

Chp. 6: ERA 2000

- ⊕ The gestation of the ER Bill & ERA
- ⊕ Overview of the Employment Relations Act
 - ▣ What are the main differences, comp. to ECA?
 - ▣ Parts of ERA & key notions
 - What do they mean in reality?
- ⊕ ERA: processes & outcomes
 - ▣ Not covered in book, where do you get info?

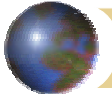
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The ER Bill caused major public policy debates, media headlines & political pressures and this had a crucial impact on the final form of the ERA. Before that, the policy positions of the ER Bill had been developed over a long time & it is important how these policy positions were arrived at & what their purposes were.

In order to understand the Act, it is important to concentrate first on the major policy points, key changes & key sections and then subsequently try to understand the finer points/details of the Act

A major issue with any legislative change is how it will influence behaviours and practices and this is a key question for such a major reform as the ERA. What were the intentions behind the key notions and did these come true in terms of workplace practices?

The book was written before information about processes & outcomes under the ERA was available. Information has started to surface on: changes in workplace practices, trends in collective bargaining, strikes & lockouts, new legal precedent, the function of the new employment institutions, impact on union activity & density, implementation costs, etc. There are research & information from government agencies, employer organisations, unions, consultancies, legal firms, and, of course, many academic articles & papers.



Theoretical shift

- ☉ ECA & employment contracts versus employment relationships & ERA
 - ▣ NZ: clash of assumptions & lack of consensus
 - See pp 68-72; 1990s re-balance discussion
 - Frames of reference, management styles & unions
 - Labour market models, economic performance & flexibility (re: work organisation, see also chp. 9)
 - Role of state, interventions & institutions
 - ▣ Interpretation of history: evaluating trends

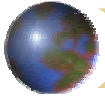
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“A lack of consensus has undermined employment relations stability for some time.” (p. 118). Will this situation continue under the ERA?

The lack of consensus goes back to the early 1980s & was highlighted by debate over the ECA. We maintain the differences were re-balanced (though not solved) in the 1990s – what is your opinion?

It is important to understand: what were the main differences between proponents & opponents of labour market deregulation, and how these differences are linked to the 3 major theoretical areas mentioned above (see p. 119). For example, state intervention in ER is viewed positively by the ERA drafters and so it union activities and collective bargaining.

The lack of consensus is also associated with how ER processes & outcomes are interpreted. This includes processes & outcomes under the ECA: as discussed in chp 4, there are still different interpretations & emphasises. For example, the ERA drafters evaluated that labour productivity was low in the 1990s & this was linked with the ECA.



Employment Relations Bill

- ⊕ New legislation alters power balances
- ⊕ Basic positions were announced post 1993
 - ▣ Did people understand impacts? (~ EC Bill)
 - Employer reaction must be seen in context
 - Philosophical divide
 - Bill formulations & employer criticism
- ⊕ Employer criticism had an impact
 - ▣ Clarity, workability & buttressing emp. position

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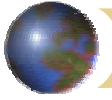
“Power and self-interest will be enhanced or constrained as *the new legislation alters the power balances in employment relations.*” (p. 120).

The key positions from 1993: voluntary unionism, support of coll. bargaining, good faith bargaining, adherence to ILO Conventions (87 & 98). However, it is unclear whether people took notice & whether they understood the impact.

The strong (employer) criticism was similar to the strong (employee) criticism of the EC Bill in 1990/91. There was clearly a philosophical divide between employers & legislators & it diminished employer bargaining power.

However, the employer criticism came after complaints over compliance costs in the post-1995 period: Alasdair Thompson (EMA): “business discontent over the performance of successive governments has been running deeper and longer than the present legislators have been in office. The changes coming to our employment relations environment are really just the last straw.” (p. 121). It also came at a time where business confidence & prospects were very low.

Employers Federation called for 125 changes & specified 20 areas of ‘major concern’ in its submission. For areas of concern, see pp 121-122. The government addressed some of the concerns, providing greater clarity in drafting of the law, appeared to make it more workable in practices, and employer philosophical and power positions were sometimes strengthened.



ERA – the fundamentals

- ⊕ More comprehensive & prescriptive
- ⊕ Mix of ECA legacy & collectivism
 - ▣ Legislative tradition can sometimes be detected
- ⊕ Object of the Act – see fig 6.1
 - ▣ Employment relationships & good faith
 - ▣ Inherent inequality of bargaining power
 - ▣ Integrity of individual choice
 - ▣ Observance of ILO conventions 87 & 98

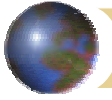
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In comparison with the ECA, the ERA is a more comprehensive & prescriptive piece of legislation. The role of DOL is increased (eg. union registration).

The ERA provides coverage of collective bargaining & coll. & indi. Empl. Agreements (Parts 5, 6 & 8), it stipulates unions' roles (Parts 3, 4, 7), the state's role in supporting ER (Parts 9, 10 & supporting legislation re: minima).

The mix of ECA legacy & collectivism impacts on the ERA's clarity. In some cases, the legislative tradition of the IC&A system rears its head (for example, the distinction between disputes of interest and disputes of rights is still there, although the terms are not used).

The Object clause of ERA is substantially different from the ECA's Object clause (see p. 72) and it provides a guideline to the tenor of Act. It also indicates how different objectives are being pursued at the same time. Finally, the choice of words is important. The difference between employment contracts and employment relationships is more than semantics; it is a fundamentally different way of viewing ER. Likewise, "the inherent inequality of bargaining power" was not recognised by the ECA and many employers will still contest that this is in fact the case.



ERA – Part 1 & 2

- ⊕ ECA differences: bargaining regulation, promotion of collectivism & unionism
- ⊕ ECA similarities: individual choice, voluntary unionism & PGs for all
 - ▣ Emphasis on less judicial intervention
- ⊕ Part 2: definitions of key terms
 - ▣ CEAs are 'owned' (concluded) by unions
 - ▣ Coverage clause: CEAs are about the type of work involved (not about particular employees)

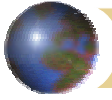
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The discussion of differences and similarities re: ECA is quite important (see p. 124). The differences highlights more interventionism & collectivism as a major break with the 1990s. But the impact of the ECA can be found in the similarities: the notions of individual choice, voluntary unionism & PGs for all employees were a major break with the previous legislation in 1991.

While ERA opens for more state interventionism, it also tries to avoid the crucial role of legal precedent under the ECA where the non-prescriptive approach & changing court decisions created some confusion (see pp 111-117)

Bargaining over CEAs is reserved for registered unions & thus, 'collective contracting' directly with a group of employees is no longer possible. Employers seeking transaction costs advantages through collective arrangements will have to negotiate with registered unions (though 'company unions' may be a possible way of bypassing traditional unions)

The coverage clause is important since it provides permanent coverage of particular types of work. "Individual employees may therefore leave their employment without this having any effect on the collective agreement." (p. 124). Thus, turnover of employees become less detrimental to unions' attempts to cover workplaces since new employees will be under the existing CEA.



ERA – Part 3 & 4

- ⊕ Part 3: similar to ECA
 - ⊞ Confirms voluntary unionism
 - But in a totally different legislative context
 - Key terms have been scrutinised by courts in 1990s
- ⊕ Part 4: union recognition & operation
 - ⊞ Unions: prescribed & promoted by Act
 - ⊞ Union registration re-introduced
 - ⊞ Comprehensive bargaining & access rights

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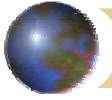
Voluntary unionism is confirmed as a hallmark of contemporary ER in NZ.

However, voluntary unionism now sits in a context where collective bargaining & unionism are promoted. This is a situation which is similar to a number of other OECD countries. The NZ situation is different though, with different historical traditions & unions being decimated under the ECA.

Finally, there is more support from legal precedent than in 1991 since concepts such as ‘choice’, ‘preference’, ‘undue influence’, etc. have been scrutinised by the Employment Court & the Court of Appeal in the 1990s.

Part 4 constitutes a major departure from the ECA. “The functions of unions are prescribed by the ERA since they will be controlled through union registration, rules regarding workplace access and union meetings as well by the prescriptions in other parts of the Act regulating collective and individual agreements, employment relations education leave and strike activity.” (p.126)

Registration of unions was part of the IC&A system. Democratisation & accountability of unions are key aims of the ERA. Unions can then hold membership meetings & gain workplace access. “The purpose of access has to relate either to the members’ employment matters or to union’s business.” (p. 126).



ERA – Part 5

🌐 Collective bargaining

- 📌 Good faith bargaining (see also pp 185-190)
 - Prescribes an approach but not conclusion of CEA
 - Behaviour & exchange of information are crucial
 - Good Faith Codes (see DOL publication)
 - 'Joker' – outcomes & impacts are unclear
- 📌 Allow earlier start & advantage unions
- 📌 Multi-employer CEAs are feasible
- 📌 Form & content are prescribed

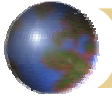
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Collective bargaining is promoted through support of unionism, allowing unions to initiate bargaining, good faith obligation, and abolishing restriction on strike rights in connection with multi-employer CEAs. This allows the observation of ILO's Conventions 87 & 98.

Good faith bargaining is now made explicit but, besides the procedural formalities & provision of necessary information, it is unclear how it deviates from previous obligations about fair bargaining. The concept itself, the procedural formalities & information obligation may influence thinking about bargaining approach & this could have major impacts on behaviour. Thus, interpretations & legal precedent may have substantial impact. So far, there has been limited legal precedent but survey information indicates that employers & unions have taken considerable notice of the concept.

Multi-employer CEAs (CECs) were possible under the ECA. However, it was not possible to strike when seeking such an agreement & employers could often resist the demand for multi-employer CECs. This is no longer possible & unions may seek these amongst smaller employers to reduce bargaining costs.

There are some basic bargaining rules & prescriptions about content of CEAs.



ERA – Part 6

🌐 Employees covered by IEAs

📌 Link between CEAs & IEAs is important

- Fixed-term & probationary agreements

📌 Protection of employees with IEAs

- Can seek advice & info prior to signing an IEA
- If CEA covers, then IEA must not be inconsistent
- If CEA exists but doesn't cover, then 30 day rule
- Prescribed content of IEAs – see p. 131

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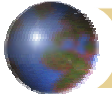
Object clause: to protect individual employees through information and ‘adequate opportunity to seek advice before entering into an agreement’. (130)

The importance of CEAs is promoted by its ability to cover the work of new employees and thus, would often set a baseline for content of IEAs in the workplace. But many private sector workplaces will not have CEAs.

ERA also tries to avoid improper use of fixed-term IEAs or probationary agreements as a way of circumventing the intent of the Act.

‘The 30 day rule’: conditions of CEA will cover employee in his/her first 30 days in a new job. However, if there is no CEA, then protection comes in two forms: first, the explicit ability to seek advice & information prior to signing an IEA and second, that IEA needs to prescribe topics such as work description, where work is to be performed, working time arrangements, payment, dispute resolution mechanisms.

The success of protection mechanisms is to some degree based on employee knowledge & ability/willingness to take action in case of substandard IEAs.



ERA – Part 7 & 8

- ☉ Employment Relations Education Leave
 - ▣ Union controlled & benefits union members
 - ▣ Costs & benefits to employers
 - See calculation of entitlements, table 6.1
 - Depends on types of education leave schemes
- ☉ Part 8: strikes & lockouts
 - ▣ Key question: when is a strike/lockout lawful?
 - Depends on: CEA, negotiations, industry type, OSH

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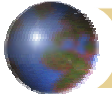
“The leave entitlement applies to situations where a collective agreement exists; it applies only to union members, and it will be allocated by unions. It is explicitly aimed at the promotion of good employment relations and particularly of the duty of good faith.” (p. 131).

“Each employee is allowed a maximum of five days’ education leave per year and will be entitled to ‘ordinary pay’.” (p. 131).

Table 6.1 shows that for most NZ organisations – ie. with less than 50 employees – leave entitlements will be 5 days or less. Leave entitlements can only be used on courses approved by the Minister of Labour.

It was argued during the Bill phase that the ERA would increase the risk of strike action, partly through its promotion of unions & collective bargaining & partly through allowing strike action in pursuit of multi-employer CEAs. Otherwise, “the Act continues many of the restrictions on strike and lockout actions that were in place under the ECA.” (p. 133).

The Act’s emphasis on both sanctity of contract (that is, strike/lockout action is not permitted when a CEA is in force) & good faith bargaining imply that strike or lockout action should be a ‘method of last resort’.



ERA – Part 8

- ⊕ Strikes/lockouts are lawful, if:
 - ▣ In support of CEA & no CEA exist
 - ▣ Negotiations have taken place (40 days at least)
 - ▣ If essential services, notice requirement is met
 - ▣ Note: strikes allowed with multi-employer CEA
- ⊕ Strikes/lockouts are unlawful, if:
 - ▣ In breach of above conditions for being lawful
 - ▣ If tort proceedings or injunctions are pursued
 - ▣ Concerns Personal Grievances or 'disputes of rights'

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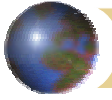
See the discussion of lawful industrial action on pp. 132-133.

The main differences compared with the ECA is that negotiations can start earlier, the requirement of good faith bargaining, and “The restriction on strike action in connection with multi-employer collective agreement has been dropped. This restriction was always dubious since it appeared to be in breach of New Zealand’s obligations under the International Labour Code.” (p. 133).

It is also different that Dept. of Labour can now apply mediation services to settle disputes in ‘essential services’. These services also require extra notice periods – to see which services & what notice periods, see Schedule 1, Part A & B of the Act.

“Employers may *request* other employees to perform the work of striking or locked-out employees and the other employees may agree to perform that work. Employers may not, however, *require* other employees to perform the work.” (p. 133).

The term ‘disputes of rights’ is not mentioned, though the Act has a similar notion: disputes concerning “the interpretation, application, or operation of an employment agreement” (p. 133). These disputes & PGs can be dealt with through the mediation services or the Employment Relations Authority.



ERA – Part 9

- ⊕ Personal Grievances – 6 different types
 - ⊞ Racial harassment is new type
 - ⊞ 13 types of discrimination from HRA 1993
 - ⊞ Focus on determining rights & obligations
 - solving ER problems efficiently, not empl. terms
 - ⊞ Reinstatement as the primary remedy
 - ⊞ 90-day rule: PG has to be raised
 - Employee can demand written justification within 60 days, if she/he has been dismissed

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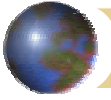
“The extension of personal grievances to cover *all* employees was a major legal contribution of the Employment Contracts Act. This approach is maintained under the Employment Relations Act.” (p. 134).

The explicit mentioning of racial harassment is new & there also more detailed prescriptions surrounding discrimination.

13 types of discrimination: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, sexual orientation.

Emphasis on information & mediation, Employment Institutions should only determine rights & obligations while terms & conditions of employment should be agreed amongst employers, unions & employees. Thus, the difference between disputes of interest & disputes of rights are still implicit in the Act.

While reinstatement has again become the primary remedy (as under the LRA 1987), it will only be granted if it is suitable. So far it has been used in only a limited number of cases taken at the Employment Institutions.



ERA – Part 10

- ⊕ Keeps traditional institutional back-up
- ⊕ But: changes to institutional set-up & encouragement of mediation & information
 - ▣ Low-level, flexible interventions
 - Procedures are vague, focus on pro-active approach
- ⊕ While mediation service is emphasised, the ER Authority & Court still have wide-ranging jurisdictions – see p. 136

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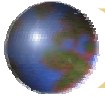
“The institutional set-up is designed to support good faith bargaining and provide a back-stop for unsolvable ER problems.” /.../ “...low-level, flexible interventions are preferable, with legal points left to higher courts.” (p. 135).

There is an emphasis on pro-active measures with information from the Dept. of Labour, ER advice, mediation services. Thus, the emphasis is to keep ER problems out of the Employment Institutions & allowing the parties to make the crucial decisions about the solutions/outcomes of ER problems.

“The Act obviously attempts to make the parties themselves responsible for conflict resolution and thereby to limit complicated and expensive legal solutions. This is in line with the criticism that legal precedent and legal presentation at the Employment Tribunal had become excessive under the Employment Contracts Act.” (p. 135).

ER Authority: ‘dispute of rights’, breach of agreement, unfair bargaining, PGs, wage recovery, union matters, strikes & lockouts.

Employment Court: ER Authority appeals, point-of-law decisions, whether a contract is for or of service, proceedings founded on tort & resulting from/related to a strike or lockout.



ERA – minimum conditions

ERA keeps & extend minima

Importance of supporting legislation

- Leave entitlements & minimum wages
- Anti-discrimination legislation (see also Part 9)
- What about working time restrictions?

Will collective bargaining make minima less important under the ERA over time?

- Link between collective barg. & levels of minima?
- What will happen in areas without collective barg.?

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The Labour-Alliance Government has extended & increased minima – for example, paid parental leave & higher statutory minimum wages. The emphasis on minima has also prompted a rise in the number of labour inspectors & information officers.

Minimum conditions are based on a web of Acts which stipulate basic minimum employment conditions, anti-discrimination provisions, health & safety measures. Thus, changes to legislative entitlements re: holidays, leave, minimum wages, etc. will have an impact across the labour market (but particularly in the bottom of the labour market where minima sets the guidelines for terms & conditions for employees).

Under the IC&A system, the awards stipulated terms & conditions above the statutory minima. This may happen again if collective agreements begin to cover a significant part of the labour force.