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Conflict in "Middle-earth": Employment law, globalisation and independent film workers

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Summary

Sir Peter Jackson's adaptations of JRR Tolkien's *Lord of the Rings* hobbit sagas have enjoyed remarkable commercial success and, having been filmed in New Zealand, have created job opportunities and boosted the country's tourism industry. Consequently, when the prospect of Warner Brothers filming *The Hobbit* elsewhere arose, there was considerable disquiet. Trade union activity and uncertainty about film workers' employment status were widely blamed for the country becoming perceived as an unattractive film location. As in the United Kingdom, the status and legal consequences of ostensible contracts for services are controversial in New Zealand. To keep filming of *The Hobbit* onshore, the government extended generous tax concessions to Warner Brothers and urgently introduced amending legislation in an attempt to clarify the employment position of film workers.

Premised on a pluralist conception of employment relations, this article analyses *The Hobbit* affair. First, employment law in New Zealand is sketched. Second, the issues that jeopardised filming of *The Hobbit* in New Zealand are outlined. Third, the consequences of the employment law change are discussed in a context of globalisation. It is concluded that, despite appearances, Warner Brothers is a bit player in the drama; the real protagonists are domestic labour and employer unions, each of which has sought hegemony over employment relations policy in New Zealand since the liberalisation of labour laws in the mid-1980s.

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Introduction

The Southern Alps divide the South Island of Aotearoa New Zealand, separating the pluvial West Coast from the drier province of Canterbury. When the humid westerly airstreams from the Tasman Sea reach the West Coast and rise, cool water vapour condenses, falling as rain on the coast and snow on the Southern Alps (Brenstrum 2009). The landscape consequently features temperate rain forest, verdant farmland and snow capped mountains. This scenery and topography recall JRR Tolkien's depiction of his mythical Middle-earth (Tolkien 1978), the setting for his hobbit sagas (Stapleton 1983). Indeed, such vistas, real and computer generated, featured prominently in *The Lord of the Rings* trilogy (Jackson 2001-2003). Aided by considerable tourism marketing, these films have created a perceptual connection between New Zealand and Middle-earth so that one in ten tourists is prompted to visit the country after watching these films (Newton 2010). Since tourism is New Zealand's second largest export earner, worth NZ$9.3 billion or 16.4 per cent of total export earnings in 2009 (New Zealand Trade and Enterprise 2010), maintaining the perceptual link with Middle-earth is important for the country's economy.

The success of the contemporary New Zealand film industry is largely associated with the achievements of Sir Peter Jackson, director of *The Lord of the Rings*. Indeed, the Wellington suburb of Miramar, where Jackson's operations are based, is commonly, if somewhat grandiosely, referred to as "Wellywood". In 2007, Warner Brothers appointed Jackson to make *The Hobbit*, a prequel to *The Lord of the Rings*. After some setbacks, including the resignation of Guillermo del Toro as director, Jackson took over that role, and filming was planned to start in late 2010. In the face of potential industrial action, Warner Brothers threatened to take production away from New Zealand, and various substitute locations, including the United Kingdom, were mooted (Newton 2010). On 27 October 2010, the Prime Minister, John Key, announced an agreement with Warner Brothers, in terms of which the latter undertook, inter alia, to make two hobbit films in New Zealand. In exchange, New Zealand agreed to extend its existing film subsidy scheme to provide further tax concessions, and, more controversially, change its labour laws to satisfy the studio's apparent concerns about the uncertain status of local film workers, particularly actors who will perform minor roles in the films (Key 2010).

At first face, *The Hobbit* affair presents a striking example of a small and relatively weak sovereign nation – a victim of globalisation – extinguishing its workers' rights at the behest of a multinational corporation. However, analysis of the underlying issues indicates that the matter is less straightforward. This article is premised on a pluralist conception of employment relations, which counters "the *de jure* ownership rights of shareholders supporting management prerogative, with the *de facto* power of trade unions, facilitated by legal immunities" (Ackers 2002, p 12). Employment law in New Zealand is sketched. *The Hobbit* crisis is then outlined and the consequences of the employment law change are discussed in a context of globalisation. It is concluded that, despite appearances, Warner

Brothers is a bit player in the drama; the real protagonists are domestic labour and employer unions, each of which has sought hegemony over employment relations policy in New Zealand since the liberalisation of labour laws in the mid-1980s.

Employment law in New Zealand

A brief history

For almost a century, starting with the Industrial Conciliation and Arbitration Act 1894, New Zealand operated a highly regulated industrial relations system. The key features were a process of compulsory conciliation and arbitration, which led to legally enforceable national awards applicable to all workers and employees in a particular sector; and monopoly representational rights for unions in respect of all workers in the sector in which they were registered. Because union membership was compulsory (de facto after 1961 through close shop agreements), the right to strike was severely restricted (Anderson et al 2005). This was "a status quo which was generally endorsed by worker and employer unions" (Hince 1993, p 8). However, from the 1960s, the legal structure for employment relations became abstract from practice and expectations, and the system was eventually overhauled by the Labour Relations Act 1987 and the State Sector Act 1988. While retaining national awards and de facto compulsory unionisation, these Acts introduced greater bargaining flexibility, and heralded the radical liberalisation of the labour market in the early 1990s. The Employment Contracts Act 1991 (ECA 1991), introduced by a neo-liberal National government, sought to promote an efficient labour market and freedom of association, principally by marginalising trade unions and encouraging individual employment contracts. Despite its laissez faire underpinnings, ECA 1991 maintained a minimum code of employee rights, including the right to lodge a personal grievance with the Employment Court or the specialised Employment Tribunal in the event of unfair dismissal (Anderson 2005). Firing workers at will, a New Right desideratum, thus remained elusive. (See Ackers 2002 on managerial unitarism as a definitive feature of neo-liberalism in the workplace.)

The reinstatement of privileged union representation and collective bargaining was a pillar of the employment relations policy of the Labour-led government elected in 1999. This goal was given effect through the Employment Relations Act 2000 (ERA 2000). (Current New Zealand legislation is available at www.legislation.govt.nz) The principles that inform ERA 2000 include good faith in employment relations; freedom of association; dispute resolution through mediation rather than the courts; and compliance with international treaty obligations (Anderson et al 2005). However, the goals of "acknowledging and addressing the inherent inequality of power in employment relationships" and "promoting collective bargaining" are foundational (ERA 2000 s 3). Once a collective agreement has been concluded in a workplace, every new employee is automatically subject to the terms of the collective agreement (ERA 2000 s 63). A member of a union, which is party to the collective agreement, remains subject to its terms. Any other employee has the choice after 30 days of employment of joining a participating union, and so becoming subject to the collective agreement, or to negotiate an individual employment agreement with the employer. Closed shops are not permitted, and industrial action is legally sanctioned only during the negotiation of a collective agreement or to ensure workplace health and safety (ERA 2000 ss 83 and 84).

A National-led government was elected in 2008. Relative to previous administrations, the Key government is ostensibly pragmatic in its employment relations policy. However, while ERA 2000 and the core of minimum rights have been maintained, a significant innovation

has been implemented. A probation period of up to 90 days, initially introduced for firms with fewer than 20 employees (ERA 2000 s 67A), will be extended to all new employees (Employment Relations Amendment Bill (No 2) 196-2 (2010) cl 12). To this extent, dismissal at will has been achieved.

Who is an employee?

As in the United Kingdom (see, for example, Deakin 2007), identification of a worker as an employee or an independent contractor and the legal consequences of such classification are controversial in New Zealand. An "employee" is statutorily defined as "any person of any age employed by an employer to do any work for hire or reward under a contract of service" (ERA 2000 s 6). This part of the definition follows ECA 1991, and has an element of pleonasm as it effectively provides that an employee is a person employed under an employment contract. Unlike ECA 1991, ERA 2000 requires an employment agreement to be in writing (ERA 2000 s65(1)(a)). However, under both Acts, it is left to judicial discretion to decide whether an employment contract exists in a particular case, and, more generally, to identify the definitive characteristics of an employment contract. *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695 (CA) is the leading decision under ECA 1991 on the real nature of an ostensible contract for services. Like many courier drivers at that time, the appellant concluded a comprehensive written contract, which described him as an independent contractor. His obligations included supplying and maintaining his own vehicle in TNT livery, and wearing a corporate uniform. Cunningham was required to follow TNT's instructions regarding deliveries and could not provide other delivery services. When his contract was terminated, Cunningham claimed the agreement was in substance an employment contract in order to access a fair dismissal process. The Court of Appeal held (at p 711):

> "The parties signed a written contract and it can be assumed they were working in accordance with its terms. On ordinary principles of construction their intention about the nature of their relationship is to be arrived at from a consideration of the contents of that document read in the light of all the surrounding circumstances at the time of its execution."

The court also recognised that, even if the original contract was in substance a contract for services, the relationship may become one of employer and employee, based on actual working practices. On the facts, it was found that Cunningham was not an employee, either at inception or through tacit novation of the contract. (See Furmston 2007, p 660 on novation.) ERA 2000 s 6 provides the following guidance:

> "(2) In deciding … whether a person is employed by another person under a contract of service, the court or the [Employment Relations] Authority (as the case may be) must determine the real nature of the relationship between them.
> (3) For the purposes of subsection (2), the court or the Authority—
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
> (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship."

The leading case under ERA 2000 is *Bryson v Three Foot Six* (2005) 3 NZLR 721; [2005] NZSC 34 (available through www.nzlii.org). In 2005, Three Foot Six Ltd,[1] a provider of film production services for *The Lord of the Rings*, was sued by a contracted model maker, James Bryson, who claimed an employee's right of fair dismissal when his contract for services was terminated. Bryson pursued his claim through the Employment Relations Authority (a specialist tribunal), the Employment Court, the Court of Appeal and, finally, to the Supreme Court. By that stage, both the New Zealand Council of Trade Unions (CTU), the representative body for organised labour, and Business New Zealand (BusinessNZ), the principal employers' group, had been joined as interveners. The Supreme Court found Bryson's contract to be in substance a contract of service. However, the victory may been Pyrrhic; references to Bryson as a "*former* technician" or "*former* model maker" (see, for example, Newton 2010, emphasis added) imply that he can no longer find employment in the industry.

The statutory guidance to the courts regarding the real nature of a disputed contract is perceived in some quarters as an innovation of ERA 2000 (see, for example, O'Reilly 2010), but may be seen as a broad, if not precise, codification of the common law. Indeed, the Court of Appeal has said "both the wording of s 6 and its Parliamentary history suggest that what was intended was more in the nature of a nudge rather than radical change in this area of the law" (*Three Foot Six v Bryson* [2004] 2 ERNZ 526 at 544). While the Supreme Court has refrained from accepting that ERA 2000 s 6 amounts to a simple codification of the common law, at least with regard to the form of a contract (ERA s 6(3)(b)), it has noted that statute confirms the common law (*Bryson v Three Foot Six* (2005) 3 NZLR 721; [2005] NZSC 34 at [31]). Lower courts may be less circumspect. Thus, despite the matter arising under the ERA 2000 regime, in *Downey v New Zealand Greyhound Racing Association Inc* (AA 315A/05, 15 November 2005) at [23], the Employment Court simply followed the test established by the Court of Appeal in *Cunningham v TNT*.

A perception that ERA 2000 represented a radical departure from extant law regarding independent contractors may have been engendered by the outcomes of the leading cases under the two Acts being different. As noted, in *Cunningham v TNT* a contract for services was found, whereas, in *Bryson v Three Foot Six*, a contract of service was found. However, it is plausible that the outcomes could have eventuated under either Act. Neither the bare words of the contract nor industry practice had ever been solely determinative of the nature of the relationship. ERA 2000 did, however, innovate explicitly in one regard, with practical consequence; it gave a union or a government labour inspector standing to test in court the true nature of an arrangement (ERA 2000 s6(5)). Consequently, a union might pursue a recruitment strategy of challenging an ostensible contract for services, and, if successful, seek to institute collective bargaining in that workplace.

The Hobbit Crisis

In 2006, New Zealand Equity, a domestic actors' trade union, joined the Australian-based Media, Entertainment and Arts Alliance (MEAA) to negotiate standard terms and conditions

[1] New Line Productions Inc, maker of *The Lord of the Rings*, was the sole shareholder of the since liquidated Three Foot Six. At the time of the litigation, New Line was a subsidiary of Time Warner Inc, and is now a direct subsidiary of Warner Bros. Entertainment Inc. 3 Foot 7 Ltd, wholly owned by Warner Brothers, was established to be responsible for the production of the feature film *The Hobbit* (Annual Financial Report 31 March 2010). The Companies Office maintains a publically accessible and searchable electronic database at www.business.govt.nz/companies

for New Zealand performers. (Many performers and other film workers were engaged under contracts for services.) The involvement of an overseas union in New Zealand negotiations may seem unusual, but, given the small size of the domestic film industry, "nearly all actors have links to overseas markets" (Rothwell 2010). MEAA probably saw the imminent start of production for *The Hobbit* as an ideal opportunity to negotiate a collective agreement with the Screen Production and Development Association (SPADA) (Anon 2010). MEAA may have proved a more aggressive negotiator than SPADA was accustomed. Indeed, in the context of Australia's robust labour relations milieu, there is reportedly "a history of bad blood", in particular, between MEAA and Warner Brothers. In the event, the negotiations quickly disintegrated into brinkmanship, boycotts and threats (Kay 2010). In particular, at the behest of MEAA, the Hollywood-based Screen Actors Guild (SAG) and the Brussels-based International Federation of Actors issued a worldwide boycott of *The Hobbit*.

From a legal perspective, certain points are clear. If the actors were engaged as independent contractors in substance and form, then, ERA 2000 would not apply to them and they could not bargain as a trade union. Indeed, the Commerce Act 1986, which prohibits restrictive practices, including price fixing, only excludes collective bargaining by *employees* from its ambit (s44(1)(f)). However, were the actors ostensible contractors, but employees in substance, they could enjoy the benefits of ERA 2000, including the right to bargain collectively, once the contracts were tested in the Employment Relations Authority or Employment Court.

Warner Brothers' allegedly expressed its concerns to the government about labour relations and labour law in New Zealand, and made it known that it might locate the films elsewhere. New Zealand Equity promptly rescinded its call for a boycott and the CTU guaranteed there would be no industrial action during the filming of *The Hobbit* (Newton 2010). Nevertheless, the government enacted the Employment Relations (Film Industry) Act 2010 under urgency to amend the definition of "employee" under ERA 2000. In short, the amendment excludes all workers engaged in film production from the definition of employee (ERA 2000 s 6(1)(d)), unless the film is made for first broadcast on television (ERA 2000 s 6(7)(b)). However, the exclusion "does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee" (ERA 2000 s 6(1A)).

Discussion

Has certainty been achieved?

The purpose of the Employment Relations (Film Industry) Act 2010 was to introduce certainty to the film production labour market, and so it is apt to consider first whether that desired certainty has been introduced. The general policy statement in the explanatory note to the Employment Relations (Film Industry) Bill states:

> "The Bill provides clarity and certainty about the status of workers in the film industry; it provides assurance that workers in the film industry can be independent contractors, and will help prevent unnecessary litigation."

There was, of course, no doubt previously that "workers in the film industry can be independent contractors"; many were before and their status will continue unaffected by the amendment. The potential mischief lay with workers concluding ostensible contracts for

services and then later claiming the benefits of employment. However, after *Bryson v Three Foot Six*, there is no indication of this having happened.

It is broadly accepted that form will now triumph over substance when a person is engaged in the film industry. For example, Cullen (2010), a prominent labour lawyer, albeit writing for a general audience, says, "The 'real nature of relationship' test does not apply to film production workers". This is an overstatement. First, there is no statutory requirement for a contract for services to be made or recorded in writing, and so an oral contract might remain open to a real nature of relationship analysis. Second, a court would consider the real nature of a sham transaction. (It is plausible that an employee and employer might enter into a sham contract for services to access the significant tax advantages that may accrue to an independent contractor, but are denied to an employee under New Zealand law.) Third, the normal grounds for vitiating consent to a contract, such as economic duress, might indirectly require an analysis of the true nature of the agreement. Furthermore, technical interpretational issues might be raised. The amended provision uses the word "provides" rather than, say, "states", "specifies" or "records". It is submitted, therefore, that a written record of a contract, may *state* that a person is an independent contractor, but it remains open to the courts to consider what the contract actually *provides* by looking at all the surrounding circumstances. Because the amendment Bill, which, it is submitted, betrays its hasty drafting, was passed under urgency with no select committee examination or meaningful parliamentary debate, there is a paucity of materials beyond the text of the Act to assist curial interpretation. This lack of interpretational aids may act to preserve the status quo. Finally, there seems to be no reason why a contract for services should not be novated by a contract of service based on the actual relationship between the parties as it develops over time.

The certainty Warner Brothers allegedly sought and government promised could only be achieved if affected contracts were put wholly beyond judicial purview. This was most unlikely, if not inconceivable. (After the devastating earthquake in the Canterbury region on 4 September 2010, the constitution was potentially suspended in that region. In terms of the Canterbury Earthquake Response and Recovery Act 2010 s 6(3), a recommendation by the Minister for Canterbury Earthquake Recovery "may not be challenged, reviewed, quashed, or called into question in any court".) The inherent conservatism of the common law may militate against progressive statutory reform of employment law. For example, the Court of Appeal has interpreted ERA 2000 narrowly, focusing on the text, rather than principles, notably that of good faith (see, for example, *Coutts Cars Ltd v Baguley* [2001] ERNZ 660). (For an analysis of the Court of Appeal's conservative approach to ERA 2000 and its attempts to assert the common law, see Nuttall and Reid 2006.) Such judicial conservatism may equally mitigate the exclusionary goals of the Employment Relations (Film Industry) Act 2010.

Who will be affected by the new law?

The extent to which the Employment Relations (Film Industry) Act 2010 will make film production workers worse off materially or in terms of their rights is currently unknown.

Employment contracts in the industry may be re-negotiated as less favourable contracts for services, but *The Hobbit* is likely to present a windfall for many film production workers, whatever their status. Besides, it is understood that disguised employment is not common in the New Zealand film industry. Most workers are genuine contractors and Bryson's situation was anomalous (Macfie 2010). If this is so, who will be affected by the law change?

In the past ten years, innovative unions have expanded their reach into areas where recruitment has otherwise proved difficult, notably in the "McJobs" sector. UNITE and the Service and Food Workers Union, for example, have been successful "in targeting mostly young workers in the fast food and casino industries" (Blackwood, Feinberg-Danieli and Lafferty 2005, p. 9). However, workers in these sectors are most obviously affected by the 90-day probation period, and would become more vulnerable were the form over substance provision extended to all workers. Could this happen? The 2025 Taskforce, a government-sponsored inquiry quixotically charged with investigating ways in which mineral-poor New Zealand might reach per capita income parity with Australia, has recommended paring back New Zealand's employment rights in order to attract foreign investment (Brash 2010). While the taskforce's recommendations are routinely dismissed by the very government that appointed it, Business NZ, the principal employers' association and the current government's natural ally, has called for form over substance to be extended to all ostensible contracts for services "to better serve New Zealand's productivity and economy" (O'Reilly 2010). Given disparity in bargaining power, large numbers of low paid workers, in particular, could then be engaged as independent contractors.

Was labour law the real issue?

Warner Brothers may have been genuinely concerned by the precedent set by the Supreme Court in *Bryson v Three Foot Six*, even though the decision has caused no obvious turmoil in the industry. However, the problem faced was not that a court had found from one particular set of facts that an employment relationship existed in substance, but rather, like all developed countries, New Zealand guarantees employees certain basic rights. The costs of statutory leave, due process in the event of dismissal, distribution preference in the event of insolvency, and so forth, can all impact on the bottom line, as can tax and exchange control movements. Indeed, the potential additional costs for filmmakers of employing workers, as opposed to engaging contractors, are likely to have been minimal relative to other production costs. Since 2007, when Warner Brothers decided on the location for *The Hobbit*, exchange rate movements have made it 35 per cent more expensive to produce the films in New Zealand, and approximately 25 per cent cheaper in the United Kingdom, a mooted alternative location (Kay 2010). Besides, a globalised filmmaker would be accustomed to working with unionised workforces in the United States, the United Kingdom and elsewhere. It seems plausible, therefore, that raising labour law concerns was a gambit on the part of Warner Brothers to exact further tax concessions from the New Zealand government.

The New Zealand tax system is broadly neutral (see Sandford 2000), eschewing the "pork barrel" distortions of many other countries, but does provide benefits to filmmakers. (The tax concessions granted to Warner Brothers extended an existing scheme, the Large Budget Screen Productions Grant, introduced by the previous Labour-led government.) *The Hobbit* films are expected to create or guarantee hundreds of jobs directly, and, perhaps, thousands indirectly, although the ripple effect is easily exaggerated. Indeed, months before the decision to extend the subsidy was made, Treasury "officials had called for an end to assistance for the film industry, saying it was negative for the economy and presented a risk to the Government's books" (Small 2010). While the tax breaks extended to Warner Brothers may represent a form of corporate welfare whereby the government transfers NZ$100 million to a foreign corporation that made a profit of NZ$1.32 billion in 2009 (Weir 2010), there was little domestic opposition. Many New Zealanders may have become inured to the demands of globalised capital. As Gould (2006, p 38) argues, the nation has been persuaded that "neo-

liberal economics is not only inevitable but is also natural, desirable, generally beneficial and to be admired".

The context of globalisation

The neo-liberal version of globalisation requires implementation of particular domestic policies, including financial liberalisation, privatisation and deregulation, openness to foreign direct investment, a competitive exchange rate, fiscal discipline, and lower taxes (O'Connell 2006). Regionally, the 1988 Memorandum of Understanding on Business Law Harmonisation requires joint examination of "the scope for harmonisation of business laws and regulatory practices including the removal of any impediment" pursuant to the Australia New Zealand Closer Economic Relations Trade Agreement 1982 (DFAT 1997, p 18). (See Kelsey 2010 for a critique of Australasian free trade agreements.) Harmonisation of its laws in this way with a more powerful neighbour might raise sovereignty issues for New Zealand, but most relevant currently is the potential for "the privatization of norm-making capacities and the enactment of these norms in the public domain", which Sassen (2003, p 8) identifies as a distinguishing feature of globalisation. If globally mobile capital is "the main cause of the threats that hang over us" (Touraine 2001, p 14), and "holds the potential to dictate the terms of government policy" (Unger 1986, p 28), then New Zealand's urgent amendment of its labour laws appears to exemplify this possibility. *The Hobbit* dispute is, then, conveniently viewed in terms of a major foreign corporation dictating policy to a relatively poor and weak sovereign nation. However, the roots of the Employment Relations (Film Industry) Act 2010 lie with New Zealand's embrace of neo-liberalism in the mid-1980s, and the struggle for hegemony over employment relations policy that has ensued.

Since the mid-1980s, successive New Zealand governments have accepted globalisation as "desirable" (Wood 2005, p 78) and have adopted an aggressive approach to implementing measures to reap its anticipated benefits (Patman and Rudd 2005). From an overall economic perspective, these efforts may have been successful (see Richardson 2005, but compare Roper 2005). Jackson and his teams of highly skilled technicians are, for example, significant beneficiaries of the dispersal of the American film industry. However, the social consequences of globalisation have been less positive. The radical economic liberalisation of the 1980s transformed "the world's first welfare state into the world's first post-welfare state" (Russell 1996, p 9), as New Zealand society was comprehensively re-imagined in market terms, and became colonised "by the culture of finance" (Jesson 1999, p 141). By individualising employment agreements, ECA 1991 was an essential, if highly unpopular, element of these reforms. As a leading neo-liberal proponent concedes, "most New Zealanders considered the employment reforms unfair, and feared for a loss of sovereignty and considered that their future prosperity had been jeopardised" (Brash 1996).

Trade unions and globalisation

The mobility of globalised capital has led countries to compete with one another to attract foreign investment, and liberalisation of labour laws is seen as one way of achieving competitiveness (Brash 2010). Indeed, globalisation has "exposed workers to global economic pressures whilst limiting their ability to exploit cyclical bargaining power where it exists" (Briggs 2006, p 12). The pluralist employment relations tripod of organised labour, employer's groups and government, which informs the principles, structures and conventions of the International Labour Organization, has become unbalanced as more power accrues to

multinational enterprises. Work patterns have also changed, with job fragmentation; expectations of flexibility; and 24/7 business hours becoming normal (Hyman 2002). The concentrations of large numbers of workers in shared workplaces during common work times that favoured unionisation, are increasingly disappearing. Fragmentation of the workforce that sees manufacturing jobs and, increasingly, higher skilled work, outsourced to low wage economies necessarily impacts on unions and their members. Simply, in developed economies, fewer people in the private sector work in the ways that previously favoured collective action.

Globalisation is, then, fundamentally inimical to unionisation, and yet they are not wholly incompatible. Unions, such as MEAA and SAG, may themselves seek to follow the vectors of globalisation (see Uchitelle 2010). Furthermore, as the body of international law needed to facilitate globalisation has proliferated, nation states have become increasingly important as "agencies that create and abide by the law" (Hirst and Thompson, 1996, p. 194). Within countries, neo-liberal measures consonant with globalisation – deregulation, competition and privatisation – have paradoxically led to more regulation (Taggart 2005). The proliferation of technical rules that accompany globalisation must be overseen by efficient bureaucracies. These bureaucracies, whose staff include significant numbers of non-market oriented, social science graduates, are often highly unionised. Indeed, union density (the expression of union membership as a percentage of the number of wage and salary earners in employment) in the sector has remained constant at around 70 per cent since the mid 1980s (Harbridge and Hince 1993; Blackwood, Feinberg-Danieli and Lafferty 2005). Unions can also benefit government and multinational corporations. Structured negotiations between unions and employers allow events with considerable emotional impact and the potential for social disorder to be rationalised, and thereby defused and normalised.

The doctrinaire free market think tank, New Zealand Business Roundtable, argues that New Zealand should establish "a regime based on the principle of free contracting, not on the fallacies of bargaining inequality and collectivism that underlie the ERA" (Kerr 2001, p 3). Business NZ, the largest employers' representative body, would also prefer the ECA 1991 approach to union agency (Burton 2004), but is pragmatic and has participated in joint work with the CTU, notably on productivity. Whether the relationship between organised labour and employer groups is characterisable as "agonism" between adversaries or "antagonism" between enemies (see Mouffe 1999, p 755 on the distinction), they have been engaged in a struggle for hegemony over employment relations policy since the liberalisation of labour markets in the mid-1980s. The tide in favour of unions, represented by ERA 2000, appears to be in ebb, but, if it is, Warner Brothers has only paid a bit role in the story.

Conclusion

Kay (2010) observes that "Government may have saved *The Hobbit*, but has done so at the expense of caving in, or at the very least appearing to cave in, to the demands of a multinational corporation, with no public scrutiny or consultation." Reflecting on the largesse extended to Warner Brothers' executives, Economic Development Minister Gerry Brownlee says, "it was said the Government should do whatever it takes to keep *The Hobbit*. We did whatever it took" (Easton 2010). Coincident with changing its labour laws apparently at the behest of a foreign corporation, the New Zealand government was ranked least corrupt in Transparency International's league table of perceptions of government corruption (joint first with Denmark, see Transparency International 2010). Negotiating tax concessions and employment law behind closed doors with a potential foreign investor may not constitute

corrupt conduct, but, nevertheless, intimates corruptibility. While that taint on the national reputation may prove significant in the long term, such compromise of values and workers' rights seems to be the accepted "admission price" for a country's participation in a globalised economy.

The media brouhaha about the possibility of *The Hobbit* going offshore and the haste with which an amending statute was enacted divert attention from the key legal issue. Disputes about the real nature of a contract are subject to judicial discretion and can only be eliminated by the most draconian of legislation. Complete certainty about a contractor's status was not and cannot be achieved. Conversely, the attempt to make the form of a contract conclusive for film production workers – as it will be, in practice, for all but the most determined and litigious of them – has intimated the prospect for workers across all sectors being engaged as ostensibly independent contractors. The current government introduced a probation period with restricted effect but has extended this to all new workers. This precedent must give the New Right grounds for optimism.

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