**END OF AN ERA?**

**THE PATH TO THE EMPLOYMENT RELATIONS AMENDMENT ACT 2014**

Since taking office in 2008, the National government has tinkered with the Employment Relations Act 2000 repeatedly, making changes by degree rather than dramatically. The Employment Relations Amendment Act 2014 is the Fifth Amendment to our Act. Since the amendments it has indicated it will make more changes, this time to address Zero Hours. It is hard to see how, given the lack of real understanding of the problem or solutions it will make effective changes.

The changes were described by one commentator as:

**“A useful tweaking, a good nudge, but not a sweeping overhaul”.**

I am not sure they are that “useful” but I agree they are tinkering. This does not mean that I underestimate the negative impact of the latest attack on collective bargaining.

In my opinion the changes certainly don’t spell the “end of an era” but rather the confirmation that certain concepts are entrenched – concepts like the **role of unions**, **good faith, relational agreements** and even and acceptance there is **a legitimate place for legislative protection for the lowest paid**.

The concepts that are not entrenched because they were not successfully dealt with in the ERA in the first place are, security of employment, collective bargaining and recognition of the power imbalance. In these areas the latest reforms further weaken and undermine important provisions, which are there in the ERA to promote these concepts but which we need to recognize had really failed to do so.

**What is entrenched?**

My view is that the changes are an indication of the entrenchment of the following:

* The increasing individualization and legalisation of the employment relationship.
* Its special nature as a relational contract, with good faith obligations.

**Why are Unions and Collective Bargaining and the Paradigm of Employment the Looser?**

This government and the NZ public have no real understanding of the value of the concepts I have listed. They do not yet appreciate the value of employment, unions and collective bargaining as the mechanisms for increasing living standards or addressing poverty and the increasing gap between rich and poor.

The view of employment, let alone unions and collective bargaining as ineffective and outdated is also in my view, strangely but tellingly, loaded with an assumption that these concepts are entrenched – that unions for example will be there forever, no matter how they are treated, protecting the poorest NZ’ers and promoting their interests, regardless of whether these people are even employees. Union’s are blamed for not doing enough, while being starved of resource.

The same people who attack unions and collective bargaining assume that unions are stronger than they are and expect them to do a much wider role than they can possibly do without proper support. For example they are constantly seen as the voice of the precarious worker, who is not actually even a member of a union and may well not be an employee but a contractor.

Currently the law makes no allowance for the social justice role that unions play.

**Changes by ilk**

Looking at the nature of the changes supports my thesis:

**The most damaging changes proposed to erode union’s membership and collective bargaining:**

• Removing the requirement to conclude a collective agreement;

• Allowing employers to reduce employees’ pay for a partial strike;

• Opting out of Meca’s

• Abandonment of 30-day rule

**There were the changes strengthening the individual nature of rights**

• Allowing any employee to request flexible working arrangements;

• Bringing the right to confidential information into line with the Privacy Act but still leaving it largely in tact, despite the earliest proposals suggesting otherwise.

• There were also noticeable non–changes – the s103A test has developed more teeth and yet it was left alone. I say this was because it strengthened the individual rights of those lucky enough to have the resource to take personal grievance cases as employees.

**There were the changes that eroded the attempt to protect the precariate but did not remove it entirely:**

• Exempting small to medium employers from certain requirements when transferring vulnerable employees under Part 6A;

I say this is because there is limited recognition of the problem and very little understanding of the solution.

**Many of the proposed changes softened to become tinkering**

• Narrowing the scope of information employers can withhold under the duty of good faith. In the initial Bill, information could be withheld on the basis that it was confidential if it included any information about identifiable individuals, or was evaluative or opinion material, or revealed the identity of a person who created evaluative or opinion material. The Act as passed does not go that far and instead requires that there be a mutual understanding of secrecy for information to qualify as confidential.

• Lowering the expectation for the Authority to give oral determinations, by only requiring them to be given where practicable.

**The changes that strengthen individualized rights** and **the commodification of the rights of employment**

The movement towards greater individual rights comes at a time when the involvement of lawyers in this field has grown significantly and that is not a coincidence. While there is money to make from the white collar, high-income earners who fund litigation half the National Party will support the concept of the personal grievance, good faith and relational agreements. Personal grievances now belong to those who have the resources to claim and pursue rights - they earn over $100K or unionised labour. Information requests are used by lawyers to generate settlements and to win cases. The use of such information and benefits of discovery are already well established and understood in commercial litigation.

Overseas we have seen the development of investment in litigation, those with resourcing profiting by funding those who cannot afford to take a case but have one and taking a profit if successful. We have also seen class actions develop.

The strengthening of individual rights is also more conducive to the mentality of those who do not really understand the power of resourcing – or can tolerate the development of market based solutions I mention above. The removal of reinstatement is also consistent with the commodification of the rights of employment.

**The changes that erode these important concepts and mechanisms**

Yes these are very real but they are just further erosions of broken mechanisms and concepts that have been failing to have resonance for NZers for sometime. The reality was that before National got into Government most NZ workers weren’t in unions anyway. Many NZ workers are not even employees and many more do not understand the value of the concept of secure work.

There was no attempt to justify these changes by an example of excessive or inappropriate use of bargaining power. These changes aren’t a passionate and zealous ideological reaction, they are the continuation of a tribal attack against a rival “tribe”. Unions are seen as a wing of the Labour Party, which needs kicking, rather than a serious force in the labour market.

The changes to collective bargaining don’t end the era, they are indicative of it. The reality is that collective bargaining has not been effective for some time – its value needs to be rediscovered as the mechanism for increasing living standards.

This is not an audience I consider needs to be preached to about the value of unions, collective bargaining or the paradigm of employment. It is likely common ground but what I can say is that the next changes to this Act need to be as elegant solutions to this problem as were the successful concepts in the original ERA 2000; they need to be the beginning of a new era; reinforcing employment and collectivity.

The next era needs to entrench the paradigm of employment, the role of collective bargaining and unions and I believe the key is insisting on (and selling the benefits of) worker participation in the workplace. The next changes need to **recognize and promote** the value of collective employee participation in the challenges that face this generation:

* Safer workplaces
* Fairer distribution of wealth
* Secure decent participation in the workplace through promoting employment

**Tinkering – Lack of Vision?**

The changes are most notable for their lack of vision. They do not address the real challenges of our generation. Safer workplaces -Fairer distribution of wealth - Secure decent participation in the workplace through promoting employment.

For example, we have had a health and safety crisis because our laws have that consequence. PIKE River was a dramatic and tragic consequence. A legislative change to the HSEA that is supposed to address this will fail because it requires strong employee participation that simply does not exist. The safety imperative is, in my opinion, a useful tool to making the public understand the value of unions and employee participation. It is provable.

We can prove that collective bargaining is the best way to narrow the gap between rich and poor.

We still have no solution to precarious work and misuse of contracting, both of which are burdening the whole society.

**New Era Thinking**

Ms Wilson was very successful in entrenching some concepts. Good faith and relational contracts are related concepts that she was aware would resonate with the international legal community and the local one. She grafted on to this way of thinking and thus made changes that survived. I have cynically suggested also that some of the changes that survived also did so because they created a self-interested industry (lawyers).

I suggest the next changes that really create a new era have to be as elegant and well aligned with international and local changes in the way we think about our society.

Both this government and the last Labour Government have tinkered without really addressing the problem or moving the public perception. My example of this is the changes to Part 6A – they are misunderstood because they are not principled – they are opaque and messy.

The next changes must address safety, the gap between rich and poor and the security of work. There is an appetite for this internationally and locally. There is a very real need.

There are a myriad of potential solutions but my belief is that the successful solutions need to be as elegant and fundamental as were those Ms Wilson successfully entrenched.