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THE HOBBIT AFFAIR: A NEW FRONTIER FOR UNIONS?

Abstract

The industrial action surrounding the making of *The Hobbit* movie presented a contentious interaction between global business, lawmakers, and unions. The debate centred upon the employment status of film industry workers and their ability to involve unions in negotiating their terms of employment, culminating in a legislative amendment which defined their employment status. One narrative interpreted these events as a pragmatic solution which brought considerable economic benefits for both the industry and the country. Alternative views, however, construed the situation as involving constitutional challenges, curtailing union influence, and removing employee choice and employment protection. Seen in the context of the increasing use of independent contracting arrangements, the events can be viewed as eroding union influence and the protection available to workers. The case highlights the interdependence between differing arenas of voice, with diminution of economic and political voice contributing to a loss of industrial voice. This paper explores a number of crucial questions regarding the future role and influence of unions in the ever-growing sphere of non-standard employment relationships.

I Introduction

The industrial action surrounding the making of *The Hobbit* movie involved a contentious interaction between a range of global players associated with the international film production including business, lawmakers, and unions. The debate centred upon the employment status of workers and their resulting ability to involve unions in negotiating their terms of employment. The dispute culminated in a legislative amendment which defined their employment status as contractors. The events can be interpreted in a number of different ways. One interpretation is that the episode simply corrected a legislative anomaly by clarifying the employment status of a small group of workers in one specific industry. This was the rationale of the government and filmmakers and was well publicised in the debate surrounding the Hobbit dispute. A second, less publicised view, however, involves a range of critiques and concerns. The events take on greater significance if the episode is viewed as an example of the wider debate regarding the growing use of independent contracting. This reframes the dispute as the juxtaposition of two competing interests. A business viewpoint affirms contracting as an alternative type of employment arrangement which provides much needed industry flexibility. An opposing perspective emphasises

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a range of threats that this poses for worker voice including employment protection, the ability to choose the nature of their employment arrangements, and the ability to form collectives and to bargain for collectively agreed terms of employment.

While the events occurred in New Zealand, the dispute has far broader implications as it raises fundamental questions regarding worker voice and the rights of independent contractors worldwide. For example, do those contractors have the right to form collectives, to engage in strike action, and collectively influence their terms and conditions of work — or are contractors excluded from these rights? In a context where contracting arrangements are expanding, if contractors are not entitled to collective representation this suggests that a growing proportion of the workforce will have neither legislative employment protection nor access to collective representation, with the possibility that this is likely to both erode working conditions and further reduce the influence of unions. From this perspective, the episode highlights major, untested issues that are likely to prove crucial determinants of the future of workers' rights and voice.

This article stems from a wider dialogue regarding the Hobbit dispute and non-standard employment, encompassing both supportive and critical commentaries.[1] The present discussion explores themes from a number of those analyses in order to investigate the implications and asks, what are the potential implications of such a case for unions and worker voice?

The structure of the discussion commences with a brief overview of the events of the Hobbit dispute. It then moves to explore a range of less obvious political, economic, legal, and employment relations issues that combined to create and shape the dispute. This leads to a discussion regarding the possible future for unions.

II An Overview of the Hobbit Dispute

To begin, it is useful to briefly outline the dispute.[2] A key part of the background to the Hobbit dispute concerns an earlier legal challenge in the film industry involving *Bryson v Three Foot Six Ltd* ('*Bryson*')[3] and the question of determining employment status. Section 6 of the *Employment Relations Act 2000* (NZ) ('*ERA 2000*') established, for the purposes of the Hobbit dispute, that whether a worker was an employee or independent contractor was not to be determined by a statement in an employment agreement but by 'the real nature of the relationship'. This was to be determined by considering all relevant matters which, the courts held, included application of the traditional common law tests. Bryson, a film model maker, was

1 Rupert Tipples and Bernard Walker, 'Editorial: Introducing the Forum' (2011) 36 *New Zealand Journal of Employment Relations* 1.

2 A range of in-depth accounts of the dispute are available. See, eg, A F Tyson, 'A Synopsis of The Hobbit Dispute' (2011) 36 *New Zealand Journal of Employment Relations* 5; Helen Kelly, 'The Hobbit Dispute', *Scoop Independent News* (online), 12 April 2011 <http://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm>.

3 [2005] 3 NZLR 721.

working for Three Foot Six Ltd on the *Lord of the Rings* trilogy. Contractual documentation supplied to him after he commenced work purported to classify him as an independent contractor. At the end of September 2001, he was terminated when his unit was downsized. In 2003, Bryson's case for unjustifiable dismissal, posited on the existence of an employment relationship rather than a contracting arrangement, went to the Employment Court, which ruled him to be an employee. In 2005, the case became the first employment case before the Supreme Court which stated that the Employment Court had used the existing legal principles correctly under s 6. The end result was that, despite widespread film industry practice, the decision of the Employment Court stood and Bryson was an employee.

The Hobbit is a multiple film venture by Warner Brothers based on the novel by Tolkien and directed by Sir Peter Jackson, producer of *The Lord of the Rings* trilogy. When the production of *The Hobbit* was being developed the local actors' union, New Zealand Actors Equity ('NZAE'), expressed dissatisfaction with the terms offered and so approached international actors' unions for support. This led to the International Federation of Actors ('FIA') instructing its members and affiliate unions not to work on the project until collective negotiation of terms and conditions had occurred with Media Entertainment and Arts Alliance ('MEAA'), which incorporated NZAE. These tactics were rejected by Sir Peter, who claimed they would ruin the New Zealand film industry. Sir Peter argued that the *Commerce Act 1986* (NZ) prevented his company from negotiating collectively with potential staff since they were contractors and not employees. This view was later supported by the New Zealand Government but disputed by the unions. Warner Brothers then announced they were seeking other production locations for making the films. The potential loss of the films to another overseas location created a furore with demonstrations taking place across the country. The peak union body, the New Zealand Council of Trade Unions ('NZCTU'), and the government both sought to intervene, concerned by the potential loss of jobs and economic benefits. The parties met and the unions agreed to discontinue their action in order to keep the films and film industry jobs in New Zealand. Warner Brothers' executives met the Prime Minister and colleagues to discuss their concerns regarding the possibility of industrial action and what they perceived as the adverse consequences of the *Bryson* decision for the contractual status of actors and film crew. After negotiations with Warner Brothers, the government announced it was urgently amending the *ERA 2000*, specifically addressing actors and film crew to 'clarify' that they would be independent contractors unless their written employment agreement stated otherwise. In addition, the government granted Warner Brothers another $15 million subsidy to help retain *The Hobbit* production in New Zealand, in return for which the premiere was to be held in New Zealand in association with a tourism promotional campaign. The legislative changes were enacted in October 2010 and filming commenced in 2011. The premiere of the completed movie was held in November 2012.

III Economic and Political Influences

To analyse the Hobbit dispute it is necessary to chart the range of powerful but less visible factors that shaped the events. This discussion commences with the economic and political elements. The global film sector constitutes a large and

powerful industry. The scale of productions and the huge associated business opportunities they bring, lead many nation states to compete with each other to become locations for film productions. For some years, New Zealand has offered subsidies to match other countries in seeking to be a site for international productions. The main multinational film companies can therefore exert considerable power even in the largest nation states. From a business perspective, New Zealand was a seller in an oversupplied market competing for the attention of Warner Brothers and MGM, and consequently this afforded those companies considerable negotiating power.[4]

The film companies were not entirely free agents though as they were under considerable pressure to complete *The Hobbit* films within a short time frame. The companies faced a range of financial demands and *The Hobbit* series held the promise of major earning potential, building on the earlier success of *The Lord of the Rings* trilogy. Sir Peter was critically important for making this happen, being the creator of the earlier trilogy and having the capacity to once more deliver high quality films that were completed on time. According to Haworth, the companies needed Sir Peter.[5]

At the same time, Sir Peter was also important to New Zealand. He was the film-making icon who had grown from a small player in the local industry to become an internationally acclaimed producer, bringing *The Lord of the Rings* and other major productions to the country, making him an industry leader and agent of the global film sector. Haworth suggests that these factors combined to allow the film companies and producers direct access to senior levels of the New Zealand Government, giving them considerable influence with regard to industry arrangements and government subsidies.[6]

At a political level, the New Zealand Government's public statements and actions, not surprisingly, focused on the major economic benefits of securing the productions for the country. The local film industry was expected to receive significant immediate benefits, while the wider country could gain from the short-term economic impetus with *The Hobbit* films expected to bring in NZ$670 million and create 3000 jobs. In the longer term, it was argued, the project would also enhance New Zealand's reputation as a film production destination with gains from publicity benefiting areas such as tourism.[7] The threat of losing the productions to another location provided a strong motivation for the government's actions. Protecting the public interest was framed in terms of these commercial matters. The government asserted that the need to avoid losing the productions gave it a mandate to intervene urgently for the greater good of both the local film industry and the nation's economy by passing the legislative amendment without the usual consultation and submissions processes.

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4 Nigel Haworth, 'A Political Economy of "The Hobbit" Dispute' (2011) 36 *New Zealand Journal of Employment Relations* 100.

5 Ibid 107.

6 Ibid.

7 Kate Wilkinson, 'One Law to Rule them All' (2011) 36 *New Zealand Journal of Employment Relations* 34.

The government's rationale was that it was necessary to address the concerns of the producers by providing conditions that would accommodate their preferences, particularly regarding employment arrangements and subsidies, in order to retain the productions. Specifically, the *Bryson* decision and the threat of industrial action had led Warner Brothers to state the employment relations environment in New Zealand was 'unstable'.[8] The government supported the film producers' assertion that workers are hired for a specific project, working on productions that are entirely events based, and therefore they are individual contractors. The ability of the courts to 'look past' the written contract and determine that an arrangement was actually a contract of service, was seen as creating what the government referred to as 'uncertainty'.[9] The government's legislative change was therefore 'to remove that uncertainty' and reflect longstanding industry practice.[10] Under the amendment, it was established that workers have a choice of being either contractors or employees, purportedly based on the decision they make at the beginning of the engagement, and the government asserted that this amendment 'does not remove rights from anyone'.[11]

IV Contracting and Non-Standard Employment

Contracting arrangements represent one aspect of the growing area of non-standard[12] temporary employment, which some writers suggest is one of the most spectacular and important evolutions in Western working life.[13] From a company perspective, contracting provides the potential for flexibility in aspects such as the tasks workers can do, the number of workers needed, and the rates of pay that can be offered. These gains, particularly the labour cost savings, are important in addressing global competition. Many of these benefits stem from the fact that contracting arrangements are outside the usual regulations governing standard employment relationships and this permits rapid adjustment through adding or subtracting workers with no long term contractual ties.[14]

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8 Ibid 34.

9 Ibid.

10 Ibid.

11 Ibid 35.

12 Non-standard employment is a broad category covering a variety of forms; in some situations the workers are employees, while others are contractors. As with the North American term 'contingent work', it is frequently characterised by its temporary nature involving situations where there is no explicit or implicit contract for long-term employment, or where the minimum hours worked can vary in a non-systematic manner. See Bernard Walker, 'How Does Non-standard Employment Affect Workers? A Consideration of the Evidence' (2011) 36 *New Zealand Journal of Employment Relations* 14.

13 Cuyper et al, 'Literature Review of Theory and Research on the Psychological Impact of Temporary Employment: Towards a Conceptual Model' (2008) 10 *International Journal of Management Reviews* 25.

14 Tui McKeown and Glennis Hanley, 'Challenges and Changes in the Contractor Workforce' (2009) 47 *Asia Pacific Journal of Human Resources* 295.

The benefits for employers may, however, constitute costs for workers. The research evidence suggests that some workers do benefit from self-employment or agency work, particularly when they voluntarily enter this type of work, 'pulled' by the lure of greater autonomy, increased earning potential, a flexible lifestyle, and more control over work-life balance.[15] Other workers are, however, disadvantaged by temporary work which may or may not be within a contract of service.[16] These are largely people with lower labour market power who are 'pushed' reluctantly into these alternative forms of employment as large organisations shed their less valued workers as part of a process of casualisation, replacing standard employment arrangements with alternatives such as part-time, casual, and outsourcing through the use of temporary agencies. While business groups argue that this approach increases labour productivity, critics respond that those gains are made by transferring the commercial costs and risks onto workers.[17]

There is evidence to suggest that casualisation can create 'economic refugees' who are unable to find standard employment.[18] The negative aspects of non-standard work can include the loss of job security, irregular work with periods of unemployment, low and variable earnings, along with the loss of non-pay benefits and training. Non-standard employment typically involves lesser protection for workers. Independent contractors are the most deprived group of workers, excluded from many employment related statutory benefits and entitlements such as protection against unfair dismissal, minimum wages, sick leave and aspects of annual leave.[19] From that perspective, non-standard employment is viewed as precarious and potentially substandard. In the longer term, non-standard arrangements are seen as leading to the de-unionisation of workplaces, lowered levels of health and safety, and the deterioration of working conditions in industries, producing an eventual erosion of labour

15 Petricia Alach and Kerr Inkson, 'The New "Office Temp": Alternative Models of Contingent Labour' (2004) 29 *New Zealand Journal of Employment Relations* 37; Gideon Kunda, Stephen R Barley and James Evans, 'Why Do Contractors Contract? The Experience of Highly Skilled Technical Professionals in a Contingent Labour Market' (2002) 55 *Industrial and Labour Relations Review* 234.

16 Walker, above n 12.

17 John Burgess, Erling Rasmussen and Julia Connell, 'Temporary Agency Work in Australia and New Zealand: Out of Sight and Outside the Regulatory Net' (2004) 29 *New Zealand Journal of Employment Relations* 25; Ian Watson, 'Contented Workers in Inferior Jobs? Re-Assessing Casual Employment in Australia' (2005) 47 *Journal of Industrial Relations* 371.

18 Ian Kirkpatrick and Kim Hoque, 'A Retreat from Permanent Employment? Accounting for the Rise of Professional Agency Work in UK Public Services' (2006) 20 *Work, Employment and Society* 649; Deborah Smeaton, 'Self-Employed Workers: Calling the Shots or Hesitant Independents? A Consideration of the Trends' (2003) 17 *Work, Employment and Society* 379.

19 Colin P Green and John S Heywood, 'Flexible Contracts and Subjective Well-being' (2011) 49 *Economic Inquiry* 716; Tui McKeown, 'Non-standard Employment: When Even the Elite are Precarious' (2005) 47 *Journal of Industrial Relations* 276; Walker above n 12.

market standards.[20] Fenton lists a range of New Zealand sectors where she reports that independent contracting arrangements are having a negative impact including fast food delivery workers, truck drivers, couriers, construction workers, caregivers, security guards, cleaners, telemarketing workers, forestry workers, actors, and musicians. She provides case studies of telecommunications engineering services, truck drivers, couriers, and advertising mail delivery to illustrate the nature of the adverse effects on workers.[21]

While workers in the New Zealand freelance film production sector may be attracted by the country's film successes, a study by Rowlands and Handy, looking specifically at the industry, concluded that the contract workers were a 'vulnerable and under-powered group working in a highly competitive and insecure industry'.[22] They report that the individualistic, project-based contracting arrangements cause workers to constantly compete with each other, eroding collective relations and group loyalties.[23] The short-term nature of the work, with highly intensive but rewarding periods that inhibited the workers' ability to pursue other interests, produced an addictive environment that was difficult to leave.[24]

V Alternative Views of the Hobbit Dispute

Against this backdrop, critics argue that the events of the Hobbit dispute significantly compromised workers' rights in a range of ways. From a political and legislative perspective, Wilson proposes that the process by which the legislative changes were introduced undermined the essential requirements of good faith by failing to provide the workers affected with either information about the proposed changes or an opportunity to participate in determining the arrangements for their core work conditions.[25] Although acknowledging that there was a degree of urgency, she asserts that there would still have been sufficient time for public participation by referring the amendment to a select committee for submissions and allowing public debate on the implications of the legislation. Wilson portrays the government's failure to consult in matters which brought major costs to workers, altering their status and removing their capacity to collectively negotiate their conditions of work, as an abuse of constitutional power. The sequence of events is interpreted as eroding the workers' political voice, leaving them 'very vulnerable and without effective representation or legally enforceable employment rights'.[26]

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20 Burgess, Rasmussen and Connell, above n 17.

21 Darien Fenton, 'Insights into Contracting and the Effect on Workers' (2011) 36 *New Zealand Journal of Employment Relations* 44.

22 Lorraine Rowlands and Jocelyn Handy, 'An Addictive Environment: New Zealand Film Production Workers' Subjective Experiences of Project-Based Labour' (2012) 65 *Human Relations* 677.

23 Ibid 675.

24 Ibid 677.

25 Margaret Wilson, 'Constitutional Implications of "The Hobbit" Legislation' (2011) 36 *New Zealand Journal of Employment Relations* 91.

26 Ibid 91–2.

Haworth analyses the political and economic influences in terms of the power and interests of government and business. In the context of globalised trade, the relative power of a sovereign government, especially a smaller state such as New Zealand, is limited compared to a powerful multinational company which can exert greater influence.[27] The ideologies of the government were also seen as having a major bearing on the dispute. The centre right government of the time was portrayed as opposing trade unions while supporting foreign direct investment. *The Hobbit* production was an important investment which could boost the domestically based film industry, enhancing the technical skill base, as well as growing tourism and promoting New Zealand's international reputation. Haworth contends that the government of the time gave priority to the desires of the business sector, enacting their preferences into legislation, and thus increasing the power of employers while reducing employee rights. Consequently, he asserts that the government 'conceded, financially and legislatively, to the global film sector', offering considerable additional subsidies.[28] In his view, the amendments to the *ERA 2000* thus served two goals; they were a concession to the filmmakers' requests and, at the same time, the legislative changes also fitted the government's own plan of liberalising employment law and countering the local trade union movement. Again, the weakening of political and economic voice produced a loss of industrial voice for workers.

VI The Role of Unions

On many levels the Hobbit dispute functioned against the unions involved. The events highlighted the growing challenge for unions as they confront globalised competition and multinational companies. This implies a need for union collaboration across a number of countries in order to provide a consistent approach, so as to avoid fragmentation and competition among workers which could lead to a constant lowering of working conditions. Prior to the Hobbit dispute, unions were already involved in such an international campaign to counter the power of the increasingly large global film sector. At the same time, within New Zealand, attempts by the local union to negotiate conditions in the film and TV sector had made little progress due to opposition from production companies. The planned production *The Hobbit* drew renewed attention to these matters, merging them together into the one dispute. The fact that this production was driven by the international companies necessitated that local unions work with the New Zealand Council of Trade Unions and international unions. Haworth proposes that given this situation, international involvement in the Hobbit dispute should have been expected and 'understood as acceptable and proper'.[29]

In practice though, the public did not accept international union involvement in what was viewed as a New Zealand dispute. Media coverage and statements from producers denied the legitimacy of involving international unions, discrediting them and portraying them as self-interested outsiders intruding in a local issue. Sir Peter

27 Haworth, above n 4.

28 Ibid 104.

29 Ibid 105.

described the MEAA leadership, for example, as an 'Australian bully boy' motivated more by their own industry interests than worker solidarity.[30] The fact that unions were seen as challenging a specific individual, Sir Peter, the iconic New Zealander who had created award-winning movies and made the country famous, caused the unions to appear as unreasonable troublemakers. The public seemingly did not distinguish between the different unions, even though the unions' approaches differed. The unions' actions were viewed unfavourably, even to the point of provoking widespread public protests opposing the unions. The dispute demonstrates the increasing challenges confronting unions as strong negative public perceptions hamper their ability to have any input into a situation. Furthermore, these negative perceptions present a significant barrier to unions being able to exert a credible united international approach for dealing with multinational companies at a time when this may be most needed.

Haworth proposes a radical interpretation of these specific political dynamics.[31] He alleges that the government's actions compounded this situation by fostering a public view that the unions were self-interested troublemakers whose short-sighted actions were jeopardising the welfare of the country. He interprets the government's actions as a deliberate attempt to disempower and exclude unions. Both the government and the NZCTU entered the dispute as external parties who had the potential to broker a solution and save the production. Haworth argues that although this situation presented an opportunity for creating an effective tripartite solution involving unions, government and film-makers, the government chose not to follow this path. Instead the government formed a very different type of alliance with the producers and the film companies. The outcomes then benefited those three parties but excluded the unions. The producers and film companies gained higher subsidies along with special legislation instituting their own preferred employment conditions. According to Howarth's view, by excluding and discrediting the unions, the government was able to claim all the credit for saving the situation while, at the same time, prejudicing public attitudes against the union movement and further weakening the unions' influence.

At the level of the workers, Rowlands and Handy describe the Hobbit dispute as also pitting groups of workers against each other.[32] While the actors and their union sought to safeguard their own rights, they found themselves in conflict with the non-unionised production crew, who joined protest marches when they saw their chances of working on the production threatened by the actors' industrial voice. The authors propose that the project-based contracting arrangements led the production workers to claim the short-term gains of another period of temporary employment, rather than work together with other groups for longer-term gains through industry wide, collectively negotiated arrangements.

Together the Hobbit dispute highlights the interrelated influence of a cluster of factors; with the economic power of global capital, along with a complex range of

30 Tyson, above n 2.

31 Haworth, above n 4.

32 Rowlands and Handy, above n 22.

internal domestic political dynamics, combining to impede economic and political voice. Those factors then directly influence the extent of collective, industrial voice in shaping the terms and conditions of work. The expansion of international companies in an increasingly global marketplace presents a formidable challenge which demands new intercountry union responses. Yet, in the absence of strong political support, the ability of unions to provide this type of response is severely constrained. Non-standard work, and particularly contracting, has the potential to become an expanding area where unions are excluded with little influence or involvement.

VII The Amendment: Redefining Employment Status

From a legislative perspective, the Hobbit amendment to the *ERA 2000* that resulted from the dispute is also the subject of critiques. Nuttall argues that the existing law at the time of the dispute was not problematic and public perceptions that there were major flaws stemmed largely from 'misunderstanding and misinformation'.[33] The government and others lobbying for legislative change presented the view that, due to the *Bryson* decision, workers who were 'really' contractors could in some way be 'deemed' to be employees by the court, with workers signing up as contractors but then using the court to change their status to employees.[34] There was an implication that the court was creating a status that differed from what the parties had initially intended or agreed to, and perhaps even differed from the reality of the working situation. In contrast, Nuttall contends that the *Bryson* decision applied well-established principles of employment law and did not create legal confusion or difficulties which needed the Hobbit amendment to resolve. The reasoning adopted by the Employment Court in the *Bryson* decision was not disturbed by the Supreme Court; it was noted that the decisions related to the specifics of that case and could not be readily generalised to other situations and did not fix the status of a whole industry. The associated case law was established and consistent. From those bases, Nuttall proposes that the law and its application in the *Bryson* decision were not faulty and did not need fixing.

The original provisions of the *ERA 2000* had reiterated the established common law position that employers could not avoid responsibility for employee rights and entitlements simply by 'labelling' a worker as a contractor. The 'label' approach asserts that the written statement made by the parties at the time of commencing the working arrangements, describing the work status as either contractor or employee, determines whether the person is an employee or contractor. Prior case law did not support this approach though and, in addition, the *ERA 2000* introduced a much wider requirement that, in determining the real nature of working arrangements, the court or authority must consider 'all relevant matters' including any matters that indicate the intention of the persons, while the labelling in 'any statement by the persons that describes the nature of their relationship' should not be treated as if this

33 Pam Nuttall, '"… Where the Shadows Lie": Confusion, Misunderstanding, and Misinformation about Workplace Status' (2011) 36 *New Zealand Journal of Employment Relations* 73, 73.

34 Ibid.

alone determined employment status.[35] The courts confirmed that ascertaining the real nature of the relationship requires a much broader evaluation of the situation which includes the common law tests such as the control, integration and the fundamental tests.[36] Any determination by the court or authority should identify the real status and this could potentially show that the label used in written statements was at variance with the reality of the arrangements.

Nuttall asserts that, despite this well established interpretation, the amendment sought to exclude the courts from being able to ascertain the real nature of the employment arrangement, instead introducing a simple labelling criterion. Therefore the 'uncertainty' that the labour Minister criticised was the fact that the written statement was not the sole determining criterion.[37] Nuttall argues that it appears from the Explanatory Note accompanying the amending legislation that the policy intent is to impose a 'label' criterion, which would serve to exclude a whole industry from the protections of the *ERA 2000*, with their status determined solely by the terms used in a written document. The Hobbit amendment to the *ERA* 2000 purports to restrict the effect of the Supreme Court *Bryson* decision by making all workers in the film industry contractors, unless an employment agreement provides otherwise. Wilson adds to this by suggesting that the labelling approach becomes more problematic when dealing with organisations such as major multinational corporations with very clear preferences regarding working arrangements. Despite claims to the contrary, workers are likely to have little choice as to the type of work arrangement.[38] If an employer proposes an arrangement and labels it as a contract for services then the worker will have little opportunity to either challenge that offer or the subsequent working arrangements. Once more, another set of factors contributed to a very pessimistic prognosis for the future of unions and worker voice.

VIII Legislating for Non-standard Employment

The real significance of the Hobbit dispute concerns the extent to which it reflects the more general situation of workers in non-standard employment and particularly independent contracting. Defenders argue that the Hobbit amendment produced little change since workers in the film industry have traditionally been contractors. The crucial difference, however, concerns the two fundamental premises used to justify the events. The first is the assertion that independent contractors are excluded from employment protection and collective action, and this abolishes their industrial voice. Accompanying this, Haworth suggests that the justification, based on the economically defined public interest, used to legislatively prescribe the employment status of film production workers could equally be applied to workers in other sectors — with

35 *Employment Relations Act 2000* (NZ) s 6.

36 *Bryson v Three Foot Six Ltd* (2003) 2 NZELR 105 [19]; although the appeal from this decision was decided on different grounds, the analysis of the Employment Court was not disturbed when the decision reached the Supreme Court, see, eg, *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721, 735 [32] (Blanchard J).

37 Wilson, above n 25.

38 Ibid.

the consequence that an increasing number of workers would also lose their rights as employees and their collective representation.[39]

The Hobbit dispute therefore points to a need to challenge the assumptions regarding the rights of contractors and others in non-standard employment. The fundamental question is whether the rights and protections of contractors should be less than those of employees. Writers such as Spoonley observe that with the rapid growth of non-standard employment and corresponding decline of standard employment, there is now a mismatch between the contemporary world of work which is comprised of radically changed employment arrangements, yet employment legislation and policy are still heavily premised upon notions of 'standard' employment from an earlier era.[40] Changes to the nature of work and the labour market are leaving an increasing number of workers with few employment rights.

Wilson argues that the 'current unreality' of the law suits the interests of politicians.[41] By omitting to make any changes to protect the rights of workers in non-standard employment, successive governments have effectively created an expanding sector of unregulated, unprotected and de-unionised work, which accords well with neoliberal economic ideologies. In the Hobbit dispute, she argues that the fact the changed nature of work is no longer reflected in the law allows a government to 'conveniently change the legal definition on the grounds of clarifying the law', and so the reclassification of workers serves to 'deprive a class of employees' access to employment rights' with the intention that this would lower the cost of labour and so benefit the employers.[42] From that perspective, the Hobbit dispute therefore highlights the broader need to bring the law into line with the reality of the modern labour market and changed work arrangements by addressing the consequences for individual workers.[43] There is an unrealistic legal vacuum surrounding contracting arrangements and this situation should be revised so as to extend protections and rights to non-standard work. Business groups, however, are less likely to be supportive of such changes. From their perspective, the very essence of non-standard employment is the flexibility that it offers; increasing legislative protections would remove that flexibility.

IX The Rights of Contractors: Local and International Labour Standards

Existing international conventions and local statutes already support the development of workers' rights, especially the right to engage in collective approaches. Haworth refers to the International Labour Organisation's ('ILO') 1998 *Declaration on Fundamental Principles and Rights at Work*, which he argues gives trade unions the ability to use international action in support of extended collective bargaining.[44] ILO

39 Haworth, above n 4.

40 Paul Spoonley, 'Is Non-standard Work Becoming Standard? Trends and Issues' (2004) 29 *New Zealand Journal of Employment Relations* 3.

41 Wilson, above n 25, 93.

42 Ibid 92.

43 Ibid.

44 Haworth, above n 4.

member countries, such as New Zealand, are required to adhere to these core labour standards even if they have not ratified them.[45] Furthermore, Kelly notes that ILO Conventions Nos 87 and 98 regarding the *Freedom of Association and Protection of the Right to Organise*, and the *Right to Organise and Collective Bargaining*, extend to contractors who are explicitly recognised in the decisions of the Freedom of Association Committee;[46]

> By virtue of the principles of freedom of association, all workers — with the sole exception of members of the armed forces and the police — should have the right to establish and join organisations of their choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which so often is non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organise.[47]

Similarly, the ILO states that '[n]o provision in Convention No 98 authorizes the exclusion of workers having the status of contract employee from its scope'.[48] Howarth therefore proposes that while the Hobbit dispute placed considerable emphasis on protecting local investment issues, there appeared to be less attention to exploring and implementing global labour standards.[49]

The restraint of trade provisions contained in the *Commerce Act 1986* (NZ) were cited as a major obstacle that prevented contractors on *The Hobbit* production from engaging in collective action to establish terms and conditions. Conflicting legal opinions were proposed but no consensus was reached. Kelly raises a number of questions regarding the application of this legislation to the situation of contract workers, including whether contractors are actually in competition with each other and whether the situation would represent grounds for the Commerce Commission to grant exemptions, as provided in the Act.[50] Furthermore, she points to the provisions of the *Trade Unions Act 1908* (NZ) which evolved from legislation establishing that

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45 Wilson, above n 25.

46 See, respectively, International Labour Organisation, *Freedom of Association and Protection of the Right to Organise Convention 1948*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force generally 4 July 1950; entered into force for Australia 28 February 1973) art 11 ('*ILO Convention No 87*'); International Labour Organisation, *Right to Organise and Collective Bargaining Convention 1949*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force generally 18 July 1951; entered into force for Australia 28 February 1973) arts 3–4 ('*ILO Convention No 98*'); and see Helen Kelly, 'The Hobbit Dispute' (2011) 36 *New Zealand Journal of Employment Relations* 30.

47 International Labour Office, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (International Labour Organization, 5th ed, 2006) [254].

48 International Labour Office, *Digest of Decisions of the Committee on Freedom of Association* (International Labour Organization, 1996) [802].

49 Haworth, above n 4.

50 Ibid.

union activity was not anti-competitive and instead explicitly permitted workers to combine to regulate arrangements with employers. If these alternative opinions are correct, then the belief that contractors were barred from engaging in collective activities in negotiating their terms and conditions may be erroneous.

In order to achieve greater protection for contractors, Wilson and Kelly both contend that a necessary starting point is for workers to exercise the basic right to unite in collective action through trade unions in order to protect and further their interests.[51] In the context of contracting relationships this may take the form of establishing common standards which are then applied in individual contracts. Other options have also been mooted. Fenton, for example, has suggested adopting provisions similar to Britain by legislating a minimum wage which applies not just to employees but all 'workers', defined as 'any individual who has entered into, or works under a contract of employment, or any other contract where the individual undertakes to do or perform personally any work or services for another party to the contract'.[52]

The conundrum is that if both global standards and local legislation support workers, including contractors, engaging in collective activities and taking part in international union action, then why is this not occurring? The Hobbit dispute provides insight into this by exemplifying how the problems associated with traditional industrial action and attempts at international union collaboration are thwarted by domestic politics, economic influences, lobby groups and public opinion. While international standards may support workers' rights, the implementation of those standards through local policy and legislation is dependent on the political and legislative situation in an individual country. Nonetheless, there is a need to highlight the question of workers' rights, for both employees and contractors, and this is particularly relevant in relation to the ILO's Decent Work Agenda, which countries such as New Zealand have to support as ILO members.[53] Having recourse to international standards is not a sure-fire solution on its own but it may be one influential element that contributes towards bringing about a change whereby local workers receive the range of basic rights at work mandated by the ILO. International expectations may prove better determinants of working standards than lobbying by domestic interest groups.

Union groups could extend their focus on establishing a fundamental code of New Zealand workers' rights based on the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work*. The new Secretary-General of the ILO, Guy Ryder, has highlighted in his first interview how maintaining workers' rights is essential to economic recovery — the unemployed need work but 'Decent Work' and should not adding further to the ranks of '*The Precariat*'.[54]

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51 Kelly, above n 46; Wilson, above n 25.

52 Fenton, above n 21, 54.

53 Rodgers et al, *The ILO and the Quest for Social Justice 1919–2009* (International Labour Office, 2009) 224.

54 ILO, *Employment Rights Essential to Economic Recovery, Says New ILO Boss* (1 October 2012) <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_190435/lang--en/index.htm>; Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic, 2011).

Australia already has its own Australian Institute of Employment Rights, and its own Charter and Standard of Employment Rights. These might form the basis of a new code of workers' rights and are summarised in 10 key points:

(1) Good faith performance;
(2) Work with dignity;
(3) Freedom from discrimination and harassment;
(4) A safe and healthy workplace;
(5) Workplace democracy;
(6) Union membership and representation;
(7) Protection from unfair dismissal;
(8) Fair minimum standards;
(9) Fairness and balance in industrial bargaining;
(10) Effective dispute resolution.[55]

Wilson highlights the problems of the New Zealand system of government and in particular its lack of constitutional protections which makes workers particularly vulnerable to core issues being determined by the legislative changes of whichever party is in power.[56] Introducing a code may reduce this vulnerability and help provide greater direction from the judicial system. Roles and Stewart have recently highlighted the increasing role of the courts in Australia and Britain in clarifying when contracting arrangements are really employment.[57]

X Conclusion

The Hobbit dispute highlights a set of pivotal, inter-related factors which have previously received little attention, yet which are likely to determine the future of unions and worker representation worldwide. Kelly asserts that the dispute was, at its core, a situation where a group of workers sought to have a say on the setting of their terms and conditions.[58] Their ability to do this was constrained by a wide range of factors. Traditional analyses of union efficacy have focused on issues such as employer attitudes and the strategic approaches and structures of unions. However, that list now needs to be extended to acknowledge the factors demonstrated in the Hobbit dispute.[59] While the role of the state continues to be evident, with economic policies and legislation exerting a major influence on the future of trade unions, it

55 Australian Institute of Employment Rights, *The Australian Charter of Employment Rights* (30 May 2013) <http://www.aierights.com.au/resources/charter/>.

56 Wilson, above n 25.

57 Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *Australian Journal of Labour Law* 258.

58 Kelly, above n 46.

59 David Metcalf, 'British Unions: Resurgence or Perdition?' (Provocation Series Report No 1, The Work Foundation, January 2005).

now needs to be seen in the context of the growing power of multinational organisations which can be larger and more influential some than nation states. International corporations have the potential to directly influence government policies and legislative frameworks. The existence of these corporations also presents a need for unions to enter into new types of cross border collaborative action with renewed urgency. Associated with this, the Hobbit dispute illustrates that it is no longer solely the employers' and employees' perceptions of unions that are important, but rather the perceptions of the wider population can have a major influence on the perceived legitimacy and support for local and international union action.

The Hobbit dispute exemplifies the issues involved in the debate concerning non-standard employment and the potential fragility of employment rights in contracting arrangements. While some groups of workers may benefit from this arrangement, there are indications that others are currently disadvantaged. This area potentially represents a new frontier where fundamental issues such as workers' rights and union involvement are yet to be negotiated. The international conventions agreed by member states may form one element of regulation and protection with the potential to support workers' rights yet as the Hobbit dispute illustrates, this is dependent on the extent to which these are interpreted at local levels.

At the same time, an analysis of workers' rights does not exist in isolation but needs to acknowledge the viability of local economies. Some working arrangements may simply reflect the nature of specific industries which, as in the film industry, can be short-term, project-based events where it is not financially or practically feasible to prescribe continuity of employment. More significantly, the globalised nature of trade means that if one nation did introduce changes to employment arrangements on its own, in a way that increased the cost of its goods or services, this could compromise the nation's ability to compete internationally. The potential trade-off between workers' rights and economic competitiveness will be a challenging issue in predominantly neoliberal environments. In the Hobbit dispute, economic arguments dominated in response to assertions that if New Zealand did not offer concessions to the international corporations the country would lose the productions. The dilemma, however, is that those economic arguments could readily be extended to a host of other industries. Does this justify further legislation which expands contracting arrangements to other industries?

Overall, this range of international and local issues raises many untested questions that have the potential to prompt significant debate. The outcomes are likely to have a pivotal influence on both the rights of workers and the future of union membership and involvement. If the outcomes prove unfavourable then the Hobbit dispute may provide an indication of a rather unhopeful future of worker representation worldwide. Conversely, the Hobbit dispute may prompt renewed attention to addressing fundamental rights and lead to improved conditions for those workers who currently do not fare well in non-standard employment, bringing a new dimension to worker representation which extends workers' rights and voice to contractors.