Contradictory Rights and Unintended Consequences: The Early Impact of the Employment Relations Act on the New Zealand Waterfront

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New Zealand's Employment Contracts Act 1991 *consigned to history almost 100 years of pervasive state regulation of collective employment relations. Many unions experienced a sharp decline in influence after the introduction of this piece of legislation. The traditional wharfies' union, the Waterfront Workers' Union, is a case in point. Following a decade of neo-liberal industrial relations deregulation, a centre-left Labour/Alliance Coalition repealed the* Employment Contracts Act *by introducing an* Employment Relations Act 2000 *designed to redress an 'inherent inequality' in power though the promotion of unionisation and collective bargaining. This article assesses whether this piece of nominally 'union friendly' legislation might forestall attenuation of union influence and casualisation of waterfront employment at New Zealand's ports. We argue that the new legislation contains contradictory union rights that have produced unintended consequences, with the emergence of new forms of employee representation designed specifically to further erode the power of the waterfront industry's established unions.*

Introduction

Waterfront researchers argue that the phenomenon of globalisation is producing similar pressures for reform in different countries, with an international trend at ports towards increasing casualisation of employment, declining employment levels, and attempts to (re)assert managerial control over work (Turnbull & Wass 1995; Stratton 2000; Turnbull 2000). In Britain and New Zealand, that trend has been reinforced by the attenuation of union influence, if not the outright defeat of waterfront unionists in major confrontations such as the protracted dispute at the port of Liverpool (see Saundry & Turnbull 1996; Castree 2000). In Australia, the qualified victory of the Maritime Union of Australia over the stevedoring company Patrick provides a stark contrast to the pattern of contemporary waterfront employment relations across the Tasman (Morris 1999).

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A key institutional factor that has facilitated attacks by waterfront employers on watersiders and their unions is neo-liberal labour legislation.[1] In New Zealand the Waterfront Workers' Union (WWU) suffered a sharp decline in influence following the introduction of the *Employment Contracts Act* (ECA) in 1991, which eroded the 'external legitimacy' of trade unions (Harbridge & Honeybone 1996). The ECA's freedom of association provisions reduced the ability of the WWU to control waterfront labour supply while 'essential services' provisions that included all activities integral to waterfront employment limited the threat of employee-initiated industrial action. The introduction of the ECA enabled employers to accelerate a process of 'waterfront reform' that commenced in 1989 with major reductions in employment (see Reveley 1997).

Following a decade of neo-liberal industrial relations deregulation, the centre-left Labour/Alliance Coalition repealed the ECA with an *Employment Relations Act 2000* (ERA) designed to redress 'the inherent inequality of bargaining power' (s. 3(a)ii) between employers and employees by promoting unionisation and collective bargaining. This article assesses the degree to which the passage of this nominally 'union friendly' piece of legislation might forestall the trend towards diminishing influence of established unions and increased casualisation that has thus far characterised waterfront employment relations in Britain and New Zealand (see Morris 1999: 71). We specifically examine the early effects of the ERA on the organisational and industrial capacities of the WWU, the labour organisation that historically organised workers who performed almost exclusively the key activity of stevedoring (loading and unloading vessels) within ports.[2]

Our analysis of the impact of the ERA on the waterfront includes an assessment of the most public industrial confrontation since the introduction of the new legislation: a dispute involving the WWU and a union registered under the new legislation that had close links to a stevedoring company that, in turn, enjoyed a preferred contracting arrangement with the multinational company Carter Holt Harvey. This dispute puts to test the legitimacy of new organisational forms given the status of 'unions' under the ERA as well as a recent claim that 'New Zealand offers the most comprehensive and peaceful approach to dock-labour reform in the world' (Finney 1999: 4). Rather than promoting productive employment relations, or authentic forms of employee representation, we contend that the ERA has heightened tension as its contradictory union rights offer employers a new opportunity to further erode genuine unionism on the New Zealand waterfront.

The structure of the article is as follows. In the following section we examine the background to the introduction of the ERA by reviewing the effects the ECA had on the union movement and waterfront employment throughout the 1990s. The next section explains the contradictory nature of union rights contained within the ERA. Preceding the conclusion we analyse in detail the impact of the ERA on the waterfront, focusing on the employer strategy of union avoidance, union defence of work coverage, bargaining structures, and dispute resolution.[3]

THE EMPLOYMENT CONTRACTS ACT AND UNION DECLINE DURING THE 1990S

In 1991, the National Government consigned to history almost 100 years of pervasive state regulation of collective employment relations, introducing a new concept of market regulation. Following a decade of bargaining under the ECA, more than 75 per cent of New Zealand's workers now have individual employment agreements. As individualisation increased, unionisation plummeted, from 41 to 21 per cent between 1991 and 1995 (Crawford *et al*. 1997). While there is no consensus as to whether the ECA had a positive or negative impact on the economy, many commentators have criticised the social impact of measures designed to promote freedom of association and labour market flexibility (Dannin 1997; Kelsey 1997). The most vulnerable employment groups, including young and low skilled employees, felt hardest the transition to individual contracting in their loss of bargaining power and employment benefits such as penalty rates for weekend or overtime work.[4]

For many employers, freedom of association became synonymous with 'freedom of contract', an arrangement that prevailed prior to the introduction of compulsory arbitration in the 1890s. The ECA made individual employers and employees responsible for their bargaining arrangements and the decision to bargain itself became a matter of choice. Critics of the ECA cited 'take it or leave it' contracts and implicit or explicit union derecognition as symptoms of a new legal environment permissive of hard and, perhaps even, unfair bargaining (McAndrew & Ballard 1995; Anderson 1999; Oxenbridge 1999).

The earliest test cases confirmed that the employment institutions created under the new legislation would allow employers to drive hard bargains in their efforts to introduce new forms of employment and workplace flexibility. In the heavily publicised Alliance Textiles case, the Court of Appeal, New Zealand's highest employment court, decided that the employer's refusal to offer employment to employees seeking representation fell short of the ECA's freedom of association prohibition against the use of 'undue influence' in the decision of employees to become or not become members of an 'employees' organisation'. In Alliance, the Court of Appeal ruled that the employer need not remain 'union neutral' and this included engaging in direct communication with employees about their decision to seek representation (*Eketone v. Alliance Textiles 1993*).[5]

Potential employee representatives faced further difficulties organising under the ECA. The Act provided that employee organisations—it did not mention trade unions at all—must establish 'authority to represent' before gaining access to the workplace. Employers might demand that the potential representative provide written authority from every employee. Employers needed only to provide access at reasonable times and this, in practice, allowed them to limit both access and the scope of activities of representatives within the workplace. The ECA's access provisions did little to assist a union movement that had become dependent upon guaranteed coverage and enforceable bargaining rights under New Zealand's compulsory arbitration system, and had consequently developed weak organising and workplace bargaining structures (Nolan & Walsh 1994). The ECA also enabled a wide range of potential agents to compete for the right to

represent employees. Throughout the 1990s, trade unions suffered not only from the spread of non-union individual contracts but, also, from the growth of non-union representation in collective bargaining.[6]

Although the ECA permitted collective bargaining, it did little to promote collective employment contracts. The type of contract formed became explicitly a matter for negotiation between the parties. Importantly, one section of the Act provided that individual contracting prevailed in the event of a disagreement between the parties. Section 19(4) stated that if the parties failed to re-negotiate a collective contract then all workers covered would be 'deemed' to be employed on individual contracts under the same terms and conditions as the expired collective. Collective bargaining suffered a sharp decline in New Zealand as many awards that expired after 1991 continued on as individual contracts under this deeming provision. If so called 'rollover' contracts enabled employers to convert collective agreements into individual contracts while avoiding the costs of negotiating separate agreements, employers also avoided collective bargaining by offering new employees individual contracts on a standard form ('take it or leave it') basis. Hence, for the overwhelming majority of New Zealanders hoping to share the purported benefits of direct bargaining, the ECA offered 'procedural' more often than 'substantive' individualisation (Oxenbridge 1999).

Following the election of the Labour/Alliance Coalition in December 1999, the National Party and key employer groups roundly criticised the new government's Employment Relations Bill (ERB) for promoting conditions under which unions might, once again, exercise considerable disruptive economic power. The conservative forces believed that any repeal of the ECA would return New Zealand to the 'bad old days' of compulsory arbitration when militant unions, such as the WWU, had the ability to bring production in important industries to a halt and interrupt the provision of essential services. The employers pointed to the period of the ECA as one during which cooperative workplace and individual bargaining replaced adversarial industrial relations, and official statistics on industrial disputes supported their contention. In effect, employers found it extremely easy to achieve, and maintain (for them), happy bargains with their employees during a period of both massively declining unionisation and collective bargaining. Wide-ranging provisions governing industrial action in 'essential services' further removed the strike weapon from the hands of unions in places, such as the waterfront, where employees remained well organised.[7] As individual contracting and casualisation of employment spread rapidly, former bastions of collective employment relations, like the building and construction industry, became effectively de-unionised.

In spite of these developments, Boxall and Haynes (1997: 587) argued that 'classic unions in New Zealand are threatened more by industrial restructuring than they are by neo-liberal labour statutes'. This contention may hold for certain unions like those in the meat industry, who suffered a loss of power as a result of changes to industrial licensing in 1981 together with plant closures (Curtis & Reveley 2001: 155). On the waterfront, however, it was the shift to a new labour relations regime under the ECA, rather than declining employment

opportunities and redundancies, that presented the biggest challenge to the WWU and played the greatest role in undermining unionism. In an industry with all the hallmarks of a casual labour market (see Morewedge 1970), union strength hinged on regulating casual employment by securing control over key facets of labour supply, rather than increasing sheer numbers of union members. In the postwar period, the Waterfront Industry Commission secured 'exclusionary closure' (Parkin 1979: 45) for watersiders by regulated hiring practices. While the advent of containerisation resulted in significant job losses (with registered watersiders dropping from 6082 in 1970 to 3127 in 1988), the WWU retained its strength by keeping the bulk of the workforce unionised, preventing work 'escaping' from its jurisdiction, and demonstrating its ability to mount a credible strike threat (Reveley 1997). Following the abolition of the Waterfront Industry Commission in 1989, waterfront employment fell by 44 per cent, and yet the WWU still maintained its ability to control labour supply at the port level and engage in effective strike action at the national level. The Union's strength enabled it to protect key worker rights and conditions in a skeletal national agreement that fixed ordinary hourly rates (thereby limiting labour cost competition), retained compulsory union membership, secured for watersiders the exclusive right to perform 'waterside work' as it had been legally defined prior to waterfront reform, and restricted the use of casual labour (see Reveley 1999: 45–6).

However, under the ECA, the WWU experienced a substantial decline in the number of full time workers in its membership, a weakening of its control over labour supply, the erosion of its members' work coverage, and the burgeoning growth of casual employment. The WWU's membership of full time workers has declined from 1575 in 1991 to 900 in 2000, all of whom are employed under collective agreements largely by port companies and stevedoring companies.[8] A further 600 casual employees are WWU members employed on individual agreements. To be sure, the union tenaciously retained its organisational presence on the waterfront, with 12 branches at major and secondary ports around the country.[9] However, the upgrading of the container facility at Tauranga to full 'container terminal' status, and the establishment by the Port of Tauranga Ltd of an inland container facility (Metroport) at Auckland in June 1999, created significant new work sites over which the WWU does not enjoy coverage. One senior official likened the situation to the 'death of a thousand lashes', with waterfront work increasingly performed by employees who are not members of the WWU.

UNION RIGHTS UNDER THE EMPLOYMENT RELATIONS ACT

The current problems confronting the WWU illustrate the difficulties the Labour Government faced as it endeavoured to adopt a moderate approach to repealing the ECA. The ERA in no way returns New Zealand to the previous model of compulsory arbitration. Rather, it introduces a limited number of important provisions that qualify a piece of legislation widely regarded as an 'employers' charter' (Anderson 1991). Given the Government's concern that the ECA enabled employers to limit employee access to representation and limit employee

discretion over matters related to contract formation, the ERA formally encourages both unionisation and collective bargaining. It enables unions to access the workplace for the 'legitimate' purpose of representing their members' interests. Whereas the ECA made establishing 'authority to represent' a pre-condition for entry into the workplace and restricted union access to matters related to contract negotiation, the new legislation gives registered unions general access to conduct union business and also to provide information to employees so as to recruit new members (s. 20(3)). To satisfy the access provisions, a union need only have a clause in its rules covering an employee normally working at the enterprise (s. 21(1)b).

The ERA formally requires employees engaged in collective bargaining to be union members ('join the union, join the collective'). The legislation also exposes new employees to unionisation wherever a collective agreement applies. Thus, employers must offer the terms and conditions of an applicable collective agreement to all new employees for the first 30 days of employment.[10] Notwithstanding these important protections, the ERA provides little support for established unions as it contains the same freedom of association provisions as the ECA. Whereas the arbitration system provided for compulsory unionism and gave registered unions monopoly rights to represent workers performing specific occupational categories of employment, the ECA and ERA eschew compulsion and allow unions to compete for members without coverage restrictions.

The ERA provides that a society is entitled to be registered as a union if the society is incorporated (meaning it has a minimum of 15 members) and 'is independent of, and is constituted and operates at arm's length from, any employer' (s. 14(1)d).[11] The Act does not explicitly address the question of overlapping union coverage, as the ERB did. Clause 15(4) of the ERB stated that 'The Registrar of Unions must not decline to register a society as a union on the ground that the society's membership rule overlaps in coverage with the membership rule of a registered union or of another society that is applying to be registered as a union'. Despite the absence of a specific provision on this matter, the early registration of unions under the ERA signaled that the Registrar would take a permissive approach to both the 'arm's length' rule and the question of registering competing unions. As the New Zealand Employers Federation correctly claimed, the new legislation set up conditions for unions to compete for business on the wharves (NZEF 2001: 13).

THE IMPACT OF THE EMPLOYMENT RELATIONS ACT ON THE WATERFRONT

This section considers the impact of the new legislation on waterfront employment relations and on the watersiders' 'classic union' in its attempt to recover ground lost under the previous employment relations regime.

Union avoidance strategies

One of the greatest challenges the WWU faced during the 1990s was the emergence of new entrant stevedoring companies that adopted a strategy of union avoidance. These companies emerged as the product of a deregulated labour

market, bent on employing a contingent labour force to contain operating costs. The most successful of them, International Stevedoring Operations (ISO) and Independent Stevedoring Limited (ISL), have their base in the North Island at the Port of Tauranga. Both companies circumvented the coverage of the WWU by employing non-WWU labour and relying heavily on part time and casual employees. These companies developed their cost minimising contractual arrangements as a basis to gain competitive advantage. As a result, the established stevedoring companies at Tauranga laid off permanently employed watersiders, who were WWU members, and competition increasingly centered on driving down casual labour rates (Reveley 1999: 50–1). Despite having a permanent branch official at Tauranga, the WWU experienced considerable difficulties in attempting to recruit members from amongst the non-union workforces of ISO and ISL, in part because of the ECA's restrictions on union right of entry to the workplace. Neither were WWU officials able to confine ISO's union avoidance to a single port. Port Chalmers WWU Secretary Phil Adams maintains that 'the worse case scenario was Napier. They went in there in 1994 ... [and] they put ads in the paper ... saying we'll create a permanent workforce here. Well, since that time, one supervisor has been made permanent, and 35 of the local permanent watersiders have lost their jobs' (interview, 25 April 2001).

Provisions within the ERA allowing the registration of new unions subject only to the 15-member minimum and the 'arm's length' rule have already frustrated WWU efforts to stave off further encroachments to its membership base. In effect, the ERA has provided space for the creation of small company unions on the waterfront. Less than one month after the passage of the Act, the Registrar had registered both the Surfside Employees Association and the Amalgamated Stevedores Union (ASU).[12] The rules of the Surfside Employees Association limit its membership to employees of ISL, with the proviso that the management committee may 'from time to time decide' differently.

Meanwhile, the ASU has close links with ISO which, by November 2000, formed Mainland Stevedoring Ltd (MSL), as a wholly owned subsidiary (Department of Labour 2001: 3). MSL obtained its workers from a labour hire company, New Zealand Associates Ltd, which, in turn, had a collective agreement with the ASU (ibid.). The ASU's rules state that membership 'shall comprise persons who are either permanently or from time to time employed by NZAL [New Zealand Associates Limited]'.[13] In late November, MSL used Tauranga as a staging post from which to enter South Island ports to perform the work of loading logs under contract to Carter Holt Harvey (CHH). CHH's international logistics manager Judith Hutchinson described MSL as its 'preferred contractor' (*Marlborough Express*, 15 January 2001), an arrangement that has reduced the number of CHH contracts with stevedoring companies who employ WWU members.[14] A significant dispute ensued as MSL stevedored a handful of vessels at the ports of Bluff, Port Chalmers, Timaru, and Nelson using staff it transferred from the North Island. WWU members resisted by picketing at these ports, while their officials simultaneously sought to mobilise the local community behind its campaign with the slogan 'local jobs for local workers' (Council of Trade Unions, Media Release, 9 January 2001).

The dispute with MSL centred on work conditions and work practices. The WWU had initially entered into negotiations with MSL to cross-hire WWU members from their existing employers at Bluff and Port Chalmers. Negotiations broke down over the application of the WWU's cross-hire agreement with other South Island stevedoring companies: MSL wished to establish separate terms and conditions. In particular, MSL sought 12-hour shifts with only two half-hour breaks, instead of the standard practice of three breaks. MSL also wished to eliminate the position of hatchman, who serves as an intermediary between the crane operator and watersiders aboard the vessel (WWU Newsletter, January 2001: 1). As a result of this disagreement, MSL flew in workers from the North Island to complete its work at the two ports (*National Business Review*, 1 December 2000).

MSL continued to operate on a weekly basis loading logs under contract to CHH at the South Island port of Nelson where it utilised permanent Tauranga employees and supplementary local casuals who were not members of the WWU. Mainland's permanent employees have a guaranteed 72 hours work (or payment) each month.[15] By prevailing waterfront standards, these workers are more accurately part-time (if not in fact casual) employees, for WWU members employed under collective agreements with stevedoring companies at most ports enjoy a guarantee of 160 hours employment per month (interview, WWU General Secretary Trevor Hanson, 4 April 2001). If the experience of the Port of Tauranga is any indication (see Reveley 1999: 50–1), the introduction of an operator with lower labour costs (associated with reduced guaranteed payments) is likely to lead to pressure from other stevedoring companies to increase their reliance on casual labour at the expense of permanent employees.

The practice of non-union 'suitcase stevedores' extending their operations into new ports is not exceptional. It has been occurring since the passage of the ECA; however WWU resistance has allowed only ISO to operate in this manner on a long-term basis (see Reveley 1997). One of the more pernicious consequences of the ERA is that it is now more difficult for the WWU to combat these interlopers. In waterfront disputes, obtaining the support of significant sections of the general public can be decisive, as the experience of the Maritime Union of Australia and the Liverpool dockers amply demonstrates (see, respectively, Sheridan 1999: 13; Castree 2000: 288–9). Yet, because the ERA extends union rights to new representational forms, employer interests were able to define the confrontation variously as 'a classic example of a demarcation dispute' between two unions (NZEF 2001: 13; *National Business Review*, 15 December 2000), 'about an entrenched union trying to muscle aside another union and hold back progress on New Zealand wharves' (NZEF 2001: 13), and 'about the right of a group of workers to belong to the union of their choice'.[16]

In spite of these public relations difficulties, the WWU did generate enough community support at Port Chalmers to prevent MSL from establishing a permanent presence following its brief foray at the port late in 2000. The WWU initiated a considerable publicity campaign to counter the employer representatives as the Branch Secretary of the union explained:

> we done leaflet drops . . . We went around the shops, we explained to the shopkeepers . . . if we're getting casual wages, well you might as well shut your doors as well . . . We went to the Chalmers community board, which is like a borough council . . . They put in the paper that they were right behind us . . . We had a public meeting, although not well attended, but we certainly put our point of view. And that's the reason why we got such a great community [support] . . . I think that's why Carter Holt have sort of backed right off Port Chalmers (interview, 25 April 2001).

The WWU also garnered the support of the union movement through the Council of Trade Unions, and drew upon its international networks through the International Transport Workers Federation to gain support from dockworkers in other countries.[17] The limited success of the WWU in rebuffing MSL was then a result of the sort of multi-level strategy, combining action at the local, national, and international levels, which previously had been deployed by unions—albeit with mixed results—in waterfront disputes in Britain and Australia (see Castree 2000; Griffin & Svensen 1998). That success had little to do with increased union rights under the ERA, which arguably worked against the Union's community-based strategy of opposition.

The development of new forms of representation on the waterfront demonstrates the limitation of the 'arm's length' requirements of the ERA's union registration provisions. Importantly, the Registrar of Unions can register any incorporated society whose officers merely feel that it meets these requirements.[18] Other unions have no direct right to contest this decision either with the Registrar or the Employment Relations Authority. It is possible to challenge the status of a registered union under an application to the Employment Court. The WWU opted not to take this course of action in relation to the Amalgamated Stevedores Union given the negative publicity that might arise from one union seeking to deregister another.[19] As WWU General Secretary Trevor Hanson commented, 'We decided . . . in the middle of the dispute that it would be wrong for us to do anything about it at that particular stage, because they would come out in the media and bloody slag us off again' (interview, 4 April 2001). Furthermore, 'arm's length' is not defined, so that even if a union meets the criteria of s. 14(1), it may still be a quiescent instrument of employer will legally sheltered by the registration provisions of the ERA.

Good faith negotiations and mediation

Given the attempts by many waterfront employers under the previous labour relations regime to change unilaterally terms and conditions of employment (see Reveley 1997: 382), the good faith bargaining and mediation provisions of the ERA hold promise for more constructive collective bargaining on the waterfront.[20] The Act creates a Mediation Service designed to provide fast and, wherever possible, informal resolution to employment relations problems. Meanwhile, good faith bargaining forces the parties to a collective agreement to meet, consider claims and justify bargaining positions by providing information (including potentially revealing sensitive financial information) (s. 32). The WWU has successfully used the Act's new Mediation Service to settle two significant disputes at the Port of Wellington.[21] However as the South Island

dispute indicates, the union rights provided by the new legislation may frustrate the intention of the mediation and good faith provisions. Since the WWU's members had no employment relationship with either MSL or CHH, no good faith relationship existed between the Union and the other parties, and mediation became a largely ineffective means of addressing the Union's concerns. Indeed, mediation involving the WWU took place following pressure from the Minister of Labour, Margaret Wilson, whose calls for all the parties to enter mediation were widely reported by the media (see *The Nelson Mail*, 23 January 2001).

The WWU's objective in the mediation was 'to get the mediator to some position where we got compulsory cross-hire . . . [of] the ones [watersiders] who are missing out on the work, and on the basis of the terms and conditions under their own employer' (interview, WWU General Secretary Trevor Hanson, 2 April 2001). Both MSL and CHH consistently claimed that they had been dealing with a union—the Amalgamated Stevedores Union—and continually sought to frame the dispute as being one between two unions. In a draft report the Mediator recommended that any further employees taken on by MSL should be 'selected from the existing permanent and casual workers employed within the port', and that CHH negotiate cross-hire agreements with other stevedores to supply labour to supplement MSL's employees. However, the final report (issued on 30 April 2001) made no mention of restrictions on MSL's labour supply. Instead, the Mediator focused on the lack of competitive tendering between Stevedoring Services (Nelson) Ltd, who CHH had previously contracted, and MSL for CHH log loading contracts (see Department of Labour 2001; Macfie 2001: 83). CHH summarily withdrew from mediation shortly after the Mediator issued his report, claiming that the focus of the final report 'makes a mockery of the mediation process' and that 'It is now time to move on' (*The Independent Business Weekly*, 2 May 2001; Carter Holt Harvey Press Release, 23 April 2001). For CHH, moving on entailed obtaining a High Court injunction to prevent members of the WWU from further disrupting the loading of logs at South Island ports (Carter Holt Harvey Press Release, 9 May 2001).

Unfortunately for the industry's established unions, the disputation at the South Island ports may amount only to an early demonstration of a new trend, prominent also in the MUA/Patrick dispute (see Dabscheck 1998: 162), towards out-sourcing waterfront employment relations. At Wellington, CentrePort Ltd initiated collective bargaining with the WWU and Rail and Maritime Transport Union (RMTU) (see below) for its permanent employees only. CentrePort's intention was to source all casual employees, whether unionised or employed under individual agreements, from a labour-hire firm. Under such a scenario, the organisation of Wellington port employees would require the unions to effectively deal with two different employers. As well as potentially circumventing the Act's good faith bargaining provisions, it is most unlikely that such a labour-hire agency would continue the customary practice of offering preferential casual employment to union members.[22]

Bargaining structures and work coverage

One of the ERA's key objectives is to promote collective bargaining in order to address the fundamental imbalance in bargaining power between employers and employees (s. 3(a)iii). While the level at which collective bargaining is to take place is not specified, the Act does overturn the ECA's prohibition against strikes in support of a 'collective agreement' covering a number of different employers.

To date, the only indication that the WWU will be able to achieve a multi-firm agreement is the ongoing negotiations with Southern Cross Stevedores for a national document with local port schedules. However, Southern Cross is not a coalition of separate employers but rather a group of port-based stevedoring companies linked together by a company that provides management services. In the case of the port companies, multi-employer bargaining is unlikely because of the intense rivalry between these operators. A more probable scenario is that mergers between port companies will occur (see Tull & Reveley 2001), which may lead to multi-employer bargaining by default rather than by union initiative. However, the desire of port companies to retain a formally segmented workforce makes even this limited pattern of multi-party bargaining seem unlikely.

Rather than encouraging multi-employer bargaining, the ERA has led to attempts by waterfront employers to locate the bargaining unit below the level of the firm. Some of the largest port companies are seeking a number of separate collective agreements for the same site, including Ports of Auckland Ltd for four separate agreements to cover different parts of its operation. The WWU has already taken strike action at Auckland, in support of a single collective agreement, and similar action should not be ruled out at other ports. However, multi-employer strike action of the sort needed to force competing employers into a single agreement may now be beyond the capacity of the WWU whose members have been split between different enterprise-based agreements at the port level since 1991. The RMTU has also indicated that it needs to weigh the benefits of multi-employer bargaining against the complexity of 'marrying' various agreements because matters such as hourly rates, hours of work, overtime and penalty rates and long service entitlements 'have evolved individually to reflect the differing pressures applied, local conditions and wish lists presented by the separate port employers' (*The Transport Worker*, December 2000: 8).

Short of achieving recognition through multi-employer bargaining, the ability of the waterfront unions to prevent further de-unionisation, associated with increasing casualisation of employment, hinges on securing extensive coverage of waterfront work.[23] Importantly, the ERA provides that new employees who commence work under an individual employment agreement are for 30 days automatically subject to the terms and conditions of employees who are party to a collective agreement covering the same work with the same employer (s. 62(2)v). With casual watersiders typically employed on individual agreements, this clause gives organisers an opportunity to convince new employees of the benefits of union membership, which confers the benefits of the collective agreement. If the collective agreement does not cover the proposed work of the new employee then individual agreements may comprise inferior terms and conditions (a practice that developed for casual watersiders under the ECA).

To prevent the continuation of this practice, the WWU has sought in negotiations with employers an extremely wide-ranging coverage clause—covering all conceivable types of waterfront work, including those associated with new technology and new areas of business, and permanent and casual employees alike (interview, WWU Assistant General Secretary Terry Ryan, 4 April 2001).[24] Employer resistance has made the question of work coverage a major sticking point in negotiations between the WWU and the port companies as well as with Southern Cross Stevedores.

Since the introduction of the ERA, work coverage disputes have also complicated the cooperative relations between the WWU and the RMTU, with the WWU seeking to cast a wider net than its counterpart. Both unions bargain together, collectively, with the port companies that own and operate the container terminals at Wellington, Lyttelton and Port Chalmers.[25] During coverage discussions between the two unions, Wellington's CentrePort Ltd pre-emptorily initiated collective bargaining for just its permanent employees. In response, the WWU 'immediately went in and initiated without waiting for the Rail Maritime [Union], with a big coverage clause . . . for all our permanents plus all of our . . . casuals, as being members of our union, for one single collective' (interview, WWU General Secretary Trevor Hanson, 4 April 2001). Following further negotiations, the two unions re-initiated bargaining for a single multi-union agreement. However, under new provisions in the Act, this process required, by secret ballot, the majority approval of each union's members.

Insofar as the ERA permits the registration of unions with overlapping coverage rules, the legislation reinforces the voluntary association provisions introduced under the ECA that encourage employee representatives to compete for members. While we can expect the advent of new entrant 'unions' to enable certain stevedore or port employers to place pressure on wages and conditions, coverage competition might also unexpectedly weaken the industrial strength of the industry's established unions. Under the ERA's new dispute provisions, (only) workers already employed by a company but not principally to perform the work of a striking or locked-out employee may perform that work (s. 97(3)). By negotiating agreements with separate unions covering broadly the same work, employers might obtain a reserve supply of labour in the event of an industrial dispute.

CONCLUSION

In an early appraisal of the ERA, a leading New Zealand employment law specialist identified ports as one of the key 'areas of union activity' that 'no doubt will remain strong' (Cullen 2000: 12). Similarly, a recent paper based on aggregate data from employment contracts has suggested that 're-legitimization of unions under the ERA will work to the benefit of maritime unions which are better placed to take advantage of this than many of their counterparts' (Walsh *et al*. 2001: 16). By contrast, our qualitative analysis of the impact of the ERA on bargaining structure and strategy leads us to draw a different conclusion. In particular, our analysis of the impact of the ERA on the once dominant and

imposing WWU highlights how the new legislation can work to destabilise established unions. As the WWU's General Secretary commented: 'What I'm hearing from a lot of union officials is, you know, more of our style, the Seafarers and ourselves and the NDU [National Distribution Union], is they really think that they were better off under the ECA. All they wanted was the ECA plus access [to the workplace]' (interview, 4 April 2001).

The restoration of the term 'union' to the lexicon of current labour law has created unintended consequences and perverse relationships on the waterfront. Any process of institutional change will inevitably result in a repositioning of actors, and the emergence of new sets of interests (Fligstein 1991; Brubaker 1994). In some cases, that process extends to the 'formation of new collective identities', which seek to be incorporated into legitimating systems of representation (Pizzorno 1978: 280). On the New Zealand waterfront, the ERA has enabled new unions to emerge, as representatives of employees working for companies that have been at the forefront of efforts to casualise and de-unionise employment. What we see are not formerly unorganised workers taking advantage of organising provisions, but rather, vehemently anti-union employers seeking the legitimacy of employing unionised workers, so as to challenge further an established union. Our analysis therefore suggests that, with respect to the reconstitution of trade unions under the ERA, an important research focus is qualitative analysis of identities and interests, not just quantitative estimates of the extent of re-unionisation. The institutional 'shells' created under the ERA, labeled 'unions', may house qualitatively different types of labour organisations.

If the continuing erosion of legitimate unionism raises concerns for waterfront workers, it might also create problems for other stakeholders interested in the efficiency and productivity of New Zealand's ports. A recent comparative study by Saundry and Turnbull (1999) suggested that established trade unions have contributed to the better performance of Spanish ports compared to British ports. The WWU's Spanish counterpart played a key role in setting 'productive constraints' that promoted employer strategies of innovation rather than labour cost minimisation (ibid: 282). To be sure, one catalyst for port reform in New Zealand was the strength of the WWU during the 1960s–80s, and its consequent rent seeking behaviour that severely limited labour productivity and port efficiency (see Reveley 1997). However, recent research suggests that port reform has resulted in a shift in the locus of rent seeking behaviour from organised labour to port companies, which are seeking to exploit monopoly rents (see Tull & Reveley 2001). The attempts by port employers, stevedoring companies and new entrant unions to erode the remaining strength of the watersiders' established union may only target the one feature of the industry that is least in need of being challenged in the interests of waterfront reform. It is therefore ultimately in relation to port efficiency that the contradictory union rights contained within the ERA may have their most unintended, and negative, consequences.

NOTES

1. Australia too provides an interesting example of the intent behind such legislation. The *Workplace Relations Act 1996* specifically targets waterfront workers, by exempting waterfront employers from the need to be a 'constitutional corporation' in order to enter into individualised Australian Workplace Agreements (see Stewart 1999: 33).

2. At the container terminals that were established at four ports (Auckland, Wellington, Lyttelton and Port Chalmers) in the 1970s, members of the Harbour Boards Employees' Union (HBEU) also carried out the work of stevedoring. However, the composition of the work teams was in accordance with the ratio of one harbour worker to six watersiders, set by a national agreement in 1971. A legacy of this arrangement is that some employees of the corporatised harbour boards (renamed port companies in 1988) belong to the Rail and Maritime Transport Union, which succeeded the HBEU.
3. The article is primarily based on interviews and documentary research. Telephone interviews were conducted with the WWU Branch Secretaries at the ports of Auckland, Tauranga, Lyttelton and Port Chalmers, as well as the WWU General Secretary with whom ongoing contact has been maintained by email. A confidential telephone discussion was held with Mediator Walter Grills. The views of Labour Party and National Party politicians about the role of mediation in the South Island ports dispute were obtained by email. The documentary research involved readings of official mediation documents and notes of mediation meetings supplied by the WWU, newspaper clippings and web-based newspaper articles, and union rules supplied by the Registrar of Unions. More broadly, the article builds on a programme of qualitative research into waterfront labour relations reported in Reveley (1997, 1999).
4. The widespread adoption of temporal flexibility was most evident in areas such as Retail, Accommodation and Cafes, and Business and Community Services (see Harbridge *et al*. 2000).
5. An International Labour Organisation delegation cited the Alliance case in a report that criticised the ECA in relation to breaches of ILO conventions governing freedom of association and collective bargaining (Haworth & Hughes 1995).
6. Non-union agent representation remained low with most non-unionised employees on collective contracts having no representation.
7. Schedule 2 of the ECA stated that, in essential services, employees needed to provide up to 14 days notice of industrial action, specifying the nature of the action, its location, and whether the action would be continuous. The definition of 'essential services' includes 'The provision of all necessary services in connection with the arrival, berthing, loading, unloading, and departure of ships at a port'. The ERA defines exactly the same services as essential and retains the same restrictions for industrial action with the addition of a new clause that requires 28 days notification of a dispute in an essential services industry that will affect the public interest.
8. Waterfront employers, as a group, comprise the following organisations: the 13 port companies, five of which are partially privatised; the successor to the former national stevedoring company (NZS Network) that has branches at most ports, Southern Cross Stevedores; locally based stevedoring companies, and one coastal shipping company (Pacifica Shipping).
9. The WWU's branches are at the ports of Whangarei, Auckland, Tauranga, Gisborne, New Plymouth, Napier, Wellington, Nelson, Lyttelton, Timaru, Port Chalmers, and Bluff. There are three full time officials at Auckland, one at Tauranga, a part time official at Napier, and the General Secretary who is located at Wellington.
10. After the expiration of the 30 days, the employee may nominate to continue under the collective and/or negotiate new terms under an individual agreement.
11. The registration of the Warehouse People Union at the retail firm The Warehouse raises some questions about the application of the 'arm's length' provision. Formed originally as People First under the ECA, the registration of the union under a new name has not convinced its competitor, the National Distribution Union, that Warehouse People Union operates independently of Warehouse management. (*National Business Review*, 16 March 2001).
12. The Surfside Employees Association was registered on 18 October 2000, and at 1 March 2001 had 72 members. The Amalgamated Stevedores Union was registered on 11 October, and as at 5 June 2001 had 98 members.
13. The rules contain a proviso allowing membership to other employees 'that the Executive Committee considers appropriate.' The ASU's status as a company union is indicated by the fact that, in the original application to register the union as an incorporated society, the scrubbed out (but still legible) title listed above the signatories is 'New Zealand Associates Union'.
14. At the Port of Nelson, CHH had since 1989 used the services of Stevedoring Services (Nelson) Ltd (see Department of Labour 2001: 12), a firm whose permanent and casual employees were members of the WWU.
15. This information is contained in the draft mediation report prepared by Walter Grills, and distributed to the disputing parties via email on 30 March 2001.
16. The final quote appears in a company flier sent to the Bluff community. The flier (n.d.) is titled 'Background Information Mainland Stevedoring Limited'.

17. For example, at one point in the dispute an ITF representative flew to South Korea to help elicit support for the WWU from the Korean dockworkers (WWU Newsletter, January 2001: 2).
18. Significantly, under s. 14(2) the Registrar of Unions can, and has in practice, relied on a statutory declaration by the incorporated society that it fulfils the criteria for registration set out by s. 14(1).
19. Under s. 17 of the Act, a union has no *direct* right to seek cancellation of another union. By applying to the Employment Court, the WWU would be engaging in groundbreaking legal action. The WWU has indicated that it is likely to use this facility 'some time in the near future' (WWU Newsletter, January 2001: 3)
20. Under the ECA there was no requirement that disputing parties enter mediation. The ERA stipulates that the Employment Authority direct the parties to a dispute to enter into mediation if they have not already done so prior to application to the Authority (s. 159(1)b).
21. In March 2001, CentrePort Ltd, the port company at Wellington, used a labour hire company to supply labour to discharge cars from a vessel, contrary to an agreement with the WWU that such labour must not be used until all available permanent employees and regular casual employees had been fully deployed. As a result of the mediation process, initiated by the Union, 12 further regular casuals were employed. In the second case, the WWU took action on behalf of its members at King's Wharf Coolstore who were threatened with compulsory redundancy. Acting on advice from its solicitor, the Union filed a case with the Employment Relations Authority, which effected immediate compulsory mediation. The result was that four members' jobs were saved, and a cash settlement was secured for those made redundant (WWU Newsletter, January 2001: 5).
22. In this type of situation, unions may be able to challenge the status of individuals sourced by employers through labour-hire agencies, to establish that they are in fact 'employees', under s. 6(1). Even if a favourable ruling was obtained from the Employment Court, it is unclear as to whether preferential employment arrangements could be sustained.
23. The ERA stipulates that all collective agreements must contain a coverage clause (s. 54(3)a), that 'specifies the work that the agreement covers' (s. 5).
24. A copy of the coverage clause was supplied to the authors by a senior official of the WWU.
25. In 1992, harbour workers at the Port of Auckland voted to join the WWU, and were readily accepted by the local branch (see Roth 1993: 200).

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