The Politics of Workplace Reform: 40 Years of Change

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Introduction

The 1970s was the decade that foreshadowed the radical restructuring of New Zealand's economic, social and political systems that began in the 1980s and continues today. As a result, this transformation of New Zealand society included the radical restructuring of the regulatory framework of the labour market and the day-to-day practice of the employment relationship in the workplace. This chapter will chart the ideological and political changes that became evident in the 1970s and provided a new regulatory framework that affected employment relations practice for the next 40 years. It will further identify the main drivers of this transformation as they have been reflected in the legislative framework. The main drivers of regulatory change have been not only the economy, but also the ideological position of the government of the day. It is therefore necessary to analyse the ideological and political shifts over the past 40 years in order to understand the impact of the changes in workplace practice.

Although this article is not an analysis of articles or academic research published in the *NZJIR*, the *Journal* from the outset provided a useful insight into the issues that have attracted analysis and research over the past 40 years. A quick review of the publication over the past four decades reveals that the Journal has reflected both the theory and the practice of employment relations. For example, the issues in the 1970s reflected the growing challenges to the existing industrial conciliation and arbitration system with its centralised collective wage fixing system. Unsurprisingly, wage policy was an important focus during the 1970s, but during this period there was an assumption that the state was to maintain a central role in the labour market. This included an article by Max Bradford, a future Minister of Labour in the 1990s, on options for wages policy. The emphasis was more on devising a new partnership, with several articles on worker participation models, including a paper by Sir Frank Holmes advocating

the need for unions, employers and governments to work together to develop a new economic policy.

There were two articles that were prophetic in terms of the radical changes that were ahead of the whole industrial relations system The first prophetic article was written by John Deeks, who analysed the nature and role of ideology in New Zealand industrial relation. He opened his article with the statement:[1]

> It is a truism that there is in New Zealand culture a widespread if inarticulate suspicion of ideas, of theory, of ideology ... and a genial preference for the practically useful, for the matter-of-fact treatment of things, for the pragmatic.
>
> ... the main thesis of this article is that ideological questions are central to the practice of New Zealand industrial relations and that we cannot adequately understand industrial relations behaviour if we persist with the view that it is not influenced by beliefs, values systems, ideas, theories.

This insight foreshadowed the total collapse of the industrial conciliation and arbitration statutory framework in 1991 and its replacement with the Employment Contracts Act. This radical shift was driven by "beliefs, value systems, ideas and theories" that impacted on the practice of employment relations in such a way that there has been a fundamental reconstruction of the employment relationship.

Another prophetic article was written by James Farmer and entitled "Labour Relations – A Takeover by the State?" He foresaw the changing role of the law during the 1970s with increasing resort to litigation to counter increasing strike action and the challenge to the managerial prerogative to hire and fire employees. He noted that while employers were responding to this new environment, the trade unions were slower to adapt and relied on traditional industrial action. He also questioned the implications of any increasing worker participation schemes to the authority of unions. He concluded with the following conclusion:[2]

> The rights and entitlements of workers will therefore become the product of the State, exercising powers of patronage, which might be extended or withheld at will ... [a]ny decline in trade union industrial power will have a corresponding effect on the considerable political strength of the unions as one of the counterbalancing forces that offset Government or State power. Any resultant increase in the political ability of the State to pass new laws to achieve its policy objectives will accordingly have significance from the wider perspective of the rule of law as it operates in a Parliamentary democracy.

Farmer foresaw the changing role of the state and the impact it would have on the employment relationship and in particular the rights of employees. As the

1 John Deeks "Ideology and Industrial Relations in New Zealand" (1976) 1 NZJIR 2 at 26.

2 James Farmer "A Takeover by the State? A New Zealand Experience" (1978) 3 NZJIR 397 at 104.

state has withdrawn regulatory support for the union movement, the individual employee has come to rely more on the state to provide for their legal employment rights and for enforcement of those rights.

This chapter will examine the various regulatory frameworks that have been in force over the past 40 years. The analysis will include the Industrial Relations Act 1973 that remained the primary regulatory framework until 1987 when the Labour Relations Act 1987 replaced it. The later Act was designed to begin a serious transition of employment relations practice to reflect the new neoliberal public policy framework. The transition was short lived, however. The change of government in 1990 repealed the 1987 Act and replaced it with the Employment Contracts Act 1991. The 1991 Act marked a radical shift in labour market regulation in the workplace. It ended the notion of a tripartite partnership by the state withdrawing from its support for trade unions as the primary agency for the enforcement of employee employment rights. The new regulatory relationship was constructed as a direct market-driven relationship between the employer and the individual employee. The 1999 election bought a change of government with a promise of a new regulatory framework in the form of the Employment Relations Act 2000. Although this Act remains in force, it has been considerably amended and increasingly reflects a neoliberal conception of the labour market and workplace relationships.

An examination of the various regulatory frameworks requires a consideration of the ideological and political forces that shaped the statutory provisions. The past 40 years has seen political changes of government being shared by the main political parties, namely, the National Party and Labour Party. During this period, there have been 13 elections, with the National Party or National-led governments winning the election eight times and the Labour Party or Labour-led governments four times. While the Labour and National parties reflect different ideological positions, these differences are not as sharp as in previous history. The reality of globalisation and neoliberalism has blurred the number of differences between the legislative frameworks implemented by both political parties.

It is, however, important to note that there have been and continue to be ideological differences between the two main political parties and those differences are reflected in the regulatory frameworks they enact. Ideology, as noted by Deeks, has been recognised as an essential element of any system of employment relations.[3] The primary ideological tension in New Zealand has traditionally been characterised as being between a unitary and a pluralist approach. A unitary approach has been associated with the legitimacy and supremacy of

3 John Dunlop *Industrial Relations Systems* (Southern Illinois University Press, Carbondale, 1958); Alan Fox *Industrial Sociology and Industrial Relations* (Royal Commission on Trade Union and Employers' Associations, London, 1966).

management rights, while pluralism recognises there are competing interests in the workplace that need to be accommodated. The reality, however, has been that there has always been dissonance between workplace practice and the statutory framework. The differences in political ideology have been primarily reflected in the role of the state and the method for wage fixing. Generally, the National governments have supported a minimum role for the state and individual wage fixing through the contract of employment, whereas the Labour governments have supported a more active role for the state and collective bargaining to fix wages.

In a previous analysis of the different political ideologies, I raised the question whether there was emerging a consensus ideological position.[4] I noted that in the past New Zealand governments have asserted their right to govern in the public interest that is above sectoral interests. The industrial conciliation and arbitration system (IC&A) expressed the traditional position of the state. Although it was a tripartite system, the state always asserted the right to intervene in the interests of the country as a whole. I noted, however, that the ideological differences between political parties have become more pronounced after 1968 when the economic pressures on government increased with changes in the global economy. These differences have increased with neoliberalism playing a dominant role in the policies of the parties of the right, while the parties of the left contest those policies, seeking a more pluralist approach in the workplace. Currently there appears to be little space for a cross-party ideological consensus to emerge in the foreseeable future.

The Foundation of the Industrial Conciliation and Arbitration System

Before the various frameworks are considered, it is important to understand the nature of the foundational statutory industrial conciliation and arbitration system. It is important because, while there have been radical changes in the statutory frameworks, aspects of the foundational system still resonate within the current framework. Although it is beyond the scope of this article, it may be argued that there is an underlying culture of values that have found shape in various statutory systems. For example, there has been an assumption of a 'fair go' frequently expressed in dismissal procedures. There is also an expectation of a 'fair wage', as has been witnessed in the struggle over zero-hour contracts. Although the values of neoliberalism pervade the current legal framework, the challenges to this framework reflect the more traditional values traditionally associated with the New Zealand workplace.

4 Erling Rasmussen *Employment Relations Workers, Unions, and Employers in New Zealand* (Auckland University Press, Auckland, 2010) at 9–23.

New Zealand's industrial relations system was enacted in 1894 within a politico-legal framework. This framework recognised that there was a fundamental conflict between the interests of labour and capital, but the state had a responsibility to balance those interests in the overall public interest. The three parties to the relationship – the state, employer organisations and trade unions – developed a policy of tripartism, with the state being represented by the Arbitration Court in the day-to-day conduct of the relationship. It was a representative system that depended on individual workers and employers being members of representative organisations that were represented on the various state conciliation and arbitration institutions. However, employer organisations were just as important as trade unions for the smooth running of the system.

The dominant partner was always the state, because it had the legitimacy to act over and above the interests of the other parties. It kept control of the relationship through the use of legislation. Through legal control, the state influenced the shape as well as the operation of trade unions and employer organisations. Noel Woods, a former long-term and influential Secretary of Labour, described the effect of this control on the development of trade union organisations. He observed after a visit to Great Britain, "When I returned . . . end of 1937 the contrast hit me . . . New Zealand was, with some exceptions, primitive stuff; hundreds of small unions kept small and ignorant and poverty-stricken by the law."[5]

When some trade unions attempted to shrug off the 'leg iron of labour' early in the 20th century, the government of the day reacted by enacting legislation: the Labour Disputes Investigation Act 1913 that effectively prevented trade unions wage negotiations outside the institutions of conciliation and arbitration. The failure of this early attempt not only stifled the development of collective bargaining in New Zealand but it also contributed to internal dissension within the union movement and inhibited the development of a strong unified movement.[6]

While there were always elements within both the trade unions and employer organisations that sought the removal of legal restrictions, the reality was the system worked well enough for all the parties, including the state. For unions it was a trade-off between the security of achieving widespread membership, an outcome in bargaining and the avoidance of recognition disputes with employers, and the uncertainty of dealing directly with employers without the support of legal enforcement. For employers, however, it provided a level of certainty and stability and protection against competition. The level of support depended to

5 Noel Woods "Comments on the Industrial Conciliation and Arbitration Act 1894" (1994) 1 NZJIR 1 at 3.

6 Herbert Roth *Trade Unions in New Zealand: Past and Present* (AH & AW Reed Publications, Wellington, 1973) at 17–40.

some extent on the economic and political conditions of the time. This included conservative governments being more responsive to the demands of the employer lobby and in 1935 the first Labour government greatly enhancing the bargaining power of unions through compulsory unionism that extended union organisation into white-collar occupations.

It was not until the 1960s, and the changing economic conditions occasioned by the entry of the United Kingdom into the European Economic Community, that the challenges to the system became more insistent. The accommodation of these pressures was tried through the development of ruling rate agreements, but the increasing complexity of bargaining arrangements and the increase in industrial action started a process of construction of a new industrial relations framework.

New Institutional Framework – Industrial Relations Act 1973

The breakdown of the IC&A system became obvious with the 1968 General Wage Order. The nil-order of the Arbitration Court to an application for a general order, followed by the employer and union representatives on the Court awarding a five per cent general wage order formally signalled what had been apparent for some time. The wage fixing system, conducted formally through centralised awards and informally through ruling rate agreements with periodic interventions through the mechanism of the general wage order, no longer produced either industrial or economic stability in the 1960s. The economic and social pressures of the time placed too much strain on institutions that were not designed to cope with the increasing complexity of the economy. For the next 15 years various attempts were made to amend the IC&A framework to accommodate the changing economic and political pressures.

The first such attempt was the Industrial Relations Act 1973. Although there was a change of name from Industrial Conciliation and Arbitration to Industrial Relations, the Act maintained much of the philosophy and provisions underpinning the IC&A Act.[7] There were signs of greater flexibility in bargaining in the form of Voluntary Settlement Collective Agreements that could be negotiated outside the restrictions of the IC&A Act. Another important departure was the recognition of the distinction between disputes of rights and disputes of interest. The recognition of interest and rights disputes, as being different in nature and requiring dispute resolution procedures that reflected this difference, was an important step in separating collective from individual rights. Individuals now had access to a legal remedy in a way that had not been available previously. Although the changes did not seem a substantial change

7 *A Description of Wage Fixing and Industrial Relations in the Private Sector* (Long Term Reform Committee, Wellington, 1983).

from the past, Young was correct when he described the passage of the Act as ". . . as a significant shift in the underlying philosophy . . . The full ramifications of this change have yet to develop. They have certainly not been grasped by the wider community and even by some within the ranks of the social partners."[8]

Whether the changes would have enabled a more flexible framework to evolve through experience will never be known. The economic conditions of the time provoked the governments of the period to embark on a policy of direct intervention in the bargaining process through statutory wage controls. This policy was first enacted in the Stabilisation of Remuneration Act 1971 and a series of regulations that came and went in various forms until the 1982 Wage Adjustment Regulations that prevented all wage bargaining and remained in force until 1984. This exercise of direct control by governments of the day produced a negative reaction from the trade unions that resented the controls on their right to bargain. Work stoppages rose from 71 in 1961 to 523 in 1979. It was not surprising that the increasing level of industrial conflict politicised industrial relations. This was most apparent during the 1975 election campaign when the National Party used dancing Cossacks to associate the unions with communism. The conflict between the union movement and the National government of the period went beyond ideological difference as was observed by Boston who noted:[9]

> To put it bluntly, there were many in the union movement were unwilling to reach an accommodation with the Muldoon administration, regardless of the apparent advantages of so doing. This reluctance was not merely the product of ideological convictions. It also stemmed from a fundamental lack of trust between the union movement and the National Government. The Muldoon Administration had conducted an active anti-union campaign throughout its term in office. It had demonstrated little desire to consult with the FOL or to foster a climate of understanding and goodwill.

Throughout this period, attempts were made to find agreement on a new statutory framework, but they proved unsuccessful for the reasons outlined.[10] While this work was proceeding in the industrial relations area, there was a growing understanding that a more fundamental policy shift was required to address the economic problems facing New Zealand. The result of this policy work emerged after the 1984 election in the Treasury briefing document *Economic Management*. It was in effect a neoliberal policy agenda for New Zealand of which industrial relations was one part of the overall change.[11]

8 John Young "New Zealand Industrial Relations: Retrospect and Prospect" (1976) 1 NZJIR 3.

9 Jonathan Boston *Incomes Policy in New Zealand* (Victoria University Press, Wellington, 1984) at 227.

10 Rob Campbell and Alf Kirk *After the Freeze* (Port Nicholson Press, Wellington, 1983).

11 Alan Bollard "New Zealand" in John Williamson (ed) *The Political Economy of Policy Reform* (Institute for International Economics, Washington, 1994) at 73–110.

The Road to a Neoliberal Statutory Framework – Labour Relations Act 1987

While the election of the Labour government in 1984 signalled a period of rapid change, the influence of the Labour Party and the trade unions ensured the government undertook a period of consultation on the future direction of industrial relations in the new market-focused economy.[12] It was clear, however, that the government intended to enact legislation with greater business focus. The mantra of 'improving productivity', through greater flexibility in the workplace, resounded through the discussions between the union movement and the government. The government released a Green Paper in 1985 that set out the issues that required reform with the general policy direction clearly stated in the White Paper *Government Policy Statement on Labour Relations*. Stan Rodger, the then Minister of Labour, noted in the introduction to the White Paper:[13]

> It is clear from the submissions that, while a climate for substantial reform exists, there is little consensus on the nature of that reform. The differences are sharpest between union and employer interests, but even within these sectors, discernible differences exist on important issues. In the absence of any consensus, the responsibility for making decisions shifts squarely onto the Government. In arriving at its position, the Government has been careful to preserve those features of the present arrangements, which it believes remain valid. It has also brought together elements, which have received significant support from both unions and employer submissions. The resulting reforms will constitute the most significant reshaping of industrial relations since 1894.

The government was again explicitly asserting its right to control the nature of the industrial relationship. The statutory result of this reform exercise was the Labour Relations Act 1987. It was an attempt to create a new flexibility in the bargaining environment with a move from the restrictions of national awards to industry or enterprise agreements. Employers had argued for greater flexibility in the conditions of employment to meet the conditions of the market in a timely fashion. The dilemma for the unions was they did not wish to abandon the security of minimum but extensive coverage under the national award system for the uncertainty of negotiating an industry or enterprise agreement without a commitment that the employers would conclude such an agreement. Harbridge and McCaw found through their research that the risk was real for unions through the experience of the Engineers Union and the Timberworkers Union.[14]

12 Margaret Wilson *Labour in Government 1984–1987* (Port Nicholson Press, Wellington, 1989).

13 New Zealand Government *Policy Statement on Labour Relations* (Department of Labour, New Zealand, 1986).

14 Raymond Harbridge and Stuart McCaw "Award, Agreement or Nothing? A Review of the

While the Engineers Union had greater success than the Timberworkers Union at negotiating agreements, the reality was that the environment was against serious negotiations and many agreements were never concluded. Employers, like everyone else, knew the government was about to change at the next election and that the National government had promised a reform of the system that reflected a fundamental departure from the system of conciliation and arbitration.

Although much of the focus during this period was directed to the changes in the private sector, the Fourth Labour government made substantial changes to the state sector that ultimately led to a unitary statutory framework applying to both the public and private sector employment relationships. These changes affected both institutional structures and practices. The structural changes were affected primarily through the State-Owned Enterprises Act 1986, the Labour Relations Act 1987 and the State Sector Act 1988. For example, the State-Owned Enterprises Act freed the new state-owned trading corporations from the constraints of the State Sector Act in terms of personnel procedures relating to appointment, promotion, transfer, discipline, occupational classification and grading of public officials. The State Sector Act made each department permanent head (now called a chief executive) an employer in their own right so that departments negotiated their own agreements and thereby replaced occupationally based bargaining. The new chief executives also were given the right to hire, promote, discipline and fire employees, providing the personnel policy complied with the principle of being 'a good employer'.

The fundamental assumption behind these changes was that the private sector managerial model was more efficient and should be adopted by the public sector. This approach led to the integration of the public- and private-sector labour relations procedures under the Labour Relations Act 1987. This change also led to the public-sector trade unions becoming subject to the provisions of the Labour Relations Act in terms of their membership and rules. Similarly, the disputes and personal grievance provisions of the Act now applied to the state-sector trade unions and employees. The only distinction between the two sectors was the provision for final offer arbitration being available for those covered by the State Sector Act. This provision was not used before the Act was repealed in 1991.

John Deeks undertook a thorough analysis of the implications of the Labour Relations Act and the changes in the public sector.[15] He observed that traditionally in New Zealand most industrial relations practitioners had operated within a pluralist framework in practice to ensure the organisation kept operational. Deeks argued, however, that this approach was inadequate to address the

Impact of s 132(a) of the Labour Relations Act 1987 on Collective Bargaining" (1992) l NZJIR 17.

15 John Deeks "New Tracks, Old Maps: Continuity and Change in New Zealand Labour Relations 1984–1990" (1990) 1 NZJIR 15 at 99–116.

economic and technological challenges facing New Zealand business. He noted the ". . . system maintenance role of traditional labour relations practitioners has been downgraded in value . . . labour market have been a key focus of ideologists . . . reinforc(ing) a unitarist frame of reference in corporate affairs."[16] Deeks also identified the underlying rationale for the various statutory and policy changes as being greater market flexibility and deregulation. There was evidence of greater flexibility being affected through large-scale redundancies and more flexibility in wage bargaining. He did conclude however with the observation that "The ultimate logic of complete labour market flexibility is absolute freedom of action for management, and a total loss of individual rights and collective protections of employees."[17] Whether the Labour Relations Act would have achieved a transition to greater flexibility in industrial relations will never been known, as it was repealed before it had time to be fully implemented.

Neoliberalism Arrives – Employment Contracts Act 1991

The enactment of the Employment Contracts Act 1991 marked the real break with the past and the IC&A system.[18] The centre of the statutory framework was the individual contract of employment and enterprise bargaining. The focus of the Act was to make the workplace business friendly through flexibility. In practice, this meant individualising the employment relationship that enabled the individual employee and employer to agree on wages and conditions without the intervention of a third party. Where there was a union presence, an enterprise agreement was the likely outcome of negotiations. The removal of the statutory infrastructure for awards meant they expired in the normal way but were not renewed. The Act applied to all employees in the public and private sectors. The result was a decline in union membership and union organisations.[19] Greater flexibility also resulted in lowering of wages and a decline in conditions of employment.[20]

The government in effect removed itself from the employment relationship. This trend had begun under the previous Labour government when the Minister of Labour declined to intervene in industrial disputes. The individualisation of the employment relationship totally marginalised the role of the government

16 At 112.
17 At 109.
18 Raymond Harbridge *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993).
19 Andy Charlwood and Peter Haynes "Union Membership Decline in New Zealand 1990–2002" (2008) 50 NZJIR 1 at 87–110.
20 Raymond Harbridge "Collective Employment Contracts: A Content Analysis" in Raymond Harbridge *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) at 70–88.

in the day-to-day relationship. Although the government no longer supported a collective relationship between unions and employers, there was still an expectation that it was responsible for ensuring minimum standards were maintained in the workplace. The removal of awards exposed the fragility of employment conditions such as sick pay, holidays, safety and even the minimum wage. The minimum wage in particular stood in opposition to the ideology of neoliberalism. Rather than repeal the minimum wage, however, throughout the nineties the government did not regularly adjust it.

There was one area, however, that survived this radical restructuring of the employment relationship: the retention of the personal grievance process. The notion of an unjustified dismissal was retained, which required the employer to justify the dismissal of an employee. The Act also provided a remedy for employees who had been subjected to discrimination in the terms provided for in the Act. If the employee proved to the satisfaction of the Tribunal or Court a personal grievance, the remedies provided for were reinstatement, reimbursement and/or compensation. The employee was required to pursue their remedy and the employer to defend their action through a legal process before the Employment Tribunal and then appeal to the Employment Court. This process soon became time consuming and costly for all parties. It also introduced the role of the lawyer into the settlement of personal grievances. Until this time, the legal profession had little interest in employment relations, but the decline of both trade unions and employer organisations meant their officials were no longer available to negotiate the settlement of such grievances. The combination of replacing the contract of employment for the collective agreement as the principle instrument of employment legal regulation and the change in the process of settlement of personal grievances legalised the relationship. This represented a sharp contrast with the previous statutory framework that was primarily dependent on a representative model from within both the trade unions and employer organisations.

By the end of the 1990s the consequences of the fundamental shift in employment relations was becoming obvious. There was certainly greater flexibility and employers had more control over their employees' wages and conditions. The lawyers replaced the union representative in disputes of rights with a consequential increase in costs and delays. With the decline in union membership and collective agreements, the union movement turned towards political lobbying for change in the legislation. It sought a new system of collective bargaining that provided a more even playing field. It did not seek a return to the old IC&A system, having recognised the reality of the marketplace. It was in effect seeking statutory support for collective bargaining in the new economic environment. For the individual employee who was not a member of a trade union, the issue was how to negotiate a contract with an employer that

protected both wages and conditions of employment. For those interests that felt disadvantaged under the new system, the issue was how to effect greater protection under a system that was designed to remove many of the traditional employee protections.

A Challenge to Neoliberal Framework – Employment Relations Act 2000

The only hope of change for the union movement was a change of government. Although there were still reservations about working with the Labour party after the experience with the Fourth Labour government, the Labour party had spent the 1990s reconstructing itself and re-established a relationship with the union movement that was cemented with the party making an unequivocal promise in the 1999 election manifesto to repeal the ECA. Another important political factor was the MMP electoral system, which before the 1999 election saw an agreement between the Labour party and the Alliance, a left-leaning party to work together in coalition after the election. A united campaign from the opposition and a disunited campaign from the government and its support parties saw the election of a Labour-led government in 1999.

The commitment in the election manifesto recognised both the importance of collective bargaining but also the need for a new minimum code of employment rights. It read:[21]

> Legislation should recognise that the balance of power or influence between workers and employers is not equal. Labour believes that the best way to redress this imbalance is to encourage the collective organizations of workers and to foster collective bargaining as a preferred means of establishing the rights and obligations of workers. These beliefs are shared very widely internationally and form the basis of core ILO Conventions.

The Employment Relations Act 2000 was the government response to its election commitment.[22] The purpose of the legislation was stated in the Act as follows:

(a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –
by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and

21 New Zealand Labour Party *Working Together Labour on Employment Relations* (1999).
22 Erling Rasmussen *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004).

(b) by acknowledging and addressing the inherent inequality of bargaining power in employment relationships; and
(c) by promoting collective bargaining; and
(d) by protecting the integrity of individual choice; and
(e) by promoting mediation as the primary problem solving mechanism; and
(f) by reducing the need for judicial intervention; and
(g) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively.

The Act was an attempt to provide a better balance between the market forces and the right of unions to bargain collectively. It was a retreat from the neoliberal approach of the ECA but attempted to acknowledge the legitimate role of the market, but not an unconstrained role. It also recognised the reality of the workplace that most workers were no longer protected by collective agreements but were subject to individual contracts of employment. The mechanism of good faith that was intended to provide a better balance was therefore applied to the negotiation of contracts of employment as well as collective agreements. The Act demonstrated the reluctance of government to require an outcome from the negotiations. It was more comfortable in setting the rules and the framework within which the parties themselves reached an agreement.

Although the Act stopped the decline in union membership and collective agreements, it has not greatly increased them either.[23] While union membership increased under the ERA, union density (the proportion of union members in the labour force) has been static at around 17 per cent. Much of the growth has also been in the public sector with private sector union membership clustering in the traditional unionised sectors of manufacturing, transport and storage. The recent Labour Department survey also found that only 15 per cent of the total employed workforce are covered by a collective agreement. Again, most of the agreements are in the public sector or traditional unionised industries in the private sector.

The reasons for this are complex but include the changing nature of the economy; a decline in sectors of traditional union membership such as manufacturing; the large number of small businesses that make organising employees not cost efficient; the rise in human resource capital management[24]

23 *The Effect of the Employment Relations Act 2000 on Collective Bargaining* (Department of Labour, New Zealand, 2009).

24 Alan Geare, Fiona Edgar and Ian McAndrew "Employment Relations: Ideology and HRM Practice" (2006) 17 IJHRM 7 at 1190–1208.

with its emphasis on employee identification with the enterprise; and the slow recovery of unions to adapt to the new business environment. The growth of insecure or precarious employment has also become an increasing factor in the decline of union membership and the designation of employees as legally dependent or independent contractors, which made these employees ineligible for collective bargaining.

Although the attempts to promote collective bargaining met with limited success, the government was active in developing the emerging role for government in employment relations, namely, legislating for a minimum code of employment standards to protect the interests of employees. It embarked on a programme of strengthening the Health & Safety in Employment Act, the Holidays Act, the Paid Parental Leave and Employment Act 2004, the Human Rights Amendment Act 2001 establishing an Equal Employment Opportunities Commissioner, the Employment Relations (Rest Breaks, Infant Feeding & Other Matters) Amendment Act 2008, and the Employment Relations (Flexible Working Arrangements) Amendment Act 2007. Regular reviews were also made to increase the minimum wage. Policy work was also undertaken on Pay Equity, work/life balance, and Partnership for Quality arrangements in the public sector. While the government was reluctant to directly intervene in the employment relationship, it was comfortable with creating a regulatory environment and with ordering inquiries or investigations on matters of concern, for example, the Ministerial Inquiry into Tranz Rail Occupational Safety & Health 2000, an Inquiry into Hazardous Substances in the Workplace and the Public Advisory Group on Restructuring and Redundancy 2007.

The change of government in 2008 was not accompanied by the rhetoric of major employment relations statutory change. The manifesto-foreshadowed changes were designed to further undermine collective bargaining – restricting the right for unions to meet employees in the workplace, and removing the monopoly unions had on the right to negotiate a collective agreement.[25] Since the National-led government was elected in 2008 there have been seven Amendments to the ERA. The first Amendment in 2008 introduced the 90-day rule, whereby employees were denied access to the personal grievance procedure if they were dismissed. This Amendment was followed by several other Amendments that were enacted to provide employers with further flexibility in the employment conditions they offered employees, for example, the need for employees to negotiate their rest breaks. New restrictions on the right to strike and lockout during collective bargaining placed further constraints on the collective bargaining process.[26]

25 *National Party Policy* 2008 (New Zealand National Party, 2008).
26 Margaret Wilson "Strike Ballots: The New Zealand experience" (2016) 29 AJLL at 194–209.

The current government policy is one of gradual and significant changes to the ERA that have undermined the legal status of both collective bargaining and individual employment rights. There is some evidence that there may be a retreat from the minimum employment standards statutory code, but a clearer picture of the government's policy will emerge after the current policy work on the Holidays Act. The lack of radical change to the statutory framework has been interpreted by some as a new consensus achieved in employment relations. If this is the case, then that new consensus centres on a declining role for unions and collective agreements. It may be too early to draw a firm conclusion.

Conclusion

The evolution of New Zealand's employment relations statutory framework has resulted in the government still having a substantial role in the employment relationship, but the nature of that relationship has changed. It has now assumed the responsibility of maintaining a code of minimum standards. The strengthening of a statutory minimum code of employment rights may be a cause or an effect of the decline in collective bargaining. What we may be witnessing is the reinvention of the role of the state in the regulation of employment relations. Although governments have continued to provide for the notion of collective bargaining in the statutory framework, in reality collective bargaining has become confined to the public sector and traditionally unionised private sector industries. Whether the decline in collective bargaining has stabilised may depend on the union movement to attract members and on its ability to devise new bargaining strategies. The current financial and economic conditions may provide the union movement with some opportunities as employees seek the protection of the collective and employers seek stability in an uncertain business environment.

Whatever may be the trend in unionised collective bargaining, there will be opportunities for the union movement to develop collective strategies to engage governments on behalf of employees for the protection and furthering of the codes of employment standards. The mobilisation of individual employees' support for statutory change will require unions to rethink their organising strategies. The union movement has always engaged with governments and state agencies on behalf of workers and employees, so the extension of this role to the working community as a whole would be a natural evolution of their traditional role. It would also be a role that would reassert the role of unions in civil society as a protector and activist in pursuit of the rights of citizens in a democratic society. Unions in New Zealand in the 1880s, 1890s and the 1930s were in the forefront of the struggle for individuals to participate in democratic decision-making. Although their role has been confined to the workplace through statutory

controls, as those controls have been relaxed, there is now an opportunity for unions to reinvent their role. That role may be more political than in the past, but that is also appropriate as the effects of neoliberalism on political process and institutions is beginning to be better understood.

New Zealand has always been and remains a country of small employers. This reality has meant that collective bargaining has always been a somewhat crude instrument through which to negotiate wages and conditions of employment. The development of ruling rate agreements in the 1960s was a response to changing market conditions. Today the challenges come from globalisation and the increasing use of technology and artificial intelligence in the workplace. The growth of dependent and independent contractor arrangements to avoid the legal incidents attached to the employment contract is also likely to prove a greater challenge to devising a regulatory framework that reflects both the reality of the labour market and the rights of individual employees.

Reliance on the notion of flexibility or traditional collective bargaining techniques is unlikely to provide an adequate response to either of these challenges. It may be that the time has come for a fundamental rethinking of the values and principles that need to underlie a new regulatory framework. A return to the idea of a public interest as opposed to a sector interest to be incorporated into such a regulatory framework may be worth consideration.