

RE-CONCEPTUALISING LABOUR MARKET REGULATION IN AUSTRALIA AND NEW ZEALAND

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Abstract

This paper seeks to broaden traditional assumptions that the study of industrial relations makes about regulation. Industrial relations researchers have been interested in institutional regulation since the Webbs and Commons examined the development of unions, minimum standards and collective bargaining in the United Kingdom and the United States. This tradition provides a narrow conception of institutions as structures rather than processes, norms, rituals or habits. A contemporary manifestation of this narrow conception is the preoccupation of industrial relations researchers with changing institutional structures, such as declining levels of trade union density and the decentralization of bargaining structures. Often overlooked in such analyses are important questions about the functions institutions perform, and how these functions endure in times of institutional change. This paper outlines changes to the Australian and New Zealand systems of industrial relations from the 1990s, and examines how the systems' traditional regulatory functions continue to be performed following the introduction of new institutions and bargaining structures.

Introduction

Regulation is about more than states, laws, and enforcement mechanisms. Recent contributions to the literature on legal regulation suggest that regulation comprises a complex interrelationship between private (contract) and public (statute) law and between formal (rules) and informal (customs) regulatory tools (Collins, 1999; Parker et al, 2004). In contrast to the popular assumption that privatization and contractualism mean less law, less regulation and less state intervention – this literature argues that regulation is increasing and expanding. In part the justification for this view is the thesis that developments in science and technology are creating a more “risky society”. At an empirical level, studies have demonstrated that while privatization may mean less state provision of goods and services, private provision is often underwritten by creating more law and new regulatory instruments and agencies. Changes to the regulation of industrial relations have certainly adhered to this tendency.

This paper examines the regulation of the labour markets of Australia and New Zealand. Since the mid 1980s both labour markets have undergone substantial institutional change. In both countries, unions have suffered substantial decline, employer associations have remodeled themselves, and the dominant framework of compulsory arbitration has been either weakened (in Australia) or dismantled (in New Zealand). In both countries there has been a transition from collective bargaining to individualization of the employment relationship, which, according to popular pronouncements represents a movement from a regulated to deregulated labour market. In dismissing the notion of a deregulated labour market, the aim of the paper is to highlight the continuities in patterns of labour market regulation that

underlie the formal changes to institutional structures and bargaining instruments.

As it seeks to explain the functions of regulation, political economy can offer industrial relations insights into the process of institutional change. In particular this paper applies the notion of an embedded economy – as developed by Karl Polanyi – to the case of labour market restructuring in Australia and New Zealand. The paper examines the impact of the substantial institutional changes introduced in both countries from the mid-1980s on the pattern of labour market regulation. More specifically the paper asks whether there has been a fundamental shift towards a market based system of regulation or, alternatively, whether the process of change has seen the emergence of new institutions that perform the same or similar regulatory functions.

The first section of the paper highlights some of the limitations of using a conventional industrial relations perspective to understand labour market restructuring. The second section then demonstrates the case for using a political economy perspective to understand the developments in labour market regulation. The third section of the paper reviews the comparative literature on Australian and New Zealand industrial relations. This section identifies the reasons for an explosion of interest in trans-Tasman comparisons in the late 1980s and early 1990s, and highlights the shortcomings of the methods used to compare the respective cases of labour market restructuring during this period. In the face of the substantial institutional changes that have occurred since the 1980s, section four highlights examples of continuity in the patterns of industrial relations in both Australia and New Zealand.

Regulation and Industrial Relations

A general definition of industrial relations might be the study of the *regulation of the employment relationship*.¹ Such a definition of the field reveals at least three important shortcomings. First, when examining the interaction of employment and work, most observers look only at the rights and obligations that stem from the contract of employment. Left out of the equation are a range of different types of employment and work experiences including volunteering, unpaid domestic labour and self-employment (Edwards, 2003: 1-2).

Second, by examining the dynamics of power, conflict and bargaining around the formal employment relationship, industrial relations research has become segregated from research on social security. As new patterns of employment such as the growth of casualisation have eroded the traditional (male) model of full time employment, it is essential that the fields of industrial relations and social security together explore how workers gain or lose entitlements and access to both employment, and social, protection. Safarti and Bonoli (2002) warn that changing patterns of labour market participation, including population aging, pose significant challenges that require labour market policy makers to integrate employment protection and social security.

Third, industrial relations research, since the pioneering work of the Webbs in the United Kingdom and Commons in the United States, views regulation as occurring through the *rules* made and administered by institutional actors.² These actors include, especially in the case of Australia and New Zealand, arbitration tribunals (and other mechanisms of state intervention), as well as employer and employee associations. At a time of considerable labour market restructuring, many observers have examined the causes of institutional decay and ways to reinvigorate traditional labour market institutions. The most obvious example is the considerable literature devoted to understanding, and offering suggestions to redress, the decline in unionization that has occurred across a number of developed countries (eg Fairbrother and Griffin 2002). The adoption of the so called "organizing model" has been a particular source of preoccupation for Australian and New Zealand industrial relations researchers.

Useful as they may be, studies that demonstrate a decline in unionisation might tell us little unless they explore the crucial link between unionisation and collective bargaining coverage, and discuss how alternative forms of representation or regulation complement, or continue to perform, those functions in the absence of a strongly unionised labour movement. Examples from European industrial relations systems include statutory provisions that extend the coverage and benefits of collective bargaining from union to non-union workers, and alternative forms of employee representation, such as work councils, that have statutory rights to enable employee involvement in decision making at the workplace. It is in countries, like the United States, that have both low levels of unionisation and collective bargaining coverage, that access to alternative forms of

representation becomes a most important policy issue (Freeman and Rogers 1999).

By focusing on the fortunes of particular institutional actors, industrial relations research has then tended to overlook the more fundamental functions performed by labour market institutions and how these functions might be affected by institutional change. In part, there has tended to be an assumption that the erosion of institutional structures equates to a transition from a regulated to de-regulated labour market. If we accept that the market is itself a form of regulation then the notion of a de-regulated labour market becomes absurd (eg Shearing 1993). What is referred to as deregulation is more accurately a process of regulatory contestation in which societal structures of regulation may give way to market-oriented forms of regulation. According to Blyth (2002:4):

The contemporary neo-liberal economic order ... is an attempt once again to dis-embed the market from society, to roll back the institutions of social protection and replace them with a more market-conforming institutional order.

The weakening of institutions of employment protection such as trade unions and arbitration tribunals has accompanied the decentralization of bargaining to the level of the firm or the individual employer/employee. This process does not represent a regulatory void. In the first place, there is a good case for seeing the firm as a non-market institution of regulation (Adams 1992). Second, while decentralization brings the regulation of the employment relationship closer to the direct parties, it is a process that may well be underwritten by increased state intervention, to strengthen the protection of individual rights. As Johnstone and Mitchell (2004:117-118) have observed:

The withdrawal of public regulation by the state does not necessarily reduce the sheer amount of 'regulatory' public law ... the return to market-based, or 'private', arrangements has been accompanied by a marked increase in regulatory instruments, norms and agencies.

Of course, state intervention to promote individual rights may simultaneously weaken protections that support institutional collective employment regulation.

To the extent that some traditional structures of labour market regulation are in decline, industrial relations needs to broaden its understanding of the role of different types and forms of regulation. Rather than viewing regulation as the study of institutions and their rules, we might suggest that regulation in a broad sense encompasses a range of means, both formal and informal, to influence or direct behaviour. Regulation research goes so far as to suggest that informal regulatory tools – such as negative publicity, public criticism, shaming and embarrassment – may have a more important long term influence than formal sanctions (Parker and Braithwaite 2003). A similar approach has guided changes to the regulation of occupational health and safety, with education, training and the input of the direct parties in developing codes of

conduct now playing an increasingly important role, with legal prosecutions reserved for the worst offenders.

A Political Economy Perspective

In order to better understand and compare institutional functions it is useful to look beyond industrial relations to broader theoretical frameworks within the political economy or institutional economics tradition. It is important to note that industrial relations researchers have followed the stream of institutional economic thought developed most clearly by John Commons (Kaufman, 1998). As well as founding one theoretical stream of institutional economics, Commons wrote extensively on American industrial and labour relations (see Hodgson 2003). The stream of institutional economic thought developed by Thorstein Veblen, which views institutions as rituals, norms or habits of thought – rather than particular structures – has not been embraced by industrial relations researchers. Also overlooked by industrial relations researchers are important contributions from political economics, of which one of the most glaring is the work of Karl Polanyi. Although increasingly recognised as a major contribution to twentieth century social science (Block 2003; Munck 2002), Polanyi's work remains poorly understood in industrial relations despite its centrality to that field of study.³

Polanyi (1957) claimed institutions became “embedded” in market exchanges because the factors of production – land, labour and money – cannot be traded as commodities. Institutions brought the market back to society and, in the case of the labour market, provided workers with employment and social protection. Polanyi advanced the notion of a “double movement”, whereby efforts to enable a self-regulating market would be met by the countervailing force of institutions of societal regulation.

Polanyi completed his most famous work *The Great Transformation* in the post Second World War environment of increased state intervention in the market economy. His analysis is an historical, political economic account of the transition from the economic liberalism of a self-regulated market to an institutionally embedded welfare economy (Stanfield 1980). A key question that arises in a time when traditional labour market institutions are becoming dis-embedded is what alternative mechanisms emerge to perform the same institutional functions? In other words, how does the market remain embedded in social relations?

In a recent reappraisal of *The Great Transformation*, Block (2003) argues that inherent in Polanyi's thesis was the notion of a permanently embedded economy. Thus;

... within societies, governments – even in the most market-oriented polities – continue to play a central role in economic life by organizing the key fictitious commodities (land, labor, and money) and by engaging in a wide variety of protective measures (Block 2003: 289).

It is this notion of “permanent embeddedness” that I will use to frame the case of labour market regulation in the

context of institutional change in Australia and New Zealand.

Comparing Labour Market Regulation in Australia and New Zealand

In comparative industrial relations, Australia and New Zealand are examples of most similar cases. They are small, neighbouring, settler societies, with close cultural and sporting traditions, and histories of very similar labour market regulation. By the end of the 1800s or very early 1900s, both countries had extended the franchise to the working class (universally in New Zealand in 1893); elected labour representatives to parliament, introduced forms of social security protection; enacted anti-sweating legislation; and introduced systems of compulsory arbitration to regulate industrial relations (Castles, 1985; Ramia, 1998). The advent of compulsory arbitration – which occurred first in New Zealand, from 1894 – produced a uniquely “Antipodean” pattern of labour market regulation. State agencies gained the authority to settle disputes and make binding agreements (known as awards in both countries) that prescribed wages and working conditions for specific occupational or industry groups.

Despite these similarities, cross-Tasman industrial relations research has not been well developed, apart from a concerted effort to compare the fates of the two systems during the period of 1980s and early 1990s (Bray and Howarth, 1993; Bray and Walsh, 1995 and 1998; Bray and Neilson 1996). At this time, the two systems seemed to have diverged quite dramatically. Those researching the period sought to explain the apparent differences predominantly in terms of institutional factors, including Australia's federal political system which set limits on the power of the Commonwealth government to regulate industrial relations. By comparison the New Zealand system produced what some have called “elected dictatorships”. According to this explanation, the difference in political systems, and the absence of constitutional restraint, allowed regulators in New Zealand to push forward reforms that were much more radical than those developed in Australia (Schwartz, 1994).

The comparative research examining the period of the 1980s and early 1990s is limited in a number of respects. Although plausible, the institutional explanation tends to overlook or simplify the differences in the workings of the systems of industrial relations in the two countries. If reform to the Australian system remained hamstrung by constitutional constraints, this restriction has only applied at the federal level. Australia's “federal” political and industrial relations systems present jurisdictional complexities that have no parallel in New Zealand's unitary and unicameral political structure. As Ramia (1998) argues, arbitration was easier to abolish in New Zealand than it has proven to be in Australia because New Zealand traditionally relied upon extra-arbitral mechanisms of state intervention. These have included the development of statutory minimum wages and equal employment opportunities outside the arbitral system.

Another weakness of the comparative research dealing with the 1980s and early 90s is that it examines a relatively short period of institutional divergence. Available research examining the period since the mid-1990s demonstrates a trend towards institutional re-convergence. Thus, while New Zealand reformers achieved substantial institutional change during the 1980s and early 1990s, Australian regulators have done much to bridge the gap from the mid-1990s (Wailes, 1997; Barry and Wailes, 2004). Moreover, given its focus on the 1980s and 90s, the comparative research draws insufficient attention to the importance of earlier divergent trends. These included the development of "second tier" (or enterprise) bargaining during the 1960s (Walsh 1984). The loss of credibility the Arbitration Court suffered following the events surrounding its infamous "nil wage" order of 1968 (Walsh 1994) and amendments to the arbitration system introduced in 1973 solidified and further underwrote the development of free collective bargaining (Boxall, 1990). That the final abolition of compulsory arbitration in 1991 was made possible by earlier developments which had undermined the system's legitimacy has been overlooked by most commentators, who saw the ECA as a watershed in New Zealand industrial relations.

The comparative research also fails to pay sufficient attention to the underlying interests that drove the different policy responses and institutional outcomes on both sides of the Tasman (Wailes and Ramia, 2002; Wailes, Ramia and Lansbury, 2003). Historically, these differences of interest reflected the relative importance of manufacturing (in Australia) as opposed to farming (in New Zealand) concerns, the greater extent to which peak organized labour became embedded in the Australian arbitration system (Gardner, 1995; Bray and Walsh, 1995) and the degree to which arbitration itself operated alongside (as in New Zealand) or to the exclusion of (as in Australia) other mechanisms that provided employment and social protection (Ramia, 1998). The contribution of those who have critically reviewed the comparative literature is to show that underlying institutions are interests, and divergent interests shape outcomes more fundamentally than institutional structures. The inclusion of material interests provides a valuable addition to the extant institutional analysis of Australian and New Zealand industrial relations.

Institutional Change and Regulatory Continuity in Australia and New Zealand

At the heart of the weakness in the comparative Australian/New Zealand literature comparing the period of 1980s and 90s is the assumption that labour market outcomes are determined by particular institutional structures. How and why these institutional structures emerged in the first place is not emphasized. Consequently, questions concerning how and why existing institutional functions might endure under different institutional structures are also underemphasized.

Another manifestation of the preoccupation with institutional structures rather than institutional functions

is the tendency to make comparisons between countries with very similar institutional structures rather than countries with very different institutions that nevertheless perform very similar regulatory functions. In part the similarities in institutional structures of labour market regulation have been what has prompted comparisons between Australia and New Zealand, in the tradition of the most similar case method (see Wailes 1999). To the extent that many structures could be held constant, researchers have attributed much of the apparent difference to the fewer examples of institutional divergence. As has been mentioned, a clear example is the lack of attention given to the factors that led to the introduction of the ECA in New Zealand compared to the attention given to some specific institutional outcomes that followed the introduction of the legislation.

When formal institutional change is as substantial as it was in New Zealand at the time the ECA replaced the arbitration system in 1991, there is a tendency to consider the changes as representing a watershed in labour market deregulation, rather than as signifying a change in the institutional structure of regulation. Although the ECA abolished the arbitral structures of collective employment regulation, the Act created new employment institutions and arguably strengthened existing protections of individual employee rights. In seeking to contextualise the institutional changes of the last 10-15 years on the pattern of labour market regulations in Australia and New Zealand, the following discussion focuses on the affect of these changes on bargaining structures and on the relationship between bargaining instruments and bargaining outcomes.

Structural Change: Arbitration vs. Bargaining

At its peak compulsory arbitration regulated the wages and conditions of the vast majority of workers in both Australia and New Zealand. Compulsory arbitration functioned as an effective tool of labour market regulation because occupational or industry awards determined, on a multi-employer basis, that wages were taken out of competition. This gave employers little reason to oppose unionization and, with the assistance of tariff protection, employers in many parts of the economy could afford to pay "fair and reasonable" wages. Compulsory arbitration provided a "classic compromise" between the interests of employers and employees much as systems of collective bargaining did in other countries (Adams, 1981).

In a changed economic climate, the Australian arbitration system has been diminished by the emergence of enterprise bargaining. Estimates of official data show that approximately 20-25 per cent of, predominantly low paid, employees remain "award only". A further 20 per cent of employees have "above award" wages built on the award entitlements. A larger group of 35-40 per cent of employees have a registered certified agreement. A remaining 20 per cent of employees are employed on individual agreements, the majority of which are unregistered (common law) contracts (Watson et al 2003:112).

There are different interpretations of the continuing role arbitration plays within or alongside the now dominant (?) steam of enterprise bargaining. The development of enterprise bargaining and the award simplification process can be seen as having dramatically weakened the role of Australian Industrial Relations Commission (Dabscheck 2001; see also Burgess and Macdonald 2003). Yet, the Commission still plays a central role in regulating awards, and the outcomes of other bargaining instruments are also set in relation to awards. Before certification, enterprise agreements must satisfy the Commission's no disadvantage test. This test also applies, at the Federal level, to Australian Workplace Agreements even though these agreements are vetted by a separate authority (the Office of the Employment Advocate (OEA)). Given this requirement, arbitration arguably continues to set a floor for the wages and conditions of the increasing proportion of employees covered by alternative bargaining instruments.

In a comparative study of six union movements, Hugh Clegg (1976) argued that the Australian compulsory arbitration system was analogous to a system of collective bargaining. Clegg offered this assessment on the basis of observations about the extent of over-award bargaining and the ability of the parties to reach agreement through consent provisions. In light of the institutional changes introduced by successive labor and Coalition governments it may be the case the structural changes wrought have not dramatically changed the pattern of Australian industrial relations.

Institutionally, the New Zealand system has changed considerably. When the National Government abolished the remaining pillars of arbitration in 1991, it replaced them with other employment institutions; the Employment Tribunal and the Employment Court. At the same time, the state strengthened the regulation of workers' individual rights by extending personal grievance protection to all employees. Any employee could file a personal grievance if they unfairly suffered a disadvantage in any area of employment. The transition from collective to individual rights was reflected in both the marked decline in recorded industrial disputes and the marked increase in personal grievance claims during the 1990s. The ERA represents then an attempt not to re-regulate the New Zealand labour market but rather an attempt to re-collectivise it through the provision of new supports for collective bargaining and unionization. As mentioned however these provisions appear more dramatic on paper than in practice. Moreover, while there are a small number of substantively different clauses in the ERA, there are a very large number of provisions that mirror those contained within the ECA.

Bargaining Instruments and Outcomes: Individualization and Collectivism

The introduction of New Zealand's ECA signified a formal shift from collective employment regulation to individualization. In the first few years of the Act, unionization and formal collective bargaining coverage declined dramatically. However closer analysis of this period reveals some important continuities. As

unionization plummeted, alternative forms of employee representation emerged. By the end of the ECA era, 15 percent of the non-unionised collective workforce had an alternative form of representation (Harbridge Crawford & Kiely, 2000:16). Many of these alternative representative bodies became unions when the ERA introduced a new requirement that only unions could negotiate collective agreements (Barry and May 2004).

More important to the continuity of existing patterns of industrial relations was the nature of the individual contracting that developed under the ECA. As Anderson (1999) and Oxenbridge (1999) observed, individual contracting occurred predominantly on a procedural, not substantive, basis. For existing employees individualization meant that their award conditions were rolled over into a (possibly identical) individual agreement. This process happened automatically if either party (usually the employer) refused to negotiate a new collective agreement. New employees typically signed a standard form individual agreement, often on a "take it or leave it" basis. Under either of these scenarios, employees found that individual contracting offered little opportunity to actually negotiate individual terms and conditions of employment (McAndrew and Ballard, 1995).

For employers, procedural individualization had a number of benefits. For anti-union employers, procedural individualization, coupled with other provisions contained within the ECA, provided a means to de-recognise unions. Although the ECA required employers to recognize an employee's bargaining agent, the Act did not require the parties to negotiate. Unions lost their ability to represent their members in the sense that they lost the power to compel employers to bargaining collectively, especially on a multi-employer basis. The Act also restricted the ability of unions to gain access to the workplace. Meanwhile, the Courts, particularly the Court of Appeal, interpreted the Act as giving sanctity to the contract of employment. The courts accepted individual contracts even in instances where employee signed under duress. Procedural individualization enabled employers to offer separately to each employee an identical contract, and in "negotiations" employees would be unable to threaten to collectively withdraw their labour to improve their bargaining position. On the other hand, employers realized that substantive individualisation would involve considerable "transaction costs" in negotiating and managing separate and distinct agreements, as well as threatening to disrupt the norms in the workplace, such as wage relativity, that are fundamentally collective.

In Australia the growth in AWAs shows the same tendencies. Following a very slow take up of statutory individual contracting, the OEA has recently reported a substantial (47 per cent) growth in AWA approvals between the 2002-03 and 2003-04 financial years. Through its online web site, the OEA provides facilities for companies or bargaining agents to lodge multiple agreements simultaneously as well as to create and save company templates. The online service also provides a range of industry templates that users can download, and modify should they wish to. The OEA also reports a

substantial increase in electronic lodgement of agreements (from 66 to 83 per cent) and an increase in the number of available framework agreements (from 13 to 31) which, coupled with the company templates and multiple agreement facilities, suggest the growth in individualization may be fuelled by procedural.

If this type of contracting commenced in New Zealand, under the ECA, the ERA has not reversed it. In fact, the ERA has created new incentives to for individuals to "free ride". The ERA requires employers to offer new employees the terms and conditions of a relevant collective agreement for the first 30 days of employment. At that point employees must elect to retain the collective conditions as a paid up union member or sign an individual agreement. In these circumstances there is nothing to prevent, and no reason to not to suspect an employer would seek to offer the identical terms and conditions as an individual agreement. Although the ERA requires union involvement in all collective agreements, incentives such as this informally extend the coverage of collective bargaining to non-union individual agreements (Blumenfeld et al 2004).

Discussion

Academic commentators have been at pains to explain the decline of unionization and collective bargaining as disturbing trends in labour market regulation, and they may well be. However, it is important to recognize that alternative mechanisms may offer employees continued protections in the absence of a strong union movement. In this respect free riding may be seen as a cost to unions but a benefit to non-union employees. In other words, provisions such as the 30 day rule extend to both parties the benefits of collective bargaining without imposing transaction costs, and coupled with the growth in alternative forms of employee representation, explain why there has not been a strong growth in unionization or formal collective bargaining coverage despite the explicit promotion of both in the ERA.

Touted as enhancing enterprise flexibility and individual choice, the changes that have been introduced by successive conservative (and Labo(u)r) governments in Australia and New Zealand are not representative of shift from a regulated to deregulated labour market. Indeed labour market regulation has actually increased in many areas. In Australia, the introduction of individualization came through the creation of a new bargaining instrument, Australian Workplace Agreements (in the WRA 1996, also replicated in state legislation eg QWA). Attempts by the Coalition Government to regulate union efforts to achieve pattern bargaining are another obvious example of increased state intervention. Pattern bargaining represented a clear example of a union movement's response to a conservative government's intention to diminish arbitration in favour of enterprise-level bargaining. In the higher education sector, the current 4th round of university enterprise agreements maintain a substantial number (21) of union national mandatory settlement points that severely restrain diverse outcomes at the enterprise level. Unhappy with the union's choice of bargaining strategy that has sought to

preserve industry standards, the government has not allowed the market or the parties to resolve the question. Instead, the Commonwealth has attempted (once unsuccessfully, and there are now new provisions) to intervene to directly shape the regulatory environment by tying funding of the sector to industrial relations changes that weaken collective bargaining and union influence in university governance. The Government's initiatives in higher education are indicative of its broader industrial relations strategy. When the Government realized that the regulatory environment it had promoted was not achieving its intended outcome, its response was to intervene further while simultaneously preserving the rhetoric of state abstaining from the labour market to allow parties to engage in private, contractual relations.

Although unable to pass much of its "radical" agenda through the Senate, the Coalition Government is now set to further intervene to restrain the ability of the parties to engage in free collective bargaining. Following the Coalition's recent electoral gains which enable it to control both Houses of Parliament, the Government has signaled its intention to extend unfair dismissal exemptions, introduce secret ballots for union industrial action, and in the building and construction industry, the Government will seek to establish a new industry regulator to facilitate industrial relations "reform".

Conclusion

There has been a substantial degree of institutional change in the regulation of the labour markets of Australia and New Zealand in the last two decades. In terms of a comparison between the two countries, those who have assessed the period from the mid-1980s to mid-90s argued that institutional change had been more dramatic in New Zealand than in Australia. However, this assessment needs to be qualified by the view that there has been substantial institutional re-convergence since the mid-1990s, following the election of the Commonwealth Coalition Government in Australia.

While institutional change has provided a convenient comparison between these two cases, it tends to overlook some important issues in the regulation of both countries' labour markets. Regulation does not occur only through traditional institutional structures. While measures of institutional change, such as the decline in unionization and collective bargaining, may appear to point towards a dis-embedded market, it is important to recognize patterns of continuity in labour market regulation. These patterns of continuity include the emergence of new institutional structures or actors, and even, in the case of New Zealand, the re-legitimization of traditional institutions. To suggest that the replacement of one structure of regulation with another is a case of deregulation is to engage in fantasy. It is also fantastic to assume that there exists no labour market regulation in the absence of certain, pre-defined institutional actors.

The political economy perspective adopted in this paper suggests that any attempt to enable a self-regulating market will be met by a protective societal response. As the ECA came to represent an attempt to allow

employment contracting to “commodify” labour, the Labour Government introduced new provisions to re-legitimise the role of unions and collective bargaining to redress what Labour claimed was an inherent inequality in bargaining power between employers and employees. The available evidence suggests that the re-legitimization of these institutions has not had a substantial impact on either union density or collective bargaining coverage. The most dramatic effect of the ERA has been to force various alternative forms of employee representation to become unions. These associations had earlier emerged to provide a facility for employee representation and collective bargaining in the absence of statutory protections for collective employment regulation during the ECA. Whether as unions or alternative forms of employee representation, these bodies function as a means to enable employers to reach enterprise agreements, and enable employees to bargaining collectively.

The changes introduced by the Coalition Government in Australia have not enabled a self-regulating market. The introduction of AWAs saw the introduction of a new institution charged with ensuring that agreements on employee outcomes could not fall below pre-existing community standards. Since taking up office and implementing its first wave of changes in 1996, the Government has proposed an array of amendments to further re-shape the industrial relations environment. Beneath the rhetoric of a neo-liberal agenda, the Government’s changes seek to shape rather than facilitate bargaining structures and outcomes, particularly in the pockets of the labour market where employees retain the ability to extract major concessions from employers.

Notes

- 1 Flanders (1975) defined industrial relations as “the study of the institutions of job regulation”. The use of the word regulation reflects the mainstream view that industrial relations is a rule making exercise, which according to pluralists such as Dunlop (1958), involved employees and their representatives, employers and their representatives and government agencies. A Marxist definition of industrial relations would substitute the word control for regulation (Hyman 1975:12).
- 2 For Dunlop (1958:viii-ix) “The central task of a theory of industrial relations is to explain why particular rules are established in particular industrial-relations systems and how and why they change in response to changes affecting the system.”
- 3 Polanyi’s interpretation of labour as a fictitious commodity is by itself an important contribution to industrial relations. Polanyi demonstrated his thesis on labour as a fictitious commodity by examining the development of the Poor Laws in the United Kingdom.

References

- Adams, R.** (1981) “A Theory of Employer Attitudes Towards Trade Unions in Western Europe and North America”, in Dlugos, G and Weiermair, K (eds) *Management Under Different Value Systems: Political, Social and Economical Perspectives in a Changing World*, de Gruyter, New York.
- Adams, J.** (1992) ‘The Corporation versus the Market’, *Journal of Economic Issues*, Vol. 26, No. 2, pp. 397-405.
- Barry M. and May R.** (2004) “New Employee Representation: Legal Developments and New Zealand Unions” *Employee Relations*, Vol. 26, No. 2, pp. 203-223.
- Barry, M. and Wailes, N.** (2004) “Contrasting Systems? 100 Years of Arbitration in Australia and New Zealand”, *Journal of Industrial Relations* (forthcoming)
- Block F.** (2003) “Karl Polanyi and the Writing of The Great Transformation” *Theory and Society*, Vol. 32, pp. 275-306
- Blumenfeld, S. Higgins, A and Lonti, Z.** (2004) “No Free Lunch: Union Free Riding in New Zealand”, in M. Barry and P. Brosnan (eds) *New Economies, New Industrial Relations: Proceedings of the 18th AIRAANZ Conference*, Volume 1, Noosa, Queensland.
- Boxall, P.** (1990) “Towards the Wagner Framework: Changes in New Zealand Industrial Relations”, *Journal of Industrial Relations*, Vol. 32, No. 4, pp. 523-543.
- Bray, M. and Neilson,** (1996) “Industrial Relations Reform and the Relative Autonomy of the State” in F. Castles, R. Gerritsen and J. Vowles (eds) *The Great Experiment: Labour Parties and Public Policy Transformation in Australia and New Zealand*, Sydney: Allen and Unwin.
- Bray, M. and Walsh, P.** (1995) “Accord and Discord: The Differing Fates of Corporatism under Labour Governments in Australia and New Zealand”, *Labour and Industry*, Vol. 6, No. 3, pp. 1-26.
- Bray, M. and Walsh, P.** (1998) “Different paths to neo-liberalism? Comparing Australia and New Zealand”, *Industrial Relations*, Vol. 37 3, pp. 358-387.
- Burgess, J. and Macdonald, D.** (eds) (2003) *Developments in Enterprise Bargaining in Australia*, Tertiary Press, Victoria.
- Castles, F.** (1985) *The Working Class and Welfare: Reflections on the Political Development of the Welfare State in Australia and New Zealand, 1890-1980*, Allen and Unwin, Sydney.

- Castles, F., Gerritsen R. and Vowles J.** (eds) *The Great Experiment: Labour Parties and Public Policy Transformation in Australia and New Zealand*, Sydney: Allen and Unwin.
- Clegg, H.** (1976) *Trade Unionism Under Collective Bargaining*, Basil Blackwell, Oxford.
- Collings, H.** (1999) *Regulating Contracts*, Oxford University Press, Oxford.
- Dabscheck, B.** (2001) "The slow and agonising death of the Australian experiment with conciliation and arbitration", *Journal of Industrial Relations*, Vol 43 No. 3, pp. 277-293.
- Dannin, (1997)** *Working Free: the Origins and Impact of New Zealand's Employment Contracts Act*, Auckland University Press.
- Dunlop, J.** (1958) *Industrial Relations Systems*, Holt, New York.
- Edwards, P.** (2003) (ed) *Industrial Relations: Theory and Practice* 2nd Edition, Blackwell, Oxford.
- Fairbrother, P. and Griffin, G.** (2002) *Changing Prospects for Trade Unionism: Comparisons Between Six Countries*. London: Continuum.
- Flanders, A.** (1975) "Industrial Relations: What is Wrong with the System?" in A. Flanders, *Management and Unions*, Faber.
- Freeman, R. and Rogers, J.** (1999) *What Workers Want*, Cornell University Press, Ithaca.
- Gardner, M.** (1995) "Labor movements and industrial restructuring in Australia, New Zealand and the United States", in Wever, K. and Turner, L. (eds) *The Comparative Political Economy of Industrial Relations*, Madison: Industrial Relations Research Association.
- Harbridge, R. Crawford, A. and Kiely, P.** (2000) *Employment Agreements: Bargaining Trends and Employment Law Update 1999/2000*, Wellington: Industrial Relations Centre, Victoria University of Wellington
- Hodgson, G.** (2003) "John R. Commons and the Foundations of Institutional Economics", *Journal of Economic Issues*, Vol. 37, No. 3 September, pp. 547-576.
- Hyman, R.** (1975) *Industrial Relations: A Marxist Introduction*, Macmillan, London.
- Johnstone, R and Mitchell, R.** (2004) "Regulating Work", in C. Parker, C. Scott, N. Lacey and J. Braithwaite (eds) *Regulating Law*, Oxford University Press, Oxford.
- Kaufman, B.** (1998) "Regulation of the employment relationship: the 'old' institutional perspective", *Journal of Economic Behavior and Organization*, vol. 34, pp 349-385.
- McAndrew, I. and Ballard, M.** (1995), "Negotiation and dictation in employment contract formation in New Zealand", *New Zealand Journal of Industrial Relations*, Vol. 20, No. 2, pp. 119-141.
- Munck, R.** (2002) *Globalisation and Labour: the new "great transformation"*, Zed Books, London.
- Nolan, M.** (2003) "The High Tide of a Labour Market System: The Australasian Male Breadwinner Model", *Labour and Industry*, Vol. 13, No. 3, pp. 73-92.
- Oxenbridge, S.** (1999), 'The Individualisation of Employment Relations in New Zealand: Trends and Outcomes', in S. Deery and R. Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion*, Sydney: Federation Press.
- Parker, C and Braithwaite, J.** (2003) "Regulation", in P. Cane and M. Tushnet (eds) *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford.
- Parker, C. Scott, C. Lacey, N and Braithwaite, J.** (eds) *Regulating Law*, Oxford University Press, Oxford.
- Peetz, D.** (1998) *Unions in a Contrary World: The Future of the Australian Trade Union Movement*, Cambridge University Press, Cambridge.
- Polanyi, K.** (1957) *The Great Transformation*, Boston, Beacon Press.
- Quiggin, J.** (1998) "Social Democracy and Market Reform in Australia and New Zealand", *Oxford Review of Economic Policy*, Vol. 14, No. 1, pp. 76-95.
- Ramia, G.** (1998) 'Wage Earners and "Wage Earners" Welfare States": Industrial Relations, Social Policy and Social Protection in Australia and New Zealand, 1890-1996', Unpublished Ph.D Thesis, University of New South Wales.
- Safarti, H and Bonoli, G.** (2002) *Labour Market and Social Protection Reforms in International Perspective: parallel or converging tracks*, Ashgate, England.
- Schwartz, H.** (1994) "Small States in Big Trouble: State Reorganization in Australia, Denmark, New Zealand, and Sweden in the 1980s", *World Politics*, 46, pp. 527-555, July.
- Shearing, C.** (1993) "A constitutive conception of regulation", in P Grabosky and J Braithwaite, *Business Regulation and Australia's Future*, Australian Institute of criminology, Canberra

- Stanfield J.** (1980) "The institutional economics of Karl Polanyi", *Journal of Economic Issues*, Vol 14, pp. 593-614.
- Wailes, N.** (1997) "The (Re)Discovery of the Individual Employment Contract in Australia and New Zealand: The Changing Demand on Industrial Relations Institutions in a Period of Economic Restructuring", in A. Frazer, R. McCallum and P.
- Wailes, N.** (1999) "The Importance of Small Differences: The Effects of Research Design on the Comparative Study of Industrial Relations Reform in Australia and New Zealand", *International Journal of Human Resource Management* Vol. 10, 6, pp. 1006-1030.
- Wailes, N. and Ramia, G.** (2002) "Globalisation, Institutions and Interests: Comparing Recent Changes in Industrial Relations Policy in Australia and New Zealand", *Policy, Organisation and Society*, 21, 1, pp. 74-95.
- Wailes, N. Ramia, G. and Lansbury, R.** (2003) "Interests, Institutions and Industrial Relations", *British Journal of Industrial Relations*, 41, 4, 617-637.
- Walsh, P.** (1984) "In recognition of skill: the growth of qualification payments, 1960-1980", *New Zealand Journal of Industrial Relations*, Vol. 8 No. 1, pp. 81-93.
- Walsh P.** (1994) "An 'unholy alliance': the 1968 nil wage order", *New Zealand Journal of History*, Vol. 28 No. 2, pp. 178-193.
- Watson, I. Buchanan, J. Campbell, I. and Briggs, C.** (2003) *Fragmented Futures: New Challenges in Working Life*, Federation Press, Sydney.
- Wilkinson, D Harbridge, R and Walsh, P.** (2003) Labour market re-regulation and its effects on free-riding in New Zealand. *Journal of Industrial Relations*, 45(4) 529-538.
- Woods, N.** (1963) *Industrial Conciliation and Arbitration in New Zealand*, Wellington, Government Printer.