

PERSPECTIVES

Precarious Work: The Need for a New Policy Framework

Margaret Wilson DCNZM
Professor of Law
University of Waikato

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Authored by:

Professor Margaret Wilson, DCNZM

Professor Margaret Wilson completed her LLB (Hons) and MJur at Auckland University. Professor Wilson has worked in private practice and has had an extensive career in public service including roles as founding member and Vice President of Auckland Women Lawyers' Association and Member of the Advisory Committee to establish a Ministry of Women's Affairs. From 1985 to 1989 she was Director of the Reserve Bank of New Zealand, from 1988 to 1989 as New Zealand Law Commissioner and in 1988 was Convenor of a Government Working Party on Equal Pay and Equal Opportunities.

Professor Wilson taught at Auckland Law School until 1990 and was the founding Dean of Waikato Law School from 1990 to 1994 and remained on the teaching staff until 1999. Professor Wilson has had a high profile in New Zealand politics; from 1984 to 1987 as President of New Zealand Labour Party, 1989 to 1990 Chief Adviser and Head of Prime Minister's Office.

From 1999 to 2005 she was Minister of the Crown with positions including Attorney-General, Minister of Labour, Minister Responsible for Treaty of Waitangi Negotiations, Minister of Commerce, Minister for Courts and Associate Minister of Justice. In 1999 she was elected a List Member of Parliament and 2005 to 2008 she was Speaker of Parliament.

Her preferred areas of expertise are constitutional law and employment relations. She returned to Te Piringa - Faculty of Law in 2009 as a Professor of Law and Public Policy.

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Foreword

Brian Howe AO, speaking at the National Press Club [18 April 2012], argued that "There is a new divide in the Australian economy. It is not between the blue-collar and white-collar worker, but between those in the 'core' of the workforce and those on the 'periphery'".

Howe, former Deputy Prime Minister and a highly respected academic, had just concluded a major, ACTU-funded but independent, inquiry into insecure work in Australia. He made the point in that same address that "Just as it is impossible to separate work from life, it is impossible to separate the structure of the workforce from the broader society. How we structure work, and what we demand of workers will shape the nature of our society in the 21st century".

The paper before you, *Precarious Work: the Need for a New Policy Framework*, by Professor Margaret Wilson grapples with those same questions: what is driving this fundamental and far-reaching shift in the labour market and what are the options for a new regulatory framework that "is respectful of all labour market participants' rights to be treated fairly".

Professor Wilson brings to these matters her experience as a legal academic, policy-maker and legislator. She served as a minister in the New Zealand Government from 1999 to 2005, including as Attorney-General and Minister of Labour.

While drawing most directly on her own research and experience in New Zealand, Professor Wilson's insights, her consideration of the context and drivers of these changes (including the international drivers) and her proposition for a new regulatory framework are relevant to and valuable for the much-needed deliberation on these issues here in Australia.

Professor Wilson's paper covers considerable terrain in a short space. It articulates the dimensions of these issues. It challenges current thinking; drawing, for example, on work by the Global Union Research Network [GURN] and the OECD to highlight that the noted increase in inequality is itself being driven by greater inequality in wages and salaries. Most importantly, it goes on to explore legislative and regulatory options for righting the balance without misplaced nostalgia for the past.

This paper is a further development of an address Professor Wilson delivered at a Whitlam Institute-ACTU forum held in Melbourne in August 2012.

Eric Sidoti
Director
Whitlam Institute within the
University of Western Sydney



Precarious Work: The Need for a New Policy Framework

Introduction

The increasing use of precarious work practices in Australia and New Zealand has raised the issue of the need for a concerted campaign to develop a policy and legislative framework that provides protection for workers employed under these arrangements. Although the focus of this paper is on the New Zealand experience, this is an international issue and Australia through the Howe Report¹ has already begun the process of developing a policy agenda. The close relationship between the Australian and New Zealand labour markets means this an issue that not only affects both workforces. Although the response of both countries will reflect their own labour markets and politics, there is much to be learnt from how the two countries address the issue of precarious employment.

I use the term precarious work though I am aware the terms insecure work, and non-standard work are often used to identify work that is characterised by work of uncertain duration, lack of access to benefits such as sick leave, paid holidays, low pay (though not always) and an ambiguity as to the legal nature of the employment relationship – is it an employment contract or independent contract, or a fixed term contract or a dependent contract? Precarious work is identified most closely with women, young workers and older workers, in other words, those who work on the margins of the labour market.² Various types of work such as casual work, part-time work, and home worker are often assumed to have the legal status of an employment contract but in reality none of the benefits accorded to such a contract. The legal status then does not necessarily indicate protected employment. Precarious work does not fit easily into the existing legal categories so a different approach is required to protect vulnerable workers.

Precarious Work – The Issue

Since the 1980s and the advent of neo-liberalism as the dominant public policy construct there has been a growing body of literature and research tracing the inroads of precarious work practices. From this work the interrelationship between a decline in standard work, trade union membership and collective bargaining has become apparent. In other words the traditional means of protecting workers in employment have been undermined and their effectiveness weakened. This is not the place to review the literature³ but I want to mention the work of the ILO because precarious work is an international issue that requires an international as well as a national response. Also the ILO current work on social protection provides a useful way forward to challenge not only

the consequences of precarious work, namely, insecure employment, but also the underlying causes that have created this threat to worker security and protection.

I shall return to the social protection initiative but the 2006 ILO Recommendation 198 – The Employment Relationship Recommendation, provides useful guidance on how to regulate precarious work. The Recommendation explicitly recognised the changing reality of the employment relationship and the need to provide national policy protection for all workers, regardless of their technical legal status. The Recommendation provided in clause 9 as follows:

“For the purpose of national policy of protection of workers in an employment relationship, the determination of the existence of such a relationship should be judged primarily by the facts relating to the performance of the work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.”

In other words the legal employment institutions should have the right to look at the real nature of the relationship.

For those of us in New Zealand this recommendation was of particular interest because it reflected the position taken in the Employment Relations Act 2000.⁴ (ERA) At the time this Act was passed there was considerable discussion on the best way to try and include vulnerable workers within the protections of the legislation. The outcome was s.6 (2) of the Employment Relations Act 2000 (ERA) that not only directed the Employment Court or Authority to “determine the real nature of relationship” but in s.6 (3) directed the Court or Authority to consider all matters that indicate the intention of the parties and importantly “not to treat as a determining matter any statement by the persons that describes the nature of their relationship.” This provision was tested in the Supreme Court case of *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 that upheld the decision of the Employment Court that an independent contractor was in reality on the evidence an employee and therefore entitled to the benefits of such a legal status. Naming the nature of the agreement an independent contract did not make it one in law.

¹ *Lives on Hold: Unlocking the Potential of Australia's Workforce*, Report of the Independent Inquiry into Insecure Work in Australia (2012) p. 5.

² See Judy Fudge and Rosemary Owens eds *Precarious Work, Women, and the New Economy: The Challenges to Legal Norms* Hart Publishing, Oxford and Portland Oregon 2006 for a discussion of the gendered nature of precarious work.

³ See the Report prepared by the ILO Bureau for Workers' Activities (ACTRAV) for a Symposium “Regulations and Policies to combat precarious work” ILO 2011.

⁴ Professor Wilson was Minister of Labour in the Labour Coalition Government 1999 – 2005.

The law appeared to be working well until the intervention of Sir Peter Jackson and Warner Bros in 2010 seeking financial advantage in the making of the movie *The Hobbit*. The National government conceded to their demands for not only more funding but also a change in the ERA. On the grounds of saving jobs and creating employment opportunities, the government introduced an amendment to the Employment Relations Act and within 24 hours passed the legislation under urgency. There was no consultation or opportunity for the public to comment on the amendment. The result was the legal status of all workers in the film production industry was in effect deemed to be independent contractors unless they negotiated an employment agreement. The amendment also removed s. 6 (3) that is, the direction to the court to “not to treat as a determining matter any statement by the persons that describes the nature of their relationship.” In other words if you are named an independent contractor you are one regardless of the reality of the situation.

I do not intend to analyse the *Hobbit* saga in detail. There is a special edition of the *New Zealand Journal of Employment Relations* that covers the various aspects of the dispute.⁵ I raise the issue however because it highlighted the vulnerability of the legal protections when a government with a neo-liberal agenda is in power. While I had always understood the law alone is never sufficient to provide protection for workers, I had always, and still do, see it as a fundamental element of any regime regulating the labour market and in particular the employment relationship. I think we all know the story of the evolution of the common law to accommodate the needs of capital.⁶

An important lesson from that narrative was that legal change was dependent on political change. Without enfranchisement of working people and representation in Parliament in the 19th century, the rights of workers would have been left to the protection of the common law that was reluctant to interfere with the rights of capital. Our foremothers and fathers who immigrated to Australia and New Zealand absorbed the political and industrial experiences of 19th century Britain. The fact both countries developed similar statutory industrial relations framework was an early example of the ties that link us on issues of protection for workers.

The *Hobbit* experience however requires a political and statutory response which is why I have sought to understand in the New Zealand context more fully the drivers behind the shift to precarious work and what instruments will be required to stem this tide and to develop a regulatory framework that is respectful of all labour market participants' rights to be treated fairly. This involves a better understanding of the legal possibilities, both in legislation and the common law; the ideology that has driven precarious work; the various influences on public policy at a national level; and what combination of legal protection, economic regulatory change, and political environment may be required to re-establish notions of equality, human rights, and democratic governance as essential elements of public policy. It is of course

impossible at one level and too large to do much more than share some preliminary thoughts and importantly learn from the New Zealand and Australian experience.

Australian and New Zealand Experience

The Australian experience has always been important to New Zealand because of the close relationship between the countries in a variety of formal and informal ways, except on the sports field. It may be of interest to know that it is estimated that 495,000 New Zealanders are living in Australia, that is, one in ten New Zealanders. New Zealanders in Australia have a high labour participation rate and are more likely to be working than the total Australian population.⁷ The income gap between New Zealanders and Australians is highest in the lower skilled jobs and on average Australian wages are 19% higher than in New Zealand. This wage gap may explain the increasing migration by New Zealanders to Australia. The affect this has on the labour market here I do not know but wonder if many of those workers fall into the precarious work category.

I have read with interest the ACTU sponsored independent inquiry into insecure work chaired by the Hon Brian Howe who in his introduction to the *Report Lives on Hold: Unlocking the Potential of Australia's Workforce*⁸ noted:

“Over the past few decades, a new divide has opened in the Australian workforce. No longer between the blue-collar and white collar worker, it is between those in the “core” of the workforce and those on the “periphery”. ... Although 40% of Australian workers are in insecure work, this is a development that avoided proper examination and scrutiny for too long. There has been growing interest and research by individual academics, but it has slipped under the radar of our political class.”

I agree that this is an issue that requires both further scrutiny and the development of strategies for change. The Report however provides, for Australia, an authoritative basis on which to develop such a reform strategy. Australia also has maintained through its Fair Work Act an institutional regulatory framework that continues to support a notion of collective bargaining. I am aware that this framework is contested by the political opposition and that the struggle to maintain effective collective bargaining against the individualisation of the employment relationship continues and is a real threat to the well-being of workers. The consequences of losing the right to collective bargaining however is seen in the New Zealand experience where the current government is steadily removing support for collective bargaining through a

⁵ NZJER 36(3) 2011.

⁶ Alan Fox *Beyond Contract: Work, Power and Trust Relations* Faber & Faber, London 1974; and Otto Kahn-Freund *Labour and the Law* Hamlyn Lectures 1972, Stevens & Sons, London. These texts provide two good accounts of the law of the law.

⁷ Department of Labour *Permanent and Long Term Migration: The Big Picture* (www.dol.govt.nz/publications/research/plm-migration-big-picture/03/asp) The statistics show at ages 15 – 64, 83% of NZ born men and 70% of NZ born women worked compared with 72% and 62% of Australian men and women in the same age group.

⁸ Report of the Independent Inquiry into Insecure Work in Australia (2012) p. 5.

series of amendments. The National Party has learnt the political lesson that the big bang approach to labour market reform of the 1990s creates public opposition. It now pursues the same policy through a strategy of death to collective bargaining and trade unionism through a series of small incremental changes.

New Zealand unfortunately does not have the equivalent of the Howe Report. Some research has been undertaken however. In 1991 and 1995 two national workplace surveys were undertaken that found in both years that casual, temporary and fixed term employment made up 11% of the workforce.⁹ This was at the beginning of the shift from collective to individual employment contracts. The Department of Labour in 2002 under a Labour led government undertook a literature review of precarious work¹⁰ and in 2004 conducted case study research in four industries: cleaning, finance/call centre, fish processing and labour-hire/construction.¹¹ A survey was also undertaken of employees in temporary jobs based on information collected by Statistics New Zealand Survey of Working Life in March 2008 quarter. It found that approximately one in ten employees (9.4%) were working at temporary jobs, while one in twenty (4.9%) were employed on a casual basis, with 2.7% on fixed terms contracts and 0.7% working for a temporary employment agency. This survey also found 28.4% of temporary employees were working in seasonal jobs. This makes a total of 17.3% classified as precarious jobs.

Although there are problems with definition as to what is classified as temporary, non-standard or precarious work, it would appear there has been an increase in this type of work. Statistics New Zealand¹² has also undertaken an interesting piece of research that found as at March 2006 one in five jobs (21.1%) in their database were repeat spells with the same employers and nearly half (44.4%) of the repeat job spells started following a single month on non-employment and only 16.2% of the repeat spells occurred after a non-employment period of over 12 months. A distinctive pattern among the repeat spells end in December and began in February, which coincides with the New Zealand holiday period. There was also some evidence that many repeat jobs were in fact continuing relationships between the same employee and employer. This research would indicate the education sector contributes to continuing fixed term contracts with the same employer. I note there is similar concern in the tertiary sector in Australia that the proportion of precarious work arrangements is increasing.¹³ The fact tertiary institutions in New Zealand continue this practice is troubling because the Employment Relations Act 2000 s. 66 was an attempt to provide redress for this abuse of fixed term contracts. I suspect however this is another example of inadequate legal protection.

Precarious work is not peculiar to Australia and New Zealand however. It is a worldwide phenomenon. A Global Union Research Network Report¹⁴ "Moving from Precarious Employment to Decent Work" cites figures of a third of the workforce in Canada, the United States and Japan being characterised as in precarious work,

while two million workers in the United Kingdom fall into this category and 22% of the German workforce is classified as part-time workers.¹⁵ A survey of precarious work in Europe in 1996 estimated 3 in 10 people in employment are in precarious work but if account is taken of jobs occupied for less than one year, then 43% are in precarious work.¹⁶ A more recent study undertaken by the EU Research on Social Sciences and Humanities reviewed how precarious employment is understood and appraised in both scientific and policy terms in France, Germany, Italy, Spain and the United Kingdom and concluded that:¹⁷

"Precarious employment has increased over the last two decades in most countries, while the standard employment relationship itself, even though it continues to be by far the dominant form of employment in empirical terms, has been eroded on account of the combined effects upon it of weakened employment protection legislation and institutions, the regular occurrence of layoffs and the very existence of significant population of PE (precarious employment) and unemployed."

International Drivers of Precarious Work

It is important then to place the growth of precarious work within an international context when seeking to provide regulatory protections for workers. It is especially important to understand the role of the IMF, the OECD and the World Bank in promoting the removal of worker protections. They have led a strategy to redress growing unemployment, which resulted from the policies of globalisation and structural readjustment, by removing legal and institutional protection of workers. Their argument basically amounted to the assertion that worker protections were preventing the growth of jobs and therefore had to be removed to create more jobs. The way to achieve this objective was through flexibility for the employer in organising the workplace. The removal of worker protections was designed to give employers the uncontested right to set wages and conditions and thus transferred all the risks onto the worker. The balance of power in the employment relationship was therefore removed. The so-called new regulatory level playing field was heavily tilted to the benefit of the employer.

9 Peter Brosnan & Pat Walsh (1996) "Plus ça change: The Employment Contracts Act and Non Standard Employment in New Zealand, 1991-5, Labour, Employment and Work in New Zealand, Proceedings of the Seventh Conference, Victoria University of Wellington, pp. 157 – 166.

10 Deborah Tucker 'Precarious' Non-Standard Employment – A Review of the Literature Labour Market Policy Group, Department of Labour, Wellington 2002 www.dol.govt.nz

11 WEB Research Report of Exploratory Case Study Research into Precarious Employment Labour Market Policy Group, Department of Labour, Wellington 2004 www.dol.govt.nz

12 Jason Timmins *Why are there so many short jobs in LEED? An analysis of job tenure using LEED Statistics* New Zealand and Department of Labour, 28 April 2008 (www.stats.govt.nz). LEED is the Linked Employer-Employee Database – in this survey information from tax data was used.

13 <http://teu.ac.nz/2012/05/insecure-work-rife-in-australian-universities/>

14 John Evans and Euan Gibb, "Moving from Precarious Employment to Decent Work" ILO/GURN, Geneva: ILO 2009.

15 *Ibid*, pp. 20 – 38.

16 Veronique Letourneux *Precarious Employment and Working Conditions in Europe* European Foundation for the Improvement of Living and Working Conditions 1998, Dublin pp. 9 - 10

17 *Precarious Employment in Europe: A Comparative Study of Labour Market Related Risks in Flexible Economies* ESOP Final Report 2004 (ftp://ftp.cordis.europa.eu/publications/docs/kina_21250ens_final_esope_pdf)

The fact that New Zealand and Australia rank fourth and fifth respectively on the OECD scale of countries with the least employment protection laws, demonstrates the success of this strategy.¹⁸ The insidious role of the OECD in the systematic dismantlement of worker protections is discussed in a recent Global Union Research Network discussion paper.¹⁹ The paper noted:

“The role of the OECD in particular has had a negative effect in terms of precarious employment and regulation more broadly. Beginning in the 1994 OECD Jobs Study which made the case that, “regulation limits employment growth and labour market adaptation,” (Bernstein et.al 2006: 211) and that increased regulation leads to increased unemployment, (Jackson 2006: 279) the OECD has largely maintained this approach to regulation.”

The influence of OECD policies on nation-states decision-making has been analysed by Rianne Mahon in her article “The Jobs Strategy: From neo-to inclusive liberalism?”²⁰ She noted the special place of the OECD in the international organisations network and that it “has operated as a kind of club for advanced capitalist countries, facilitating the coordination of economic policies, the development of a shared approach to development assistance, the promotion of trade and investment liberalization, and the working out of common solutions in a widening range of areas.”²¹

According to the Global Union Research Network (GURN) discussion paper there is little empirical evidence to support the OECD assertion, but it persists with dispensing this advice to countries. The World Bank however that dispensed similar advice has recognised the inadequacy of the OECD policy and instructed their officials to stop using the “Employing Worker Indicator” in its Doing Business reports. The GURN paper concludes its discussion of the influence of the OECD and World Bank in not only deregulation of labour protections but the reregulation of labour law to privilege employer interests in the following terms:

“In order to improve labour law and regulation it needs to be ‘scaled up’ so that it can be adapted to cope with the increasing variety of employment relationships (Suptot 1999: 35) instead of allowing the passive (intentional or otherwise) deregulation to continue spreading. An example of ‘scaling up’ is to include workers under labour law regardless of the form of their employment relationship. If this approach were practised self-employed and directly employed workers would maintain access to the same system of legal recourse and have the same rights to organise and bargain collectively. They would move closer to guaranteeing equality of treatment and narrow the terrain of competition in terms of precariousness.”²²

While I agree with the approach recommended in the discussion paper, the question is however how to affect a policy shift away from the neo-liberal policies of the OECD and the World Bank in their pursuit of support of the globalisation of capital. Their careless disregard of the

consequences of their policies is becoming more apparent with the current recession.²³ Recent research from the OECD itself in its recent report *Divided We Stand: Why Inequality Keeps Rising*²⁴ noted:

“The Landmark 2008 OECD report *Growing Unequal* showed the gap between rich and poor had been growing in most OECD countries. Three years down the road, inequality has become a universal concern, among both policy makers and societies at large. ... Today in advanced economies, the average income of the richest 10% of the population is about nine times that of the poorest 10%. ... The single most important driver has been greater inequality in wages and salaries. ... The study reveals a number of surprising findings: ... regulatory reforms and institutional changes increased employment opportunities but also contributed to greater wage inequality. ... part-time work has increased, atypical labour contracts became more common and the coverage of collective-bargaining arrangements declined in many countries. These changes in working conditions also contributed to rising earning inequality.”

There is an internal discussion within the OECD on the future approach of the Jobs Strategy and the notion of flexicurity. Rianne Mahon notes that while there is evidence of alternative strategies within the OECD the dominant strategy remains within the neo-liberal parameters so little fundamental change in approach is likely.

How to counter the influence of the international institutions policies on national regulatory arrangements is central to any strategy to reinstate worker protection as the norm. The challenge for a country like New Zealand, with little economic independence, is how to acknowledge the reality of the power of international agencies while maintaining some semblance of national sovereignty over its statutory and policy frameworks. The position may be different in Australia given the strength of its economy, but New Zealand struggles to maintain sovereignty over its own affairs. The New Zealand Minister of Trade Negotiations in the context of the Trans Pacific Partnership negotiations recently asserted a loss of sovereignty was inevitable and in fact normal.²⁵ The elements of any strategy for change then require a consideration of both the international and national policy context.

18 See Danielle Venn (2009) “Legislation, collective bargaining and enforcement: Updating the OECD employment protection indicators”, www.oecd.org/els/working-papers.

19 John Evans & Euan Gibb *Moving from Precarious Employment to Decent Work*, International Labour Organisation; Global Union Research Network (GURN), - Geneva: ILO, 2009 74p. (GURN discussion paper; no.13) pp. 45 -47.

20 Review of International Political Economy, 18.5 December 2011, 570-591.

21 Ibid, at 571.

22 Ibid p 47.

23 See Richard Wilkinson and Kate Pickett *The Spirit Level: Why Equality is Better for Everyone* Penguin Books, London 2010 for discussion of growing inequality in New Zealand. The IMF has also noted growing inequality in a recent report Sanjeev Gupta & David Coady *Income Inequality and Fiscal Policy* IMF Staff Discussion Notes No12/08, 28 June 2012.

24 OECD, www.oecd.org/els/social/inequality 2011.

25 Audrey Young, *We'll lose under trade deal*, says Groser, NZ Herald July 7, 2012.

Legal Framework

In many ways the construction of a new legal framework is technically easy. In essence what is required is a legal definition of work that incorporates precarious work, plus a regulatory framework that supports collective bargaining as the primary means of determining wages and conditions for the same or substantially similar types of work, wherever it is performed. In other words collective bargaining should be incorporated with the market as the primary means for determining wages and conditions. There should be a proper contestable process incorporating all interests, employers and workers, in the outcome. It is nonsense to assume as it is in New Zealand that individual workers can bargain with employers over wages and conditions. This may be possible in some areas of the labour market that requires skills in short supply but for the majority it is not possible. Support for unions as bargaining representatives for workers is therefore essential in any legal framework.

The redefinition of work to incorporate precarious work was examined in the recent report prepared for the Symposium organised by the International Labour Organisation's Bureau for Workers' Activities (ACTRAV). It provides a useful summary of the criteria against which to assess whether the work falls within the definition of a genuine employment relationship. The Report noted:²⁶

"Despite this variety of rather context-specific ways of referring to precarious work, some common characteristics can be identified. In the most general sense, precarious work is a means for employers to shift risks and responsibilities on to workers. It is work performed in the formal and informal economy and is characterized by variable levels and degrees of objective (legal status) and subjective (feeling) characteristics of uncertainty and insecurity. Although a precarious job can have many faces, it is usually defined by uncertainty as to the duration of employment, multiple possible employers or a disguised or ambiguous employment relationship, a lack of access to social protection and benefits usually associated with employment, low pay and substantial legal and practical obstacles to joining a trade union and bargaining collectively."

The ILO Recommendation 198 also provides useful guidance on the criteria and institutional framework to identify a genuine employment relationship. It relies substantially on the common law indices around subordination and dependence and usefully recommends the inclusion in any national law of a presumption of an employment relationship until proven otherwise – the reversal in effect of the Hobbit legislation. I would agree with Rosemary Owens however that a broad view of national regulation should be taken and it should "include not only laws regulating employment per se, but also industry, trade and competition policy, taxation regimes, rules relating to pensions and benefits, and welfare provisions."²⁷

A much more difficult task is the construction of a regulatory framework that facilitates union membership and supports collective bargaining as the primary means for the determination of wages and conditions. Australia has retained an institutional framework through Fair Work Australia to regulate collective bargaining. New Zealand through the Employment Relations Act relied on the notion of good faith bargaining to promote collective bargaining but the focus has remained on enterprise bargaining and thereby limited the scope and coverage of collective agreements. Restriction on the capacity of unions to recruit members has also undermined the influence of unions. Attempts being made by the New Zealand Combined Trade Unions (CTU) through the promotion of TOGETHER, an organisation to recruit and represent workers in precarious work, have had limited success but it is an important initiative to reassert the role of the unions as representatives of the workers wherever they work.

There have been issues raised in New Zealand whether collectivising independent/dependent workers contravenes competition legislation. This objection arose during the Hobbit dispute and was a useful reminder that originally the law had seen trade unions as a restraint on trade and therefore unlawful. They were conspiracies designed to prevent the free flow of capital. Not much has changed on one level in the relationship between capital and labour. They have conflicting interests and it is the role of the state to resolve conflicts that arise from these conflicting interests. This was an important element in the 19th century political struggles, and although much has changed since that time, in essence the issues remain the same. What is the fair price for labour and how is that to be determined? The answer to this question is found in policy and one of the instruments for the implementation of the policy is the law. More importantly however there must be recognition of the representative role of the trade unions as an essential institution within a democracy. I shall return to this theme.

While a new domestic regulatory regime has many challenges the more difficult task lies in constructing a shift in policy away from the neo-liberalism policies of globalisation driven by the World Bank, the OECD and the IMF. Internationally the response to the policies of the World Bank, OECD and IMF has come from the International Labour Organisation. The ILO has provided a coherent response to 'the jobs at any price' mantra of the IMF, OECD and World Bank. There is not time to detail the initiatives of the ILO that have been developed since the 1980s to counter the negative impact of globalisation on workers. There are however two instruments that are of practical use in the development of a new policy framework. They are the Decent Work Agenda and the notion of Social Protection Floor that was formally endorsed by the recent ILO conference and approved as a Recommendation.

²⁶ From *precarious work to decent work. Policies and regulation to combat precarious employment* International Labour Organisation 2011 p. 5 (978-92-2-125523-9 web pdf)

²⁷ *Supra* 1 at 289.

Juan Somavia, former Director-General of the ILO described the notion of decent work as follows: “The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.” The decent work agenda has four strategic objectives²⁸: to promote and implement international labour standards and rights at work; to create decent employment and income opportunities for all men and women; to enhance coverage and effectiveness of social protections for all peoples; and to strengthen economic and social dialogue between government, employers and workers. The ILO provides support for governments that wish to develop a decent work country programme.

New Zealand has already agreed to the decent work agenda and describes its vision in the New Zealand context as being – recognition of peoples differing needs; providing satisfying and productive work, adequate income and social protection; stability for people and families; respect for peoples’ rights; time for other activities; and the opportunity to be involved.²⁹ While the Department of Labour describes in detail the decent work agenda for New Zealand, the real question is whether the vision and objectives are implemented and there is a good argument to be made that increasingly New Zealand is slipping away from its commitment to decent work.

While the decent work agenda focuses on the workplace and employment relationship, the social protection floor initiative takes a more comprehensive approach to workers protection. It recognises the need for an integrated policy strategy involving both the private and public sector, and economic and social policy working coherently to provide where appropriate a floor of social protections. This proposal is defined as a nationally set of basic social security guarantees which secure protection aimed at providing or alleviating poverty, vulnerability and social exclusion. The Recommendation sets out as follows the steps required of a country to implement the notion of a social protection floor:

- “10. In designing and implementing national social protection floors, Members should:
- (a) combine preventive, promotional and active measures, benefits and social services;
 - (b) promote productive economic activity and formal employment through considering policies that include public procurement, government credit provisions, labour inspection, labour market policies and tax incentives, and that promote education, vocational training, productive skills and employability; and
 - (c) ensure coordination with other policies that enhance formal employment, income generation, education, literacy, vocational training, skills and employability, that reduce precariousness, and that promote secure work, entrepreneurship and sustainable enterprises

within a decent work framework.

11. (1) Members should consider using a variety of different methods to mobilize the necessary resources to ensure financial, fiscal and economic sustainability of national social protection floors, taking into account the contributory capacities of different population groups. Such methods may include, individually or in combination, effective enforcement of tax and contribution obligations, reprioritizing expenditure, or a broader and sufficiently progressive revenue base.”

The social protection floor notion is designed to acknowledge the reality of globalisation and the need for flexibility in the labour market with the need to preserve and promote security for workers whatever their role or status in the labour market. It advocates a variety of policy instruments with which to implement such a programme. Already in the New Zealand context traditionally there has been an acceptance of the need to provide citizens with social security through state support in times of need. This policy has been under increasing attack since the mid 1980s and the rise of neo-liberal policies. Currently legislation is being introduced to remove people from a variety of state support by requiring them to seek jobs no matter what sort of jobs. The policy is consistent with the OECD approach of removing protections such as benefits to get people into work. Although there has been policy leadership at an international level by the ILO, the reality is that unless the national government is prepared to take responsibility for the regulation of the labour market that is inclusive of all interests in the workplace little will change.

The Importance of Ideology

The New Zealand government currently does not accept the state has responsibility to promote either decent work or the social protection floor. The market remains the dominant mechanism to determine wages and conditions. It operates within a neo-liberal ‘lite’ policy framework however with a slow but consistent policy to dismantle legal support for trade unions and collective bargaining. This approach to the labour market and the role of the state requires not just a policy shift but also an ideological change by governments to take co-responsibility to provide decent work and the protections for workers that will bring a halt to the growing inequality in the community. It may be that the foreshadowed initiative of the ILO, the UN system, the IMF and the World Bank setting up a Social Protection Interagency Board within the G20 framework to promote social protection in global, regional and national development agendas will have some influence on advice to national governments. In the New Zealand context it is difficult to see a change in policy without a change of government however.

²⁸ <http://www.ilo.org/global/about-the-ilo/decentwork-agenda/eng/lang-en/index.htm>.

²⁹ www.dol.govt.nz/services/decentwork/overview/vision.asp.

The political implications of the growing number of precarious workers were examined by Guy Standing in his book *The Precariat: The New Dangerous Class*³⁰. Whether his vision of a disaffected class of precarious workers embracing neo-fascism and creating political unrest eventuates in the context of New Zealand and Australia remains to be seen. Political support for the National Government in New Zealand remains high with a 44% rating (at the time of writing). He does however emphasise the need for a political response to the reality for many workers. This presents a real issue for political parties of the centre left.

Traditionally the NZ Labour Party has represented the interests of working people. The decision of the fourth Labour government in 1984 to introduce the policies of neo-liberalisation without declaring its intention to the electorate has created a distrust of the Party amongst many people. The Party has experienced like political parties generally a decline in membership. It is also struggling to develop a policy that acknowledges the reality of globalisation while retaining the traditional values associated with social security policies. The Party in my view needs to reinvent itself to become again a trusted representative of working people, whatever their employment status. This is not the place to embark on a discussion of political organisation.

It is noteworthy however that the Labour Party has undertaken an organisational review that is currently before the Party membership. The purpose is to be more inclusive with organisation structures that encourage participation and involvement in the political process. While such a review is necessary and worthwhile, the reality is most people are attracted to the Labour Party through a commitment to a set of values and policies. Until a new policy strategy emerges, it is difficult to see much of a change. As a former Party President I do not underestimate the political challenges for centre left political parties. I do know however that return to the educative role of the Party is essential if long-term relevance is to be achieved. It is important to build a constituency that understands what influences their life chances. Parties of the left have traditionally understood this role and it is time to undertake the task again.

One of the institutional and policy challenges for the Labour party will be agreeing a new policy framework that supports the role of the trade union movement as representatives of workers in the workplace and with policy makers. As union membership declines and is confined to specific sectors, for example, in New Zealand public sector employment, the question arises whether trade unions have become the representatives of an 'elite' group of workers in standard employment. If this is the case precarious workers will remain without representation in the workplace. The issue then is how the fruits of union coverage through collective bargaining can be extended to precarious workers or do such workers have to rely on statutory protections. Traditionally before the advent of neo-liberalism, workers' protections were gained through a combination of union bargaining and

statutory protections. It was an iterative process that acknowledged both the industrial and political roles of the trade union movement in decisions that affected worker well-being whether it was in the private or public sector. This role was reflected in the legal framework that provided legitimacy to the representative role of trade unions.

The policies of neo-liberalism have undermined the representative role of trade unions as seen in the provisions of the Employment Contracts Act. The Labour led government reasserted the role of trade unions in the Employment Relations Act which is currently again being undermined by the current National government. The politically contested role of trade unions reflects to a large extent the failure to find a consensus on the role of the state and market in the lives of New Zealanders. It also reflects the flexible, pragmatic and increasingly fragile nature of New Zealand's constitutional arrangements.

There are few constitutional norms formally expressed in legislation. The dominating constitutional notion is the sovereignty of Parliament with the practical consequence being the importance of politics as the primary driver of citizens' rights and responsibilities. The law is capable of change by simple majority and the courts have no jurisdiction to strike down the laws of Parliament as being contrary to human rights or constitutional norms. The political reality makes the checks and balances on government more complex, especially under the mixed member electoral system that rarely produces a majority government. It does mean however that is difficult to construct a stable framework. While this is not the place to discuss the New Zealand constitution, in this context it is important because it relies on an active citizenship to ensure democratic decision-making. For workers this means their voice is not strong unless there is a viable trade union movement to act as representatives of their interests in the workplace and in policy making.

There is an argument in academic literature that workers are more likely to be provided with protection under a strong human rights framework³¹ or through the recognition of the right of workers' rights within a constitutional framework.³² While I see merit in both strategies, I keep asking the basic question – legal rights are necessary but unless they are enforceable they are of limited value to the individual worker. Legal enforcement is not practical for most workers because of limited access to information, costs of enforcement and the appropriateness of remedy. This is why I believe a legal framework is a necessary but insufficient response to the protection of workers' rights. It is why it is necessary to ensure the representative role of trade unions not only to pursue legal rights of workers but also their role as

30 Bloomsbury Academic, London 2011.

31 Colin Fenwick and Tonia Novitz eds, *Human Rights at Work: Perspectives on Law and Regulation*, 2010, Hart Publishing.

32 Roth Dukes, "Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund and the Role of Labour Law" (2008) Vol 35, Issue 3, *Journal of Law and Society*, 341-363; and Harry Arthurs, "The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems" (2001) 19 (4) *Social and Legal Studies*, 403-422.

participants in the policy making process. They provide an essential democratic check on the power of the executive, as well as employers. I am aware that trade unions are also capable of abuse of power and must also be subject to democratic process. It is difficult however to ensure how both the legal and policy rights of workers can be delivered without a representative trade union movement subject to law but also supported by the law in this role.

Conclusion

I have endeavoured in this paper to map out the prevalence of precarious work, the consequential growing inequality from insecure, low paid work, and the failure to redress this trend by regulatory and policy frameworks. I have highlighted the difficulties for national governments to develop policies that are not consistent with the international organisations' policies. Precarious work appears to be an essential element of globalisation regardless of the consequences for individual workers but also their governments. There are alternatives to the current policies but they require an exercise of political will and the ability to work within the realities of the international constraints in such a way that protects the interests of all citizens. The ILO Social Protection Floor provides the framework for such an approach to policy making. This approach is founded on the assumption of the central role of the state in constructing a regulatory framework that balances the needs of the market with the needs of individual workers.

I have also discussed the fundamental importance of the representative role of trade unions in the protection and furtherance of workers' rights. The law is necessary in the recognition of this role but the executive also needs to acknowledge and support the representative role when making policy that affects workers. Although the representative role of trade unions is contested constantly under the policies of neo-liberalism, it is essential that both the trade unions themselves and their political representatives respond to the challenges of globalisation that are having the affect of undermining democratic governance. This will mean a reassessment of role and structure and a clear statement of values and principles to guide both policy and decision-making. Precarious work has exposed the vulnerability of worker representativeness as an essential element of democratic governance. It is essential that we recognise that the issues raised through the reality of precarious work go beyond the workplace and lie at the very heart of our democracy.

Whitlam Institute

WITHIN THE UNIVERSITY OF WESTERN SYDNEY

UWS Parramatta Campus, Cnr James Ruse Drive & Victoria Rd Rydalmere NSW Australia 2116

Locked Bag 1797 Penrith NSW Australia 2751

T + 61 2 9685 9187 F + 61 2 9685 9110 E info@whitlam.org W www.whitlam.org

