

Bargaining and Worker Representation under New Zealand's Employment Contracts Legislation : A Review After Two Years

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Résumé de l'article

Avant 1984, la politique économique et industrielle en Nouvelle-Zélande était dominée par des règlements gouvernementaux et un contrôle centralisé. En outre, l'État-providence et le socialisme d'État jouaient un rôle important en tant que contreponds de l'économie privée et de la puissance du marché. La philosophie directrice et la base juridique des relations du travail en Nouvelle-Zélande n'ont pratiquement pas changé ni été contestées. La reconnaissance officielle des syndicats, l'importance accordée aux conventions collectives au niveau national et centralisé, ainsi qu'un processus de règlement des conflits fondé sur un mécanisme de conciliation et une commission d'arbitrage étaient les principales caractéristiques du système. Depuis 1984, la déréglementation, la décentralisation, le libre-échangiste et le laissez-faire ont été les thèmes recherchés et mis en place tant par le Parti travailliste que par le Parti national.

En règle générale, le droit du travail, les relations du travail et le marché du travail n'ont pas échappé aux mutations radicales de la dernière décennie. La loi sur les contrats de travail (Employment Contracts Act) de 1991 représente un changement significatif dans les relations du travail. Cette loi supprime le mode de règlement des conflits et les institutions s'y rattachant. De plus, elle ne contient aucune référence à la notion de syndicats ou de syndicalisme. Toutes les dispositions de la précédente loi relatives à l'adhésion syndicale, au scrutin et aux élections au sein des syndicats ont été supprimées. Tous les droits exclusifs auparavant accordés aux syndicats ont été formellement retirés. Même si les syndicats sont toujours libres de jouer un rôle dans les relations du travail, ils ne possèdent plus automatiquement de droits exclusifs sur le lieu de travail. Selon cette loi de 1991, toute négociation vise à aboutir à un contrat de travail. L'expression « contrat de travail » est nouvelle. Elle couvre non seulement les documents collectifs (appelés conventions collectives), mais aussi les conventions individuelles, communément connues comme « contrats de service ». En fait, la notion de contrat de travail individuel semble être devenue le terme générique car un contrat individuel est défini par la loi comme un « contrat de service ». On attribue la qualification supplémentaire de « collectif » aux contrats de travail liant deux ou plusieurs employés. Cette très controversée loi sur les contrats de travail est en vigueur depuis maintenant deux ans et son effet a été très significatif sur la structure des relations du travail dans l'entreprise et leur fonctionnement. L'article fait état de deux études empiriques menées pendant cette période.

La première étude examine le système de négociation collective, son échec, et les changements apportés au processus de négociations pour ceux qui ont gardé une protection collective. Le taux de représentation du système de conventions collectives est de 45 % inférieur à ce qu'il était et on a pu constater une nette remise en question des acquis des salariés dans de nombreux contrats de travail. Ceci résulte essentiellement de l'échec de toutes les structures de négociations multi-employeurs. Les résultats de l'étude font aussi état de changements majeurs dans le contenu des conventions collectives, en particulier, une réduction des primes pour le travail en dehors des heures normales, les moindres acquis des femmes en comparaison avec les hommes et l'émergence d'un système d'emploi à « deux niveaux ».

La seconde étude fait état de la structure et de l'adhésion syndicale en Nouvelle-Zélande dans ce nouvel environnement. On constate la poursuite du déclin du nombre de syndiqués et de la densité syndicale depuis la mise en vigueur de cette loi, soit une réduction globale de 30 % du nombre de syndiqués et une densité syndicale en net recul, passant de 73 % à 46 %. La tendance à la consolidation des syndicats caractérisée par une chute du nombre de syndicats et une proportion croissante de syndiqués adhérant aux syndicats les plus importants, encouragée par la loi précédente, a été interrompue.

En fait, il est apparu une nouvelle tendance vers la fragmentation. L'étude rapporte des données à cet égard ventilées par industrie et par sexe. Si le régime de la loi sur les contrats de travail reste inchangé, le nombre de syndiqués continuera à diminuer. Les commerces de détail, les grossistes et le secteur tertiaire seront tout particulièrement vulnérables, le déclin se poursuivra dans le secteur agricole et la pression croissante réduira encore davantage l'adhésion aux syndicats dans les secteurs d'emploi les plus importants, la production industrielle et le secteur public. Il faut s'attendre à une fragmentation continue des syndicats vers le niveau de l'entreprise, mais la restructuration et la rationalisation interne du mouvement syndical apporteront une force allant à rencontre de cette fragmentation. Le nombre de syndicats est susceptible d'augmenter, mais la concentration de l'adhésion dans quelques syndicats importants se fera encore plus évidente.

De plus, les tendances actuelles laissent à penser que les négociations collectives continueront à se détériorer dans la mesure où les employeurs se refusent à entrer dans des accords multi-employeurs, qu'ils remplacent les accords collectifs par des contrats individuels, et refusent de négocier en toute bonne foi. La fragmentation des négociations continuera et une fois que les accords d'entreprise seront établis, le principe de la flexibilité régionale (relativement peu évidente jusqu'à présent) se traduira par des accords.

L'emphase persistante mise sur les contrats individuels va miner les bases de la négociation collective, en particulier dans les secteurs liés aux services. Les accords collectifs de facto pour lesquels les négociations ont été faibles, voire inexistantes, qu'on soumet au personnel pour signature continueront à se développer. La négociation à double palier va se poursuivre et s'accroître. Les syndicats du secteur public continueront à rencontrer des difficultés à amener les employeurs du secteur public à se réunir à la table de négociation sur des termes tant soit peu acceptables par le syndicat.

L'érosion des principes d'équité en matière d'établissement des salaires et autres conditions de travail est susceptible de persister. La différence de salaires à travail égal entre hommes et femmes se fera de plus en plus grande. Bien que la politique du Parti travailliste ne prévoit pas un retour à l'arbitrage, à la centralisation ou à l'adhésion syndicale obligatoire, la mise en valeur de relations collectives plutôt que des contrats individuels, un système d'enregistrement des syndicats et donc leur reconnaissance, des clauses visant à obliger à négocier et à négocier en toute bonne foi, tous ces points associés à l'abrogation des restrictions aux négociations multi-employeurs, contribueront largement à stopper la chute de la négociation collective et du syndicalisme.

Bargaining and Worker Representation under New Zealand's Employment Contracts Legislation A Review after Two Years

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and
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This paper examines the significant shift in the central philosophical and legislative base of labour relations in New Zealand since the adoption of the Labour Relations Act in 1987 and the Employment Contracts Act in 1991. It reports two empirical studies. The first examines the collective bargaining system. The second study reports the structure and membership of trade unions in New Zealand in this new environment.

Prior to 1984 economic and industry policy in New Zealand was dominated by state regulation and centralised control. Moreover, welfarism and state socialism played a significant role in counterbalancing private economic and market power. Since 1984 deregulation, decentralisation and free market, laissez-faire, economics have been the norm, pursued and applied with vigour by both Labour Party and National Party governments.

Corporatisation and privatisation of state trading agencies, elimination of rural and manufacturing industry subsidies, a programme of tariff reduction, floating exchange rates, and financial markets opened to full internal and

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international competition, have been but part of these thrusts. Reform of the tax system (a major shift of emphasis from direct to indirect taxation), major increases in applying user-pays policies and targeted support concepts to government produced economic and social goods (especially in health and education) have occurred. Corporate management philosophies, structures and processes have been grafted onto a reorganised and drastically reduced public service.

Labour law, labour relations and the labour market, generally, have not been exempt from the radical change of the past decade. For ninety years from 1894 the central philosophic and legislative base of labour relations in New Zealand remained, largely, unchallenged and unchanged. However, in the past seven years two major re-writes of legislation, the *Labour Relations Act 1987* and the *Employment Contracts Act 1991*, have made a significant shift in those fundamentals.

THE DEATH OF CONCILIATION AND ARBITRATION

New Zealand had a long history of state-sponsored trade unionism with up to 60 percent of the workforce being employed under the terms and conditions of a union negotiated collective bargain. For many years, New Zealand and Australia stood alone among the market industrialised countries, as the only countries that had adopted systems of industrial conciliation and arbitration as a means of resolving disputes over wage fixing and related matters. In New Zealand the result was a network of (mostly) occupationally based awards with coverage throughout the country. These awards invariably contained blanket coverage or common rule provisions (a mechanism first developed in the 1930s) that bound all employers covered by the coverage clause of the award, and further bound all workers covered by the award through a compulsory union membership provision. Unions had a right to have exclusive jurisdiction conferred on them through the process of union registration. In addition, unions had a right to have a union membership clause inserted in settlements. By 1990 the reality of collective bargaining in New Zealand was that nearly all settlements registered by the Arbitration Commission contained both blanket coverage and union membership provisions. This system bound some 720,000 workers (circa 73 percent of the workforce) and around 70,000 employers.

However, over the last 20 years, New Zealand had gradually departed from the tradition of arbitration. Boxall (1990; 1991) has analysed that departure in three phases. The first phase, a 1973 statute, endorsed the growth of free collective bargaining and introduced the North American distinction between disputes of right and disputes of interest.

The second phase occurred during the period of the Labour government (1984-1990) which saw compulsory arbitration replaced by voluntary arbitration and an attempt to shift from occupational to industry and enterprise bargaining. The reforms to New Zealand's industrial relations system in 1984 which saw compulsory arbitration become voluntary allowed the potential collapse of awards. Labour's decision to require a single set of negotiations to cover all workers covered by the resultant award or agreement was designed to encourage the development of enterprise bargaining tailored for specific workplaces and companies. It had, however, the reverse effect and unions largely abandoned their limited foray into enterprise bargaining in an attempt to retain securely the status of their awards (Harbridge and McCaw 1992).

Much of the difficulty in developing enterprise or single employer bargaining resulted from the occupational basis of union registration in New Zealand — a concept fine in the 1890s but increasingly irrelevant in the 1990s. Industry and workplace bargaining was made difficult while unions maintained exclusive jurisdiction and monopoly coverage, and remained registered largely on an occupational basis. The 1984-1990 Labour government addressed various labour market issues but failed to tackle this one. By 1990, this difficulty had reached crescendo pitch in some industries. In the health sector, for example, over 60 of New Zealand's (then) 100 unions had the right to collectively bargain for members employed by the hapless health employers.

The third phase, as identified by Boxall, followed the passage of the *Employment Contracts Act* 1991. By 1990, New Zealand's National Party had captured the mood of many employers who were seeking greater flexibilities than they believed the traditional award system allowed. National campaigned as an alternative to Labour — a party exhausted after a vigorous six years of economic restructuring — and high on National's agenda was reform of the labour market and the industrial relations institutions. National won the election in a canter gaining 68 of the 97 seats in New Zealand's Parliament.

THE BIRTH OF EMPLOYMENT CONTRACTS

National wasted little time in developing its new employment contracts regime. The Employment Contracts Bill was introduced to Parliament less than two months after the election. Surprise at the nature and extent of the Bill was expressed in many quarters, but National had made little secret of its plans before the election. As some have suggested, perhaps the only real surprise was that an elected Government was actually implementing something from its manifesto (Walsh and Ryan 1993).

The employment contracts legislation is based on the libertarian notion that workers and employers are free agents to contract with each other over the

price and conditions of work. Workers are no different in the market than a case of apples to be auctioned at the daily fruit auction. Individualism is promoted over collectivism. New Zealand's long legacy of state sponsored unionism is gone: the employment contracts legislation makes no reference to unions, and the Government is now unable to report on the number and membership of unions, as the State no longer maintains such records.

The *Employment Contracts Act* is a simple piece of legislation with far reaching effects, which are comprehensively reviewed elsewhere (Harbridge 1993). Part One of the Act provides for freedom of association and gives employees the right to associate or not to associate with other employees for the purpose of advancing their collective employment interests. Membership of any employee organisation is entirely voluntary, and discrimination in employment matters on the grounds of membership or non-membership of an employee organisation is prohibited.

Part Two of the Act deals with issues of representation and bargaining arrangements. The *Employment Contracts Act* abolished the conciliation council mechanism, the Arbitration Commission and the concept of an "award". All bargaining is to be towards an employment contract, a term which covers not only collective documents (previously known as awards or agreements), but also individual agreements, commonly known as contracts of service. Employers and employees are free to choose who will represent them in bargaining and both the type of contract, individual or collective, and its contents are a matter for negotiation. However, it is specifically unlawful for employees to strike in support of a multi-employer collective employment contract. The emphasis on individual contracts, and the lack of emphasis on collective bargaining, is such that the *Employment Contracts Act*, arguably, fails to meet the requirements of several International Labour Organisation conventions, particularly the International Labour Organisation Conventions 87 (Freedom of Association and Protection of the Right to Organise), 98 (Right to Organise and Collective Bargaining) and 154 (Collective Bargaining) (Anderson and Walsh 1993). The New Zealand Government has now abandoned its attempt to ratify the relevant conventions as a result of informal advice, and the New Zealand Council of Trade Unions has made a formal complaint to the ILO about contravention of the conventions.

There is no longer any provision for the exclusive registration of union coverage for any specific occupational or industry based group. Employers and employees can represent themselves or be represented by a bargaining agent who can be any person, group or organisation they choose. While the Act requires an employer to "recognise" the bargaining agent nominated by the workers, there is no requirement for the employer to take part in any bargaining process. Unlike the Canadian labour statutes, the New Zealand legislation fails

to provide a duty to bargain and procedures for ensuring “good faith” bargaining. Given the current economic recession experienced in New Zealand, the power to decide whether or not to bargain rests almost exclusively with the employer.

The transition from the multi-employer award system to employment contracts was designed to allow existing awards and collective agreements to run their natural course to their nominal expiry. Thereafter the award could be replaced by a negotiated collective or individual employment contract. In the absence of successful negotiations the award was to be replaced by an individual contract “based on” the terms and conditions of the previous award. The government made much of assuring workers that no worker would be forced to accept a change in working conditions unilaterally imposed by the employer, and this view was upheld by the Employment Court in some early decisions. A number of employers expressed surprise that the Act did not allow them to unilaterally change their worker’s conditions of employment, but that is the general nature of contract law — a contract is a contract and cannot be changed unilaterally (Kiely and Caisley 1993).

The reality for many workers and employers was, however, that significant changes to employment conditions soon occurred. Employer expectation that the employment contracts law did allow them to exercise enhanced power in negotiations was soon to be fulfilled. The use of the lockout (and the partial lockout) of workers as a bargaining tool in industrial negotiations was confirmed by the Employment Court as a legitimate mechanism for employers eager to persuade their workforce to accept new (and reduced) employment conditions.

The *Employment Contracts Act* was enacted on 15 May 1991. In this paper, two years after that enactment, we review the impact of the legislation on collective bargaining and union membership, two important aspects of industrial relations.

COLLECTIVE BARGAINING

Prior to May 1991, awards and other settlements registered with the former Arbitration Commission were a matter of public record, and were published annually as the *Book of Awards*. The *Employment Contracts Act* reduces the employment relationship to the basis of a legal contract. As with other commercial contracts, the employment contract is seen as solely between the parties and as such not open to public scrutiny. Accordingly, there is no public record of collective bargaining. However, a number of sources of data are being developed to provide some insights into the patterns of bargaining that have emerged in the two years since the legislation took effect. First,

employers who enter into collective employment contracts covering 20 or more staff have a statutory obligation to send a copy to the Department of Labour who observe the confidentiality of the contract but report on general trends. The level of compliance by employers is, however, quite low (Andrews and Rasmussen 1993). Second, the Government commissioned a survey of 1,000 workers and 1,437 enterprises which was undertaken in August 1992 by Heylen Research Centre (Armitage and Dunbar 1993). Third, a series of proactive surveys of collective bargaining have been undertaken at Victoria University, and it is data from these surveys that are reported in this paper.

We have undertaken a number of surveys — of nearly 4,000 employers and all trade unions — requesting copies of all collective employment contracts that have been agreed, so as to compile a contracts database. As contracts expire, requests are made for any replacement contracts. On the second anniversary of the Act, May 1993, the database contained 1,558 collective employment contracts covering slightly more than 9,000 employers and 273,000 workers. This sample represents 63 percent of the unionised workforce at 31 December 1992, 38 percent of workers covered by collective settlements under the “old” system, or 25 percent of the current full-time workforce. Our analysis of these collective employment contracts presents nine key findings.

A Significant Collapse in Collective Bargaining

A very significant collapse in collective bargaining has occurred. We estimate that collective bargaining coverage has fallen by nearly 60 percent in the two years since the Act took effect. We estimate that currently there are slightly more than 300,000 workers who are covered by (or who remain in negotiations for) collective employment contracts. Just 40 percent of those workers who were covered by an award or collective agreement under the old system are now covered by a collective contract, the rest are on individual contracts.

The Fate of Multi-employer Bargaining

Multi-employer bargaining has largely collapsed. In a nation where multi-employer bargaining had been the norm for the nearly 100 years, where all but 6 percent of the unionised private sector workforce were covered by a multi-employer bargain, we can now report that we can identify just 30 multi-employer contracts (2 percent of all collective contracts) covering some 44,000 workers (16 percent of all workers in the sample). Single-employer, enterprise bargaining has become the dominant form of bargain struck.

While the collapse of multi-employer bargaining was expected by many unionists when the legislation was enacted, the extent of the collapse has

surprised many. The collapse has come about for two main reasons. First, it is illegal under the employment contracts legislation for unions and workers to take strike action in support of a multi-employer contract. That in itself is more indicative of attitude than an actual impediment. Unions in New Zealand have traditionally been litigious rather than militant and have rarely relied on strike action to secure a bargaining position. The legal restriction on strikes was, however, no aid to gaining multi-employer bargains. Second, and more importantly, the negotiation of multi-employer bargains requires the existence and cooperation of the appropriate employer organisation. The tradition in New Zealand has been that one central organisation of employers, the New Zealand Employers Federation, has coordinated multi-employer bargaining through the award system. Industry associations played a minimal role (if any) in such negotiations. With the change in the legislation, the New Zealand Employers Federation encouraged employers away from multi-employer arrangements and proposed enterprise settlements in their place. Industry associations were poorly placed to step in and fill the breach, having no history of such a role. Accordingly, unions were largely unable to find authorised employer organisations prepared to cooperate with multi-employer bargaining arrangements. The result, predictably, has been the collapse of multi-employer settlements. This naturally has had a major impact on unionisation levels. Visser (1991) identifies a strong multi-employer bargaining framework as one of four key determinants as to the holding up of unionisation rates internationally. The absence of such a framework is certain in New Zealand to be a key cause of falling union density.

Worker Choice of Bargaining Agent

Much was made during the introduction of the legislation that workers would now be free to choose the bargaining agent of their choice. Trade unions, although losing all special status under the employment contracts legislation, have retained the support of many members as the collective bargaining agent. Unions negotiated 1167 collective contracts (74 percent) covering 231,000 workers (85 percent). Just 33 contracts covering 9,000 workers were negotiated by identifiable non-union bargaining agents. In the remaining 358 contracts covering 32,000 workers (12 percent), the workers either represented themselves or were not represented in negotiations for the new contract. Anecdotal evidence indicates that in most cases, the employer presented the new collective contract to staff for their signature and that little bargaining took place. Research by McAndrew (1992; 1993) confirms that such presentation has become a common form of negotiation. A leading business magazine has referred to this practice as *Sign or Resign* (*Management Magazine* 1992).

Flexibilisation through Regionalism

Under the previous bargaining system, not only were multi-employer settlements the norm, these settlements were frequently national in their coverage. In fact, 75 percent of the unionised work force was covered by a settlement with coverage throughout all of New Zealand. One stated objective of the Act was to improve the adaptability of enterprises to their competitive market places (Armitage and Dunbar 1993: 95). It was expected then that under the new system, national settlements would be replaced by settlements that reflected the labour market in specific regions. While the majority of contracts are now specific to the employer's operation in a particular city or town, national bargaining has continued for many. There are 248 contracts (16 percent) covering 167,000 workers (61 percent) which have national coverage. Many employers have decided to implement the same wages and other conditions of employment throughout their company, thus not taking advantage of the opportunities for flexibilisation based on regional labour market considerations.

The Collapse of the Comparative Wage Justice System

Wage increments in collective contracts are widely dispersed. In the first year, approximately half of workers covered by collective contracts experienced either wage decreases or no wage movement at all; at the other end of the spectrum a group of workers escaped from their traditional wage relativities and achieved wage increases as high as 20 percent. Overall the mean weighted wage movement on an annualised basis showed hardly any wage movement at all, a 0.1 percent increase.

In the second year, the extent of dispersion remains, however the extremes have been trimmed. Approximately 45 percent of workers covered by collective contracts experienced no wage movement or a decrease whilst 35 percent of workers received wage increases between 1.0 and 1.9 percent. The weighted mean wage increase taken on an annual basis is 1.1 percent. The level of wage movement reported is likely to be coming off a lower base. Evidence suggests that many employers took the opportunities presented to them in the first year under the new legislation to reduce their labour costs (either by reducing wages directly or by removing penalty rates of pay). The small increases reported in the second year will not have offset the reductions previously experienced by many workers.

The Reduction in Penal and Overtime Rates of Pay

A detailed analysis of working time arrangements in collective contracts indicates that there have been significant changes (almost invariably

reductions) to working time arrangements (Harbridge and Tolich 1993). Contracts covering 111,000 workers (40 percent) do not contain "clock hours" which specify the ordinary hours of work each week. The absence of clock hours makes the attainment of penal and overtime rates difficult. A growing number of contracts in the hotel, retail and service sector are providing for a standard four ten-hour day (rather than the five eight-hour) week. Penal rates have commonly been reduced.

The Effects on Women Workers

A detailed analysis of the contracts by gender has produced the unsurprising finding that women have fared worse than have men in the collective contracts examined (Hammond and Harbridge 1993). The mean wage movement for women was just one-third of that for men. Contracts covering mainly men workers were significantly more likely to experience a large wage increase than were contracts that were mixed or which covered mainly women workers. Contracts covering mainly women workers were significantly more likely to experience changed working time arrangements which have led to women experiencing lower access to and reduced levels of overtime payments.

The Two-tier Employment System

There is no doubt that many new (and reduced) conditions of employment have been introduced under this new system, though frequently existing employees have had their conditions maintained through a system of "grand-parenting" existing staff to existing conditions. In many situations, new hires come in at lower base rates of pay and with lower penal rates and other conditions. The development of the two-tier system was enabled by the employment contracts legislation which made the extension of any collective contract to new hires a negotiable matter. There is no automatic "extension" mechanism for allowing the contract to cover new employees. This potentially allows employers to undercut the existing contract by engaging new workers at lower rates. Many unions have sought to get around this by negotiating into the contract a clause requiring the employer to offer any new employee the right to become party to the existing collective employment contract. Many employers have refused to agree to such a clause but instead had agreed to a provision that stated that new employees would be covered by the existing contract if the employer *consented*. Clearly, in many cases, such consent has not been given.

The two-tier system has been tried elsewhere. Two-tier wage structures became common-place in the 1980s in the United States of America as employer ascendancy in collective bargaining grew. Workers working alongside each other performing the same duties and functions are often paid very

different rates, based not on performance but simply date of engagement with the employer. Considerable research has been undertaken on the effects of these policies. Not surprisingly, research focusing on those on the low-tier shows that such workers perceive the pay structure as unfair, have lower pay satisfaction and organisational commitment, and report poorer worker-management relations than do high-tier workers (McFarlin and Frone 1990). Further, a recent study (Heetderks and Martin 1991) shows that not just the low-tier group of workers are dissatisfied. High-tier workers are also expressing dissatisfaction with the two-tier wage system as they fear, amongst other things, that they will be replaced with cheaper workers. And growing employer concerns about the negative consequence of paying workers different rates for the same work are behind the notable recent decline of the two-tier system in the United States, according to Heetderks and Martin. The international experiences of management are not irrelevant in New Zealand. There is every reason to believe that the implementation of a two-tier system by New Zealand employers will have similar effects to those observed in the United States — and worker dissatisfaction and decreased commitment is unlikely to be what employers who are battling a recession require.

Public-private Sector Differences

Reform in the public sector through 1987-1989 had transformed the collective bargaining system so that enterprise bargaining had become the norm in the core public service, and only in the health and education sectors were multi-employer bargaining arrangements prevalent. In the private sector, at that time, multi-employer bargains were the most common form of bargain, with enterprise bargaining covering only some 6 percent of the unionised private sector workforce. As a result the *Employment Contracts Act*, with its thrust towards decollectivising and the elimination of multi-employer bargaining, has had very different effects on collective bargaining (and employee retention of union membership) in the public vis-à-vis the private sectors.

Job (in)security has played a significant role in the public sector. The impact of first, corporatisation, and then privatisation, in many government spheres led to a significant reduction in employment and to many quite large scale redundancies. After the implementation of the Employment Contract in May 1991 transitional bargaining settlements saw most public sector collective contracts extended through to June 1992. A year later many of these, particularly in the core public sector, have not been re-negotiated and the existing staff are deemed to be on individual contracts based on the former collective contract. The effect of this is that the individual contracts retain attractive provisions regarding redundancy and retrenchment, and current employees, concerned that further job losses will occur, have instructed their unions not to

enter into contracts that diminish those benefits. New employees coming into the public sector are invariably being placed on individual contracts that do not contain these conditions, and the resultant "two-tier" workforce makes it very difficult indeed for the union to present a set of claims for a single replacement collective contract that public sector employers will accept.

Union membership (which historically had been almost always voluntary in the public sector) has suffered a smaller decrease, and one that is more likely to be attributed to decreased levels of employment than to any mass defection from the main public sector unions.

Employer size, and primary/secondary labour market issues, are also important considerations. Public sector unions deal with large employers and not the plethora of small employers that had been party to the large multi-employer awards in the private sector. Public sector employers are largely in the primary labour market, whereas many private sector employers are in the secondary labour market, characterised by staff with lower skill levels, poorer pay and working conditions, and high job turnover. Large employers are easier for unions to organise. Secondary labour market employers are very much more difficult for unions to retain involvement. Both reasons help explain why union membership has largely held up in the public sector, whilst declining dramatically in the private sector.

UNION MEMBERSHIP

For almost 100 years, from 1894 through to 1991, trade unions in New Zealand operated with a legislative base that protected and encouraged unionism. Registration, that protected the right to organise and the right to bargain, *compulsory arbitration* and *compulsory unionism* were elements of this protection. Union membership grew and density increased over time. That pattern of expansion has now reversed. Unions have lost a quarter of a million members since 1985.

Union membership data is no longer collected by the New Zealand government. Prior to 1991 the Registrar of Unions was required to report annually on the number of unions and their membership. With the abolition of the office of the registrar under the new legislation no official records are maintained. Data post-1991 is reported from an annual survey of unions conducted by the authors.

The decline is most dramatic since the implementation of the employment contracts legislation. Unions lost some 90,000 members in the first seven months of the new system and a further 86,000 members in the most recent year, an aggregate loss of almost 30 percent of membership in less than two

years. Union density has fallen from a high of 73 percent in 1989 to 46 percent in 1992. Data of the number of unions, union membership and union density 1985-1992 is presented in Table 1.

TABLE 1
Number of Unions Membership and Union Density 1985-1992

		<i>Number of unions</i>	<i>Membership</i>	<i>Density</i>
Dec	1985	259	683,006	66%
Sept	1989	112	648,825	73%
May	1991	80	603,118	65%
Dec	1991	66	514,325	56%
Dec	1992	58	428,160	46%

Sources: Fuller 1989; Harbridge and Hince 1992, 1993.

Harbridge and Hince (1992, 1993) argue that the decline in union membership and density between September 1989 and December 1991 can be ascribed to the expectation and then the reality of the *Employment Contracts Act* 1991. These effects continued in 1992. An increasing trend to placing employees on individual contracts in contrast to collective contracts, a more general collapse of collective bargaining as reported above, and the repeal of the compulsory unionism provisions, were specific aspects of the new industrial relations environment that impacted on union membership.

Size of Unions and Membership Concentration

In December 1985, of the 259 registered unions, 147 had less than 1,000 members. Thirty-seven percent of union members were in unions with more than 10,000 members. Average union membership was (approx.) 2,000 members. The Labour Relations Act 1987, passed by a *Labour government*, sought to increase the viability of unions to a point where independence of the legislative props of the past could be envisaged. To this end, the Act increased the minimum union size for retaining registration from 10 to 1,000 members.

Harbridge and Hince (1992, 1993) argue that the dramatic changes between 1985 and 1989 are a direct result of the legislative change. However, internal forces for change in these directions were emerging within the union movement (see NZCTU 1988, 1989), and reinforced the legislative intent. By May 1991 the number of unions had decreased to 80, only 4 unions had less than 1,000 members, and the 20 unions with membership greater than 10,000 members accounted for 72 percent of union membership.

The *Employment Contracts Act* simply abolished union registration and as a consequence the 1,000 minimum membership rule. Further, the intent of the legislation was to abandon national awards, minimise multi-employer settlements and, by contrast, enhance and encourage enterprise bargaining and unionism. A philosophy of the propriety of competition between unions for membership also underlies the current legislation, but is in sharp juxtaposition to the legislative protection of membership territory in the era of union registration. There is also emerging evidence of internal divisiveness between segments of the union movement, leading to small breakaway groups, particularly at the enterprise level. A combination of intra-union disagreements and employer support may be facilitating this development.

Up to December 1991 the internal momentum for restructuring within the union movement was maintained. The number of unions continued to decline. Amalgamation remained the main reason, although several unions (including the NZ Clerical Workers Union, a union of some 15,000 members) simply ceased to function due to the impact of the *Employment Contract Act* changes, particularly the abolition of compulsory unionism. Aggregate union membership continued to decline, but the concentration in larger unions continued.

The real impact of the philosophical attitude towards unionism of the *Employment Contracts Act* regime become more apparent in the December 1992 survey (although the contra-force of an underlying continuance of the internal union movement thrust for rationalisation persists). The annual survey for December 1992 covers 58 unions. There are now 7 unions with less than 1,000 members. It also must be recorded that in late 1992 (and continuing into 1993) the authors have noted the emergence of several additional small, enterprise based unions. To date precise information has not been available, although (imprecise) information suggests that aggregate membership is less than 2,000 members. Further information is being sought in respect of this group of unions. The legislative intent supporting a fragmentation of unions is now impacting on the union movement. However, thirteen unions with more than 10,000 members account for a high membership concentration, 72 percent of total membership.

Union Membership by Industry, Gender and Affiliations

The historical data series collected by the Registrar of Unions was restricted to the number of unions and aggregate union membership. In conducting the survey since the introduction of *Employment Contracts Act* we have sought to disaggregate data collected by industry and gender. The data reported is an approximation given that many unions had difficulties in determining the disaggregations requested. Notwithstanding, the data represents

broad trends and directions of change. In 1991 women comprised exactly 50 percent of all union members. In the 1992 returns a small drop, to 47 percent, is recorded.

Union membership by industry for December 1991 and 1992 is shown in Table 2. The largest percentage losses have occurred in construction, wholesale and retail, agriculture, and mining — all sectors which have experienced losses in excess of 40 percent of the membership in just 12 months. The largest absolute loss was in the wholesale and retail sector which lost nearly 30,000 members over the year. Two sectors, energy and transport and communication, experienced small increases in membership.

TABLE 2
Trade Union Membership by Industry

<i>Industry</i>	<i>1991</i>	<i>1992</i>	<i>Decline</i>	
			<i>No</i>	<i>%</i>
Agriculture	14234	7002	7232	42
Mining	4730	1996	2734	42
Manufacturing	114564	97409	17155	15
Energy	11129	11721	(592)	(5)
Construction	14596	3930	10666	73
Wholesale and Retail	64335	34976	29359	46
Transport and Communication	52592	56084	(3492)	(7)
Finance	32219	25915	6304	20
Public service	205925	189130	16795	8
Totals	514324	428163	86161	17

The peak organisation for worker representation in New Zealand is the New Zealand Council of Trade Unions (NZCTU). In 1991 only 65 percent of all unions were affiliated to the NZCTU but they were the largest unions — representing 87 percent of all union members. In 1992 fewer unions were affiliated (57 percent) but more importantly the number of union members in unions affiliated to the NZCTU fell to 80 percent. Unions disaffiliated from the NZCTU for a number of reasons: amalgamations reduced the number of affiliates; some smaller unions could no longer afford to pay capitation fees; other unions became disaffected with NZCTU leadership and policies and in early 1993 an alternative peak council, the Trade Union Federation (TUF) was formed. The number of unions which have joined TUF is small, and collectively have comparatively few members. None of the large unions has joined.

Traditionally many unions have affiliated to the New Zealand Labour Party. The basis of affiliation is generally for part, rather than all, of each unions membership. In 1991 11 unions covering 25 percent of all union members were affiliated to the Labour Party. In 1992 the number of unions affiliated to the Labour Party had fallen (exclusively as a result of amalgamations) to 7 but these unions continue to represent 25 percent of all union members.

PROSPECTS

A general election was called before the end of 1993. Some significant differences are emerging as between the policy positions of the major parties in respect of labour relations. The National government has indicated that there will be only minor changes to the legislation. The Labour Party, on the other hand, has indicated that it will repeal the *Employment Contracts Act*, replacing it with an *Employment Relations Act*. While Labour confirms that there will be no return to the past with blanket coverage awards and compulsory union membership, there will be changes made that restore union recognition and that employers will not be able to circumvent the collective bargaining process by offering staff individual contracts where those staff have voted for a collective agreement (a variation of the "good faith bargaining" principle). With these distinctions in mind, together with the information related to developments of the immediate past as outlined in this paper, some predictions about future changes in unionism and collective bargaining can be made.

Prospects: Unionism

If the *Employment Contracts Act* regime continues unchanged the contraction in aggregate union membership will continue. The retail and wholesale, and the service sectors will be particularly vulnerable, the decline in the agricultural sector will persist, and increasing pressure will further reduce membership in the largest employment sectors, manufacturing and the public sector. Further fragmentation of unions may occur (towards the enterprise level). Employer pressure, and internal divisiveness within unions will continue whilst the legal framework places few constraints on competition between labour market institutions (both unions and non-union bargaining agents). An emerging and expanding focus on workplace reform will place additional pressure on traditional industry and occupational union structures. Continuing restructuring and internal rationalisation of the union movement will provide a counteracting focus to this fragmentation. In short, the number of unions is likely to increase but the concentration of membership in a few large unions will become even more noticeable.

The labour relations policy of the Labour Party does not envisage a complete return to pre-*Employment Contracts Act* positions. For example, legislative compulsory unionism will not return, nor will compulsory arbitration or national occupational awards. However, a return to registration of unions, recognition of a duty to bargain (in good faith), removal of constraints to multi-employee bargaining, and the establishment of industry and national tripartite consultation, will alter the context within which unions operate. Under such circumstances the pattern of decline and fragmentation may be halted and perhaps reversed. Legislative change will be important, but the real challenge is for unions to respond to the needs of the worker, to continue to modernise structures and operational processes, and to develop internal links and resource bases that can meet these challenges. Such challenges have confronted many labour movements throughout the world over the past 15 to 20 years. New Zealand trade unions were, like so many areas of the economy, insulated from these effects until more recently. The adjustment shocks have been more dramatic. The introduction of industry and national level consultative mechanisms as intended by a Labour government would provide a further legitimisation of unionism, through the recognition of peak bodies and key industry unions, thus providing a frontier of recognition for the re-establishment of union involvement at other levels, and in other areas of the labour market (training, occupational safety and health, for example), as well as collective contract bargaining.

Prospects: Bargaining

If the *Employment Contracts Act* regime continues then current trends indicate that collective bargaining will continue to collapse as employers refuse to enter into multi-employer settlements, as employers replace collective settlements with individual contracts, and as employers refuse to bargain in good faith. The fragmentation of bargaining reported earlier in this paper will continue and once enterprise settlements are established, regional flexibility (of which comparatively little has been observed to date) will be translated into settlements.

The continued emphasis on individual contracts will further erode the basis of collective bargaining particularly in the service sectors. "De facto" collective agreements where there has been no little or no negotiation, but rather, the agreement has been presented to staff for signature will continue to flourish. A further factor likely to lead to the collapse of more collective agreements will be the growth of the two-tier bargaining arrangements discussed. The existence of a two-tier employment structure within the firm, makes the re-negotiation of an existing collective agreement difficult for as time passes more and more of the firm's employees are on the reduced conditions, and the

union is faced with the unpalatable task of accepting this if it wants to renew the agreement. This situation has developed in many public sector agreements in New Zealand and the unions involved are finding it increasingly difficult to get public sector employers to the collective bargaining table on terms that are in any way acceptable to the union.

Finally, there is a demonstrable erosion of equity principles in establishing wages and other conditions of employment. This erosion is likely to continue. Of particular concern will be the widening of the gender gap in pay settlements.

Labour Party policy does not envisage a return to arbitration and centralisation. It is unlikely that tripartite consultative bodies will be used to establish agreed base criteria for contract outcomes. However, a re-emphasis on collective relations, rather than individual contracting, the provision for union registration and hence recognition, provisions to impose a duty to bargain and to bargain in good faith, together with the repeal of the restrictions to multi-employer bargaining, will go a long way to halt the collapse of collective bargaining and unionisation itself. Presently the political opinion polls indicate the National government to be a very unpopular government and that the Labour Party is a possible next government for New Zealand. The forthcoming election will almost certainly determine the long term future of collective bargaining and trade unionism.

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Négociations salariales et représentation syndicale selon la loi néo-zélandaise sur les contrats de travail Bilan après deux années

Avant 1984, la politique économique et industrielle en Nouvelle-Zélande était dominée par des règlements gouvernementaux et un contrôle centralisé. En outre, l'État-providence et le socialisme d'État jouaient un rôle important en tant que contre-poids de l'économie privée et de la puissance du marché. La philosophie directrice et la base juridique des relations du travail en Nouvelle-Zélande n'ont pratiquement pas changé ni été contestées. La reconnaissance officielle des syndicats, l'importance accordée aux conventions collectives au niveau national et centralisé, ainsi qu'un processus de règlement des conflits fondé sur un mécanisme de conciliation et une commission d'arbitrage étaient les principales caractéristiques du système. Depuis 1984, la déréglementation, la décentralisation, le libre-échangiste et le laissez-faire ont été les thèmes recherchés et mis en place tant par le Parti travailliste que par le Parti national. En règle générale, le droit du travail, les relations du travail et le marché du travail n'ont pas échappé aux mutations radicales de la dernière décennie.

La loi sur les contrats de travail (*Employment Contracts Act*) de 1991 représente un changement significatif dans les relations du travail. Cette loi supprime le mode de règlement des conflits et les institutions s'y rattachant. De plus, elle ne contient aucune référence à la notion de syndicats ou de syndicalisme. Toutes les dispositions de la précédente loi relatives à l'adhésion syndicale, au scrutin et aux élections au sein des syndicats ont été supprimées. Tous les droits exclusifs auparavant accordés aux syndicats ont été formellement retirés. Même si les syndicats sont toujours libres de jouer un rôle dans les relations du travail, ils ne possèdent plus automatiquement de droits exclusifs sur le lieu de travail. Selon cette loi de 1991, toute négociation vise à aboutir à un contrat de travail. L'expression « contrat de travail » est nouvelle. Elle couvre non seulement les documents collectifs (appelés conventions collectives), mais aussi les conventions individuelles, communément connues comme « contrats de service ». En fait, la notion de contrat de travail individuel semble être devenue le terme générique car un contrat individuel est défini par la loi comme un « contrat de service ». On attribue la qualification supplémentaire de « collectif » aux contrats de travail liant deux ou plusieurs employés. Cette très controversée loi sur les contrats de travail est en vigueur depuis maintenant deux ans et son effet a été très significatif sur la structure des relations du travail dans l'entreprise et leur fonctionnement. L'article fait état de deux études empiriques menées pendant cette période.

La première étude examine le système de négociation collective, son échec, et les changements apportés au processus de négociations pour ceux qui ont gardé une protection collective. Le taux de représentation du système de conventions collectives est de 45 % inférieur à ce qu'il était et on a pu constater une nette remise en question des acquis des salariés dans de nombreux contrats de travail. Ceci résulte essentiellement de l'échec de toutes les structures de négociations multi-employeurs. Les résultats de l'étude font aussi état de changements majeurs dans le contenu des conventions collectives, en particulier, une réduction des primes pour le travail en dehors des heures normales, les moindres acquis des femmes en comparaison avec les hommes et l'émergence d'un système d'emploi à « deux niveaux ».

La seconde étude fait état de la structure et de l'adhésion syndicale en Nouvelle-Zélande dans ce nouvel environnement. On constate la poursuite du déclin du nombre de syndiqués et de la densité syndicale depuis la mise en vigueur de cette loi, soit une réduction globale de 30 % du nombre de syndiqués et une densité syndicale en net recul, passant de 73 % à 46 %. La tendance à la consolidation des syndicats caractérisée par une chute du nombre de syndicats et une proportion croissante de syndiqués adhérant aux syndicats les plus importants, encouragée par la loi précédente, a été interrompue. En fait, il est apparu une nouvelle tendance vers la fragmentation. L'étude rapporte des données à cet égard ventilées par industrie et par sexe.

Si le régime de la loi sur les contrats de travail reste inchangé, le nombre de syndiqués continuera à diminuer. Les commerces de détail, les grossistes et le secteur tertiaire seront tout particulièrement vulnérables, le déclin se poursuivra dans le secteur agricole et la pression croissante réduira encore davantage l'adhésion aux syndicats dans les secteurs d'emploi les plus importants, la production industrielle et le secteur public. Il faut s'attendre à une fragmentation continue des syndicats vers le niveau de l'entreprise, mais la restructuration et la rationalisation interne du mouvement syndical apporteront une force allant à l'encontre de cette fragmentation. Le nombre de syndicats est susceptible d'augmenter, mais la concentration de l'adhésion dans quelques syndicats importants se fera encore plus évidente.

De plus, les tendances actuelles laissent à penser que les négociations collectives continueront à se détériorer dans la mesure où les employeurs se refusent à entrer dans des accords multi-employeurs, qu'ils remplacent les accords collectifs par des contrats individuels, et refusent de négocier en toute bonne foi. La fragmentation des négociations continuera et une fois que les accords d'entreprise seront établis, le principe de la flexibilité régionale (relativement peu évidente jusqu'à présent) se traduira par des accords.

L'emphase persistante mise sur les contrats individuels va miner les bases de la négociation collective, en particulier dans les secteurs liés aux services. Les accords collectifs *de facto* pour lesquels les négociations ont été faibles, voire inexistantes, qu'on soumet au personnel pour signature continueront à se développer. La négociation à double palier va se poursuivre et s'accroître. Les syndicats du secteur public continueront à rencontrer des difficultés à amener les employeurs du secteur public à se réunir à la table de négociation sur des termes tant soit peu acceptables par le syndicat. L'érosion des principes d'équité en matière d'établissement des salaires et autres

conditions de travail est susceptible de persister. La différence de salaires à travail égal entre hommes et femmes se fera de plus en plus grande.

Bien que la politique du Parti travailliste ne prévoit pas un retour à l'arbitrage, à la centralisation ou à l'adhésion syndicale obligatoire, la mise en valeur de relations collectives plutôt que des contrats individuels, un système d'enregistrement des syndicats et donc leur reconnaissance, des clauses visant à obliger à négocier et à négocier en toute bonne foi, tous ces points associés à l'abrogation des restrictions aux négociations multi-employeurs, contribueront largement à stopper la chute de la négociation collective et du syndicalisme.

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