



Chp. 6: ERA 2000 - trends & issues

✦ Overview

- ✦ ERA 2000 & legislative framework changes
 - 2004 Amendment Act & National's changes
- ✦ Bargaining trends
 - Collective & individual bargaining
 - Role of unions & employer organisations
 - Strikes & lockouts
- ✦ Employment Institutions & legal precedent
- ✦ Outstanding issues & future challenges

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The ERA was an attempt to change from the previous contractual philosophy of the ECA with more emphasis on collectivism, individual support & employment rights. As Haworth (2004: 204) has argued, "given the range of measures introduced, in train and under consideration, future commentators will undoubtedly view the post-1999 period as one of the most striking periods of employment relations innovation in New Zealand's history."

However, bargaining trends have largely defied predictions and there has been a surprising decline in private sector collective bargaining. There have been attempts to 'fine-tune' the ERA and this continues under the National-led government.

ER Amendment Act 2004 is a rather complicated piece of legislative changes which tries to keep voluntary union membership and address concerns over 'free-riding' ('passing on' of union-negotiated improvements). The Amendment Act can be seen in two ways: in the context of research findings of bargaining trends prior to 2004 and in light of subsequent (post 2004) changes in both bargaining processes and outcomes and legal precedents.

Concerns over productivity growth and the impact of the economic crisis in 2008-9 can create further pressures for change in employment relations practices.



Legislative framework changes

- ✦ ERA – philosophy & aims (see chp. 5)
- ✦ Emphasis on collectivism
 - ▣ Early evidence ERA is not working
 - ▣ Leads to ER Amendment Act 2004
- ✦ Legal precedent v/s ERA's intent
- ✦ Statutory minima – major changes
- ✦ National's changes (2008 ->)

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The Object of the ERA – see p. 107. The strong support of collectivism, good faith and individual choice is clear. The notion of inherent inequality of bargaining power has been contested (see pp 76-79).

The strong emphasis on collectivism is based on the assumption that 'productive employment relationships' can be associated with collectivism (collective bargaining and unions are seen as part of the 'solution' instead of being part of the 'problem').

There has been considerable public funded research into the effects on employment relations which has been a welcomed change, compared to the 1990s (see chp. 4).

While the Labour-led government did try to tailor the legislative framework to its employment relations philosophy, it is noticeable that there were few direct interventions in bargaining processes and outcomes. However, the expanded statutory minima constitute a range of direct interventions.

As the National-led government is still instituting new changes, it is too early to make any comprehensive evaluation.



ER Amendment Act 2004

- ✦ Original Act didn't deliver re: outcomes
 - ▣ This was highlighted in research findings
 - Collective bargaining & union membership
 - 'behavioural, administrative & regulatory' issues
- ✦ Was it 'fine-tuning' or 'radical change'?
- ✦ ER Amendment Act 2004's key changes
 - ▣ There were 6 major areas highlighted initially
 - ▣ (1) Defining 'good faith', enforcement & penalties
 - Implying a higher standard & applied to IEAs

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A more detailed overview of the ER Amendment Act 2004 can be found in Walker 2008 (see: www.employment.org).

Some of the evaluations of the first years – 2000 to mid-2004 – can be found in Rasmussen, E. (ed.). 2004. *Employment Relationships. New Zealand's Employment Relations Act*. Auckland University Press, Auckland.

There have also been several research projects into various changes under the ERA, please consult the references in the textbook and the various websites by Department of Labour, employer organisations, unions, legal firms and consultancies.

Various views of the impact of the ER Amendment Act 2004 can be found in Rasmussen, E. (ed.). 2010. *Employment Relationships. Trends and issues under New Zealand's Employment Relations Act*. Auckland University Press, Auckland.

There have been some attempts to define 'good faith' through legal precedents and this appears to have prompted a certain disconnect between the Act's intent and court interpretations. It is an open question how the requirements of good faith can be enforced (see also the discussion in chapter 13).



ER Amendment Act 2004 - II

- ❖ (2) Dealing with 'passing on' (avoid 'free-riding')
 - Is 'passing on' a deliberate tactic? Difficult to prove
 - 'Bargaining fees' allowed (overcoming legal precedent)
- ❖ (3) ER Authority settling collective agreements
- ❖ (4) Change of employer situation (firm being sold)
 - Two types: 'vulnerable' employees & 'other' employees
 - Main change concerns 'vulnerable' employees
- ❖ (5) Personal grievances: new 'test' of justification
- ❖ (6) Employment Institutions: address 'problems'
 - Extending scope of mediation & reduce opportunistic employee behaviour (contingency-based representatives)

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Unions regarded 'passing on' as a major impediment to making it attractive for employees to join unions. As the 'passing on' should be a deliberate tactic it would need to both have the 'intention' and the 'effect'. Recent court cases have set the threshold rather high for demonstrating a deliberate attempt to undermine unions (see p. 380).

The ER Authority's ability to intervene was confined to a very small minority of the most difficult cases of unresolved bargaining and strike actions.

For vulnerable workers – defined by either the service they provide or by the sector they worked in – this "created a new right to transfer to a new employer on their existing terms and conditions." (p. 162). Or they could seek an alternative – eg. redundancy or redeployment.

The justification test proposed that: (1) "the employer's actions needed to fall within a range of options a fair and reasonable employer could take" and (2) "the court could not substitute its own judgment for the employer" (p. 163).

Changes to mediation could reasonable be seen as 'fine-tuning' though 'contingency-fee representatives' were seen as providing an incentive for opportunistic employees to 'try on' cases which lacked merit.



Legal precedent

- ✦ ERA wanted to overcome 1990 issue: precedent 'driving' legislative impact
 - ▣ Achieved – less focus on legal precedent
- ✦ Gov considers precedents 'problematic'
 - ▣ ER Amendment Act to 'enforce' legal intent
- ✦ Amendment Act has limited influence
 - ▣ Good faith & 'passing on' are determined by traditional court understanding

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As discussed in chp. 4, the non-prescriptive nature of the ECA prompted a range of court cases (which were further fuelled by stand-offs between the Employment Court and the Court of Appeal), resulting in a shifting legal precedent decisions. This has been less the case under the ERA.

Court decisions were seen as continuing a previous understanding of 'good faith' and the Amendment Act was a government attempt to 'clarify' that a higher standard was to be expected, following the ERA's launch of the good faith concept.

In hindsight, it seems that ER Amendment Act has had limited influence. There are currently some debate as why this is so. It appears it is partly because the courts are still applying a traditional understanding (it hasn't been overcome with the Amendment Act 2004) and partly because the legislation appears difficult to apply.

As legal precedent has been slower to unfold – compared to the 1990s – there may still be considerable movement in legal precedent. It is important, therefore, to keep a watching brief of the major court decisions.



Statutory minima

- ✦ Considerable expansion, 2000-2008
 - ✦ Emphasis on low-paid, with other policies supporting their net income levels
 - Protection: overcome limited bargaining power
- ✦ Min. Wage: up 71% & wider coverage
- ✦ Holidays: 4th week introduced in 2007
 - ✦ Public holiday penal rates & day off in lieu
- ✦ Paid Parental Leave, introduced 2002

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The considerable changes to statutory minima is a reflection of stagnant incomes & a tough labour market for low paid employees in the 1990s. Besides public policy changes, a tight labour market put upwards pressure on wages post 2000. However, NZ is still a low wage country amongst OECD countries & this can make it difficult to attract & retain employees.

Besides the annual increases, coverage has changed considerably. "There was a lowering of the eligible age for the adult minimum wage from 20 to 18 years of age in 2001, and the youth minimum wage (covering 16- and 17-year-olds) has been raised from 60 per cent to 80 per cent of the adult minimum wage." (p. 164). With the rise to \$12.50 by the National-led government in April 2009, there has been a 79% rise, since the \$7 statutory minimum wage of April 1999.

The Holiday Act is having another review under the National-led government & this could lead to further changes.

Paid Parental Leave has been increased to 14 weeks in 2005 and extended to self-employed parents in 2006. Paid Parental Leave has had a major impact in female-dominated industries & occupations.



National Government changes

- ✦ Limited public policy agenda in 2008
 - ✦ ERA is retained (not so in 2005 election)
 - ✦ Promises changes to: personal grievances, union bargaining rights, Holiday Act, ACC insurance monopoly
- ✦ 'Probationary period' for new employees
- ✦ Reviews suggest changes will come
- ✦ Public sector may face major shake-up

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The 2008 general election was the first time in over 2 decades where it was not a high priority election promise to implement substantial adjustments to the legislative framework of employment relations. This was prompted through a shift in the position of the National Party (p. 166).

Still, the promised changes to the ERA will constitute major changes as highlighted on p. 166. By the end of 2009, the National-led government has proceeded on 3 out of the 5 major election promises in the ER field. The 'probationary period' has been implemented already in December 2008; there has been considerable changes to ACC levy and a partial privatisation of workplace injury insurance has been foreshadowed; there has been a review of the Holidays Act.

Besides the immediate change of introducing a 'probationary period' in late 2008, there has been a measured and low key approach to ER changes under the National-led government. In particular, there has been no public discussion of the promise to remove the unions' 'ownership' of collective agreements which would open for a return of 'collective contracting'.

Recent debates of how to reduce costs and increase efficiency in the public sector could have a direct impact on ER practices and bargaining processes and outcomes.



Bargaining trends

- ✚ **Bargaining trends defy ERA's intent**
 - ▣ Sharp decline: private sector collective bargaining
 - Limited expansion outside traditional areas
 - Decline in collective bargaining strongholds
 - ▣ Result: mainly present in large organisations
- ✚ **Public sector bargaining strong & stable**
 - ▣ Over 60% bargaining density & interesting changes to bargaining structures
 - Advances of MECAs & partnership arrangements

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The ERA's intent to support collectivism and unionism has only worked to some degree and there has been an extraordinary decline in private sector bargaining coverage in the new millennium (see table 6.1).

While there has been a debate about this decline (see next overhead), there has been (a) a limited expansion in the fast-growing service industries - some gains in fast-food, retail and finance have been insufficient to stop a decline in bargaining coverage in those industries; (b) union strongholds in the private sector is in industries – particular in manufacturing – which are either stagnant or contracting.

As unions have limited organising resources, they have had to give priority to existing and large workplaces. There are now relatively few large workplaces in the private sector and that makes organising rather difficult (as well as other reasons, see next overhead). It should be noted that other Anglo-American countries – UK, USA & Australia – have experienced a decline in private sector union density in the new millennium.

The changes to bargaining structures in the public sector is in stark contrast to the lack of growth in MECAs in the private sector. Health and education have witnessed bargaining structure changes; though not in the tertiary education sector.



Bargaining trends II

- ✦ Why this decline in private sector CEAs?
 - ❖ No all-encompassing satisfactory explanation
 - Lack of MECAs, employer resistance, employee apathy, 'representation gap', ERA being weak (eg. 'passing on')?
 - Probably a combination which raises a key question:
 - Can unions regain their relevance without legislative support?
- ✦ IEAs – helped by tight labour market
 - ❖ Skills shortages, turnover, pay rises up, careers
 - ❖ But also many in low pay, limited opportunity jobs
- ✦ Strikes & lockouts are few

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Many of the explanations put forward can be combined to a satisfactory explanation; that is, these explanations are not in conflict with each other. For example, the lack of MECAs and less comprehensive bargaining coverage will normally lead to a 'representation gap' in small and medium-sized enterprises. For an overview of the various explanations, see pp 129-133 and consult the various references for details.

However, it is unclear how much each of the various explanations can explain of the decline in private sector collective bargaining. While 'passing on' of union gains to non-union employees has been a major union complaint, it is probably necessary to take a wider view of bargaining and union membership. This raises the questions of how much more legislative support and in what form would be necessary to underpin a genuine revival of collective bargaining in the private sector.

There has been a considerable move towards IEAs and there need to more research in terms of processes and outcomes associated with IEAs. The buoyant labour market and strong employment demand have impacted positively on pay and conditions in the new millennium though there are 2 caveats: (1) too many jobs offer low pay, with limited development and career opportunities; (2) the 2008-9 economic crisis has had a major impact across the labour market and this has halted progression.

Strikes and lockouts have not featured strongly; except for a few high profile strikes and the continuous unrest in particular public sector areas.



Unions – trends & issues

- ✦ Originally seeking new legal framework
 - ❖ Always maintained it was a 'modest law'
 - Just one of many influential factors re: union growth
- ✦ Sought to overcome 'passing on'
 - ❖ Appears less urgent in 2009 than risk of having no union representation (incl. 'representation gap')
- ✦ Focus on organising & relevance
 - ❖ Various campaigns but limited membership effect
 - ❖ CTU seeks to influence public policy & opinion
 - ❖ Many boutique unions but limited membership

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Unions sought the repeal of the ECA and they wanted a stronger piece of legislation. While unions have maintained the ERA was a 'modest law' it was unclear whether they had agreed a clear-cut alternative amongst themselves. This may happen in light of the National-led government changes.

With less than 10% bargaining coverage in the private sector, the lack of union representation in many firms has become a major issue, stymieing future campaigns to increase union membership.

The CTU has had a high profile role in the new millennium and its collaboration with Business NZ appears to continue under the National-led government. It is clearly important that this public profile is underpinned by CTU's union members being more successful in organising new members and workplaces.

Will there has been many new unions – see pp 136-7 – the growth in new unions also appear to have stopped around 2003-4. These unions have only organised a limited number of members and they have played a very confined bargaining role.



Employer organisations

- ✦ **Business NZ gains major role under ERA**
 - ✦ In opposition to ERA but seeks policy influence
 - ✦ Business Roundtable is sidelined by government
- ✦ **Information & service role is enhanced**
- ✦ **Preference for less gov. intervention**
 - ✦ Objects to higher & more statutory minima
 - ✦ Supports workplace and/or individualised bargain.
- ✦ **Conflicting ideas re: higher productivity**

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Overall, mainstream employer organisations have done well under the Labour-led governments. They have managed to both criticise and work with the various governments and they now have a bargaining structure – dominated by collective workplace agreements or individual agreements – which appear in line with employer preference for a direct, individualised ER approach.

There has been limited research on employers and their representative organisations amongst NZ researchers. An exception is the recent study of employer attitudes to collective bargaining conducted by Barry Foster, Massey University. Business NZ and its 4 regional employer organisations are also doing surveys of employer attitudes (see their websites for up-to-date information).

There have also been studies undertaken of individual employers' employment and HRM practices which – until 2008 – gave the impression of a tight labour market with skill shortages being the main concern of employers. Business NZ has also kept the media attention on 'transaction costs' (of doing business) and the so-called 'gravy train' associated with personal grievances.

How a high skill, high wage economy is going to grow out of individualised ER and limited statutory minima is a major issue which will probably dominate the debate over labour productivity in the coming years.



Employment Institutions

- ✦ Institutions appear to be working well
 - ❖ Preference for mediation has changed 'game'
 - ❖ Problems with waiting time appear over
 - ❖ Aspirations about being pro-active haven't worked
- ✦ Fewer legal precedent cases
 - ❖ This was the intention of the ERA's drafters
 - ❖ There have been a few cases re: good faith
 - ❖ Collective bargaining: communication & behaviour
 - ❖ 'Passing on': 2004 changes have had little effect

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Employment Institutions were in the limelight in the 1990s with new PG entitlements creating considerable demand and long time delays and with legal precedents in several core ER areas being set (see chapter 4).

The ERA's intended to 'promote mediation as the primary problem-solving mechanism' and "reducing the need for judicial intervention" (see p. 107).

The ERA has succeeded in both of these aims, when compared to the ECA situation. While there have some been complaints about processes and outcomes, the Mediation Service has been able to dispose of 8,000-10,000 applications a year and Dept. of Labour research indicates that 'customers' are reasonably satisfied. As Fig 6.2 (p. 155) shows, applications still mainly fall in two areas: unjustified dismissals and disadvantaged. There is also the standard high level of legal presentation, though this is considerably less so at mediation than at cases in the ER Authority and the Employment Court.

While employers often talk about a 'grave train' there have also been concerns that the compensation and costs awarded have been too low.

Legal precedent has yet to become a major political issue though there have been some stand-offs between the courts and the policy-makers; the most obvious example being 'good faith' and 'passing on'. It will be interesting to watch where there will new legal precedent prompted by changes to PGs and annual leave.



Outstanding issues & questions

- ✦ Unclear what Government will do
- ✦ Productivity, sustainability & growth
 - ▣ What is the role of ER (eg. workplace partnership)
- ✦ Labour market – post crisis issues
 - ▣ Will skill shortages, turnover, etc. re-appear?
 - ▣ Work-life balance, flexible working, careers
 - Raises issues about working time, choices, social support
- ✦ What will unions & employers do?
 - ▣ Continued difference: public & private bargaining?

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While the National-led government has implemented ‘probationary periods’, it is unclear what the various task forces and election promises will mean in terms of regulatory changes and changes to ER in the public sector.

How to create sustainable productivity improvements is high on the political agenda but the ‘solutions’ are less obvious and so is the role of ER. Will the impacts on ER be of a direct or indirect kind; will the government rely mainly on ‘soft’ measures?

While this chapter has focussed mainly on traditional ER issues – including legislation – there has been some major labour market shifts. While the impact of the 2008-9 economic crisis is still unclear, many of the high-profile labour market issues are bound to re-appear. While it is unlikely that there will be a major roll-back of legislative and employer initiated changes, it is an open question whether new initiatives will happen and, if so, what their possible impacts would be across the NZ labour market.

The last decade has witnessed a return to bi-partite and tri-partite collaboration. Will that continue in the coming years and what would the major issues and implementation effects be of such a collaboration?