

THE IMPACT OF NEW ZEALAND'S EMPLOYMENT CONTRACTS ACT ON INDUSTRIAL RELATIONS

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INTRODUCTION

Wage determination matters in New Zealand have long been a source of international fascination. For the best part of a century, New Zealand and Australia stood alone as the only industrialized market-oriented countries that used an arbitration-based award system to resolve wage fixing matters in preference to collective bargaining.¹ Since 1991, New Zealand has adopted policies that have totally abandoned industrial conciliation and arbitration, and have promoted individual employment contracts at the expense of collective bargaining.

The Industrial Conciliation and Arbitration Act 1894 established the principles of wage fixing in New Zealand—conciliation and arbitration. Those principles were based on four features: (i) multi-employer arbitral awards which provided minimum terms and conditions of employment; (ii) subsequent party clauses which, by law, extended blanket coverage of awards over specified industries or occupations, regardless of whether they had participated in the process of award negotiation; (iii) procedures designed to make membership in trade unions compulsory; and (iv) compulsory arbitration to settle disputes of interest.²

The principles of conciliation and arbitration were developed and reinforced in various amendments to the Industrial Conciliation and Arbitration Act 1894, the Industrial Relations Act 1973, and the Labour Relations Act

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The research reported herein was supported by a grant from the Foundation for Research Science and Technology (F603). The authors are grateful to Alex Harrington and Charlie Welch for research assistance and to Ellen Dannin for her comments on an earlier draft.

1. Efen Cordova, *Collective Bargaining*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS* 523 (Roger Blanpain ed., 1987).

2. NOEL S. WOODS, *INDUSTRIAL CONCILIATION AND ARBITRATION IN NEW ZEALAND* (1963).

1987. This structure of industrial relations began to change in 1984 after the election of the Labour Party. This new government embarked on a remarkable period of pro-market reform of the New Zealand economy, commencing a frenzy of deregulation, guided by a powerful cadre of New Right bureaucrats within the Treasury.³ New Zealand shifted from being one of the world's most regulated economies to the precise opposite—an economy acclaimed as a model of laissez-faire market reforms.⁴ Labour's deregulatory thrust in economic matters was not, however, followed in the industrial relations arena. In its briefing papers to Labour, the Treasury foreshadowed its views on labor market reform. It argued that the pre-1984 system of labor market regulation was "rigid" and restricted employment opportunities.⁵ These sentiments were echoed by an Organisation for Economic Co-operation and Development OECD report, which identified the labor market as the area in which there had been least reform.⁶ During this period of market-driven reforms, however, the labor market remained the bastion of a regulatory era.

While the Treasury pressed for deregulation of the labor market, the central organizations of employer and unions were also expressing dissatisfaction with the industrial conciliation and arbitration system. Tripartite talks over the failings of the system and the future of wage fixing took place during the period of a government-imposed wage and price freeze (June 1982 to December 1984). At this time, unions and employer organizations agreed substantially on the perceived faults in the system.⁷

Amendments in 1984 to the Industrial Relations Act 1973 and the Labour Relations Act 1987 attempted to address these faults. Arbitration was made voluntary; unions were required to have 1,000 members to retain their registration; and unions could undertake just a single set of negotiations for each group of members, preventing the proliferation of "tiered" bargaining that had been occurring.⁸ These changes had limited impacts—voluntary arbitration was infrequently used and did little to break the rigidities of the relativity system that had developed under conciliation and arbitration. Further, the "single set of negotiations" principle decreased, rather than in-

3. BRUCE JESSON, FRAGMENTS OF LABOUR: THE STORY BEHIND THE LABOUR GOVERNMENT (1989).

4. ROGERNOMICS: RESHAPING NEW ZEALAND'S ECONOMY (Simon Walker ed., 2d ed. 1989); ECONOMIC RESTRUCTURING AND INDUSTRIAL RELATIONS IN AUSTRALIA AND NEW ZEALAND: A COMPARATIVE ANALYSIS (Mark Bray & Nigel Haworth eds., 1993).

5. NEW ZEALAND TREASURY, ECONOMIC MANAGEMENT 235 (1984).

6. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ECONOMIC SURVEYS: NEW ZEALAND (1985).

7. Max Bradford, *A Private Sector Employer View*, in THE FUTURE OF WAGE FIXING 11 (Peter Brosnan ed., 1983); Ken Douglas, *A Private Sector Union View*, in THE FUTURE OF WAGE FIXING 22 (Peter Brosnan ed., 1983).

8. The term "tiered bargaining" described the practice of groups of workers being covered by multiple sets of negotiated agreements, typically enterprise specific ("second tier") agreements which built upon the relevant national or regional award.

creased, the instances of enterprise bargaining, as unions sought to ensure the integrity of multi-employer awards.⁹

New Zealand had, until 1988, two industrial relations systems operating parallel to each other: in the private sector, a system of conciliation and arbitration; in the public sector, a system of pay fixing based on the principles of comparability with the private sector. The State Sector Act 1988 brought public service pay fixing under the same legislative rules as those operating in the private sector. Earlier, the State Owned Enterprise Act 1986 had freed the new market-driven state trading organizations from the constraints of centralized control of employment policies. The State Sector Act introduced a managerial rather than bureaucratic style of operation with each government agency presided over by a chief executive officer responsible to the appropriate Minister and having comparable freedoms to private sector counterparts. The effect of the State Sector Act and the State Owned Enterprise Act was the removal of the elaborate institutional procedures that had operated in the state.

Across the board, annual adjustments to state pay rates disappeared, as did the old criteria designed to retain fair relativity between state sector pay rates and pay rates for comparable jobs in the private sector. Departmental pay agreements gradually replaced occupational pay agreements, and the employment of staff on short-term contracts or as consultants expanded considerably.¹⁰ Enterprise bargaining flourished in a way that it was not flourishing in the private sector.

National Party government replaced the Labour government at the October 1990 General Election. The basic market-oriented economic policies of the previous government were continued, but attention was also focused on reform of labor law. The new government abandoned all of the legislation and institutions referred to above, and introduced the Employment Contracts Act 1991 as the new model for labor market and labor relations policy. The Employment Contracts Act 1991 abolished industrial conciliation and arbitration, all other disputes settling process, and all associated institutions operating under previous legislation. Furthermore, the statute does not include a single reference to the notion of trade unionism. The Union Representatives Education Act was repealed, as was pay equity legislation. While unions are free to play a role in industrial relations, they no longer have automatic and exclusive rights in the workplace. Other commentators have outlined the detail and effects of the legislation elsewhere.¹¹

9. Unions were concerned that awards would become residual documents under the single set of negotiations principle as their industrially stronger members opted out of award coverage and sought better conditions through an enterprise agreement. JOHN DEEKS & PETER BOXALL, *LABOUR RELATIONS IN NEW ZEALAND* 225-29 (1989).

10. JOHN DEEKS ET AL., *LABOUR AND EMPLOYMENT RELATIONS IN NEW ZEALAND* 70 (2d ed. 1994).

11. See, e.g., Kevin Hince & Martin Vranken, *A Controversial Reform of New Zealand Labour Law: The Employment Contracts Act 1991*, 130 INT'L LAB. REV. 475 (1991); Gordon Anderson, *The Employment Contracts Act 1991: An Employers' Charter?* 16 N.Z. J. INDUS.

The reality for many workers and employers was that significant changes to employment conditions soon occurred. These changes were driven by employer expectations that the law allowed them to exercise enhanced power in negotiations. A highly decentralized system with bargaining taking place predominately at the level of the enterprise quickly replaced the concept of a highly centralized industrial relations system with multi-employer bargaining taking place at the national level. Deunionization and decollectivization were inevitable outcomes of the new system. This Paper, written nearly seven years after the implementation of the Employment Contracts Act, identifies key changes to the profile of industrial relations on the New Zealand landscape and concludes that the centralization of the past is a forever lost feature. Specifically, the profile we examine focuses on trends in collective bargaining coverage,¹² trends in union membership and density, trends in collective bargaining outcomes, and trends in disputes and industrial disputation.

COLLECTIVE BARGAINING COVERAGE

The Employment Contracts Act itself has created various difficulties with monitoring labor market changes. The main difficulties occur in reporting on institutional changes (especially collective bargaining coverage and union membership) and collective bargaining outcomes (especially wage change). The philosophy behind the Employment Contracts Act was to remove traditional relationships and relativities between industries and occupations, thus ensuring that employers (and employees) would determine employment conditions appropriate for each enterprise and each individual employee. Relativities rely on knowledge previously supplied through the public record, i.e., the awards themselves. The absence of any public record of collective bargaining outcomes negotiated under the Employment Contracts Act has made bench marking of employment conditions within and between industries difficult, though not impossible. Old habits, however, have died hard. Employers, unions, and employees have been very willing to take part in voluntary surveys of collective bargaining and union

REL. 127 (1991); EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES (Raymond Harbridge ed., 1993); Ellen Dannin, *We Can't Overcome? A Case Study of Freedom of Contract and Labor Law Reform*, 16 BERKELEY J. EMP. & LAB. L. 1 (1995).

12. The Employment Contracts Act does not require that an employment contract, collective or individual, is an outcome of negotiation. Throughout this Paper we use collective employment contract coverage as a proxy for collective bargaining coverage, although in some cases the contract would have been struck without negotiation or after minimal "bargaining." See Ian McAndrew, *The Process of Developing Employment Contracts: A Management Perspective*, in EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES 165-84 (Raymond Harbridge ed., 1993). Twelve percent of employees in Harbridge and Crawford's sample of collective contracts are unrepresented in collective contract negotiations. See Raymond Harbridge & Aaron Crawford, *The Employment Contracts Act and Collective Bargaining Patterns: A Review of the 1996/97 Year*, in EMPLOYMENT CONTRACTS: BARGAINING TRENDS & EMPLOYMENT LAW UPDATE 1996/97 12-14 (Raymond Harbridge et al. eds., 1997).

membership, ensuring a flow of unofficial information reporting trends in New Zealand's industrial relations system.

CHANGES IN COLLECTIVE BARGAINING COVERAGE

Prior to the Employment Contracts Act, the Labour Relations Act 1987 and its predecessors had established private sector multi-employer collective bargaining as the mainstay of the industrial relations system. Outside of this system, however, a trend towards decentralized, enterprise, or workplace bargaining had emerged during the late 1960s. The Industrial Relations Act 1973 officially recognized the emergence of "second tier" enterprise bargaining and provided a mechanism for these "agreements" to be registered with the Arbitration Commission, thereby becoming enforceable through official dispute channels. While this move extended the formal system to cover emergent decentralized bargaining, it did not encourage decentralization.¹³ Nor were unions, organized around the requirements of the centralized system, well placed to pursue collective bargaining arrangements at the level of the workplace.¹⁴ The Labour Relations Act 1987 sought to rationalize bargaining, therefore introducing the "single set of negotiations" principle. While the intention of the Act was to encourage unions towards greater use of enterprise bargaining, the reverse was the case as unions sought to maintain the integrity of award coverage. Contrary to its intention, the Labour Relations Act 1987 actually saw a shift away from enterprise bargaining that moved back towards multi-employer awards.¹⁵

The Employment Contracts Act radically changed the structure of collective bargaining in New Zealand. It abolished the existing award framework and decentralized bargaining to the level of the individual workplace. The decision as to the form of contract, collective or individual, was left up to the individual parties to determine. The result was a rapid, yet predictable, collapse in collective bargaining, as illustrated by the data in Table 1.¹⁶ The data show that collective bargaining coverage fell by over 40 percent between 1989/1990, the last full bargaining round under the Labour Relations Act 1987, and 1996/1997. The level of the collapse is supported by the official data reported in 1993.

There has been a major shift in the form of collective bargaining away from multi-employer bargaining to single employer bargaining as a direct

13. See DEEKS & BOXALL, *supra* note 9.

14. Melanie Nolan & Pat Walsh, *Labour's Leg Iron? Assessing Trade Unions and Arbitration in New Zealand*, in TRADE UNIONS, WORK AND SOCIETY: THE CENTURY OF THE ARBITRATION SYSTEM 9-37 (Pat Walsh ed., 1994).

15. Raymond Harbridge & Stuart McCaw, *Award, Agreement or Nothing? A Review of the Impact of s132(a) of the Labour Relations Act of 1987 on Collective Bargaining*, 17 N.Z. J. IND. REL. 175-83; DEEKS ET AL., *supra* note 10, at 81-82.

16. See data in Table 1, Appendix; Raymond Harbridge, *Collective Bargaining Coverage in New Zealand: The Impact of the Employment Contracts Bill*, 17 AUSTL. BULL. LAB. 310-24 (1991).

result of the abolition of mechanisms to support multi-employer bargaining. Further, unions and employees now face significant logistical difficulties and legal obstacles in attempting to procure multi-employer contracts. Since the introduction of the Employment Contracts Act, the number of employees covered by collective bargains negotiated at the level of the enterprise has increased by 84 percent, with enterprise bargaining clearly becoming the predominant form of collective bargaining under the new regime. The number of employees covered by multi-employer bargaining has fallen by over 80 percent, from 553,000 to 107,000, with 60,000 of these being public sector employees, mainly school teachers covered by two large multi-employer contracts which have to date survived the trend to enterprise level bargaining.

For the period since 1993, no official data on the level and extent of collective bargaining are available. It is unlikely, however, that the level of multi-employer bargaining has increased. Our unofficial surveys show no evidence of growth back to multi-employer bargaining. Unions have had little success in promoting multi-employer bargaining, and a number of the industry-wide collective contracts negotiated in the first years of bargaining under the Employment Contracts Act have not been renewed, being replaced instead by a series of single enterprise contracts.

Collective bargaining coverage has collapsed from a high of 721,000 employees in 1989/1990 to some 420,000 employees in 1996/1997. The shortfall (of some 300,000 employees) was moved to individual contracts. A collapse in multi-employer bargaining due to a collapse of the award system is the main reason for the collapse in collective bargaining coverage.¹⁷ This collapse occurred especially in the private sector. Notwithstanding this collapse, there is a trend (albeit minor) back to collectivization, as employers struggle with the transactional costs of individual employment contracts. However, this trend has been employer—rather than union—driven.

Trade Union Membership

The relationship between the degree of centralization of the bargaining system and the level of unionization is well established.¹⁸ Thus, one could predict that a decentralizing statute such as the Employment Contracts Act would have a negative impact on unionism. In practice, this impact has been dramatic and has been exacerbated by the collapse of collective bargaining since 1991. A severe reduction in union membership levels has occurred, as is shown in Table 2.¹⁹

When viewed by industry, the data show that union membership has

17. Raymond Harbridge & Anthony Honeybone, *External Legitimacy of Unions: Trends in New Zealand*, 27 J. LAB. RES. 425-44 (1996).

18. RON BEAN, *COMPARATIVE INDUSTRIAL RELATIONS: AN INTRODUCTION TO CROSS-NATIONAL PERSPECTIVES* 92-97 (2d ed. 1985).

19. See data in Table 2, Appendix.

declined in all major industry groupings. The extent of this decline differs, however, among different industries. Union membership in the agriculture, retail, and hospitality sectors has collapsed, whereas in the traditional union strongholds of manufacturing, transport, and utility sectors, and in the public sector—government administration, health, and education—the decline has been much less dramatic.²⁰ Union membership has now stabilized and the remaining unions (and union members) are quite different creatures from the litigious arbitration-driven unions of the period 1890-1990.

The fall in membership is one thing, but the halving of density is another. Unions face a serious crisis. They are failing to recruit new members, so their membership base is primarily comprised of employees who were traditional union members prior to the radical labor market changes of 1991. This failure to recruit is at two levels: first, unions are not successfully recruiting new employees in already unionized workplaces; second, unions are having extreme difficulty with new employers in greenfield sites. Such employers have little difficulty rebuffing union organizing drives—the law at present enables the employer to decline right of access. Anecdotal evidence indicates that this is a commonly used ploy.²¹

COLLECTIVE BARGAINING OUTCOMES

The primary goal of the Employment Contracts Act was to increase labor market flexibility. Our analyses of the outcomes of collective bargaining under the Employment Contracts Act would certainly suggest that this objective has been achieved. The pattern of change has been marked; radical changes to employment conditions were recorded in the first two years of bargaining under the new Act. Subsequently, some consolidation has occurred as collective bargaining patterns have become established in the following years.

Wage flexibility was a key issue in employer calls for reform. The award system was criticized as inhibiting wage flexibility as a result of its concern with maintaining traditional relativities between different groups of workers. Historically, conciliation and arbitration acted as labor's leg iron and helped rein in large (or excessive) wage claims, while ensuring that those weaker groups in the labor market maintained some parity. The resultant pattern of wage settlements led to certain rigidities over many decades with comparative wage justice being a primary determinant of wage settlements. The removal of the conciliation and arbitration system has removed comparative wage justice as part of the wage fixing equation. Wages are now determined by market forces, and for many New Zealand employees

20. *Id.*

21. For a detailed analysis of the theoretical reasons for why New Zealand unions are unlikely to recover their position under employment contracts type legislation (industry-wide, multi-employer bargaining; free-loading; secure institutionalized workplace presence; and inclusive bargaining), see Harbridge and Honeybone *supra* note 15.

this has meant no wage change or a wage decrease under the Employment Contracts Act in the early years of its operation. There is, however, another largely unanticipated outcome. Some groups of employees, those with sought-after skills, are no longer shackled by the leg iron of the past and have sought, and achieved, very large improvements in wages and conditions in the past five years. Some employers have found themselves caught by the new market rules and have no alternative but to meet the demands. Data on annualized wage increases are present in Table 3.²²

While wage flexibility has been important, the major area of radical change in collective bargaining outcomes has been working time arrangements. Awards typically contained clock hour clauses which provided that workers engaged to perform work outside of normal hours of work, typically Monday to Friday, 8 a.m. to 6 p.m., were to receive additional payments or "penal rates." The Labour Relations Act 1987 fixed the length of the ordinary working week at not more than 40 hours, with the intention that these hours were to be worked substantially or wholly between Monday and Friday. The Employment Contracts Act left the matter of organization of the working week to the parties themselves. Not surprisingly, employers, especially those in seven-day-a-week industries, have sought to remove penal rates from contracts to reduce labor costs and provide increased flexibility.²³

Penal rates have all but disappeared from restaurant and food retailing contracts and are rare in education, health, and community services sectors. Penal rates remain prevalent in manufacturing, utility, and financial services sectors. Further, even where the entitlement to penal rates remains, there has been a trend to reduce the rate at which work performed outside of the ordinary working week is paid.

Non-wage flexibility has also increased through the removal of the restrictive practices often contained in awards and agreements. Limits on the period of engagement of casual workers, premiums on the wages of workers engaged on a casual or part-time basis, and restrictions on the ratio of part-time to full-time workers were introduced in some awards to encourage full-time employment by penalizing the employer for using more flexible forms of engagement. While it is questionable as to the extent these restrictions were enforced in practice,²⁴ they have certainly now been removed from most collective employment contracts. Provisions in collective employment contracts that relate to part-time or casual workers are generally now enabling provisions, confirming the employer's ability to engage casual or part-time workers without restriction.²⁵

22. See Table 3, Appendix.

23. Raymond Harbridge & David Tolich, *Collective Employment Contracts and New Working Time Arrangements in New Zealand*, in READINGS IN STRATEGIC HUMAN RESOURCE MANAGEMENT 143-56 (Alan Nankervis & Robert Compton eds., 1994).

24. Ian McAndrew & Paul Hursthouse, *Reforming Labour Relations: What Southern Employers Say*, 16 N.Z. J. INDUS. REL. 1-11 (1991).

25. See Harbridge & Crawford, *supra* note 12.

The occupational basis of trade unionism inhibited functional flexibility through the rigorous policing of job demarcations by unions. The extent to which this issue impacted the average employer is questionable; however, the abolition of union registration removed this potential fetter. As noted above, the Employment Contracts Act has greatly enhanced labor market flexibility. Flexibility, however, can mean different things to different people. The position of women workers in the flexibility debate has been equivocal. Proponents of reform have argued that increased flexibility would allow women workers to negotiate pay and conditions more suited to their needs, whereas, under the existing system, awards provided for conditions that were in the best interests of male workers.²⁶ Others argued that women would be worse off under a flexible, contract-based system, given their relative position in the labor market.²⁷

Results of research on the effect of the Employment Contracts Act on women workers have tended to support this second view.²⁸ Analysis of contracts showed that the moves to deregulate the industrial relations system had resulted in bargaining outcomes which clearly disadvantaged women workers.²⁹ Such research examined contracts according to the proportion of men and women covered by each contract. It found that contracts that covered "mainly men" were more likely to have received the large wage increases seen in the first years of bargaining under the Employment Contracts Act. Contracts that covered "mainly women" were more likely to have received low or nil wage increases and to have removed the entitlement to penal rates than other contracts.³⁰ Other research has confirmed that bargaining outcomes have had varying effects on women and men.³¹ The reason

26. Penelope Brook, *Reform of The Labour Market*, in ROGERNOMICS: RESHAPING NEW ZEALAND'S ECONOMY 183-207 (Simon Walker ed., 1989); PENELOPE BROOK, *FREEDOM AT WORK: THE CASE FOR REFORMING LABOUR LAW IN NEW ZEALAND* (1990).

27. Janet Sayers, *Women, the Employment Contracts Act and Bargaining: A Discussion Paper*, 16 N.Z. J. INDUS. REL. 159-66 (1991); Janet Sayers, *Women, the Employment Contracts Act and Labour Flexibility*, in EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES 210-33 (Raymond Harbridge ed., 1993).

28. Suzanne Hammond & Raymond Harbridge, *The Impact of Decentralised Bargaining on Women: Lessons for Europe from the Antipodes*, Paper presented to the Fifth European Regional Conference of the International Industrial Relations Association (Dublin, Ireland, Aug. 26-29, 1997) (unpublished manuscript, on file with authors). See also Suzanne Hammond & Raymond Harbridge, *The Impact of the Employment Contracts Act on Women at Work*, 18 N.Z. J. INDUS. REL. 15-30 (1993); Suzanne Hammond & Raymond Harbridge, *Women and Enterprise Bargaining: The New Zealand Experience of Labour Market Deregulation*, 37 J. INDUS. REL. 359-76 (1995).

29. *Id.*

30. Hammond & Harbridge, *supra* note 28.

31. Alistair Pringle, *The Pursuit of Flexibility in the New Zealand Supermarket: The Employment Contracts Act, Continuities and Discontinuities*, 18 N.Z. J. INDUS. REL. 306-25 (1993); Janet Hector et al., *Industrial Relations Bargaining in the Retail Non-Food Sector: 1991-1992*, 18 N.Z. J. INDUS. REL. 326-41 (1993); Raymond Harbridge & Maryan Street, *Labour Market Adjustment and Women in the Service Industry: A Survey*, 20 N.Z. J. INDUS. REL. 23-34 (1995).

for this variation has been attributed to occupational segregation and the differential impact of the new bargaining regime across industries.³²

Overall, the deregulation and decentralization of collective bargaining and industrial relations has resulted in great variance and fragmentation in bargaining outcomes. To this end, the Employment Contracts Act has achieved the goal of introducing greater flexibility into the operation of the labor market. Decentralization has produced winners and losers. Workers with skills in short supply are no longer constrained by the principle of relativity. Vulnerable workers, the unskilled, those in casual or part-time employment, women, the young, etc. have faced an erosion of employment security and a worsening of employment conditions.

Trends in Industrial Disputes

The Employment Contracts Act places restrictions on the use of strikes and lockouts by parties to an industrial dispute. The Act does recognize the right of workers to strike and the right of employers to lockout subject to certain constraints, but a lawful strike or lockout must relate to the negotiation of a collective employment contract for the employees involved. A strike or lockout is deemed to be unlawful if it occurs during the currency of a collective employment contract, it relates to a dispute or a personal grievance, it is in support of a multi-employer contract, it is in contravention of a court order, or the appropriate notice has not been given where the strike or lockout occurs in an essential industry as defined by the Employment Contracts Act.³³ Participation in a strike or lockout on the grounds of a risk to health and safety is not considered to be unlawful.³⁴

The trend in industrial disputes in New Zealand is presented in Table 4³⁵ and is consistent with falling trends over the course of the 1980s and early 1990s in other Western countries. In the New Zealand context, several possible contributing factors include increasing unemployment throughout the late 1980s and early 1990s affecting job security and thus the willingness of workers to go on strike and the declining level of unionization over the later half of the 1980s (itself partially attributable to structural changes in the labor market). Some commentators have also credited the Employment Contracts Act, although invariably this is speculation.

The Employment Contracts Act maintained the tradition of a separate, specialist labor law jurisdiction despite significant pressure from employer groups for its abolition. The Act maintained the tradition of a two-tiered

32. Janet Sayers, *Women, the Employment Contracts Act and Labour Flexibility*, in EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES 210-33 (Raymond Harbridge ed., 1993); JOHN DEEKS ET AL., LABOUR AND EMPLOYMENT RELATIONS IN NEW ZEALAND 500-06 (2d ed. 1994).

33. Employment Contracts Act, §§ 63-64, 1991 (N.Z.).

34. ECA § 71.

35. See Table 4, Appendix.

system. It established the Employment Tribunal as a forum for informal mediation of disputes and grievances, with the authority to adjudicate on matters with the agreement of the parties, and the Employment Court to decide on points of law and to hear appeals of Tribunal decisions. The Employment Tribunal has both mediation and adjudication functions. The Employment Court oversees the function of the Employment Tribunal. Decisions of the Employment Court may be appealed to the Court of Appeal on points of law but not to the Privy Council. Table 5 shows applications to the Employment Tribunal since the first full year of the Employment Contracts regime.³⁶ It shows that the number of cases brought to the Tribunal has grown steadily, as has the number of applications outstanding at the end of each year.³⁷

The Employment Court and Tribunal are the main bodies for hearing disputes of rights between workers and employers. Official data on the operation of the Court and Tribunal show that use of the State-sponsored system of dispute and grievance resolution has been high. The number of applications brought before the Tribunal has risen consistently from 2,332 in the first full year of operation, to 5,144 for the year to June 30, 1996. Large delays in the hearing of applications have resulted, with 2,985 applications still outstanding as of June 30, 1996.³⁸

Unions operating in the late 1990s' environment are quite different creatures from those that existed prior to 1991. The new breed of union has learned one thing: its core business is collective bargaining. If it fails at its core business, it fails altogether. Industrial action, particularly in the public sector, is growing in New Zealand and will no doubt develop as unions (and their members) decide to resist further claims for concession bargaining and to make proactive claims for wage increases. The sting in the tail of the new breed of unions may well be more than most employers have bargained on. Where changes were sought by employers in Years One and Two of the Employment Contracts Act, they were largely achieved. Six years later, employers have difficulty imposing radical work re-organization. Unions have re-grouped and are not prepared to make further concessions. Stability in collective bargaining has become more apparent as a direct result of this re-organization, with the bargaining patterns established in the period 1991-1994 becoming somewhat entrenched.

36. See Table 5, Appendix.

37. *Id.*

38. NEW ZEALAND DEPARTMENT OF LABOUR, ANNUAL REPORT FOR THE YEAR ENDED JUNE 30, 1996 (1996). The majority of applications to the Tribunal relate to claims of unjustified dismissal. Personal grievances alleging unjustified dismissal accounted for 2,568 (80 percent) of the 3,220 applications to the Employment Tribunal disposed of in the year as of June 30, 1996. Recovery actions accounted for another 310 applications (10 percent of all disposed applications).

OTHER EFFECTS

The industrial relations effects of the Employment Contracts Act are clear: decollectivization and deunionization. What then of other effects: employment, productivity, and international competitiveness, for example? Curiously, remarkably little research has been conducted on the other effects of the Employment Contracts Act, with much of the rationale for support for the Act coming from ideological and polemic rather than analytical sources. Nonetheless, some limited analyses have been undertaken.

Researchers at the Reserve Bank of New Zealand have modeled the bargaining framework to analyze the impact of the Employment Contracts Act on wages. They conclude the following:

By making strikes and lockouts less costly to employers, and by introducing the possibility of a switch from collective to individual negotiations, the Employment Contracts Act will tend to reduce real wage settlements. However, the overall impact of the Act on real wages is uncertain, as upwards pressure on real wages will result if the Act raises productivity growth. The decentralization of bargaining that has occurred under the Act exposes the bargaining parties to greater competitive discipline from product markets, making wages more flexible in response to unemployment. This change in wage behavior has significant implications for the operation of monetary policy.³⁹

In testing the model, the difficulty experienced by Beaumont and Jolly is inadequate wage data. Their hypothesis seems certain to remain untested.

Easton has reviewed the findings of Kasper, who has argued that the New Zealand economy has shown substantial productivity growth since 1991.⁴⁰ Easton uses Kasper's own data to deny the claim and quotes the work of Philpott, who identifies that there has been no growth in productivity in the 1990s.⁴¹ Maloney has claimed that the Employment Contracts Act has increased employment.⁴² His claim is, however, a qualified one. Maloney has estimated the effects of the Act on employment levels and average wages rates. In the period reviewed, 1991:2-1993:4, full-time equivalent employment was reported as growing by 4.4 percent.⁴³ Maloney attributes

39. Craig Beaumont & Peter Jolly, *Wage Bargaining and the Employment Contracts Act 35* (Reserve Bank Discussion Paper G93/6, 1993).

40. Brian Easton, *Retaining the Benefits and Addressing the Pitfalls of the Employment Contracts Act* (Paper presented at the 11th IIR Industrial Relations Conference, Mar. 3, 1997); WOLFGANG KASPER, *FREE TO WORK: THE LIBERALIZATION OF NEW ZEALAND'S LABOUR MARKET* (1996).

41. Easton, *supra* note 40; see also Bryan Philpott, *A Note on Recent Trends in Labour Productivity Growth*, RESEARCH PROJECT ON PLANNING PAPER 281 (1996).

42. TIM MALONEY, *HAS NEW ZEALAND'S EMPLOYMENT CONTRACTS ACT INCREASED EMPLOYMENT AND REDUCED WAGES?* (University of Auckland Department of Economics Working Paper 135, 1994); Tim Maloney, *Estimating the Effects of the Employment Contracts Act on Employment and Wages in New Zealand*, 20 AUSTL. BULL. LAB. 320 (1994).

43. Maloney, *Estimating the Effects*, *supra* note 42.

“at least one percentage point” of this to the Act. Average real wages fell by 0.5 percent over the same period, and this is attributed exclusively to the Act.⁴⁴ Easton argues that the evidence pointing to the increase in employment levels in the 1990s is more likely due to the cyclical economic upswing of 1993 and 1994 rather than any policy change such as the Employment Contracts Act.⁴⁵ Inadequate data (in particular) will ensure that the other effects of the Employment Contracts Act are likely to remain largely untested and subject to speculation and posturing based on ideology rather than economic analysis.

THE PROSPECT OF FURTHER LABOR MARKET REFORM

The Employment Contracts Act has seen a radical and controversial shift in the role and focus of industrial relations in New Zealand. At its core, the Act has rejected the collectivist principles of previous industrial relations legislation in favor of a model of individual contracting and the free market. Unsurprisingly, perhaps, industrial relations reform was high on the political agenda during the 1996 General Election campaign.

The difficulties that have developed over collective bargaining have driven union calls for reform. The requirements of bargaining under the Act placed logistical obstacles in the way of successful collective bargaining by trade unions. These obstacles proved to be so large that in 1993 the New Zealand Council of Trade Unions, the largest central body of unions, took a complaint against the Act to the International Labour Organisation (ILO), alleging that the Act breached ILO Conventions on the Right to Organize and Collective Bargaining (Conventions 87 and 98, respectively). The ILO's Final Report concluded that the Act did not meet the requirement to promote collective bargaining and recommended changes to the legislation be made to bring it into line with ILO Conventions.⁴⁶ Overall, the ILO's Committee on Freedom of Association concluded:

[P]roblems of incompatibility between ILO principles on collective bargaining and the Act stem in large part from the latter's underlying philosophy, which puts on the same footing (a) individual and collective employment contracts, and (b) individual and collective representation. . . . In effect, it seems that the Act *allows* collective bargaining by means of collective agreements, along with their alternatives, rather than *promoting* and *encouraging* it.⁴⁷

44. *Id.*

45. See Easton, *supra* note 40.

46. Nigel Haworth & Stephen Hughes, *Under Scrutiny: The ECA, the ILO and the NZCTU Complaint 1993-1995*, 20 N.Z. J. INDUS. REL. 143-62 (1995).

47. INTERNATIONAL LABOUR ORGANISATION, CASE NO. 1698: FINAL REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION ON THE COMPLAINT AGAINST THE GOVERNMENT OF NEW ZEALAND PRESENTED BY THE NEW ZEALAND COUNCIL OF TRADE UNIONS 84 (1995) (emphasis in original).

The National Government had clearly signaled it was unwilling to tinker with an Act that it saw as central to economic policy. Employer groups, on the other hand, have called for further liberalization of labor law. The Employment Court has been attacked for its activist approach and its failure to "let contracts be contracts."⁴⁸ Employer groups have also called for greater freedom to contract, including abolition of minimum wage regulations.⁴⁹

The 1996 General Election resulted in a coalition government of the incumbent National Party and the center-right New Zealand First Party. The Coalition agreement announced on December 12, 1996, included thirteen "key initiatives of policy" for industrial relations.⁵⁰ Broadly these were (1) maintaining the Act, including voluntary unionism; the prohibition of strike/lockout action in pursuit of multi-employer collective bargaining; and the retention of the separate employment jurisdiction; (2) increasing the minimum adult wage by nearly 10 percent (from \$6.375 an hour to \$7.00 an hour) and reviewing the current youth minimum wage; (3) introducing "fairness" into bargaining procedures; (4) strengthening bargaining agents' rights to workplace access; (5) reviewing personal grievance procedures to codify "procedural matters" into the legislation; and (6) reviewing the performance of the Employment Tribunal and Court with a view to minimizing judicial activism.⁵¹

Reforms then will be limited and the thrust of the Act will remain intact. Notwithstanding moves to ensure that unions gain better access to workplaces and the introduction of some form of "fair" bargaining, the issues raised by the Council of Trade Unions in its complaint to the ILO are likely to remain largely unaddressed. However, employer groups' concern about the performance of the Employment Court has been taken on board, and may well result in significant change in the area of dispute resolution, particularly in relation to personal grievances.

48. Richard Epstein, *Employment Law: Courts and Contracts* 17 (N.Z. Business Roundtable, 1996).

49. JUDITH SLOAN, TOWARDS FULL EMPLOYMENT IN NEW ZEALAND: A RESPONSE TO EMPLOYMENT: A REPORT OF THE PRIME MINISTERIAL TASK FORCE ON EMPLOYMENT 28-33 (1994); ACIL ECONOMICS & POLICY, WHAT FUTURE FOR NEW ZEALAND'S MINIMUM WAGE LAW? (1994).

50. THE COALITION AGREEMENT BETWEEN NEW ZEALAND FIRST AND THE NEW ZEALAND NATIONAL PARTY (visited Dec. 10, 1996) <<http://www.executive.govt.nz/coalition>> (on file with authors). For fuller analysis of the proposed changes, and of the likely impacts of these changes, see Aaron Crawford & Raymond Harbridge, *External Legitimacy in New Zealand: An Update*, J. LAB. RES. (forthcoming, copy on file with authors).

51. THE COALITION AGREEMENT BETWEEN NEW ZEALAND FIRST AND THE NEW ZEALAND NATIONAL PARTY, *supra* note 50.

APPENDIX

Table 1: Collective Bargaining Coverage 1989/90 - 1996/97

1989/90 Coverage (000s)	Type of Settlement	1993 Coverage (000s)	1996/97 Coverage (000s)	Percentage Change 1989 -1997
	Multi-Employer Settlements			
384.6	Private Sector	38.2	47.0	-88%
169.3	Public Sector	51.8	60.7	-64%
553.9	Total Multi-Employer	90.0	107.7	-81%
	Single-Employer Settlements			
29.0	Private Sector	238.3	200.5	+591%
138.5	Public Sector	98.8	107.9	-22%
167.5	Total Single Employer	337.1	308.3	+84%
—	Awards, etc. still in force	1.6	—	—
721.4	Total Coverage	428.7	416.0	-42%

Note: The data for 1989/90 are unofficial and are the result of comprehensive surveys of unions and employers as to the coverage of awards and collective agreements.⁵² The data for 1993 are official data and are reported in Statistics New Zealand.⁵³ The data for 1996/97 are unofficial data resulting from extensive surveys of employers and unions and are derived from data reported by Harbridge and Crawford.

52. Raymond Harbridge, *Collective Bargaining Coverage in New Zealand: The Impact of the Employment Contracts Bill*, 17 AUSTL. BULL. LAB. 310-24 (1991).

53. STATISTICS NEW ZEALAND, LABOUR MARKET 1994 (1994).

Table 2: Unions, Membership, and Density 1985 - 1996⁵⁴

Year	Unions	Membership	Density
December 1985	259	683,006	43.5%
September 1989	112	648,825	44.7%
May 1991	80	603,118	41.5%
December 1991	66	514,325	35.4%
December 1992	58	428,160	28.8%
December 1993	67	409,112	26.8%
December 1994	82	375,906	23.4%
December 1995	82	362,200	21.7%
December 1996	83	338,967	19.9%

Table 3: Annualized Wage Dispersion in Collective Employment Contracts

Year to	Decrease	Zero	0.1% - 1.9%	2.0 - 4.9%	5.0%- 9.9%	10% or more
June 92	10%	44%	29%	12%	3%	2%
Dec 92	7%	42%	29%	14%	5%	3%
June 93	5%	35%	41%	16%	1%	2%
Dec 93	5%	33%	41%	19%	1%	1%
June 94	2%	34%	45%	18%	1%	0%
Dec 94	1%	32%	44%	21%	2%	0%
June 95	3%	28%	43%	24%	1%	1%
Dec 95	2%	15%	34%	48%	1%	0%
June 96	1%	11%	35%	50%	2%	1%
Dec 96	0%	5%	26%	67%	2%	0%
June 97	0%	5%	19%	73%	3%	1%

Harbridge & Crawford, *supra* note 12, at 18.

⁵⁴ Aaron Crawford et al., *Unions and Union Membership in New Zealand: Annual Review for 1996*, 22 N.Z. J. INDUS. REL. 212 (1997).

Table 4: Industrial Stoppages 1986-1996

Year ended Dec. 31	Complete Strike	Partial Strike	Lockout	Total	Number of workers involved (000)	Working days lost per worker involved	Average days lost per worker involved	Estimated loss in wages & salaries (\$000)
1986	206	3	6	215	100.6	1,329.1	13.21	119,496
1987	187	5	1	193	80.1	366.3	4.57	24,204
1988	162	10	0	172	104.0	381.7	3.67	32,632
1989	155	16	0	171	78.9	193.3	2.45	18,763
1990	126	10	1	137	50.0	330.9	6.62	48,433
1991	65	3	3	71	52	99	1.91	11,577
1992	41	6	7	54	26.8	113.7	4.24	19,372
1993	48	5	5	58	21.3	23.8	1.12	2,836
1994	56	7	6	69	16.0	38.3	2.39	4,580
1995	59	8	2	69	32.0	53.4	1.66	6,813
1996	63	8	3	74	44.4	72.9	1.64	10,245

Table 5: Claims before the Employment Tribunal 1992-1996

Year to June	Outstanding Applications at Start	Applications Received	Applications Withdrawn	Applications Disposed	Outstanding Applications at End
1992	17	2,332	459	743	1,079
1993	1,079	3,207	743	1,568	1,919
1994	1,919	3,592	1,046	2,447	1,954
1995	1,954	4,248	976	3,042	2,184
1996	2,184	5,144	1,121	3,220	2,985

