

RESEARCH NOTE

Unions and Non-union Bargaining Agents under the Employment Contracts Act 1991: an Assessment after 12 Months

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This paper records a study of the impacts of the Employment Contracts Act 1991 (ECA) on unions and non-union bargaining agents. The assessment primarily relates to the first 12 months of the Act's operation but, where appropriate, does extrapolate certain trends into the foreseeable future. Both trade unions and non-union agents (alternative worker agents and employer agents) are discussed.

Introduction

As Mitchell (1989) reminds us, it is important to see the Australasian model of conciliation and arbitration as comprising two central pillars - a judicial system of dispute resolution (compulsory arbitration) and a system of union recognition through official registration. New Zealand's retreat from this model has been conducted over approximately the last 30 years (Boxall, 1990, 1991). Prior to the Employment Contracts Act 1991, however, the retreat was almost exclusively associated with reforms of the law on bargaining (i.e. dispute resolution). The Industrial Relations Act 1973 gave official blessing to a dualistic system of awards and collective agreements. Then, in the context of major practitioner frustration with various unsatisfactory centralised wage controls, the fourth Labour Government abolished the process of compulsory arbitration in 1984. That Government affirmed its commitment to direct wage bargaining in the Labour Relations Act 1987 but attempted to reform the second tier. The arbitral structure of trade union rights, however, remained largely intact. Unions retained a troika of important legislative supports - exclusive jurisdiction, blanket coverage and (in essence) compulsory membership. The Employment

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Contracts Act 1991 completes the deconstruction of the arbitration system by targeting this troika. Employee representation is now entirely contestable and bargaining structure entirely negotiable. How the Employment Contracts Act affects the traditional activities of trade unions and the ways in which it is used by non-union agents is an important subject for study. This article assesses the Act's impacts on these groups after 12 months of operation.

Research methodology

In-depth interviews were held with selected officials of 18 trade unions segmented across the manufacturing and construction, private sector services and public sectors (Table 1). The interviewees were Auckland-based district secretaries. Often, certain other officials (e.g., senior organisers) were involved in the interviews. The sample was designed to fairly represent the three main sectors of the economy and to reflect a balance of large, small, affiliated and non-affiliated unions. The total national membership of the unions studied represented 55% of total New Zealand union membership at December 1991 and thus we believe the sample can be regarded as fairly representative of trade union views and trends. Two officials of the New Zealand Council of Trade Unions (NZCTU) were also interviewed on union structural changes.

In-depth interviews were also held with 8 non-union bargaining agents (Table 2). The objective here was to study the impacts of the Act on the traditional employer agent, the employers association, and a cross-section of alternative agents. As we shall see, most of the alternative agents work on the employer side of the table. Besides the General Manager of the Auckland Employers' Association, interviewees were sole proprietors or principals in their firms.

The impact of the ECA on trade unions

General impact

The union officials were asked to indicate what proportion of their pre-ECA membership had signed new bargaining authorizations. We were interested in the extent to which the ECA had affected membership levels. Data analysis showed that the unions surveyed could be split into two groups:

- (1) those significantly affected by the ECA
- (2) those unions affected mainly by economic restructuring since 1984 and marginally (if at all) by the ECA.

Table 1: Unions studied

Manufacturing & Construction

- * NZ Engineering & Related Trades' Union
- * Electrical Workers' Union
- * United Food & Chemical Workers' Union
- * Northern Combined Apparel Union
- * Auckland & Tomoana Freezing Works' Union
- * Building Trades' Union
- * Bakers Trade Employees' Union

Private Sector Services

- * Service Workers' Union
- * Northern Distribution Union
- * Finance Sector Union (Finsec)
- * NZ Journalists & Graphic Process Union (Jagpro)
- * NZ Nurses' Union
- * Society of Technicians, Administrators and Supervisors (STAMS)
- * Association of Professional, Executive Salaried Staff (APEX)

Public Sector

- * NZ Public Service Association (PSA)
 - * Northern Local Government Officers' Union
 - * Post Office Union
 - * Resident Doctors' Association
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Table 2: Non-union agents studied

- * Auckland Employers' Association
 - * Teesdale Meuli & Co
 - * Wheeler Campbell Labour Markets Ltd
 - * Hesketh Henry
 - * Haigh Lyon & Co
 - * Russell E M Hodge & Associates Ltd
 - * Judith Collins & Associates
 - * Garry Pollak
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The unions in the first category were mainly located in the less skilled private sector services and had clearly benefitted from exclusive jurisdiction, compulsory membership and blanket coverage under the old system. Their membership losses after 12 months of the Act's operation appear to be in the region of 20 to 40%. Unions in the second category were mainly located in manufacturing, construction and the public sector. Their membership bases had been severely affected by the redundancies associated with economic restructuring and recessionary downturns since 1984, but their members, with certain exceptions, had remained loyal since the introduction of the ECA. These unions, one should point out, were either voluntary before the ECA (in the public sector) or did not depend on compulsory membership to any great degree. Unions whose workplace organisation efforts were effective, which allocated resources to delegate training and which involved themselves in enterprise issues beyond the traditional concerns of collective bargaining have clearly been much less affected by the ECA (to date). Some unions, it must also be emphasised, claim rising density levels since the ECA.

The general picture, then, is one of a significant fall in union density but largely as a result of major losses amongst the unions that did depend on the supports of the old system. These unions are largely located in the secondary labour market. The historical unions remain strong in their traditional primary labour market domains but face something of a challenge from the emergence of new enterprise unions and less formal employee groupings engaged in direct contracting with their employers. This challenge may well grow and thus complacency would be unwise in any part of the union movement.

Major challenges

Our interviews involved extensive discussion of reasons for changes in membership levels and of factors that many commentators predicted would affect the unions under the ECA. Data analysis suggests the unions have faced three main challenges:

(i) *The major downward shift in the structure of private sector bargaining*

The private sector unions have had to cope with a major shift to enterprise bargaining. Although there have been certain important examples of multi-employer bargaining, the new system is primarily based at enterprise, establishment and individual levels. Those unions already well entrenched at the enterprise level have had little trouble adapting. Others have largely withdrawn to serving only their significant sites. Those with a majority of scattered members in small sites or in peripheral worker groups on larger sites have been severely affected.

(ii) *Pattern-breaking employers*

With the major shift to enterprise bargaining, a range of employer behaviour has emerged. Broadly speaking, we believe employers can be clustered into three groups. The first group has stuck with the basic pattern of employment relations in the industry (either because they are basically happy with it or because they are not particularly innovative employers). This group tends to work in a non-threatening way with the traditional unions and/or a committee of employees to reach reasonable, if unspectacular, deals. Some relatively minor changes to work practices may be sought in exchange for a small pay increase or a

stable pay structure but nothing is attempted that significantly disrupts the basic pattern of employment relations. Where, however, these employers have perceived multi-occupational unionism as a problem in the past, they are quite often encouraging the unions to form a single table or rationalise their coverage so that a single or dominant union emerges. The other two groups are both significant pattern breakers.

One group is engaging in a strategy of improved direct relationships with the workforce based on greater consensualism and involvement. This was a trend amongst certain employers before the Act and it seems to have gained impetus under it. Many of these employers have made significant progress with total quality management (TQM) and believe that their employee relations policies must reflect more mutuality and less adversarialism. Various innovative practices seem to be emerging here including greater use of performance-based pay within job ranges, a new interest in productivity gainsharing and a bargaining stance based on a good first offer from the employer (rather than on a traditional offer of nothing or an offer of clawbacks). The latter appears to be a New Zealand application of what the Americans call Boulwarism (see, for example, Capelli (1990)). We should expect further experimentation from these employers as they learn which practices work best in their specific context (as Streeck (1987) argues occurs in such situations). These employers constitute a threat to those unions which are ambivalent towards greater worker participation in management or whose forms of engagement with management are restricted to a narrow band of traditional concerns. Where these employers do succeed in establishing a higher trust environment over the long run (and by no means all of them will stay the distance), then there is a challenge to those unions which fail to remain relevant in some important way to the workers concerned.

The second group of pattern breakers, regrettably, is involved in overt forms of anti-unionism, in some cases with illegality. The anti-union stance is generally associated with harsh bargaining. Included here are certain small to medium-sized employers intent on denying access to union officials and convinced that proprietorship gives them a right to impose their absolute will on an intimidated workforce. One of the worst instances involves an employer requiring the workers to repudiate union membership (in writing) as a condition of entering into a new contract. This, of course, is illegal under the Employment Contracts Act but it seems that some employers have assumed the Act provides carte blanche for a stance of doctrinaire anti-unionism and harsh bargaining. Unlike the group of high trust employers just mentioned, these employers are not interested in greater employee involvement, but simply in the emphatic assertion of management prerogative. This behaviour, surely, will only perpetuate a cycle of bad industrial relations and bring commercial consequences as labour turnover and industrial disputation rise in the foreseeable future. Besides certain smallish employers, our research also indicates that certain large (often foreign-owned) corporations have used the ECA as an opportunity to pursue anti-union practices. With a limited number of exceptions, our respondents did not attribute such an attitude to New Zealand-owned corporations or to the traditional New Zealand manager where a certain pragmatic acceptance of the role of effective trade unionism is considered to be more the norm.

(iii) *Worker direct bargaining*

A third challenge comes to the historical trade unions from the growth of worker direct bargaining. The trend to date is "at the margin" but it may well grow in significance. Certain groups of workers have resigned from their historical unions to pursue direct

contracting with their employers. Of the contracts lodged to date with the Secretary of Labour, approximately 20% involve some form of employer/employee contracting without traditional union involvement (*Contract*, Vol.2, May 1992: 2).

The reasons being cited for the disaffection include a belief that the unions have done too little for their membership fees in the past, a feeling of alienation from wider trade union politics, the belief that they will achieve better bargaining outcomes than those recommended to them by their union officials or a fundamental agreement with the employer that certain changes which the unions have opposed are in fact sensible and fair in the specific company context. The rise of worker and delegate power implied by the new framework does have serious implications for trade union structures - an important subject to which we return below.

To summarise this section, then, it is clear that the change in bargaining structure brought about by the ECA and the ongoing impact of economic liberalisation since 1984 has passed the strategic initiative in labour relations from the historical trade unions to employers and, in some cases (but probably increasingly), to the workforce itself. We must emphasize that the words chosen here are important - the initiative has passed not to the employer organisations but to the employers. Employer organisations and lobbyists have played a critical role in the reform of labour market regulation since 1984 but the effect of the reforms has been to place the initiative in the hands of individual employers.

And opportunities?

Tempted as the unions may be to see the ECA as a total disaster, there is an old Eastern proverb about crises presenting opportunities for those with the ability to discern them. It might be said that the ECA has had certain positive impacts on the unions.

First, in many situations, the ECA has made free riding a more dangerous activity. Workers who took the benefits of awards without contributing fees now face the possibility of exclusion from a collective whose strength they may actually need to obtain and defend reasonable wages and conditions. This helps to account for the rising level of union density on certain sites.

Second, those employers who have been exhibiting harsh bargaining behaviours have often driven groups of workers back into the arms of the unions. Not only in certain parts of the private sector, but also in the state sector, harsh bargaining postures are stiffening the resolve of various worker groups to resist certain kinds of employer initiative and strengthening union organisation.

Third, as in the United States (Capelli, 1990), the unions are becoming increasingly adept at media campaigns, customer boycotts and shareholder challenges at AGMs that are designed to shame anti-union employers and harsh bargainers. Those employers who haven't thought of the link between their industrial relations practices and their product market image are particularly vulnerable.

Fourth, the general public perception of trade unions may well be improving as voluntary unionism shifts the basis of union legitimacy from historical registration to worker choice. Unions, in effect, are seen to have a right to exist based on the free decision-making of the workforce. That commands greater public respect than compulsion.

Finally, the ECA does challenge the unions to reconsider their strategies. Some unions appear to be simply punchdrunk. Others, however, seem to be engaged in a serious appraisal of their policies and objectives. Union surveys of member attitudes are growing. One union

has gone through a robust process of strategic planning in which individual political objectives seem to have been put to one side and members extensively surveyed on their needs, generating a healthy process of self-criticism and goal setting for the future. Unions, it might be suggested, may be starting to employ more of the strategic management concepts and techniques traditionally used by the larger businesses. In the United States, unions which do adopt worthwhile strategic planning processes are more proactive and appear to enjoy increasing membership bases (Stratton & Brown, 1988). Unions that do not plan strategically are more likely to have declining membership and to be pursuing mergers to stave off collapse. An interesting study could be launched in New Zealand to see if the same trends can be observed here.

In summary, then, although the unions live in "dangerous times" there are nonetheless opportunities and new horizons. We turn now to a more detailed discussion of the trends in union structure (which is intimately connected to the question of strategy just discussed).

Trends in union structure

The changed legal framework, along with the impact of economic restructuring since 1984, has created two distinct and essentially conflicting pressures in respect of union structure. The first is well recognised: the pressure for amalgamation of union structures in order to take advantage of economies of scale and (generally speaking) to create a more efficient form of industry-based unionism. However, the second pressure - to decentralise union structures and power in response to decentralised collective bargaining - is difficult to reconcile with the pressure to amalgamate. Some unions are finding that creating or maintaining a large structure in the face of this new pressure is an inherently difficult process. They are discovering that with the loss of compulsory membership and exclusive jurisdiction, there is a real risk of losing certain groups of members who feel remote - geographically and/or politically - from those making deals on their behalf. In the new environment, the real power must be in the branches, and branch officials must be seen to be serving the membership's needs and not some wider political agenda. Larger, industry-based unions are clearly a sensible response in the new environment but pose risks where the grassroots feels distanced from decision-making.

As discussed above, there are instances where union members have resigned because (amongst other reasons) officials have been perceived as poor performers or have recommended that members accept a contract that they feel they don't have to. Although it must be stressed that membership loss of this type from established trade unions has been relatively limited to the present time, it seems that a large number of small enterprise or micro-industry unions may become a fixture of the new industrial relations landscape.

At the same time, a number of small historical unions continue to guard their autonomy jealously and are unwilling to succumb to the economic pressure to merge with a large union. The continued existence of a number of small, fiercely independent unions is likely to reinforce the dichotomisation of worker interest organisations into a relatively small number of large industry-based unions or union federations and an array of smaller micro-industry and enterprise-based unions.

The implications of these trends for the central worker organisation, the NZCTU, are difficult to anticipate. It should also be noted in this respect that a number of unions and union officials continue to feel alienated from wider trade union politics and evince no immediate desire to participate. These trends, taken together, must necessarily pose real problems for any future attempts at centralised wage fixation.

The impact of the ECA on non-union agents

The employer side of the table

We turn now to an examination of the Act's impacts on non-union agents. The first thing that must be said is that all the evidence strongly suggests that most of the business is on the employer side of the table. The market for employer advocacy and representation, given the decentralisation of private sector bargaining, has expanded enormously.

The new employer agents can be divided into two main groups:

- (1) innovative, practitioner-oriented consultants who are quite often helping to facilitate a more consensual, direct employer-employee engagement,
- (2) lawyers who are involved in advising their clients on contract contents and in litigation before the Employment Tribunal and Court.

The first group tend to be experienced in labour relations, prepared to run with new ideas in the new environment, capable of focusing on the needs of the individual employer and not connected to wider employer politics. Their approach seems to be increasingly popular amongst these employers looking for something different to what they perceive as "traditional conflict-oriented IR". As with the workforce, there are employers who don't want to be part of wider politics: they simply want to run a good ship. The growth of these alternative agents - given the blend of fresh ideas and credible experience they tend to bring - is a healthy development. We must stress, however, that their approaches do vary and the market will inevitably become more discerning as employers travel up the learning curve associated with enterprise-based labour relations.

The impact of the second group, it seems, is much more ambiguous. Many respondents made strong criticisms of "new kids on the block" lawyers. Some lawyers, it seems, are not well briefed on labour law. Others seem to have adopted the kind of adversarial approach which expands conflict (for example, escalating cases to litigation which would be more appropriately settled informally in an ongoing employment relationship). Yet others seem to be taking a strict, legalistic approach to contract construction which amounts to poor employee relations advice because it demotivates, if not completely alienates the employee. Some legal advice is clearly not sensible business advice. On the other hand, respondents tell us there are lawyers - perhaps mostly the "old pros" who were around before the ECA - who do have a reputation for proffering legal advice which also makes business sense. Again, the market is learning from its experience and some sort of "shake-out" amongst law practitioners may well be occurring.

Where does all this leave the traditional employer agent - the employer association? The employers' associations, arguably, are just as affected by the ECA as any of the trade unions. The demise of blanket award coverage and the politics of the wage round has created a whole new ball game. There are clear signs of a new strategic direction emerging in the employers' associations, one which places more emphasis on consultancy, education and training and information services. Such a strategic shift - in an increasingly competitive environment - cannot, of course, be achieved overnight, especially in organisations with a strong tradition in the former system. As with the CTU, we must await further developments.

The worker side of the table

As indicated earlier, there is much less business on the worker side of the table. Trade unions are still generally the most cost-effective option in terms of worker agency needs and the best unions bring a range of advantages in terms of contract enforcement, industry experience and supplementary member services (such as health centres). Alternative worker agents, like the employer ones, can be divided into two main groups:

- (1) former union officials setting up in competition to trade unions,
- (2) lawyers largely involved with personal grievances and contract advice.

It seems that the first group - former union officials - is meeting with mixed success. One or two agents have reportedly already established quite sizeable businesses while others may well be living off scraps. Certain essentially employer-oriented agents are also receiving requests from worker groups for bargaining services and this may well grow as particular individuals acquire a reputation for high effectiveness. It may well be that certain of the worker groups now pursuing direct bargaining with their employers are keen to "shop around" for the best advice and services and are thus more than willing to consider non-traditional sources of help. The impact of the second group is again ambiguous. Certain lawyers are taking worker grievances on a contingency basis but the level of competence in terms of labour relations expertise and judgment is clearly variable.

Conclusion

In conclusion, a number of points are worth emphasising:

- (i) Unions - to date - have not been equally affected by the Employment Contracts Act. For those unions most dependent on the historical supports of the old system, the consequences have naturally been greatest. The rest of the unions tend to have been more affected by economic restructuring and recession than by the ECA. And those unions whose workplace organisation efforts have been effective, whose resources have been allocated to delegate training and support and which have involved themselves in enterprise issues beyond the traditional concerns of collective bargaining have been much less affected by the ECA. There is no cause for complacency anywhere in the union movement, however.
- (ii) The unions have been facing certain important challenges. These include the challenges posed by the decentralisation of private sector bargaining, the initiatives of pattern-breaking employers and the growth of worker direct bargaining. Pattern-breaking employers can be divided into two main groups: those pursuing high trust direct relations, and those indulging in anti-unionism and harsh bargaining. The strategic initiative in labour relations has passed to employers and, in some cases (but probably increasingly), to the workforce itself.
- (iii) The Act has had some positive impacts on the unions. These include the fact that free riding is made more dangerous, that harsh bargaining has backfired on certain employers, that PR campaigns against anti-union employers have proved quite useful, that the public perception of unions seems to be improving and that the new

environment may well be encouraging strategic planning.

- (iv) The new environment has brought two essentially conflicting pressures in terms of union structure. One is towards greater size and (generally speaking) industry-based structures, the other towards greater decentralisation of resources and power. While the larger unions grapple with this tension, a number of smaller ones wish to remain autonomous and there is an incipient movement towards enterprise and micro-industry unions.
- (v) In terms of non-union agents, most of the business is on the employer side of the table. New employer agents can be divided into innovative, practitioner-oriented consultants and lawyers mainly involved in legal advice and litigation. The first group has been associated with much of the innovation in labour relations styles. The impact of the second group has so far been ambiguous.
- (vi) There is much less business available to alternative worker agents because trade unions are still generally the most cost-effective option in terms of worker agency needs and the best unions bring a range of advantages in terms of contract enforcement, industry experience and supplementary member services. The main players to date are former union officials and lawyers. The impact of both groups is so far variable.

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