

Collective Labour Relations and Labour Law in a Changing World of Work

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I. Workers, the labour market, and the diversification of work

Overview and trends in the labour market

Aotearoa New Zealand (ANZ) has been described as “a small open economy, with large international labor flows and skilled immigrants.”¹ In the first two decades of the 21st century, it experienced steady economic performance, based on primary industries (including dairy farming, forestry, and horticulture) and tourism.² Small but growing technology and film and television industries are helping to diversify the economy.³

Employment growth has been strong, and labour utilization rates high, but they have been accompanied by low investment in technology, disappointing productivity gains and low wage rates.⁴ Use of immigration to address skill and labour shortages (alongside high levels of outward migration) has created a diverse workforce from “the Pacific, Asia, and elsewhere” but gender and ethnic pay gaps have persisted,⁵ and unemployment dogs some parts of the community, including young workers, Māori and Pasifika.⁶ Writing in 2019, Fletcher and Rasmussen asserted that “While many other OECD countries would envy the headline economic statistics, the embedded social, infrastructure and employment issues leave no room for complacency.”⁷ Against this background, in March 2020, ANZ entered a strict pandemic lockdown which had significant impacts on both labour supply and demand.⁸ In her 2022 report to the Japan Institute for Labour Policy and Training (JILPT), Duncan noted that “due to the success of the elimination strategy ... the most significant

1. Mare, David. 2018. “The Labor Market in NZ 2000–2017.” *IZA World of Labor*, no. 427: 1.

2. Fletcher, Michael, and Erling Rasmussen. 2019. “Labour Market Change and Employee Protection New Zealand in Light of the ‘Future of Work’ Debate.” *New Zealand Journal of Employment Relations* 44 (3): 32–33.

3. See, for example, <https://www.stats.govt.nz/tools/which-industries-contributed-to-new-zealands-gdp/> (2020) and <https://www.live-work.immigration.govt.nz/work-in-new-zealand/job-market-key-industries/information-technology/>. Websites accessed 19/02/2024.

4. See Mare above n 1, and Fletcher and Rasmussen above n 2: 34.

5. Parker, Jane, Amanda Young-Hauser, Patricia Loga And Selu Paea. 2022. “Gender and Ethnic Equity in Aotearoa New Zealand’s Public Service: Where is the Progress amid the Pandemic?” *Labour and Industry: A Journal of the Social and Economic Relations of Work* 32 (2): 156.

6. Mare, above n 1: 1.

7. Fletcher and Rasmussen, above n 2: 34.

8. Fletcher, Michael, Kate Prickett, and Simon Chapple. 2022. “Immediate Employment and Income Impacts of Covid-19 in New Zealand: Evidence from a Survey Conducted during the Alert Level 4 Lockdown.” *NZ Economic Papers* 56 (1): 79.

negative effects on workers have come from the containment measures rather than the disease itself.”⁹ Although a comprehensive wage subsidy scheme was initiated immediately (and later extended to subsequent lockdowns) this did not prevent considerable job displacement and income reduction, with up to half the respondents in one survey experiencing “direct economic loss ... when considered from a household perspective.”¹⁰

Job losses were concentrated in travel and tourism (which employed 8% of the pre-pandemic workforce), hospitality and international education.¹¹ As well as women, the low paid generally were particularly hard hit,¹² and although the impact on unemployment rates was relatively short-lived, it occurred in a context where job displacement was known to have “substantial and long lasting” impacts including reduced earnings.¹³ Finally, rising house prices and rents during the pandemic led to significant wealth transfer.¹⁴ Coupled with growing inflation, these factors compounded the “embedded issues” identified by Fletcher and Rasmussen (2019) immediately prior to the pandemic so that “the relative economic prosperity of ANZ through the pandemic” hid “a massive increase in economic inequality.”¹⁵ Once border controls were lifted in mid-2022 net immigration “rebounded to record-high levels.”¹⁶ Along with this boost to labour supply, there was also an increase in labour demand, linked in part to the recovery in international tourism.¹⁷ For a time, employment and wage levels rose, but so did inflation. After having been “relatively flat” at about 2% “for decades,”¹⁸ inflation peaked at 7.3% in the June 2022 quarter.¹⁹ High inflation and interest rates continue to create cost of living issues and unemployment is now forecast to increase from 3.2% in the June quarter 2023, to 5.2% by early 2025.²⁰

Challenges related to the expansion of “new forms of work”

Writing in 2019, Fletcher and Rasmussen identified two key sets of issues for consideration in relation to discussions about the future of work in ANZ: the first related to the way work relationships are structured (including casualization, precarious employment and the gig economy, including dependent self-employment) the second, to technological change, structural labour market change, and the potential for job losses to result.²¹ Their pre-pandemic analysis of ANZ data indicated that levels of non-standard work had been stable for almost two decades, accounting for the work arrangements of only a little over 20% of the

9. Duncan, Dawn. 2022. “Added Pressure: Exploring the Impacts of Covid-19 on Workers and Labour Laws in Aotearoa New Zealand.” *Japan Labor Issues* 6 (40): 68.

10. Fletcher, Prickett, and Chapple, above n 8: 79.

11. Duncan above n 9: 70; quoting Annick Masselot and Maria Hayes. 2020. “Exposing Gender Inequalities: Impacts of Covid-19 on Aotearoa New Zealand Employment,” *New Zealand Journal of Employment Relations* 45 (2): 57–69.

12. See above n 1: 1.

13. Hyslop, Dean, and Wilbur Townsend. 2019. “The Longer-term Impacts of Job Displacement on Labour Market Outcomes in New Zealand.” *Australian Economic Review* 52 (2): 158.

14. Duncan, above n 9: 71.

15. Duncan, above n 9: 71. Duncan relies for this information on Official Statistics New Zealand, <https://www.stats.govt.nz/indicators/unemployment-rate>. Websites accessed 19/02/2024; figures are for the December 2021 Quarter.

16. The Treasury. 2023. “Half Year Economic and Fiscal Updates 2023” Economic outlook(7-26): 13, 21, <https://www.treasury.govt.nz/sites/default/files/2023-12/hyefu23.pdf>. Website accessed 19/02/2024.

17. The Treasury, above n 16.

18. Duncan, above n 9: 71. Duncan relies for information on inflation on “Monetary Policy Framework,” <https://www.rbnz.govt.nz/monetary-policy/about-monetary-policy/monetary-policy-framework>. Website accessed 19/02/2024.

19. <https://www.stats.govt.nz/news/annual-inflation-at-4-7-percent/>. Website accessed 19/02/2024.

20. The Treasury, above n 16.

21. Fletcher and Rasmussen, above n 2: 32.

total workforce.²² A further longitudinal study of non-standard work practices, published in 2022, confirmed the “relative stability in most of the well-established forms of flexible work practices over the last couple of decades” and suggested further research to identify why a predicted increase in such work arrangements had not occurred.²³

As to the second issue, while Fletcher and Rasmussen (2019) concluded that “wholesale de-jobbing” was unlikely, they also noted the dearth of local research into the impact of new technologies.²⁴ Given indications that some sectors (such as driving and home-based care work) are increasingly using “platforms” as a means of organizing work, further research on the specific ANZ context would certainly be valuable now.²⁵ It could also be useful to look at how machine learning technologies may impact key sectors such as farming and tourism and the extent to which this may affect workers and the labour market.²⁶

Workers’ attitude toward changes in the world of work

There is a need for specific ANZ research on this topic also. A Productivity Commission 2020 review of attitudes to digital technologies found that New Zealanders were “relatively unconcerned that robots would “steal people’s jobs,”²⁷ although 50% of those surveyed agreed that “robots and AI steal people’s jobs.”²⁸ Most of those surveyed considered themselves sufficiently skilled in the use of digital technologies to do their current job,²⁹ or to do another one in the near future,³⁰ and the researchers concluded that this confidence was well grounded.³¹ Most New Zealanders agreed that “more jobs will disappear than new jobs will be created,”³² but saw a need for robots to do jobs that were “too hard or too dangerous for people.”³³

In November 2023, a centre-right coalition government replaced the centre-left government which had been in place since 2017. In its otherwise comprehensive briefing to the incoming government, the New Zealand Council of Trade Unions Te Kauae Kaimahi (NZCTU) made no reference to the impact of recent technologies, suggesting that the trade union movement in ANZ does not see these issues as being the immediate priority of workers in this country.

II. Collective labour law: Regulation of trade unions and collective bargaining

Background to the labour law framework in ANZ

From the late nineteenth century onwards, ANZ had a highly regulated labour relations system which

22. Above n 2: 35, see figure 1 and table 1.

23. Ang, Huat Bin (Andy), and Erling Rasmussen. 2022. “A Longitudinal Study of Flexible Working Practices in New Zealand Organisations.” *New Zealand Journal of Human Resources Management* 22 (2): 30.

24. Fletcher and Rasmussen, above n 2: 33.

25. <https://www.mycare.co.nz/become-a-worker>. Website accessed 19/02/2024.

26. See, for example, Henderson, Paul, 2023, “At the Cutting Edge: How Artificial Intelligence Will Change Our Primary Sector Forever.” Maxim Institute Auckland (2023), and Wang, Pola. Q., “Personalizing Guest Experience with Generative AI in the Hotel Industry: There’s More to It than Meets a Kiwi’s Eye.” *Current Issues in Tourism* DOI: 10.1080/13683500.2023.2300030.

27. Heatley, Dave. 2020. *New Zealander’s Attitudes Towards Robots and AI*. Research note 2020/1, Productivity Commission, (page iii), <https://www.treasury.govt.nz/sites/default/files/2024-05/pc-rp-research-note-nzers-attitudes-towards-robots-and-ai.pdf>.

28. Heatley, above n 27: 14.

29. Heatley, above n 27: 6.

30. Heatley, above n 27: 7.

31. Heatley, above n 27: 9.

32. Heatley, above n 27: 10.

33. Heatley, above n 27: 13.

featured compulsory, state-run arbitration, and restrictions on the right to strike.³⁴ Under this system unions of workers and employers had limited rights to bargain directly and in the event that agreement could not be reached wages and conditions could be fixed on either an industry or occupational basis.

This system survived until confronted by the pressures of the 1960s oil shocks and Britain's entry into the European common market. Thereafter it underwent a series of reviews designed to facilitate wage bargaining in general and enterprise level bargaining in particular.³⁵ Although these reviews were initially tripartite in nature, consensus ultimately gave way to employer demands for complete deregulation, pursuant to the Employment Contracts Act 1991.³⁶ As its name suggests, this legislation dismantled collective bargaining procedures and curtailed trade union rights in favour of an emphasis on individual agreement of terms and conditions of work.

The Employment Relations Act 2000

At the start of the millennium another new government — this time of the centre-left — enacted fresh legislation: the Employment Relations Act (ERA).³⁷ This statute restored recognition of trade unions and imposed requirements of good faith dealing between employers, unions, and workers. It did not, however, return ANZ to the highly regulated system of earlier years. In 2008 when the government next changed to the centre-right, it opted against wholesale repeal the ERA, retaining the good faith requirements and making only (relatively) minor amendments to other aspects of it.³⁸

The object of the ERA is to “build productive employment relationships” which are defined to include both individual and collective relationships between unions, employers, and employees.³⁹ The definition of ‘employee’ (which relied on the common law “contract of service”) excludes volunteers but includes homeworkers and “persons intending to work” thereby enabling provisions such as those governing the negotiation of individual agreements to have effect.⁴⁰ In deciding whether a person is an employee for the purposes of the statute, the “real nature of the relationship” between the parties must be determined, having regard to “all relevant matters” including those indicating the intention of the parties.⁴¹ Statements by the parties describing the nature of the relationship are not determinative.⁴²

In addition to requirements of good faith, the Employment Relations Act supports collective bargaining by means of:

- Protection of freedom of association and voluntary union membership,⁴³
- Recognition of trade unions, with rights of representation and access to worksites, and requirements relating to registration and independence,⁴⁴
- Procedures to determine initiation and scope of bargaining, requirements for bargaining process agreements, ratification processes, and requirements to conclude a collective agreement,⁴⁵ and

34. Industrial Conciliation and Arbitration Act 1894.

35. Industrial Relations Act 1973 and Labour Relations Act 1987.

36. Employment Contracts Act 1991.

37. Employment Relations Act 2000.

38. Employment Relations Amendment Act 2008.

39. Employment Relations Act 2000, s 4.

40. Employment Relations Act 2000, s 6 (1).

41. Employment Relations Act 2000, s 6 (2).

42. Employment Relations Act 2000, s 6 (3).

43. Employment Relations Act 2000, s 7.

44. Employment Relations Act 2000, s 12.

45. Employment Relations Act 2000, s 31.

- Protections for lawful industrial action.⁴⁶

Although the ERA permits multi-employer agreements these may only be executed with the agreement of all parties. In practice, since 1991, most collective bargaining occurs with only one employer, at the enterprise level, and usually only one or two unions involved.

The ERA specifically addresses some issues relating to non-standard employment. Limited worker entitlements to request flexible working arrangements were introduced to the statutory framework in 2007 and are to be found in Part 6AA of the ERA.⁴⁷ The object of Part 6AA is to provide employees with a statutory right to make a request for a variation of work arrangements including the place or hours of work, duties, or contact details to be provided to the employer.⁴⁸ Employers must respond within a month of receipt and may refuse only on the basis of a specified ground such as inability to reorganize work among existing staff.⁴⁹ If an employer does not meet its obligations the employee may refer the matter to a labour inspector, to mediation and ultimately to the Employment Relations Authority for determination.

In 2016 the issue of “zero hours” contracts was tackled through the insertion of provisions requiring individual and collective agreements to specify hours of work.⁵⁰ Restrictions were also imposed on “availability provisions.”⁵¹ These may only be included if the agreement has specified agreed and guaranteed hours of work, where the availability clause relates to hours which are additional to those specified hours, where the employer had genuine and reasonable grounds, and where there is consideration for the availability clause.⁵²

Collective bargaining and employment status in the film and television industry

ANZ statutory anti-competition laws are also relevant to consideration of collective bargaining in ANZ. The Commerce Act prohibits contracts, arrangements or understandings that substantially lessen competition, and provides that no such agreement shall be enforced or given effect to.⁵³ This has been understood to have the effect of making it unlawful for the self-employed to bargain collectively, including making it unlawful to take strike action in connection with any such negotiations.⁵⁴

The full implications of this were seen in 2009–2010 as an industrial dispute unfolded in the film industry in the capital, Wellington. It related to wages and conditions of workers involved in the production of the movie *The Hobbit*, a group that included both employees and others of possibly unclear status, since across the sector as a whole many workers were at least ostensibly self-employed. In 2010, in response to the workers’ claims, Warner Bros made it publicly known that it was thinking about taking production of the movie outside ANZ. Despite opposition from Actors Equity, and the NZCTU, the government of the day responded by enacting legislation which excluded all persons engaged in any capacity in film production work from the definition of “employee” unless they were party to a written employment agreement — effectively taking such workers out of the ambit of the “real nature of the relationship” test and preventing them from bargaining collectively.⁵⁵

46. Employment Relations Act 2000, s 80.

47. Employment Relations (Flexible Working Arrangements) Amendment Act 2007.

48. Employment Relations Act 2000, s 69AA.

49. Employment Relations Act 2000, s 69AAF.

50. Employment Relations Amendment Act 2016, s 67C.

51. Employment Relations Amendment Act 2016, s 67D.

52. Employment Relations Amendment Act 2016, s 67D (1).

53. Commerce Act 1986, s 27.

54. McCrystal, Shae. 2016. “Independent Contractors and Strike Action in New Zealand” *NZ Universities Law Review* 27 (1):162.

55. Employment Relations (Film Production Work) Amendment Act 2010.

In 2022 a different government decided that, rather than repeal the 2010 amendment, it would provide the industry with its own customized legislation: the Screen Industry Workers Act (SIWA).⁵⁶ The SIWA governs a number of matters relating to work relationships. Employment status of production workers is to be determined pursuant to SIWA, and workers are still excluded from the “real nature of the relationship” test, in favour of a more black-letter approach.⁵⁷ SIWA imposes responsibilities on the “engager” entering into an individual contracts, and workers are free to organize and bargain collectively, pursuant to specific provisions of the SIWA rather than the ERA.⁵⁸ SIWA does not however permit strike action in support of collective bargaining.

III. Unions: Current state and challenges

Union density

Union density dropped markedly after the legislative changes of 1991 but has remained stable over the past two decades.⁵⁹ As of 31 March 2022, 400,309 workers in ANZ were union members (16.73% of employees).⁶⁰ Unions in the wider public sector (including workers in nursing, medicine, teaching and the public service) account for well over half the total number of union members nationally. In the unions that provided information as to gender, 62 percent of members were women.

Concerns have been raised that low union density contributes to declining wage rates in ANZ, because while there is “... no ... statistical evidence of a definitive link between union membership decline and rising income inequality ...” there has been “substantial overlap in the occurrence of each.”⁶¹ In response, an attempt has been made to generate a discussion about the value of a “union default” policy whereby new employees are required to actively opt out of union membership, rather than the other way round.⁶²

Industrial action

The number of work stoppages in ANZ has been consistently low for some time apart from a brief spike from 2017 as in Figure 1, possibly caused by a combination of labour shortages as discussed above, and a change of government in that year.⁶³

Organisation of workers in non-standard work

While both private and public sector unions in ANZ include part-time, casual, fixed term and other non-standard work in broader campaigns and collective bargaining, campaigns specifically targeted at precarious workers (such as the large union-led campaign for legislation to address “zero hours contracts”) provide direct organizing opportunities.⁶⁴ The NZCTU also engages in a number of initiatives which provide opportunities

56. SIWA 2022.

57. SIWA 2022, s 4.

58. SIWA 2022, s 4 (4) and 4 (5).

59. <https://www.companiesoffice.govt.nz/all-registers/registered-unions/annual-return-membership-reports/>. Website accessed 19/02/2024.

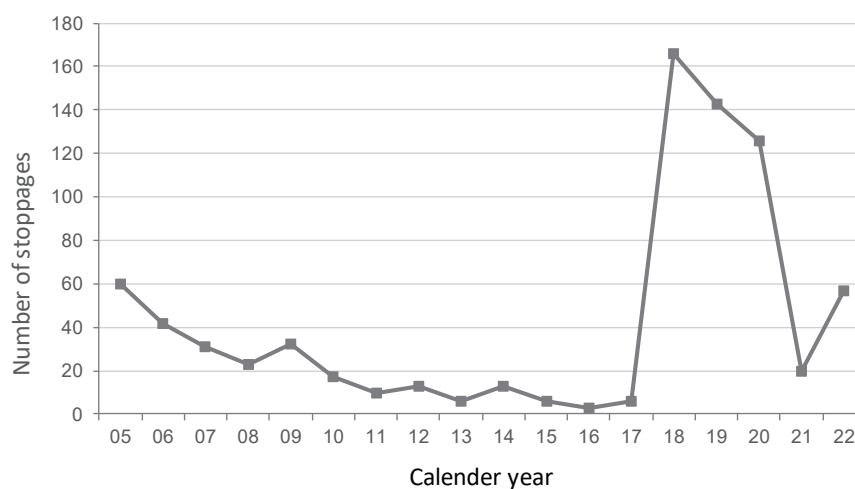
60. Companies’ Office, above n 59.

61. Harcourt, Mark, Gregor Gall, Nisha Novell, and Margaret Wilson. 2019. “A Union Default Policy for New Zealand,” *New Zealand Law Journal*, Feb 2019: 8–9.

62. Harcourt, Gall, Novell and Wilson, above n 59. See also: Harcourt, Mark, Gregor Gall, and Margaret Wilson. 2023. “The Union Default: Effects and Implications of Regulated Opting-in” *Industrial Relations Journal* 54 (2): 132.

63. <https://www.employment.govt.nz/starting-employment/unions-and-bargaining/work-stoppages/>. Website accessed 19/02/2024.

64. See, for example, <https://www.unite.org.nz/>. Website accessed 19/02/2024.



Source: Ministry of Business, Innovation & Employment, New Zealand Government.

Figure 1. Number of work stoppages, 2005 to 2022

to organize workers in non-standard work. Examples include the digital organizing tool “Together,” and the Young Workers Resource Centre.⁶⁵

Unions in ANZ have also made efforts to recruit and organize workers whose employment status is in dispute, including through the use of strategic litigation. Two private sector unions, FIRST Union Aotearoa (FIRST) and E Tu, recently supported a group of Uber drivers who sought declarations from the Employment Court as to their employment status. Two of the applicants were involved with Uber rideshares and two with UberEats. The Employment Court confirmed that all four were employees pursuant to s. 6 of the ERA which, as noted above, requires an assessment of the “real nature” of the work relationship between the parties.⁶⁶

However, the precedent value of this case remains uncertain. The judgment is expressed to relate only to the four specific individuals who brought the case and in a previous decision involving similar respondent parties the Employment Court came to a different decision. The first instance respondents in the recent case have also sought and obtained leave to appeal on questions of law relating to the application of s. 6 of the ERA and the Employment Courts findings in relation to the relationship between the different entities controlling the Uber drivers’ work relationships.⁶⁷ At the time of writing this appeal had yet to be heard.

The ERA entitles unions to offer different classes of membership, not limited to employees (for example, many unions enable retirees to maintain membership).⁶⁸ Consistent with E Tu’s initiatives in respect of Uber drivers, the membership rule of E Tu includes “Any person who ... is a contractor or is employed or about to be employed” in any of the industries listed for union coverage.⁶⁹ The other union involved in the recent litigation, FIRST has not extended its membership rule beyond employees,⁷⁰ but it has used the Employment Court decision as an opportunity to launch a campaign to organise Uber drivers, offering a discounted

65. <https://www.together.org.nz/campaigns>. Website accessed 19/02/2024.

66. *E Tu Incorporated and FIRST Union Incorporated v Rasier Operations BV* [2022] NZEmpC 192.

67. *Rasier Operations BV v E Tu Incorporated* [2023] NZCA 21.

68. Employment Relations Act 2000, s18.

69. <https://etu.nz/wp-content/uploads/2021/10/E-tu-Rules-2020-Signed-4-March-2021-ID-401294.pdf>. Website accessed 19/02/2024.

70. For the rules of FIRST, or other unions, see the register of incorporated societies: <https://app.businessregisters.govt.nz/>. Website accessed 19/02/2024.

bargaining fee and initiating bargaining for a collective agreement.⁷¹

The Public Service Association, ANZ's largest union with over 90,000 members, has also attempted litigation in respect of non-standard workers, namely employees in triangular work relationships (albeit on this occasion the outcome did not support the union position).⁷² Consistent with the endeavour to organise workers outside standard work relationships, it has also extended its membership rule to include "Individual independent contractors or groups of independent contractors" contracted to work in the areas covered by that union, including the public service, state sector, health sector community public services and local government.⁷³ This measure is designed enable carers engaged in publicly funded platform work (and other similar workers) to have access to union coverage.⁷⁴

The situation in ANZ appears similar to that of countries in the global north where "... the main actions are the traditional unions seeking proper classification of these workers via the courts and collective bargaining" as opposed to "demonstrations and strikes ... by ... new platform worker unions ..." as seen in the global south.⁷⁵ This may reflect the fact that platform workers have been the focus of organizing efforts by existing private sector unions, rather than new unions, which is itself unsurprising given the small size of the total ANZ workforce.⁷⁶

IV. Where to next for labour law in ANZ?

Non-compliance with International Labour Organisation (ILO) fundamental rights

One of the objects of the ERA is:⁷⁷

To promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

Convention 87 on Freedom of Association (1948) (C087) and Convention 98 on the Right to Organise and Bargain Collectively (1949) (C098) are of course two of the core conventions that underpin the ILO's 1998 Declaration of Fundamental Principles and Rights at Work (FPRW) and are deemed to bind all members of the ILO automatically.⁷⁸ ANZ ratified C098 in 2003, shortly after the ERA came into force, but has yet to ratify C087.⁷⁹ In the most recent ANZ country baseline report to the ILO the then Minister of Workplace Relations was quoted as explaining that "... our non-ratification reflects long held and considered policy positions regarding the scope of lawful strike action ... which prevent compliance..."⁸⁰ The limited rights to

71. <https://www.firstunion.org.nz/uber>; and <https://www.stuff.co.nz/business/131210436/uber-drivers-to-begin-collective-bargaining-after-landmark-court-ruling>. Websites accessed 19/02/2024.

72. *Keanu Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 69 [14 May 2021].

73. <https://www.psa.org.nz/about-us/rules-regulations-and-sector-procedures/#P2>. Website accessed 19/02/2024.

74. For an example in ANZ, see <https://help.mycare.co.nz/hc/en-us/articles/360000497136-Your-responsibilities-as-a-worker-on-Mycare>. Website accessed 19/02/2024. See also Alisa Trojansky "Towards the 'Uberisation' of Care: Platform Work in the Sector of Long-term Home Care and its Implications for Workers' Rights" (Visits and Publications Unit, European Economic and Social Committee, European Union, 2020).

75. ILO. 2022. "Decent Work in the Platform Economy." Geneva. https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_855048.pdf. <https://www.ilo.org/resource/decent-work-platform-economy>.

76. As of the December 2023 Quarter Statistics New Zealand, Tauranga Aotearoa, recorded the number of employed persons at 2,939,000; see <https://www.stats.govt.nz/indicators/employment-rate/>. Website accessed 19/02/2024.

77. Employment Relations Act 2000, s 3 (b).

78. https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453911:NO. Website accessed 19/02/2024.

79. <https://www.ilo.org/dyn/normlex/en/>. Website accessed 19/02/2024.

80. Country Baseline under the ILO Declaration Annual Review, New Zealand (2000–2019), <https://www.ilo.org/wcmsp5/groups/>

strike set out in the ERA would indeed appear inconsistent with the broader rights understood to be provided for by C087, although the scope of those rights is increasingly subject to challenge by the employer caucus within the ILO.⁸¹

This issue may soon need to be confronted as a result of the recent free trade agreement between ANZ and the European community (FTA) which is concluded although not yet in force.⁸² The FTA expressly requires compliance with the core labour rights set out in the FPRW, including the right to a safe and healthy working environment.⁸³ It also identifies, as relevant context, the ILO Declaration on Social Justice for a Fair Globalisation adopted at Geneva on 10 June 2008 by the International Labour Conference at its 97th session, and the associated Decent Work Agenda.⁸⁴ The FTA's dispute resolution processes also require recourse to expert opinion of the ILO in certain circumstances.⁸⁵

Political change and challenges to consensus

As earlier sections of this paper have indicated, the labour relations system in ANZ underwent a series of major changes in the latter part of the twentieth century. Then, as Anderson has described, the ERA ushered in a “period of ... consensus ...” which (at least for a time) “... stabilised economic and industrial relations between labour and capital.”⁸⁶

With the diversification of the world of work and the persistence of low wages and low productivity, Anderson has more recently suggested that some features of the system require review, recommending labour law reforms to include:⁸⁷

... the establishment of a clear set of fundamental employment standards applicable to workers rather than just employees; the construction of stronger, more effective rights of employees to union representation and voice in the workplace; the establishment of a realistic collective bargaining system; and (as noted above) greater statutory recognition of the rights of workers to be treated with respect and dignity.

In their 2019 paper Fletcher and Rasmussen identified the future of work, active labour market policy, and vocational education as further areas which were critical to labour policy development.⁸⁸

Many of these issues were considered by the centre-left government which was in office between 2017 and 2023. In its briefing to the incoming (new) government in 2023 NZCTU commended the previous government for record low levels of unemployment, a 44% increase in the minimum wage, an increase in paid parental leave (to 26 weeks) and the doubling of statutory sick leave, from five days to ten.⁸⁹ (As already

public/---ed_norm/---normes/documents/publication/wcms_752621.pdf. Website accessed 19/02/2024.

81. International Labour Convention on Freedom of Association and Protection of the Right to Organise, C087 (1948), Article 11. For discussion of this point, see Gordon Anderson and Dawn Duncan, *Employment Law in Aotearoa New Zealand* (Lexis Nexis, Wellington, 2022): 540.

82. <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/new-zealand-european-union-free-trade-agreement/>. Website accessed 19/02/2024.

83. Above n 82, Article 19.3 (3).

84. Above n 82, Article 19.1 (1) and Article 19.3 (1) and (2).

85. Above n 82, Article 26.21 (3).

86. Mitchell, Richard. 2019. “Forty Years of Labour Law Scholarship in New Zealand: A Reflection on the Contribution of Gordon Anderson.” *Victoria University of Wellington Law Review* 50: 159–168, and Gordon Anderson, 2010, “‘The Sky Didn’t Fall In’: An Emerging Consensus on the Shape of New Zealand Labour Law?” *Australian Journal of Labour Law* 23 (2): 94–120.

87. Mitchell, above n 86: 169, again referencing Anderson 2010.

88. Fletcher and Rasmussen, above n 2: 39.

89. NZCTU Te Kauae Kaimahi. 2023. “Briefing to the Incoming Government.” <https://union.org.nz/wp-content/uploads/2023/11/NZCTU-BiG-25-November-2023.2.pdf>. Website accessed 19/02/2024.

noted, measures had also been put in place to address ‘zero hours’ contracts.)

Other policy initiatives, however, remained unfinished at the conclusion of that administration, and are not supported by the incoming government. One related to the development of a social insurance scheme to address the “systemic weaknesses in NZ support for displaced workers” that pandemic restrictions had brought to light.⁹⁰ Another of particular relevance to diversified work relationships concerned the regulation of “working arrangements at the intersection of “employment (employment law) and ‘contracting’ (commercial law)”⁹¹ After public consultation, a tripartite working group (experts and representatives of the social partners) had been set up to “recommend a set of policy changes to improve ... regulatory protections” for workers at this intersection.⁹² In 2021 the group issued a report which recommended that:⁹³

... addressing the employee/contractor boundary issue must be ... the priority. Accordingly, this report focuses on delineating a clearer boundary between employment relationships and contractor/principal relationships, both in the legislation itself and by making supportive changes to regulatory systems.

To this end, it suggested revision of the “legislative definition of ‘employee’ to include a strong sense of contradistinction to someone who is genuinely in business on his or her own account.”⁹⁴ It also suggested that a duty must be imposed on “hiring entities” to “apply a robust decision-making process when considering worker classification” and take responsibility for making the correct decision.⁹⁵

The recommendations were not progressed during the remainder of that government’s time in office. In its 2023 briefing to the incoming government, NZCTU expressed concerns that the new government would in fact move in the opposite direction, away from the “real nature of the relationship test” towards a more black-letter law approach.⁹⁶ It argued that such an approach would “entrench the widespread problem of employees in low-paid and precarious industries being misclassified as contractors.”⁹⁷ It recommended that the new Government preserve the tripartite approach and work with unions and business to develop a test which would avoid “misclassification [which] leaves many vulnerable workers, who, in terms of the ‘real nature’ of their work, are employees, without the rights and protections that they ought to have under the law.”⁹⁸

Yet other policy initiatives which had been progressed, such as a restructure of the tertiary education sector, were reversed in the first 100 days of the new government.⁹⁹

Of particular relevance here was the repeal of the “fair pay” legislation enacted in 2022.¹⁰⁰ ANZ’s low wage rates and poor growth in productivity are sometimes attributed to a “race to the bottom” in which small and medium employers compete by means of a low wage strategy in preference to enterprise bargaining and investment in technology.¹⁰¹ On that basis, in June 2018, a tripartite working group was established to

90. Rosenberg, Bill. 2020. “Support for Workers in the Covid-19 Emergency.” *Policy Quarterly* 16 (3): 67–70.

91. Ministry of Business, Innovation and Employment (MBIE), NZCTU Te Kauae Kaimahi, and Business New Zealand. 2021. “Tripartite Working Group on Better Protections for Contractors: Report to the Minister for Workplace Relations and Safety.” <https://www.mbie.govt.nz/assets/tripartite-working-group-on-better-protections-for-contractors-december-2021.pdf>: 3. Website accessed 19/02/2024.

92. MBIE et al, above n 91: 3.

93. MBIE et al, above n 91: 3.

94. MBIE et al, above n 91: 3.

95. MBIE et al, above n 91: 3.

96. NZCTU, above n 89: 15.

97. NZCTU, above n 89: 15.

98. NZCTU, above n 89: 15.

99. <https://www.beehive.govt.nz/release/disestablishment-te-p%C5%ABkenga-begins>. Website accessed 19/02/2024.

100. Fair Pay Agreements Act 2022 (repealed).

101. <https://www.mbie.govt.nz/business-and-employment/employment-and-skills/fair-pay-agreements/> and https://stats.oecd.org/index.aspx?DataSetCode=PDB_LV. Websites accessed 19/02/2024.

consider possible mechanisms for an industry-wide bargaining system.¹⁰² Its work ultimately resulted in the Fair Pay Agreement Act 2022 (FPA) which had the purpose of providing “a framework for bargaining for fair pay agreements that specify industry or occupation-wide minimum employment terms” and, in certain circumstances, for determination of those minimum terms by the Employment Relations Authority.¹⁰³ Meanwhile by the time the legislation had come into effect, the employer lobby had withdrawn support for the new system. Progress on the first proposed fair pay agreements was slow. In late 2023, the incoming coalition government repealed the short-lived FPA despite protests from NZCTU and the rest of the union movement.

V. Conclusions

As a small economy dominated by primary industries, ANZ has yet to experience the full impact of change in the world of work, but where issues have arisen — such as in personal transport and delivery and the screen and television industry — the labour law framework has offered some support for a collective response. The ERA, for example, provides that the “real nature” of work relationships should prevail over a black letter law approach to determining employment status, thus giving unions an opportunity to use strategic litigation as a tool to organise Uber drivers. The SIWA similarly provides an organizing opportunity by enabling collective bargaining by contractors, although the question remains whether this represents a gain for contractors, or a loss of rights, overall, for workers who might otherwise have been classified as employees under a “real nature of the relationship” test.

The accommodations described here have arguably resulted from a twenty-year period of comparatively stable labour law, during which successive governments retained the core of the system set out in the Employment Relations Act 2000. However, the recent election of a government which includes a libertarian coalition partner (and Minister of Workplace Relations)¹⁰⁴ may jeopardise this stability and foreshadow a shift away from a collectivist approach in labour law policy.

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102. Above n 101.

103. Fair Pay Agreements Act 2022 (repealed), s 3.

104. <http://www.beehive.govt.nz/minister/biography/brooke-van-velden>.