

Calmfors, L. and Drifill, J. (1988), Bargaining Structure, Corporatism and Macroeconomic Performance, *Economic Policy: A European Forum*, 6(April): 14-61.

Clark, H. (1993), Employment Relations - the New Direction under Labour, *New Zealand Journal of Industrial Relations*, 18(2): 153-162.

Easton, B. (1987), The Labour Market and Economic Liberalisation. In Bollard, A. and Buckle, R.(eds), *Economic Liberalisation in New Zealand*, Wellington, Allen & Unwin.

Hall, T. (1993), Rising Dollar Worries Manufacturing Exporters, *Sunday Times*, 13 June, p.19.

Lorenz, E. (1992), Trust and the Flexible Firm: International Comparisons, *Industrial Relations*, 31(3): 455-472.

McAndrew, I. (1993), The Process of Developing Employment Contracts: the Management Experience. In Harbridge, R. (ed.), *Employment Contracts: New Zealand Experiences*, Wellington, Victoria University Press.

Marshall, R. (1992), The Future Role of Government in Industrial Relations, *Industrial Relations*, 31(1): 31-49.

Matthews, J. (1992), The Industrial Relations of Skill Formation. Paper presented to International Industrial Relations Association Ninth World Congress, Sydney.

Paloheimo, H. (1990), Between Liberalism and Corporatism: the Effect of Trade Unions and Governments on Economic Performance in Eighteen OECD Countries. In Brunetta, R. and Dell'Aringa, C. (eds), *Labour Relations and Economic Performance*, Basingstoke, Macmillan.

Solow, R. (1990), *The Labor Market as a Social Institution*, Cambridge, Blackwell.

Walsh, P. and Ryan, R. (1993), The Making of the Employment Contracts Act. In Harbridge, R. (ed.), *Employment Contracts: New Zealand Experiences*, Wellington, Victoria University Press.

Wells, G. (1990), Economic Reform and Macroeconomic Policy in New Zealand, *The Australian Economic Review* No. 92: 45-60.

## The Culture of Tripartism: Can European Models be Adapted for New Zealand Use?

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### The context of industrial relations policy

For nearly one hundred years, industrial relations systems in New Zealand have had two basic characteristics: they have been largely prescriptive, and they have been relatively self contained.

They have been prescriptive in that the institutions and the procedures that were set out in the law were designed around a fairly precise intended outcome, and it was clear how and when the system would deliver the intended result.

The system had its specific objectives - equity, industrial harmony, etc. - which were not exactly independent of what governments sought for the wider economy, but which were not integral to the direction of economic policy.

The Employment Contracts Act was far more permissive than the traditional pattern. It is clear that there was an intended outcome of the legislation, but because it did not set out the rights and roles of institutions, or define the way that they would interact, its results would be uneven and evolutionary, rather than uniform and predictable. It was also different in that labour market policy was seen to be a pivotal element of the wider economic strategy of the government.

The Labour Party industrial relations policy is similarly permissive, and potentially, if not overtly, a central component of wider economic strategy. Because it is unlike the past, it is easy to see it as being not too different from the present.

The challenge is to identify where permissive industrial relations systems differ, in a context where there is no historical comparative experience of permissive systems to draw on.

### The origins of prescriptive systems

The 1894 Industrial Conciliation and Arbitration Act in many ways set the pattern for the century that followed it. It was essentially a response to perceived defects in the way the labour market was performing - generating too much industrial conflict on the one hand (for example, the 1890 maritime strike) and too little protection on the other hand (as reported by the sweating commission).

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Hence an Act "to encourage the formation of industrial unions and to facilitate the settlement of industrial disputes by conciliation and arbitration." The law set up a structure (unions of workers and employers, machinery for conciliation and arbitration, etc.) and defined relationships within that structure that led to largely predictable results (unions operating within a constrained role, but delivering a socially acceptable floor of employment conditions). It is this mechanical, almost predetermined, and certainly highly predictable model against which most variations have since been judged.

That model is in stark contrast to European systems of industrial relations where there are very few formal structures or set rules. The process dominates. It is the behaviour patterns - the culture - that emerge that determine the result. The results of the formal structure are absolutely unpredictable, the results of the culture that emerges out of it highly so.

The Employment Contracts Act departed from the established New Zealand tradition in many ways. It was permissive rather than prescriptive, and disestablished most formal structures. It was consistent with the tradition in that it had clear intended impacts - which were essentially a deunionised workforce, an extension of managerial authority in the employment relationship and the emergence of enterprise level bargaining.

The Labour Party industrial relations policy is consistent with the new orientation of policy in that it is not formally prescriptive, but it does tend to reassert the importance of structure as a means of directing the process down alternative paths.

It is a policy that is neither in keeping with the structuralist traditions of the past, nor with the ideology of unbridled libertarianism that dominated systems of government for the last decade. It is, as a result, a policy that has to be interpreted with care. It is also a policy that will have very different results depending on how a Labour Government would operate other policies in economic and social areas.

### The importance of purpose

New Zealand industrial relations systems have been underpinned for so long by "equity and good conscience" considerations that very little attention has been paid to the central importance of the formal purpose of industrial legislation. The aims of legislation were always secondary to the more dominant test of "is it fair"? The ECA broke that mould by shifting industrial legislation from an *employment* relationship to a *contractual one*.

The distinction is crucial. It is captured in the 1948 "Philadelphia Declaration" that has been annexed to the constitution of the International Labour Organisation. That declaration asserts that labour is not a commodity.

There are a number of aspects of an employment relationship that set it apart from the laws of commodity exchange. It is essentially human in its composition, and should in consequence be regulated by notions of civilised interpersonal behaviour. It tends to be open ended, not discrete. In the relationship, obligations change, and along with that, rights change. It is progressive, developmental and dynamic.

Commodity exchange, on the other hand, tends to be confined, at arms length and impersonal (even when transactions are more or less continuous or repetitive).

What the ECA did was to "commodify" (at least partly) the employment relationship by introducing a notion of an employment contract to replace that of an employment relationship. The new notion is somewhere between a purely commercial contractual relationship and one that is more overtly an "industrial relationship".

The most substantial change that goes with this is the replacement of the test of "is it fair" with one of "is it in the contract?". When interpretations were needed - as they inevitably would be in the intensely and unavoidably personal process of forming the contract - the Courts fell back on the purpose of the legislation. Here the legislation proclaimed its purpose as being "an Act to promote an efficient labour market", and efficiency came to be the standard against which behaviour was judged.

It has taken a long time for industrial relations practitioners to appreciate just how crucial this purpose has been in determining rights and obligations on matters such as access to worksites, supply of information, union recognition, and bargaining procedure.

If the purpose of the Act had been different - if it had been, for example, "to encourage the formation of unions and to facilitate the settlement of industrial disputes ..." as per the 1894 IC&A Act, there would have been radically different judgements delivered from identical sets of facts in the precedent setting *Alliance Textiles*, *Richmonds*, *Ports of Auckland*, etc., etc., cases.

This is one area where the Labour Party industrial relations policy is *fundamentally* different from the ECA, and where differences will result in *radical* not marginal or piecemeal differences in the results of organisation, and bargaining.

The first objective is to facilitate economic growth (in a largely open economy). This is a much broader concept than "efficiency", and it allows new tests to be applied about labour market practices that, for example, improve quality, consistency of quality, reliability of supply and adaptability of industry and enterprise to changing international conditions. At the very least, this objective is likely to widen the range of matters that unions can legitimately seek to organise and bargain around, and limit employers rights to marginalise unions in the productive process.

The second objective is to promote collective bargaining, and this will substantially upgrade rights of access to worksites and to information. Just how far worker rights will be extended to allow this objective to be met remains to be seen, but this is one area where a prescriptive aim will have impacts on industrial relations structures. In particular, the objective will restore basic rights of unions, and a recognition of unions as a key industrial relations institution. It is difficult to "promote" collective bargaining without a much more formal recognition of the vehicles for collective representation than the ECA offers.

The third objective is to restore equity and fair play, and because of it the industrial relations system will again have to be influenced by concepts of equity and good conscience. This will not simply mean that there will be an expanded minimum code and more effective

enforcement of it. Notions of unfair treatment are likely to lead the Courts to take account of the way that the contract (or agreement) was formed and not only what was in it.

The fourth objective seeks to integrate what would otherwise be disparate aspects of industrial relations practice (wages, health and safety, EEO, workplace reform, etc.), and again it cannot be achieved without a far wider role for unions being promoted and not only allowed.

The final objective is the elimination of "destructive wages competition", and so the intended end result of a system that is not overly heavy with structure and formal process is, nevertheless, not too far away from the intention of systems that have, in the past, been much more structured.

The difference of objectives between the ECA and Labour's industrial relations policy will not simply respecify rights and obligations, but is most likely to change behaviour - of both employers and unions - and in time start to shift the industrial relations culture.

It is surprising that most commentators on the policy have not as yet picked the centrality of this change of emphasis. On the one hand it destroys the old order that more or less delivered a settlement of a dispute to a union, and on the other it terminates the unilateral power of an employer to virtually dictate that outcome.

If there is a single thread that runs through all of the objectives, it is that a Labour industrial relations law will be arranged to achieve its purposes via the promotion of collective bargaining - it essentially places the process as the purpose of the system, which is unusual in an historical context in New Zealand.

The philosophical rationale behind that seems to flow out of an overriding respect for international law and standards. This implies that ILO principles are accepted as a more rational and equitable basis for regulating labour market relationships than are the laws of commodity exchange. It is also consistent with the growing recognition in the literature that tripartite processes for macroeconomic management, for industry rather than enterprised based responses to the competitive environment, and for collaborative rather than authoritarian workplace relationships, are simply more efficient.

The changed purpose of industrial relations law is the single most important feature of Labour's industrial relations policy, and it dominates and dictates what the institutions will do within the new system.

### **Tripartism in macroeconomic management**

The obsession with structure has meant that because the Labour policy has little detail about the structures through which tripartite consultations will be conducted, this aspect of any industrial relations system has received little attention.

Indeed, it is a criticism that can be directed at Labour Party documents themselves. On the one hand they extol the economic virtues of strategic partnership, common interest and

common future, and the importance of ILO principles (the absolutely vital one, of course, being tripartism which is the very basis of the ILO's existence!). On the other, tripartite participation is formally listed as the central organisation being a part of the proposed Enterprise Council.

If that is the limit of union engagement on economic and social policy, then the policy will be a dismal failure in terms of this dimension of its operation. It is to be hoped, however, that this will not be the essence of tripartism.

New Zealand's past experiences with tripartism have been mixed. Curiously enough, there was an active sort of tripartite discussion during the Muldoon era, with endless meetings around matters such as reform of the wage fixing system, the prospects of wage tax trade-offs and the timing and amount of periodic general adjustments to wages.

The weakness of Muldoon's tripartism was that it was linked to a narrow macro target - wage outcomes - and did not really allow discussions around a wider mix of policy instruments. It was also a type of tripartism that never considered any form of mutual obligation to implement agreements - at the end of the day the government regulated. The lack of any sense of ownership of the decision meant that there was no development of new practices in the labour market. Each decision was specific to its time and topic.

The formal Tripartite Wage Conference that was introduced as a part of the mechanism for exiting from Muldoon's wage freeze had an explicit rationale. It reflected a recognition that on the one hand wages were too important a macroeconomic variable to be ignored (as either a cost or a component of aggregate demand), but on the other the labour market was heterogeneous and not amenable to central regulation. The TWC concept relied on goodwill and on a recognition of where the common or "public" interest lay, but its operation was a farce for the simple reason that the government of the day didn't believe in tripartism. The conference convened as a matter of obligation.

The most successful "tripartite" agreement was one that didn't develop through formal structures, and one that didn't even have formal employer participation in its development. The "Growth Agreement" of 1990 indicated what was possible without compulsion or centralisation, if there was the political will to seek consensus on the appropriate macroeconomic settings.

Of course, it was only the first phase of the agreement that was put to the test, and it is still questionable if a voluntary restraint agreement can be made to stick in periods of sustained economic expansion. However, it is certain that if Labour wants to lift the rate of growth to its target of four percent or more, and to get serious traction on jobs, then some easing of monetary settings will be unavoidable.

At that point, an incomes policy will become the only way that its inflation and growth objectives can be reconciled, and informal tripartism will have to be tried.

So far Labour policy is muted about this. The political will that is displayed in this area, rather than the formal structures for tripartite engagement, will be crucial in determining the success of the wider industrial relations package, because without a growing economy and an

expanding employment base, rights to organise and to bargain do not translate into significant improvements in conditions of employment.

One area where Labour policy on tripartism is more explicit is in the development of the minimum code of employment rights. This is a major improvement on current (and past!) practice, under which statutory rights were established through an incredibly secretive process and in a remarkably unilateral manner.

### The industry as the basis of the bargain

As written, Labour policy is essentially an enterprise based bargaining model with an escape route to multi-employer or industry documents, rather than the other way around (as in, for example, its 1990 amendment to the Labour Relations Act).

There are severe limits on the ability of an economy to achieve and maintain a broadly based international competitiveness if decisions within it are made at enterprise level.

This means that if the first objective of Labour's policy is going to be achieved, then an "industry" dimension to industrial relations systems will have to be developed as an integral - not occasional or secondary - dimension of them.

This is not the place to go into the need for pan-enterprise (industry) competitive strategies, but in summary, an enterprise based model tends to result in underinvestment in technology, product, market and skills development.

The Labour industrial relations policy will be relatively supportive of the development of industry collective bargaining in industries that are fairly clearly defined, and which are dominated by a few large enterprises, in both the public and private sectors.

On its own, it will not necessarily steer that bargaining down a path that emphasises skills development, the deployment of new technologies and the adoption of new work methods. The content of the bargains will depend very much on what other initiatives are taken by the government in areas such as training policy, encouragement of expanded R&D and the promotion of industry standards of product quality.

In areas where industrial boundaries are indistinct and where there are many enterprises - general manufacturing, distribution, personal services, etc. - the policy in itself is unlikely to stimulate "industry bargaining" in any meaningful way. Here, government facilitation of industry approaches will be more important in shaping industry policies than the industrial relations system.

This means that there is an interface between administrative reform and industrial relations reform. The Labour Party policy calls for the development of "Industry Development Organisations" (IDOs) through active government facilitation. What is unclear in the policy is how "active" the government will be in "facilitating" industry involvement in these organisations. In particular, the policy is silent on the degree to which financial incentives

and penalties (for example, through revised tax treatment, or loss of access to state funded inputs on research, technology transfer, skills development and infrastructure supply) will be applied to secure effective producer participation in IDOs.

Effective IDOs will allow more widespread multi-employer bargaining, and a wider range of matters to be discussed during the course of that bargaining. Weak IDOs, with a limited consultative role, will tend to ensure the continued dominance of enterprised based bargaining.

### Collective bargaining in the enterprise

In the last three years, the industrial relations system has moved from one dominated by national occupational awards to one based on employer driven enterprise contracting.

The Labour Party system will be decisively different from either of these models.

While it is true that in the first instance, at least, the scope of bargaining will tend to remain confined to the enterprise, a new regime would be radically different from that of the ECA. Again, an emphasis on the formal industrial relations structures that a Labour policy would establish might conclude that the differences are cosmetic rather than substantial, but a recognition of the impact of process allows a different conclusion to be reached. The two elements of process that will "make a difference" are a shift to collective bargaining, and the introduction of duties, the most significant of which is the duty to bargain in good faith.

Collective bargaining allows the organisation of workers and the conclusion of agreements around an area of work, and not only for those who are doing it at the time of the contract. This reasserts the continuity and dynamism of the employment relationship, and resists the tendency to commodify labour that is inherent in the contacts type approach.

But the duty to bargain in good faith will be fundamental to different results coming out of systems with similar scope. Equally, the sorts of differences that emerge will themselves be determined by the final "model" of good faith bargaining that is adopted.

The duty to bargain in good faith recognises that collective bargaining is part of a mutual and continuing relationship and that the settlement of a collective agreement is desirable in this relationship. It aims to preserve the collective relationship and to prevent employers exploiting voluntary unionism to undermine collective bargaining while it is in progress. It should be the focus of a radically new bargaining culture.

The Labour Party paper is by no means clear as to the scope of the requirement or its likely enforcement. This is crucial. A good faith requirement can be enforced by highly regulatory means. This is what occurs in North American systems where good faith is enforced through the concept of unfair labour practices, which are breaches of highly specific requirements about the bargaining process. The North American experience is that this focus on specific issues such as meeting times can lead to:

- remedies which resolve the specifics but do not move the collective relationship towards settlement.
- litigious and confrontational behaviour by the parties.

What is needed is a system which concentrates on enabling parties to develop good faith relationships but penalises those who do not act in good faith. This is the implicit focus of good faith in European collective bargaining systems where the parties assume that they have a mutually beneficial relationship.

Designing a system which recognises the need for mutual respect but prevents exploitation and unfairness is of course more challenging. At this stage, there is not enough detail to enable judgment to be made on whether the Labour Party policy will achieve this.

### Residual protections

The pre-ECA industrial relations regimes tended to emphasise the importance of protecting the exposed segments of the labour market, and in many ways the arbitration system and the national award system reflected a devolved system of labour market regulation.

If the intention is to regulate against abuse of employer power, it is better to do that in a coordinated, transparent and efficient way, for obvious reasons, but also because that is more likely to encourage compliance and to enable enforcement.

Labour's minimum code is a victory for common sense over sentiment, and it plugs a big gap that the ECA opened up.

### Conclusion

Experience with the ECA has suggested that, despite its many and obvious imbalances and shortcomings, there are three advances on the old system that neither employers nor workers wish to see reversed. One is the right to choose a union, one is the right to ratify a contract and the last is the extra degree of freedom that has followed in the wake of a removal of rigid occupational demarcation. This last conclusion may not please all workers, particularly those who gained when occupational demarcation allowed the extraction of scarcity "rents" in the bargaining process.

The problem is that the attractions of a workplace with few occupational demarcations will be shortlived if it is not built into a replacement regime for certification, recognition and reward of new skills and responsibilities. Workers like doing new and challenging tasks. They also want them to be recognised, paid for, and certified so that they can be used in looking for another job, should the need arise.

Labour's new regime cements in the attractions of the new liberalism, and in that respect it could be dismissed as being politically expedient and little else.

That judgement would be unfair. Its policies have two very strong points: the introduction of a more robust and effective minimum code and a return to a regime that intends to promote collective bargaining as the basis of employment relationships. The significance of both should not be underestimated.

The policy is soft on its commitment to tripartism, but there is scope for practice to fill the gap that exists in the formal structure and declared process.

Finally, in key areas of industry bargaining, and reform of agreements on use of technology, skills and work methods, much depends on what happens with other policies. But after all, all that is saying is that the industrial relations regime is but a subset of the wider strategic mix of political economy.

Just as the ECA would not have had the same effect if there had not been the benefit cuts, the six month stand down and public sector spending caps, so Labour's industrial relations structures will generate results that are moulded by what it does in complementary areas of government.

Final judgement is reserved.