

## Constitutional Implications of 'The Hobbit' Legislation

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### Abstract

In October 2010 an amendment to the Employment Relations Act 2000 was passed under urgency. This amendment redefined the employment status of workers in the film industry. This article addresses the constitutional implications of this process, contrasting the stated need for urgency in relation to the need to necessary to preserve jobs on the 'Hobbit' film production, with the costs in terms of removing the opportunity for consultation with the workers affected, altering their employment status and their capacity to negotiate their remuneration and conditions of work.

### Introduction

On 28 October 2010, the National-led Government rushed through Parliament, under urgency, an amendment to the Employment Relations Act (ERA) 2000 that, in effect, redefined, by Government fiat, the employment status of workers in the film industry. The legal and employment implications of this decision have been discussed in detail elsewhere. In this article, I want to address the constitutional implications of this decision. It will be argued that the exercise of power by a Government that legally alters the status of employees and, thereby, their capacity to negotiate their remuneration and conditions of work without any opportunity of those affected to be consulted let alone participate in the decision, is an abuse of constitutional power.

The rushing through Parliament of legislation without reference to a Select Committee is uncommon, even in these times of an increasing use of urgency by the Government. The Government justified the legislation on the grounds that it was necessary to preserve jobs on *The Hobbit* film production. This justification would appear to be questionable in the light of the Kelly (2011) narrative of events, but even if it was necessary for that purpose, the question arises, does this action justify ignoring the rights of a section of the working population to be heard? It is time for the Parliamentary Standing Orders to explicitly define the grounds on which the urgency process can be used to depart from the normal legislative procedure for the enactment of an Act of Parliament.

It will be further argued that, given the lack of democratic constitutional process in the enactment of the legislation, it is time to consider the explicit recognition of citizens' economic and social rights in the workplace through the incorporation of these rights within New Zealand's constitutional arrangements. The fragility of a citizen's rights under the current constitutional arrangement has again been highlighted by The Hobbit saga. Although in the past, New Zealanders have resisted attempts to entrench specified fundamental rights of citizens, especially social and economic rights, the time may have come to debate whether reliance on the good practice and goodwill of Governments to promote fundamental rights is a sufficient safeguard against an abuse of power. This issue was raised during the debate on the Bill of Rights in the 1980s when New Zealand was embarking on economic reforms that have significantly altered the institutional and representational protections traditionally given to workers. The changes in economic policy since the 1980s have removed progressively protection and representation traditionally provided by trade unions to employees in the workplace. This has left many employees very vulnerable and without effective

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representation or legally enforceable employment rights. Without effective workplace representation, employees must rely on political representation to ensure recognition of their right to have a say in the decisions that affect them. The Hobbit saga has demonstrated that, under the current constitutional arrangements, neither the political process nor the law has been sufficient to protect workers' employment status or rights.

Helen Kelly, in her narrative of the events surrounding The Hobbit saga, identified the essence of the issue when she noted:

Fundamentally this was simply a situation where a group of workers sought to have a say on the setting of their terms and conditions. This was not just in relation to the Hobbit – but in all productions made in New Zealand. This desire sits aside from all the legal questions about employment status, status of the union and all other considerations – that is simply what it was, regardless of all barriers that were subsequently put in their way (Kelly, 2011).

## **The Changing Employment Relations Framework**

The right to participate in the decisions that affect citizens is a fundamental democratic political right. That right is normally expressed in New Zealand's constitutional arrangements by voting for representatives, who exercise the power to make decisions that affect others through the institution of Parliament. While the right to participation is recognised in a political constitutional context, it has always been a contested right in the workplace. In New Zealand, however, it was recognised by Government early in the development of the country that workers combining together to further and protect their interests was a political reality. The Liberal Government in 1893, therefore, recognised that it was in the public interest to legitimise the right of unions to negotiate for workers wages and conditions in the workplace through the provision of a regulatory regime. The result was the enactment of the Industrial Conciliation and Arbitration Act that governed industrial relations for 90 years. It was also a regime that enabled Governments to regulate the labour market and control the price of labour through a tripartite system of decision-making. Central to that system was the recognition of the right of workers to participate in the decisions that affected them in the workplace through their representative trade unions. (Woods, 1963; Holt, 1986)

Although the changing nature of the world economy through globalisation required the industrial relations statutory framework to reflect this reality, the right to participate in decisions that affected citizens remained in various forms until the Employment Contracts Act (ECA) 1991. This Act signalled the end of Government regulatory support for trade unions as the representatives of labour in the workplace. Although the ERA 2000 restored the right to participate in the decisions that affected employees through union representation, changes in the labour market have effectively reduced the trade union movement's capacity to provide comprehensive protection to employees in the workforce (Rasmussen, 2004; 2010).

Today, 20.9% of wage and salary earners are still represented by trade unions, but the majority of employees are not. In fact, unions represent only 17.4% of the total employed workforce. It must also be noted the majority of unionised employees work in the public sector (Department of Labour, 2009). It is noted, however, that the launch of *Together* by the Council of Trade Unions (CTU) is an example of the union movement's initiative to find new ways to provide representation for individual employees. Despite this development, most employees remain unrepresented so the question arises how do employees protect and further their employment interests? When relatively low union membership is combined with low coverage of collective agreements, it also becomes apparent that there is an effect on both wages and conditions of employment. The admission from

the Minister of Finance Hon. Bill English that New Zealand should take advantage of being a low wage country was an acknowledgement of the changed nature of the labour market (Fallow, 2011).

## **Why Employment Status is Important**

At present, individual employees must rely on the law and their capacity to negotiate a contract of employment with their employer. As an employee, the law guarantees specified employment rights, such as the right to a written contract, to expect to be dealt with in good faith in all employment matters, the right to rest breaks, to sick leave, not to be unjustifiably dismissed, the right to four weeks holiday and the right to a minimum wage amongst other employment rights. The employment rights that are attributed to an employee are not, however, available to a non-employee who is classified as a contractor. How an employee's status is legally defined determines their legal employment rights. This is why the question of legal classification and how that classification is made is so important.

Re-classification of a class of employees as non-employees, for the purposes of the law, lies at the heart of the controversy over *The Hobbit* saga. The purpose of the Government in making this change was to deprive a class of employees' access to employment rights in the expectation that this would lower the cost of labour for the benefit of the employers on *The Hobbit* project. The benefit for the employee was to have a job, but not one that carried benefits or rights unless they could be negotiated as part of a contract for service. Further, the law change was designed to prevent those classified as contractors from combining together to negotiate a contract for their employment services.

In the course of the dispute, there had been a flurry of legal opinions exchanged on the right of contractors to combine to negotiate contracts. The Government had argued in the legal opinion from Crown Law that such a combination was a restraint of trade and therefore, a breach of the Commerce Act that is designed to promote competition. Whether the legal opinion actually stated this is uncertain because it has not been released, but the Attorney General, Hon. Christopher Finlayson, who sought the legal opinion sent a letter to both the producers of *The Hobbit* and the NZ Actors Equity that stated "the New Zealand Government obtained advice from the Crown Law Office ... that confirms the [Commerce] Act does prevent...competing independent contractor performers from entering into or giving effect to a contract..." (Onfilm, 2010). The CTU countered this with its own legal advice and a reference to the Trade Union Act 1908 stating that trade unions were combinations that were exempt from the restraint of trade legal restrictions (stuff.co.nz, 2010).

The Trade Union Act makes it clear that a combination of regulating relations between workers and employers or imposing restrictive conditions on the conduct of any trade or business is not acting criminally or unlawfully if the pursuit of such objectives is registered under the Act. Whether the provisions of the Commerce Act override the historical recognition, both here and overseas, that unions' activities are exempt from restraint of trade provisions, would make an interesting legal case. Such a case is likely to turn on whether contractors are workers for the purposes of the Trade Union Act, and therefore, clearly exempt from any restraint of trade constraint. This question of who can be classified as a worker in the current labour market with its growth of non-standard precarious work is the real underlying issue in *The Hobbit* case. The changing nature of work and the labour market has now left many workers without any employment rights. The fact that the changing nature of work is no longer reflected in the law has enabled the Government to conveniently change the legal definition on the grounds of clarifying the law without addressing the more serious question of bringing the law into line with the labour market (Wilkinson, 2010).

## **The Changing Nature of the Contract of Employment**

The fact that the current unreality of the law suits the political interests of the Government is not surprising. Since the advent of the contract of employment as the legal instrument to regulate the employment relationship, this has been legally contested territory (Atiyah 1979; Fox, 1974). It is worth reflecting briefly on the development of the law in this area because it clearly identifies that the issues surrounding the legal classification of work have provoked a political struggle since the rise of capitalism. The issues raised in *The Hobbit* saga are not new, and reflect competing ideologies on the rights of employees, not only in the workplace but also constitutionally. Without political power, workers could not change the law to ensure their right to participate in the workplace decisions through their trade union. It was through the formation of trade unions and collective bargaining that the inequality of bargaining power in the workplace was addressed in the latter 19<sup>th</sup> and much of the 20<sup>th</sup> century. The notion of the contract, which provided the legal support for capitalism, was inadequate legal protection for those in the workplace. There was, however, a deeply held suspicion by the courts of workers combining to pursue their self interest in the workplace. A similar suspicion existed by members of Parliament in the 19<sup>th</sup> century. Capitalism required a free unrestrained environment in which to thrive. The notion of individual workers combining to restrict that freedom has been the site of continuous industrial and political struggle for a long time and continues to be so.

The emergence of the law of contract, with the rise of capitalism, was accompanied by change in the legal nature of the employment relationship. The master and servant relationship that was defined by the characteristics of subordination, obligations and duties slowly morphed into a contract that assumed the free and voluntary will of the parties to negotiate terms and conditions that defined the legal limits of the relationship. The employment contract, however, incorporated the notion of subordination that remained fundamental in distinguishing it from other forms of employment related contracts. The interventions through legislation for the negotiation and content of the contract of employment and collective bargaining steadily increased throughout the 20<sup>th</sup> century as employees obtained political influence and the legal rights to organise industrially. Through political organisation and democratically winning political power, parties representing the interests of employees legally recognised employees' rights in the workplace.

After World War II, much of the legal analysis of the employment relationship centred on the shift from a contractual to a status definition of the relationship. The growth of a statutory framework of minimum standards guaranteeing workers' rights which were independent of collective bargaining was seen as undermining the contractual notion of the employment relationship. These statutory terms were implied in the notional contract of employment. The rise of neo-liberalism in New Zealand in the 1980s saw the decline of statutory intervention to protect and further the interests of employees, and the re-emergence of the notion of contract as the primary instrument of regulation in the workplace.

The ECA reinforced the resurgence of the contract as the basis for the relationship in the workplace. The rationale for this shift was founded on the notion of the liberation of the individual worker to be free from the "outcome-orientated, centralist-collectivist viewpoint to an incentive-orientated, truly individualist viewpoint" (Brook, 1990: ix). Trade unions and the statutory support for employees were characterised as a constraint on the individual's freedom to pursue their self-interest. The traditional democratic notions, such as the equality that had driven much of the rationale for political and industrial reform in New Zealand in the 20<sup>th</sup> century, were criticised as being results-orientated and denying individual equal opportunity. Even though much of the rhetoric that surrounded the ECA was contradictory, it did clearly reflect a fundamental shift in political ideology and consensus that had dominated New Zealand politics for much of the 20<sup>th</sup> century.

## Changing Legal Definition of an Employee

Although the neo-liberal rhetoric was founded on the right of the individual to be free to choose the nature of their employment agreement, it did not liberate the law to reflect the changing nature of work and remove the historically embedded notion of subordination in the contract of employment. Some attempts have been made through statutory definition to recognise that the nature of work has changed and, therefore, so should the test for distinguishing an employee from a contractor. For example, attempts to include dependent contractors within the employee definition have been discussed but resisted by employers. The ERA also attempted to ensure the law reflect the reality of the nature of the employment arrangement. The Act states that when determining whether a contract of service is present, the Employment Authority must determine the real nature of the relationship by considering all relevant matters, including the intention of the parties, and most importantly “not to treat as a determining matter any statement by persons that describes the nature of their relationship” (Employment Relations Act 2000, s6 (3) (b)).

In this context, it is relevant to note that the Supreme Court in *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 applied this definition to a case involving a contractor working as a technician for Three Foot Six, a film production company, who challenged his employment status as a contractor on the grounds that the terms under which he worked, in reality, were those of an employee. The Supreme Court decided that the contract was, in fact a contract of service. Helen Kelly notes in her narrative that this case had applied in the industry since 2005 with many productions having taken place since the decision without much difficulty. There was still freedom for the parties to negotiate their own contract but it must reflect the actual conditions of work.

The 2010 Amendment to the ERA not only overturns the Supreme Court decision, but it attempts to exclude consideration by the courts of the legal nature of the employment contract by explicitly excluding persons working in film production as “an actor, stand-in, body double, stunt performer, extra, singer, musician, dancer or entertainer” or a person “engaged in film production work in any other capacity” (Employment Relations Act 2000, s6 (d) (i)(ii)). Film production work is also extensively defined to include pre and post-production work or services and promotional or advertising work or services (Employment Relations Act s6(7)). In effect, the Government was ‘labelling’ this work as only being undertaken by a contractor unless there was a written agreement by the parties stating that the person is an employee. The unreality of this provision to give employees a real choice as to their status becomes apparent when it is realised that the employer is often a company like Warner Bros., which was involved in negotiations with the Government at the time of the Amendment. Any notion of choice as to an employee’s employment status in the film production industry in New Zealand is now illusionary.

The Hobbit legislation may also signal the end of the attempt of the ERA to construct a new consensus around the employment relationship. The Government’s disregard to proper constitutional processes undermined the whole notion of good faith when dealing with employment-related matters. Good faith dealings require full disclosure of information and an opportunity to participate in the legal arrangements that govern the parties to the agreement. The Government’s action also raises the question of whether there will be a return to policy that resulted in the ECA. This policy explicitly rejects any notion of inequality of bargaining in the workplace and focuses only on the freedom of the employer to organise the workplace to produce the maximum profit for the shareholder. The argument is that this policy promotes economic growth, which will benefit the workers through the provision of jobs (Davies and Freedland, 2007).

The evidence would suggest, until the global financial collapse, unemployment was low but the evidence would also suggest the quality of the jobs has been affected through the growth of

precarious employment and the decline in wages (Felstead and Jewson 1999; Web Research, 2004). This economic policy has also required state support for wages and salaries through the Working for Families subsidy. The economic recession has also identified the need to start to rethink the form and nature of the employment relationship to ensure it is consistent with the need for both sustainable employment and a living wage. The legal tools required to support these policies include a rethinking of how the legal status of employees is determined and defined.

## **Constitutional Implications**

The lack of debate of employment-related issues in constitutional terms is partially attributed to the nature of New Zealand's constitutional arrangements, and partially due to the fact that economic and social rights are not seen as a constitutional issue. The Report of the Constitutional Arrangements Committee described a constitution in the following terms:

A constitution governs the exercise of public power. It sets out the rules under which the various branches of Government operate. It affects, and is affected by, our economy, society and culture. We consider that the nature and operation of New Zealand's constitution should be of interest to all those who are interested in the exercise of public power in New Zealand (NZ House of representatives, 2008: 7).

While constitutional matters should be of interest to New Zealanders, they do not attract a great deal of debate or discussion. This may be because the lack of written constitution makes it difficult to identify exactly what is a constitutional matter, or it may be that New Zealanders like the idea of flexible constitutional arrangements that can easily be changed to accommodate our pragmatic approach to decision making. These were both matters identified in the 2005 constitutional review along with the conclusion that

Although there are problems with the way our constitution operates at present, none are so apparent or urgent that they compel change now or attract the consensus required for significant reform. We think that public dissatisfaction with our current arrangements is generally more chronic than acute" (NZ House of Representatives, 2008: 8).

Although it is arguable whether New Zealand's constitutional arrangements have reached the acute level of concern, the chronic nature of our constitution arrangements continues to cause concern and requires attention. The Government announced, on 8 December 2010, a new constitutional review in compliance with the Relationship and Confidence and Supply Agreement between the National and Maori Parties (English and Sharples, 2010). This review will provide an opportunity to debate further constraints on the power of the executive as well as whether it is time to once again entrench fundamental values and rights in a Bill of Rights that includes economic and social rights in accordance with the International Covenant on Economic, Social and Cultural Rights, which New Zealand ratified on 28 December 1978.

While a discussion of constitutional reform is not appropriate in this context, The Hobbit saga has raised the issue of whether the Cabinet Manual and the Standing Orders of Parliament are sufficient protection against an executive abuse of power when enacting legislation. The Hobbit amendment should have been referred to a select committee for submission and a public debate on the implications of the legislation. It did not involve a matter of public importance that required a suspension of the normal procedure for the enactment of legislation. Yet, the Government did not break any law or offend any constitutional requirement in acting in this way. If, however, there had been a written constitutional requirement for consultation, then the Government would have been obligated to follow it. Such a requirement may not be a written constitution but it does need an amendment to the Standing Orders. Unfortunately this is unlikely, given that all changes to the

Standing Orders need near unanimity of all parties in Parliament. This highlights again the fragility of a Parliamentary system that requires the parties to act constitutionally as well as politically.

The issue of the use of urgency by Governments has recently been reviewed by the New Zealand Centre for Public Law and the Rule of Law Committee of the New Zealand Law Society. The project considered, amongst other questions, the use of urgency from a constitutional or democratic legitimacy perspective, which is the main concern of this article in relation to the use of urgency to enact The Hobbit legislation. In its submission to the Standing Orders Select Committee – in its review of Standing Orders – the Urgency Project submission emphasised the importance of the select committee process (Geiringer, Higbee and McLeay, 2011). It expressed the reason for legislation to be submitted to a select committee as being

... because of the select committee system's important role in enhancing the House's deliberative and scrutiny functions, in providing opportunities for public participation, and in thereby enhancing the quality of legislative output. In our view, this use of urgency ought to be rare, and justified by a genuine need for haste in relation to the particular measure (Geiringer et al.: 9).

The question, then, is whether the use of urgency to enact The Hobbit legislation reflected a genuine need for haste. It is difficult to believe that once the Government had announced it was going to enact the legislation Warner Bros. would have withdrawn their support for the project. The Government had the numbers and a delay of a day or even a week, to provide time for submissions would seem unlikely to have placed the project in doubt. The larger issue, however, is whether this is an example of the ends justifying the means. While I would argue, in this instance that it did not because there was time to follow some form of constitutional process that admitted of public participation, there are others who would argue that the economy takes precedent over all other matters. The Hobbit may be an example of the reality of the limited power a New Zealand Government has in the age of the globalisation and where the power of a transnational company is greater than that of a sovereign Government.

A larger constitutional issue is the need, in the absence of a written constitution, to entrench fundamental rights, including economic and social rights. This was attempted in 1990 when the New Zealand Bill of Rights Act was discussed but failed through lack of Government support. While Government opposition is likely to continue, it is time to renew the debate because, as the effects of current economic policy become obvious, it is apparent that without an agreed employment relations statutory framework to protect and further the interests of employees, the only protection of employment rights is through a constitutional acknowledgement of those employment rights. Again, this would not require a written constitution, but it could be achieved through amendment to the Bill of Rights Act to include economic and social rights as agreed to under the International Covenant on Economic, Social and Cultural Rights and for those rights to be entrenched so any government action in breach of those rights can be contested in court.

## **Conclusion**

In conclusion, The Hobbit amendment has identified the fragility of employees' employment rights when faced with an executive that is not prepared to observe constitutional good practice, and a Parliament that is powerless to prevent such action because the majority rules in all matters. The Hobbit amendment also highlighted the need for the law to reflect the reality of the labour market and the changes in work practices, and their effects on individual employees. The old division between employee and contractor needs to be revised to take account of non-standard precarious work. If such a change in status cannot be achieved, then employees in non-standard precarious employment must be free to form unions to protect and further their interests without the restraint of

trade constraints. While a level playing field cannot be expected under the current economic policy, those who support this policy could not object to a gentle slope on the field of workplace relations by supporting fairer negotiating arrangements for collective contracts by contractors.

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