



## Chapter Fifteen

### Sheep in wolves' clothing? New forms of employee representation in New Zealand

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Recent changes to the shape of New Zealand trade unionism have raised an interesting question: what is a trade union? For most of their history, New Zealand unions, unlike many union movements around the world, have had both their form and function defined and prescribed by law. Works Councils or enterprise-based consultative committees have never been a visible feature of the New Zealand industrial relations landscape (Gardner and Palmer 1997, p. 343).

It is now starting to emerge that many of New Zealand's newer unions have been formed out of, and informed by, a workplace-based focus and experience. Hence the question: what effects will the emergence of these new bodies have on New Zealand trade unionism? In answering this question, this chapter explores the extent of employer control of these bodies, the unions' influence and membership, and identifies the criteria to test the effectiveness of these new bodies. Finally are the new unions innovative bargaining agents or merely mouthpieces of the employers, another step to writing industry level unions out of the picture?

The Employment Relations Act 2000 marked a new era in New Zealand industrial relations. It rejected the individualistic approach of the previous decade, as embodied in the National Government's Employment Contracts Act 1991, but did not return to the compulsory arbitration and compulsory unionism of the past that guaranteed unions a comfortable existence. The Act has sparked a return to the past in one aspect however; the face of New Zealand unionism is once again becoming characterised by a proliferation of small unions whose emergence and continued presence is largely attributable to the law. These new small unions differ from the

occupationally-based unions of the past in that the majority are company or workplace-based. This newly emerging trend toward enterprise-based unions provides some important clues as to what kind of representation filled the gap left by the massive decline of unionism and collectivism during the employment contracts era, and what may lie ahead for New Zealand's industrial relations. Before considering the formation of these new unions, it is necessary to briefly outline the legislative history of New Zealand trade unionism.

#### **Institutional framework of New Zealand unionism**

During the 1990s, trade union membership and density in New Zealand more than halved, from 41.5 per cent in 1991 to 23.4 per cent in 1994 (Crawford, Harbridge and Walsh 2000). The Lange Labour Government's deregulation agenda of the 1980s had already resulted in the contraction of smaller unions, but a key reason for the continuing union losses was the impact of the Employment Contracts Act 1991. This legislation emphasised individual workplace contracts and required unions to separately establish their authority to act of behalf of employees, rather than benefiting from the automatic and monopolising representation they had enjoyed. The after-effects of this enactment were far-reaching within the unions' own institutional frameworks as well, leading to the disaffiliation of what remained of some of the smaller unions from their peak body, the New Zealand Council of Trade Unions (CTU).

Although the Act was by no means the only reason for the collapse of trade unionism, its removal of the institutional supports which had historically protected the existence of New Zealand's unions, made a major contribution to the fall in union membership (Harbridge, Walsh and Wilkinson, 2001). The Employment Relations Act 2000, enacted by the Labour/Alliance coalition government, repealed the Employment Contracts Act. Although the Employment Relations Act (ERA) does not restore the full range of protections that existed previously, it does provide some measure of institutional support for trade unions. In the words of the CTU in their submission on the Employment Relations Bill:

..The Employment Relations Bill is not a return to the past.

It does not return to any form of compulsion over union membership. It does not restore compulsory arbitration, national awards, fixed relativities or demarcations in union coverage. It achieves balance, rather than advantage, in employment relations (CTU, 2000, p. 9).

The impact the ERA will have on trade union membership and density will reveal itself over time. However, one immediate and, to some degree, unintended and unexpected consequence of the Act has been a remarkable increase in the number of trade unions. Within eight months of the passage of the ERA, the number of unions jumped from 82 to 140, an increase of 70 per cent (Crawford, Harbridge and Walsh 2000, Department of Labour website). By the end of 2001 New Zealand had 165 registered unions (Department of Labour 2001). Such a remarkable increase in such a short space of time raises important questions about the character of these new unions, their structure and operation, their effectiveness and the implications posed by their emergence for the New Zealand union movement as a whole.

#### **The Employment Relations Act 2000**

As previously noted, the ERA does not represent a return to the 'good old days' of state protection for unions. However its explicit promotion of collective bargaining and the principle of 'good faith employment relations' are attempts at restoring some measure of fairness and equity to the regulation of employment relations. The objects of the Act with respect to the recognition and operation of unions are:

- To recognise the role of unions in promoting their members' collective interests;
- To provide for the registration of unions that are accountable to their members;
- To confer on registered unions the right to represent their members in collective bargaining; and
- To provide representatives of registered unions with reasonable access to workplaces for purposes related to employment and union business.

In pursuit of these objectives, the ERA establishes a union registration system and grants registered unions exclusive bargaining rights and virtually unlimited rights of access to

workplaces. To gain registration, a union must have more than 15 members and provide a statutory declaration that it complies with the requirements of s14 of the Act regarding rules, incorporation and independence from employers. The Act requires the statutory declaration to stipulate that the union is 'independent of, and is constituted and operates at arm's length from any employer' (s14(1)d). The Registrar of Unions may rely on the statutory declaration to establish entitlement to registration. Only registered unions may negotiate collective agreements, and collective agreements apply only to union members and to all members of the union whose work falls within the agreement's coverage clause.

These provisions have significant implications for the shape of the union movement. A striking feature of collective bargaining under the ECA was its separation of bargaining from union membership. The Act permitted workers, regardless of whether or not they were union members, to negotiate a collective contract without reference to a union. By 1999, 15 per cent of all employees covered by a collective contract were not represented by a trade union (Harbridge, Crawford and Kiely 2000, p. 16). The ERA does not permit this to continue. Three options are open to those workers under the ERA. They may shift on to an individual agreement with their employer, join an existing union or form a new union that will be permitted to negotiate a collective agreement under the ERA. It is evident that many are choosing the third option. In addition, the new legitimacy of unions under the ERA appears also to be encouraging the formation of new unions made up of workers who have not previously negotiated a collective contract under the ECA. A majority of the new unions have only very recently become incorporated under the Incorporated Societies Act (a prerequisite for registration), suggesting that they are completely new to the system.

#### **A new vintage or old wine in new bottles?**

The very recent emergence of these unions means that it is difficult to provide a detailed analysis of their form and functions. However, Victoria University's annual survey of union membership for the year 2000 also posed a number of questions to unions about their strategies in the current environment. A response rate of around 60 per cent from the new unions provides some information on which to pursue further analysis. A telephone questionnaire survey

of representatives of 18 of the new enterprise-based unions, conducted in late 2001, provides additional information, upon which the following discussion is based (see Barry and May 2002).

#### **Origins**

Our telephone survey found that 14 of the 18 unions surveyed had existed as a loose consultative body during the era of the ECA, for the purposes of collective bargaining. As a result of the ERA these groups became incorporated and then registered as unions so to be able to continue bargaining collectively in their workplaces. Fifteen of the unions existed alongside an established union and a number of these reported that they had formed as a result of dissatisfaction with the established union at their workplace.

#### **Formation**

The key question in the context of the ERA's independence test for registered unions is whether they were formed solely by groups of workers or whether management had any role in their formation. If the former is the case, then a central issue is why those workers were sufficiently dissatisfied with existing unions that they were prepared to go to the trouble of forming their own organisation. If the latter is the case, then two key issues are the objectives lying behind management's involvement and whether the character of that involvement shifts over time. If management has played a significant role in forming any of these new unions, was this in order to keep out an existing union or is it simply to provide a mechanism for ease of negotiating a collective agreement under the new Act? Second, it will be important to assess whether management continues over time to play a significant role in the operation of the union. The Warehouse People Union, discussed below, is one public example where allegations have been made about management being closely involved in its establishment. Our telephone survey found that 11 of the 18 unions had the costs of setting themselves up as unions paid for by their managers. In the case of seven of the unions, management was closely involved in the union's establishment, as it was management who facilitated the process of choosing which form of representation workers would pursue.

**Membership basis**

Of the 50 new unions, 33 are workplace or enterprise based, 13 are occupationally or professionally based and the remaining four are general unions with membership open to any worker. Of the 33 workplace or enterprise-based unions the vast majority are centred on a single-site workplace (for example, St Peters School, Cambridge, Academic Staff Association) with a small number being based at the enterprise and covering workers across a number of sites within the enterprise (for example the Warehouse People Union). Examples of the occupational/professional-based unions include Physiotherapy Collective Incorporated and Auckland Association of Taxi Drivers. General unions include the NZ Employees Union and the e-union.

**Membership size**

For those unions for which membership statistics are available, the average size is 50 to 100 members. At this size, serious questions are raised as to viability and ability to provide a range of services to members. Their capacity to be anything more than an agent for negotiating a collective agreement is questionable.

**Structure**

Our telephone survey found that the elected positions in the unions were, in all cases bar one, held by workers holding permanent positions in their workplaces. In the case of the Warehouse People Union, by far the largest of the new unions, at least two officers have been appointed. It may be that we will see a return to the pre-1987 practice of several unions joining together to employ one full-time official.

**Operation**

The union membership survey responses give us some clues as to the way these new unions see themselves. By and large they differ only mildly from more established unions in terms of their responses to a range of questions relating to strategy under the new legislative regime. Points of difference relate more to capacity and focus. For example, new unions are less likely to expect to negotiate more multi-union and multi-employer agreements under the ERA, and more likely to see providing advice to individual union members as a more important role for them. Interestingly, new

unions agreed far more strongly than unions overall that they would be seeking improved wages and conditions for their members under the new Act, and new unions were more likely to agree that the Act would encourage partnerships with employers. It may be as the 'new kids on the block' these unions are far more optimistic about their prospects than their more established counterparts. New unions were more likely than unions overall to be planning to offer more services to members. In terms of plans to increase membership, new unions' aspirations were very similar to those of unions overall.

#### **Independence**

One of the major questions about these new unions concerns their independence from employers, and this question goes to issues relating to the size of these unions as well as their origins. At this stage it appears that the Registrar of Unions is broadly relying on the union's own statutory declaration for proof of independence, mindful that there is a penalty for providing incorrect information in a statutory declaration and there is also capacity for an individual or union to challenge any registration before the Employment Authority. Of course the idea of an existing union challenging a new union is highly problematic, as noted in the case of the Warehouse People Union discussed below.

#### **Wider interests**

At this stage none of the new unions have affiliated with the CTU, nor does it appear likely that any will in the near future.

#### **Case study: Warehouse People Union**

One very public new union, the Warehouse People Union provides an interesting, albeit atypical, case study. This is by far the largest new union, with around 1000 members (*National Business Review*, 16 March 2001). Although it cannot be suggested that it is representative of the other new unions, many issues have been raised as a result of its rather high profile. The Warehouse People Union is the in-house union of The Warehouse, a large and very successful NZ-owned retail chain. The union was registered in January 2001 after being set up and incorporated in mid-2000. The union has a membership representing approximately 20 per cent of all Warehouse employees (*National Business Review*, 16

March 2001). The National Distribution Union (NDU), the industry union, also has membership at The Warehouse. The Warehouse People Union states its mission as:

'People First (the original name of Warehouse People Union) was set up just for employees of the Warehouse Group. We believe that a union that is not distracted by the industrial concerns of other organisations can provide the best support for its members' (Warehouse People Union brochure).

As the mission statement shows, it is a union only for workers employed by The Warehouse. The union is not affiliated to the CTU, and indeed its mission statement seems to very much reject any kind of collectivist approach beyond that applicable to its own company. There is evidence that company resources have assisted the union. In a letter to the editor of the *National Business Review*, two officials of the union (who were former company managers) acknowledged that the union was assisted by a donation 'sought and accepted from The Warehouse' (*National Business Review*, 6 April 2001, p. 23). As dues are \$1 a week for those working more than 20 hours, substantially lower than those charged by established unions, such a donation would seem necessary for the union's existence. This donation calls into question the idea of the union operating at 'arm's length' from the employer. Warehouse People Union officials argue that it is no different to unions accepting facilities on site for delegates or paying delegates whilst being on union business (*National Business Review*, 6 April 2001, p. 23). However, a union accepting or winning company resources of whatever form from a position of strength is quite different to accepting assistance from start-up. Equally, however, it is certainly the case that many of the traditional small and weak unions of the past accepted employer resources to support their operation but did not do so from any position of strength.

The activities of the Warehouse People Union appear to be the representation of employee interests rather than any more direct involvement in the decision-making processes. The officials argue that

WPU was set up to provide its members with a collective

voice within The Warehouse (*National Business Review*, 6 April 2001, p. 23).

Not surprisingly the National Distribution Union has expressed its concerns, claiming that the WPU has had advantageous access to workers (*National Business Review*, 9 April 2001 p. 21) and that its real purpose is fulfilling the company's desire to keep the NDU out (*National Business Review*, 16 March 2001). However, if this is the case, the company's actions have had relatively limited effect as the new union's membership remains fairly low. Under the ERA, there is nothing to prevent the NDU from seeking to expand its membership in The Warehouse. Ironically, the formation of Warehouse People Union is likely to raise the profile of trade unionism within the company and may assist both unions in their organising efforts. There is a dilemma for established unions such as the NDU in terms of what approach to take here. Whilst challenging the legitimacy of the Warehouse People Union through the courts may well be an option the issue is whether this would really achieve anything apart from ensuring hostility from a large potential membership and incurring high legal costs.

#### Unions or consultative committees?

So far, none of the new unions have shown any inclination to affiliate with the CTU. However, it is likely that some will at least consider affiliation in the medium-term future. Over the last decade unions such as the Association of Salaried Medical Specialists (which represents public hospital consultants) and the Association of University Staff, both of which have a membership that would not have been expected to countenance CTU affiliation, have become affiliated. The willingness to affiliate or actively contemplate affiliation may become an important milestone in the development of the new unions. The experience of operating as a union differs from that of forming a union, and the attitudes and focus characteristic of the formation period may come under challenge as events unfold.

With regard to the question of whether the new unions comply with the legislative test of independence, the first court case in this area, heard in late 2001, provides some background. An established union was unsuccessful in its attempt to have a new enterprise-based union deregistered, in *Meat & Related Trades*

*Workers Union of Aotearoa Inc vs Te Kuiti Beef Workers Union Inc. AC 71/01 (unreported).* The Full Court acknowledged employer involvement in the establishment of the new union, and held that the union had at some point since become independent. The Full Court also compared the collective agreements of both unions, finding no substantial difference. The Court's reliance on comparing the terms of the collective agreement as a measure of union independence raises a number of issues. An employer who might favour an in-house union is unlikely to give that union an inferior collective agreement, as this would provide workers with an incentive to join the established union. Furthermore, the collective agreement is only one measure of overall union strength and says nothing about a union's ability to represent members in other areas such as unfair dismissal or health and safety. Small-enterprise unions are unlikely to have the resources to seek legal advice in the instance of more technical legal matters.

There are implications for the wider union movement in this emerging backward trend to a large number of poorly resourced and disparate unions. The CTU, with a recently elected and completely new executive, has embarked on an aggressive campaigning and organising agenda. An organising agenda is by its very nature resource hungry and demanding of a centralised approach. Many of the new unions have been set up in industries that would have represented natural growth for larger affiliates of the CTU. While the CTU will continue to have within its auspices the vast majority of unionised New Zealanders, it cannot afford to ignore this emerging trend.

The key issue is the extent to which these unions are a new form of representation in the New Zealand workplace. In addition, are these new unions a partial response to the representation gap that had arisen under the ECA? Or is it that the ERA has ushered in a new form of union that has its focus in the enterprise rather than in the industry. In some respects these new unions represent a continuation of the traditional unions which existed prior to the Labour Relations Act 1987. To a certain (but as yet unknown) degree, they are 'creatures of the state', having been brought into existence by the provisions of the ERA. Small membership, limited resources and a narrow range of services extend the comparison with the traditional unions. In other respects, however, they differ from traditional unions. They are creatures of quite a different

state, and they exist in a very different institutional environment. The growth of these new unions has surprised many observers, including existing unions. It shows no sign yet of abating and may be a clue as to a new and emerging form of workplace participation.

**Notes**

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