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Comment

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The Green Paper may be commended for its far-reaching and thoughtful review of the current system of industrial relations in New Zealand. However, one can criticise the manner in which some important topics are presented to the public and for omitting certain issues from the debate.

Narrow Focus

The Green Paper, quite apart from limiting its focus to the private sector, deals exclusively with what has been referred to by Szakats as the "macro" level of industrial law, i.e. the relationship between employers and organised labour. A review of the individual employment relationship or the study of industrial law in its "micro" component is missing. The Green Paper therefore fails to provide a complete picture of the position of workers in New Zealand as of 1986.

The importance of such an overall picture needs hardly to be stressed any more. Industrial law, or labour law, is clearly distinct from other related areas of study such as commercial or company law because of its social dimension. It is concerned with labour or work which is done in a position of (legal) subordination. In its individual component, the emphasis is on the direct relationship between employer and employee and historically this individual level of industrial law came first. It is only because the principles of freedom to contract are of little use in what is essentially a relationship of economic dependence between "master" and "servant" that workers became organised. Thus the relationship between employers and organised labour developed into what is known today as collective labour law. It must be borne in mind, though, that an acknowledgement of the weak bargaining position of the individual worker is what industrial law is all about. A system of industrial relations is therefore inseparably linked to the ultimate question as to the protected status of the individual employee, whether this be resolved in any given case by rules focussing on unions or by provisions for direct employee protection. A major pitfall of the Green Paper lies in its lack of acknowledgement of the latter alternative. The Government proposals for reform only incidentally touch upon the position of the individual worker.[1]

It is undoubtedly true that collective labour relations are often of much more societal significance than is the case with individual labour law. It is equally so that many of the detailed terms of any given employment contract nowadays are incorporated from awards or agreements negotiated on behalf of the individual worker. But all this goes to strengthen the argument that, since organised labour apparently has come to play an increasingly crucial role in the life of the individual worker, extra caution is called for when changes in the field of collective industrial relations are contemplated since the protected status of the worker in New Zealand is directly linked to it. State establishment of minimum standards by statute is low,

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1. Four out of 44 questions in the Green Paper deal with the position of the individual worker directly: see question 9 as to the union-member relationship, questions 11 and 12 as to coverage in negotiations and question 23 with respect to coverage of the personal grievance machinery.

compared with other developed countries. The consequent reliance on self-regulation (by means of award negotiation) for such things as the form and sorts of individual employment countracts, the legal effect of events that temporarily suspend the contract performance, illness, annual vacation, military service, strikes, etc. and, most importantly, the termination of the employment relationship on the employer's initiative, is obvious. Although a system of self-regulation does not necessarily yield inadequate results, self-regulation as it operates in New Zealand today is, as argued below, incapable of reaching all workers concerned.

In spite of the presence of blanket coverage, it is indeed estimated that only something in excess of half a million workers in the private sector have their wages and conditions of employment fixed by negotiations between unions and employers. It follows that many persons in the private sector currently miss out on award protection (potentially as many as 300 000, this being the number of non-unionised persons in the private sector although both figures do not necessarily cover the same people). The reasons for this vary. First of all, one has to be "a worker" as defined in the Industrial Relations Act. This seems self-evident. However, it does imply that apprentices miss out on award coverage under the 1973 Industrial Relations Act as they are deemed not to be in a master-servant relationship.

It does not suffice to be labelled a worker. One has to be a worker "for purposes of award coverage". Here s.213 of the Industrial Relations Act holds that, to be considered a worker for the purpose of award or agreement coverage, one has to be employed for the "direct or indirect pecuniary gain of the employer". The only, but crucial, exception to this prerequisite is when the employer is a body corporate.

Even a "worker" employed by a "qualified" employer does not enjoy award coverage automatically. A further requirement is that there be a union which has negotiated an award or agreement. This presupposes employment in a job covered by the membership rule of a registered union. And even then it may turn out that some workers are excluded from coverage by the award itself, in that they earn salaries in excess of the salary bar specified in the award which would otherwise apply to them. A typical example is the New Zealand Clerical Workers Award, where the salary bar is $18 053.

The Green Paper identifies those "unorganised groups" (pp. 81-97) and gives special attention to the employment protection of home workers and young people. Each time the solution offered is protection by legislaion. One may wonder why an extension of legislative protection (beyond such issues as minimum wage and holidays) is not being considered for *all* workers, regardless of their particular employment situation and irrespective of award and/or union coverage. Statutory regulation in the already mentioned areas of contract formation as well as suspension and termination of the employment relationship, would have the advantage of yielding uniform (minimum) results on which collective bargaining could build and expand.

An example which illustrates the shortcomings of the present reliance on self-regulation is the grievance system. As s.117 of the Industrial Relations Act contains no legislative command independently from a collective instrument, it is viewed as having no direct enforceability (Szakats and Mulgan, 1985, p. 27). It follows that, in the absence of a European-type Labour Court system which would allow for "aggrieved" individual workers to have their complaints dealt with directly, only an action at common law before the ordinary courts remains wherever the grievance machinery is not available. It will be recalled that such availability depends on both union and award coverage. This raises additional problems for workers that have been exempt from union membership by the newly established Union Membership Exemption Tribunal. Does their non-membership status constitute a bar to using s. 117 and, if so, does the possibility of bringing an action at common law really provide for an adequate alternative?

"Neutrality" of the questions

The willingness of the present Government to engage in prior consultation with all interested (in a broad sense) parties is noteworthy. It allows for the decision-making process to be an informed one. It also represents a highly democratic approach. There is one major drawback, though. No government can be completely neutral in a review process such as this. There are 2 reasons for this. Firstly, the State is the biggest single employer in the country and although public sector employment is not covered by the Green Paper, some overflow from developments in the private sector seems inevitable. Secondly, the Government's attitude

towards industrial relations has to be seen as part of its overall public policy making. Thus the Government is a directly interested party. This entails the risk of there being no clear dividing line between a Green Paper (outlining the several options possible) and a White Paper (containing policy decisions already made) at all times.

When turning to the actual questions raised in the Green Paper, it becomes clear that certain basic assumptions have served as a starting point to the Government's "Framework for Review". It is imperative to identify these assumptions in that they may reflect underlying value-judgments held by the Government as to the proper functioning of a system of industrial relations and therefore would "colour" its commitment to review.

The introduction to the Green Paper enunciates the original objectives of the system and the Government strategies that have been focussed upon in connection with these objectives. Next, question 2 asks what effect these objectives and strategies have had on the outcome of union/employer negotiations. More specifically, it asks whether the balance of advantage favours unions, employers, or whether it is about equal. Such phrasing of the question suggests that a system of industrial relations has to aim for an equal balance between the bargaining parties. Although a similar attitude can also be found in industrial relations systems elsewhere, most notably in the USA and the Federal Republic of Germany, it is an approach to industrial relations which is by no means self-evident. An alternative starting point could indeed have been to acknowledge the basic economic imbalance in the employer-employee relationship and to stress the subsequent need for legislative intervention. This need for protective social legislation is a permanent one since also the economic dependence of the worker is there to stay as well. Such an "alternative" approach to industrial relations may have far-reaching practical consequences. It means, for instance, that it would be wrong to treat strikes and lock-outs as equal weapons before the law.

Assumptions are also made regarding the role of the State and the desirable degree of government involvement in industrial relations. A lack of freedom on behalf of the bargaining parties to regulate their own relationship is believed to account, at least in part, for the current malfunctioning of the system. It is therefore assumed that a reduction of government intervention may be beneficial to the overall functioning of the industrial relations system. Suggested areas of reduced involvement by the State are the bargaining scope (question 13), enforcement (question 19) and administration (question 2) of awards or agreements, as well as industrial action (question 39).

On the one hand, underlying assumptions affect the type of questions being raised and therefore it follows that they are not necessarily value-free. On the other hand, they way the questions themselves are phrased is not always completely neutral either. In some instances, they are formulated in such a way as to be assured in advance of a contradictory answer by the respective parties. Examples are questions as to whether the award system should continue to be a central feature of wage fixing (question 16), whether the powers of suspension available to the employer in response to strike action are appropriate (question 37) and whether there is a case for recognising a broader freedom to picket than that provided by present law and precedent (question 38). Occasionally, the question itself may even be provocative, as in question 7 where compulsory unionism is explicitly made a non-issue. Undoubtedly not even a more careful phrasing of the issues at stake would have been likely to induce a general consensus in the submissions to be made. Industrial relations as such is too emotional an area for this to be possible. It can only be hoped that the Government will not hide behind the smoke screen that it itself has produced. The possibility of limiting itself to marginal changes is made both likely and tempting.

References

Szakats A and Mulgan A (1985) *Dismissal and redundancy procedures* Wellington, Butterworths.