

## Comment

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New Zealand will no doubt celebrate the centennial of the Industrial Conciliation and Arbitration Act in the near future, either on 31 August 1994 (100 years after passage) or on 1 January 1995 (100 years after effect). As that centennial approaches, the Green Paper offers a timely and useful opportunity to identify and review the basic assumptions and operating axioms of that system. This comment will set out those assumptions and attempt to articulate the corollaries which flow from them.

The most basic axiom, and the lowest common denominator of all western industrial relations systems, is the principle of collective bargaining. Indeed, the history of industrial relations of the 20th century is little more than an annotation of 19th century judicial hostility to, and ultimate legislative endorsement of, the practice of collective bargaining.

That principle, condemned until the 20th century as a criminal conspiracy, is the right of workers by law to establish or to select an artificial legal person to serve as a bargaining agent with the employer/employers of those workers in contract negotiations, conciliation, arbitration, and dispute resolution generally (hereafter, "collective bargaining agent" will be abbreviated as CBA, or "the union"). The institutional significance, not to say threatening aspect, of collective bargaining is dramatically apparent by reference to certain lines of authority where the intercession of such an agency is unthinkable (at present): prison superintendant — prisoner, in the designation of accommodation block; battalion commander — private soldier, in determination of military assignment; professor — university student, in allocation of exam mark. The significance of collective bargaining in the industrial arena is that the employer must accept the designated representative of the workers at the bargaining table, both to establish new agreements, and to interpret or to fulfill existing agreements. It would be unfair and illegal to attempt to bypass that representative and deal with or impose upon the workers directly as individuals.

Several corollary questions necessarily follow upon recognition of the collective bargaining principle:

1. How do the workers select, create, or recognise their CBA? And will their CBA be associated with workers craft-wise (horizontally) or industry-wise (vertically)?
2. Which employers, or rather which aspects of an employer's enterprise, is "covered" by a particular CBA? If an employer produces, packages, warehouses, sells, and delivers a product, and keeps all manner of clerical records, does the same CBA cover those workplaces?
3. Once the first 2 questions have been answered, and the 2 parties to collective bargaining have been identified, a third question arises: Are there any limits on the parties' bargaining capacity? Is there a managerial prerogative closed to the CBA? Does the employer wish to bargain about off-the-job responsibilities of or benefits to workers?
4. A fourth problem should also be identified: If the CBA has rights and responsibilities on the bargaining platform, does it have standing to participate (to sue and to be sued) in the performance of any bargains struck? In other words, if the employer does not perform (pay wages as agreed) does the collective bargaining agent have the standing to pursue a remedy? Conversely, if the workers collectively do not perform does the collective bargaining agent have a liability or a responsibility to ensure performance (or to pay damages for non-performance)?

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In New Zealand, the collective bargaining achievements of William Pember Reeves in 1894, as further strengthened by the first Labour Government in 1936, were imposed on the actors in the industrial relations drama at a very early, perhaps premature, stage indeed. The result of Reeves' success was, and still is, a metallic rigidity in the evolution of the corollaries identified above. In particular, the legislative formulae for identification of the parties and proper subjects for bargaining has evolved from being a mere supportive exoskeleton to being a stiff statutory straitjacket. For example, it is fair to say that rather than workers forming or choosing a CBA, a pre-existing statutory-ordained CBA chooses them.

In a process vividly described in the Green Paper as a "gold rush" (vol. 2, p. 21), the first CBA up the steps to the Registrar's office received a perpetual indefeasible title to the staked-out block of industrial topography. The benefits of this perpetual title are well described in the Green Paper (vol 1, pp. 6-7).

It is suggested, therefore, that the real heart of the Green Paper, and the greatest potential for unlocking the legislative straitjacket of Reeves' system, lies in question 6 of volume 1, and chapters 1.1D and 1.2C of volume 2.

Question 6 should not be phrased "Which approach is the most appropriate for determining compulsory union membership?" but rather "What is the best method of identifying parties to the collective bargaining process?" and "Should the workers' CBA be based on historical priority or workers' choice?" If the latter, then a system of Department of Labour supervised work place competitive ballots should be considered. Political solicitude for the existing union structure is presumably responsible for the unspoken assumptions of the Green Paper, but if the Minister wishes to prepare an industrial omelette for the next century, he must risk cracking a few union eggs from the last century.