strike notice requirements applied to union representing workers in essential service. Also, despite that penalties are now in place for unreasonable denial of a union access to a workplace, the 2010 amendments to the Act also removed reinstatement as a primary remedy for dismissal. This renders union delegates and activists vulnerable to dismissal, as the employer is less likely to be required to reinstate the worker, even if the dismissal is determined to have been unjustified. In sum, the intent of these legislative changes appears to be to place further limits on unions' ability to operate effectively in the workplace, hence weakening unions' power during collective bargaining.

Despite National and Act rejecting the Holidays (Full Recognition of Waitangi Day and Anzac Day) Amendment Bill and the Prime Minister's unsuccessful effort to pressure coalition partner Peter Dunne into changing his vote, the Government elected not to exercise its financial veto to stop the bill. The significance of this with respect to proposals from National to amend New Zealand's employment laws is that the Government's other coalition partners, United Future and the Maori Party, supported this legislation. Furthermore, the Government's proposals regarding extending paid parental leave entitlements have no doubt been influenced by the fact that opinion polls indicate strong support for family-friendly policies from the voting electorate, and this being an election year.

The desire to avoid a perception that it is anti-worker has also likely influenced the Government's support for other measures which, on their face, might appear antithetical or counter to its neo-liberal political philosophy. In particular, despite its lack of support for most legislative measures to extend statutory entitlements for workers, National has introduced changes on foreign charter vessels (FCV), health and safety and migrant worker rights during its second term. For example, while no legislation has been enacted yet, as a result of a ministerial inquiry into the treatment of crew aboard South Korean fishing boats working New Zealand waters, the Government has declared its intention to end the use of FCVs, which will now be required to reflag to New Zealand and follow New Zealand's employment laws. Furthermore, in the aftermath of the Pike River disaster, National is proposing to place an increased onus on employers in matters related to health and safety, including a duty on directors, chief executives and others in governance roles to be pro-active in health and safety, with significant liability if this duty is not met.

Perhaps the biggest threat to union security under changes to the collective bargaining regime approved by Cabinet in May 2013 but still awaiting enactment more than a year later is the proposed removal of the '30-day rule', which requires that non-union workers be employed, for their first 30 days of their employment, under the same terms and conditions as those in any collective agreement covering their work. Currently, a new worker in a workplace hired to perform work which is covered by a collective employment agreement is automatically employed on the basis of that collective agreement for their first 30 days of employment. This is intended to protect newly hired workers from being offered inferior terms and conditions to those enjoyed by all others doing that work for the employer. Yet, under the changes proposed by National, employers will be able to employ workers who are not union members on individual terms and conditions offered by the employer and accepted by the employee, from day one on the job.

Furthermore, despite the fact that there would still appear to be a clear disincentive to employers, offering worse terms and conditions under individual agreements to new employees, this change will undoubtedly make it easier for employers to undermine the collective agreement and employ casuals on lower rates. To that end, the Cabinet briefing paper to the Minister of Labour from the Cabinet Economic Growth and Infrastructure Committee notes:

> Repealing the 30-day rule will provide employers with more flexibility on what they are able to offer new employees as their starting terms and conditions of employment. It will enable employers to offer individual terms and conditions that are less than those in the collective agreement.

Further to this, in the long run, this will undermine all workers' terms and conditions, including those covered by the collective. This change, in addition to the others National proposes aimed at limiting the

power of unions in collective bargaining, will no doubt discourage workers from getting involved in collective bargaining and from being part of the union.

Moreover, this change will likely have a negative impact on union membership of more vulnerable workers, in particular, as new workers will be employed on terms that are inconsistent with the collective agreement and may fear adverse consequences if they, then, opt to join the union and, therefore, the collective agreement. In addition, workers on 90-day trial periods may be hesitant to join the union and, thereby, the collective agreement, given that their employment may be terminated during the first 90 days for any or no reason at all. As it currently stands, though, those fears are likely allayed to a large extent by the offering by the employer of terms and conditions that are identical to those under the CEA. This was the primary intent of the 30-day rule when it was first enacted in October 2000, to ensure that those vulnerabilities of new workers are not exploited. Furthermore, under the Government's proposed changes, new employees will need to be made aware of any collective agreement covering their work by someone other than their employer, as is presently the case.

As there is a significant imbalance of bargaining power in favour of the employer at the point of accepting a new job, new workers may be compelled to agree to worse terms and conditions than existing workers. In this respect, the 30-day period, as it now applies, offers a significant protection for new workers while they get information and experience in the workplace. As it currently stands, the ERA effectively provides for the automatic extension of the terms and conditions of a collective agreement to all new employees whose work falls under the coverage clause of that agreement, regardless of the union status of those employees (the 'free rider' issue). Importantly, even after the expiry of the initial 30-day period, individual employees who decide not to join the union will retain the terms of the collective as an individual agreement until variations are agreed. The individual employee is, therefore, in a strong bargaining position, even if they do not join the union.

## Labour's Proposed Changes to New Zealand's Employment Legislation

At its annual conference last year, the New Zealand Labour Party (NZLP) changed its constitution, giving its affiliated unions a 20 per cent share of the vote for party leader, hence, underscoring the importance of employment policy to its members and as an election issue. It was virtually inevitable then that distinctions between Labour's and National's approach to employment law were prevalent during the contest for leadership of the NZLP between David Cunliffe, Grant Robertson and Shane Jones later in the year. Not surprisingly, all three pledged to roll back a number of National's employment law changes and highlighted specific changes they would make following a Labour Party victory in the 2014 general election.

During the recent contest for leadership of the NZLP, David Cunliffe, the eventual victor in that contest, highlighted some of the fundamental employment law changes he would make if he were the Prime Minister following the next general election, which is set for this September. Labour has argued the legislative changes enacted at the end of 2013 and initially set to take effect in 2014 will allow employers to refuse to negotiate a collective agreement with their employees, pay new workers less than the rate in the collective agreement, opt out of industry agreements in order to undercut their competitors on wages, deny workers meal and rest breaks, reduce the wages and conditions of vulnerable workers, such as cleaners when taking over a new contract, dock the pay of workers taking partial strike action, impose more restrictions on the right to strike, and refuse to provide employees the information they need to challenge an unfair redundancy or dismissal.

In October of last year, in his inaugural speech as party leader before delegates to the New Zealand Council of Trade Unions biennial conference in Wellington, the newly elected leader of the NZLP said his party would focus on turning back the tide of 'anti-worker' legislation introduced under the National Government. Labour MP David Cunliff promised to eliminate the 'discriminatory' youth wage, to consider paying remissions on student loans to encourage selected professions into the regions, and to extend paid parental leave from 14 to 26 weeks in his first term. Labour has promised to up the minimum wage from $13.75 to $15.00 an hour, which would increase on an annual basis, and implement the living wage of $18.40 an hour for the core public service. The Labour Party leader said the scheme to ensure employers who paid a living wage were favoured when tendering for government contracts would also be implemented as soon as possible. If elected, he hoped to extend paid parental leave in the first term.

Among the recent changes to the ERA made by National which Labour has indicated it would reverse, 90-day grievance-free trial periods are the most prominent. Labour has also pledged to restore reinstatement as a primary remedy for workers found to have been unjustifiably dismissed and to repeal the changes affecting workers in New Zealand's film industry as a consequence of the dispute arising over production of the Hobbit films. All three candidates for the Labour Party leadership also pledged to raise the minimum wage to $15 an hour and pledged their support for a 'living wage', currently reckoned to be $18.40 an hour, as a minimum for all government employees and contractors. Since that time, Labour has declared its support for industry agreements between unions and employer organisations, which would set a floor for employment standards across any industry in which such an agreement had been reached.

## Conclusions

The next New Zealand general election will be held Saturday, 20 September 2014, with the possibility of further amendments to New Zealand's employment laws being mooted in Parliament shortly thereafter, depending on the outcome of that election. While it might seem surprising that employment law would have salience as an election issue in New Zealand more than 14 years passed since the ERA was first enacted, the regulation of employment relations in New Zealand has nevertheless been a movable feast for nearly a quarter century now. When and if changes in the *Employment Relations Amendment Act 2013* are incorporated into the legislation, the *ERA* will have been amended and printed in 25 versions since first being enacted in October 2000.

One of the objectives of the ERA 2000, as stipulated in Section 3, is the promotion of collective bargaining as the preferred means of determining working conditions. A related objective of the Act is to promote observance in New Zealand of the principles underlying ILO 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively. These objectives were to be accomplished primarily by means of the Act's registration, access and bargaining provisions (Boxall, 2001). Despite these objectives, most of the reforms to New Zealand's employment relations regime enacted under the current National-led Coalition Government in its first two terms commencing in 2008, as well as those reforms it proposes to enact either prior to or soon after the upcoming general election, are effectively aimed at undermining these objectives of the ERA, as originally intended.

Furthermore, while legislation, in itself, rarely transforms the nature of specific employment relationships, it can strongly influence the environment within which those relationships endure

(Traxler, 1998). Whether the goal to promote collective bargaining has yet been realised, let alone whether the ERA is even capable of delivering such an outcome with its original framework, is still a matter for debate. What is clear, nonetheless, is that the a number of changes to New Zealand's employment legislation enacted since National formed the Government in November 2008 have rendered the prospect of promoting collective bargaining through that statutory enactment more remote than ever, since the ERA was first enacted in October 2000.

It may, nevertheless, seem premature to be considering changes to the Act that might – and then again, might not – come into effect more than a year from now, especially in light of the fact that a number of recently enacted changes to New Zealand's employment laws have yet to come into effect. NZLP, though, has ensured that employment relations and the regulation of employment remain in the minds of voters throughout 2014. In particular, the constitutional change made at NZLP's annual conference in 2012 giving the Party's affiliated unions 20 per cent of the vote for the Party's leadership, underscores the importance of employment rights to Labour's overall political agenda, even several months out before the next general election.

Further to this, less than a year out from the election, the National-led Government proposed amending the legislation to provide greater flexibility for employers, including removing the requirement to conclude collective bargaining and saying when bargaining ends. Labour, on the other hand, is proposing new industry standard agreements representing the minimum employment standards in a particular industry, agreed between unions and employer organisations in that industry; to repeal many of National's amendments to the ERA, including 90-day probationary periods; to restore reinstatement as a primary remedy for unjustifiably dismissed workers and to repeal the changes affecting film and television workers as a consequence of the Hobbit crisis.

In general, changes to the collective bargaining regime approved by Cabinet aim to remove provisions crucial to unions and union security in New Zealand. For one, the Government intends to remove the 'good faith' requirement that the parties to collective bargaining conclude a collective agreement. In 'certain circumstances', the Employment Relations Authority will be empowered to declare collective bargaining has ended. What 'circumstances' in which the Authority will elect to intercede is anyone's guess, although negotiations that extend beyond 12 months would seem to be what the Government most desires to curtail with this change.

Needless to say, however, there is genuine concern amongst all unions in New Zealand that collective bargaining will simply be declared to be at an end if the employer and union reach a stalemate following protracted negotiations. Although, given that the parties will still be required to bargain *in good faith with the intention of reaching an agreement*, it is also hard to imagine any circumstance under which the Authority would declare that bargaining had ceased. Therefore, a key conclusion of this analysis is that legislation enacted and proposed by National during its two terms are effectively aimed at re-balancing rights within what is, more or less, the same decentralised wage-fixing framework as had existed under the ECA 1991 (Geare, 2001).

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