

Voiceless Actors? The Hobbit Affair and the Future of Unions

Bernard Walker, University of Canterbury
Rupert Tipples, Lincoln University

ABSTRACT

The industrial action surrounding the making of *The Hobbit* movie presented a contentious interaction between business, lawmakers, and unions. The debate centred upon the employment status of workers and their ability to involve unions in negotiating their terms of employment. The issue culminated with an urgent amendment to the ERA 2000 which defined workers in the film industry as contractors unless their written agreement provided otherwise. One narrative interpreted these events as a pragmatic solution to a relatively unique situation, which brought considerable economic benefits for both the industry and the country, with only minor implications for employment law. Alternative views however construed the situation as involving constitutional challenges, bringing the demise of union influence, removing employee choice and minimising employment protection. Seen in the context of the increasing use of independent contracting, and non-standard employment arrangements in general, the events were viewed as a major erosion of both the influence of unions and the protection available to employees. This paper explores the significance of these developments, identifying a number of crucial but untested questions regarding the future role and influence of unions, particularly whether unions can have a role in the ever-growing sphere of independent contracting relationships.

Introduction

The industrial action surrounding the making of *The Hobbit* movie involved a contentious interaction between a range of global players including business, lawmakers, and unions, associated with the international film production. The debate centred upon the employment status of workers and their resulting ability to involve unions in negotiating their terms of employment. The events can be interpreted in a number of differing ways. One interpretation is that the episode simply corrected an anomaly in the legislation, clarifying the employment status of a small group of workers in one specific industry. This was the rationale of the government and film makers, and was well publicised in the debate surrounding the Hobbit events. A second, less publicised view however involves a range of analyses, 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. One emphasises a business viewpoint in asserting contracting as an alternative form of employment which provides industry flexibility. The opposing perspective emphasises the rights of workers to employment protection, their ability to choose the nature of their employment arrangements, their ability to form collectives and to bargain for collectively agreed terms of employment.

The discussion addresses the processes that occurred in New Zealand as international companies and government initiated a legal amendment that redefines the criteria for determining employment status for one industry. The dispute has broader implications though as it raises fundamental questions regarding the rights of independent contractors worldwide. Do contractors have, for example, the right to form collectives, to engage in strike action, and collectively influence their terms and conditions of work - or are contractors a group of workers who are excluded from these rights? In a context where contracting arrangements are expanding, if contractors are not entitled to collective representation this suggests that 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 erode working conditions as well as further reducing the coverage and influence of unions. From this perspective, the episode highlights major issues which are likely to prove crucial determinants of the future of worker rights and collective representation.

This article outlines a number of those critical analyses, not to endorse them but rather to explore the issues they raise with regard to the future of worker representation. The critiques derive from a wider dialogue which contains both affirming and critical commentaries regarding the Hobbit dispute and non-standard employment. The purpose of this article is not to support one side or another in that debate; rather, it asks, if those critical views did hold some degree of veracity, what could be their implications for union involvement? The discussion commences with an initial brief overview of the events of the Hobbit dispute, then moves to explore the political, economic, legal, and employment relations issues involved. This leads to a series of options regarding the possible future for unions and collective representation.

An overview of the Hobbit dispute

To begin, it is useful to briefly outline the dispute¹. 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* and the question of determining employment status. Section 6 of the Employment Relations Act 2000 established, for the purposes of the Hobbit case, 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 working for Three Foot Six Limited 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. Bryson's case for unjustifiable dismissal, posited on the existence of an employment relationship rather than a contracting arrangement, went to the Employment Court (2003), which ruled him to be an employee. The case became the first employment case before the Supreme Court (2005) which stated that the Employment Court had used the existing legal principles correctly under s 6. The end result was that, despite majority film industry practice, the decision of the Employment Court stood, and under that decision, Bryson was an employee.

The Hobbit is a two 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 Jackson, who claimed they would ruin the New Zealand film industry. Jackson argued that the Commerce Act 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

¹ A detailed analysis of the sequence of events is provided in Appendix 1 and a range of in-depth accounts are available; for example see Tyson (2011), Kelly (2011a), and Nuttall (2011)

another overseas location created a furore with demonstrations across the country. The peak union body, the NZ Council of Trade Unions, and the government both sought to intervene, concerned at 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 Warners, the government announced it was amending the ERA 2000 under urgency, 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 law changes were enacted under urgency in October 2010 and filming commenced in 2011.

The economic and political contexts

The economic and political contexts play a powerful, but less visible, role in shaping the events of the *Hobbit* dispute. The global film sector constitutes a large and powerful industry. The scale of productions and the huge associated business opportunities they bring, make it attractive for many nation states to compete with each other to become locations for film production. For some years New Zealand has offered subsidies to match other countries in becoming a potential 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 (Haworth, 2011).

The film companies were not entirely free agents though and were under considerable pressure to complete the *Hobbit* films within a short timeframe. 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 Jackson 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. The companies needed Sir Peter Jackson (Haworth, 2011).

At the same time, Sir Peter was important to New Zealand as the icon of film making who had grown from a small player in the local industry to become an internationally acclaimed producer who had brought the *Lord of the Rings* and other major productions to the country. Haworth (2011) suggests that this reputation, and his commercial power as an industry leader and agent of the global film sector, meant that Sir Peter had direct access to senior levels of the New Zealand Government and considerable influence with regard to industry arrangements and government subsidies.

At a political level, the New Zealand Government's public statements and actions, not surprisingly, focused on the economic benefits of securing the productions for the country. The benefits were major. The local film industry was expected to receive significant immediate benefits, while the wider country could gain from short-term economic impetus, with the two *Hobbit* films expected to bring in \$670 million dollars and create 3000 jobs. In the longer term, there would also be the enhanced reputation as a film production destination, and gains from publicity that could benefit areas such as tourism (Wilkinson, 2011). 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, and the government asserted that the need to avoid losing the productions gave it a mandate to intervene urgently for the greater good of the local film industry and the nation's economy, passing a legislative amendment without the usual process of consultation and submissions.

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 v Three Foot Six Ltd* decision and the threat of industrial action had led Warner Brothers to believe the employment relations environment in New Zealand was "unstable" (Wilkinson, 2011, p.34). 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". The government's legislative change was therefore "to remove that uncertainty" and reflect the longstanding industry practice (Wilkinson, 2011, p.34). 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 employment relationship, and the government asserted that this amendment "does not remove rights from anyone" (Wilkinson, 2011, p.35).

Contracting and non-standard employment

Contracting arrangements represent one aspect of the growing area of non-standard², temporary employment, which some writers suggest is one of the most spectacular and important evolutions in Western working life (De Cuyper, et al., 2008, p.25). From a company perspective, contracting provides the potential for flexibility, in terms of 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 regulation governing standard employment relationships, and so this permits rapid adjustment through adding or subtracting workers with no long term contractual ties (McKeown, 2005, McKeown and Hanley, 2009).

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 benefits such as greater autonomy, increased earning potential, a flexible lifestyle, and more control over work-life balance (Alach and Inkson, 2004, Casey and Alach, 2004, Kunda, et al., 2002). Other workers are however disadvantaged by temporary work which may or may not be within a contract of service (Walker, 2011). 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, utilising outsourcing and temporary agencies in a new approach that increases labour productivity by pushing the costs and risks of employment onto workers (Burgess, et al., 2004, Watson, 2005).

There is evidence to suggest that casualisation can create "economic refugees" who are unable to find standard employment (Kirkpatrick and Hoque, 2006, Smeaton, 2003). The negative aspects of non-standard work can include the loss of job security, irregular work with periods of unemployment, low and variable earnings, the loss of non-pay benefits and training. Non-standard employment typically involves lesser protection for workers; contractors are the most deprived group, excluded from many employment-related statutory benefits and entitlements including protection against unfair dismissal, minimum wages, sick

² 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 Walker 2011)

leave and aspects of annual leave (Aloch and Inkson, 2004, Burgess, et al., 2004, Green and Heywood, 2011, McKeown, 2005, McKeown and Hanley, 2009, Smeaton, 2003). From that perspective, non-standard employment is viewed as precarious and potentially substandard employment. 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, leading to an eventual erosion of broader labour market standards (Burgess, et al., 2004, Watson, 2005). Fenton (2011) 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.

A study looking specifically at the New Zealand freelance film production industry, (Rowlands and Handy, 2012) alleges that the contract workers are a “vulnerable and underpowered group working in a highly competitive and insecure industry” (p.21). They report that the individualistic, project-based contracting arrangements cause the workers to constantly compete with each other, eroding collective relations and group loyalties. The short-term nature of the work, with highly intensive but rewarding periods of work that inhibit the workers’ ability to pursue other interests, interspersed with highly aversive unemployed periods between contracts, was seen as producing an addictive environment.

Alternative views of the processes

Against this backdrop, critics therefore argue that the events of the Hobbit dispute significantly compromised workers’ rights. Wilson (2011) 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. Although acknowledging that there was a degree of urgency, she asserts that there would still have been sufficient time for some form of public participation, by referring the amendment to a select committee for submissions and allowing a public debate on the implications of the legislation. Failing to consult in matters which brought major costs to workers, altering their status and removing their capacity to collectively negotiate their conditions of work is portrayed as an abuse of constitutional power. The end result was

therefore seen as leaving those workers “very vulnerable and without effective representation or legally enforceable employment rights” (Wilson, 2011pp. 90-91).

Haworth (2011) analyses the political and economic influences that shaped the events, 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 and a multinational company can exert greater influence. The ideologies of the government were seen as having a major bearing on the dispute. The government of the time was conservative, opposing trade unions and 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 (2011) contends that this government had a policy which gave priority to the desires of the business sector, enacting their preferences into legislation, while at the same time eroding employee rights and increasing the power of employers. Consequently, he asserts that the government “conceded, financially and legislatively, to the global film sector”, offering considerable additional subsidies. In his view, the amendments to the ERA 2000 thus served two goals; they were a concession to the film-makers’ 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 (Haworth p. 104).

The role of unions

On many levels the *Hobbit* dispute worked against the unions involved. The events highlighted the growing challenge of dealing with globalised competition and multinational companies. Responding to these requires collaboration across unions from 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 producers. The planned *Hobbit* production drew renewed attention to these matters, drawing them together into the one dispute. The fact that this production was driven by the international companies necessitated that local unions work together with international unions and the New Zealand Council of Trade Unions. Haworth (2011) proposes that given this situation, international involvement in the

Hobbit dispute should have been expected and “understood as acceptable and proper” (p.104).

In practice though, public perceptions 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, with Sir Peter Jackson describing the MEAA leadership for example as an ‘Australian bully boy’ motivated more by their own industry interests than worker solidarity (Tyson, 2011, p.7). The fact that unions were challenging the esteemed Sir Peter Jackson, the iconic New Zealander who had done so much in creating award-winning movies and making the country famous, made the unions appear as unreasonable trouble-makers. The public seemingly did generally not distinguish between the differing unions, even though their approaches differed. Actions by the unions were viewed unfavourably, even to the point of provoking widespread public protests opposing those actions. The Hobbit dispute demonstrates the increasing challenges confronting unions as strong negative public perceptions of unions now means that even local unions can hamper their ability to have any real 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 (2011) proposes quite a radical interpretation of the political aspects. He alleges that the government’s actions compounded this situation by fostering a public view that the unions were self-interested trouble-makers whose short-sighted actions were jeopardising the welfare of the rest of the country. He interprets the government’s actions as representing a deliberate attempt to disempower and exclude the unions. The government and the NZCTU both entered the dispute as external parties who had the potential to broker a solution and save the production. Haworth (2011) 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 producer 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 (2011) view, by ostracising and discrediting the unions, the government was able to claim for itself all the credit for saving the situation, at the same time colouring public attitudes towards the union movement and thus weakening the unions’ influence.

At the level of the workers, Rowlands and Handy (2012) describe the Hobbit dispute as also pitting groups of workers against each other. While the actors and their union sought to safeguard their own rights, they found themselves in conflict with the similarly under-protected non-unionized crew, causing those production workers to join protest marches as they saw their chances of working on the production threatened by the actors' industrial moves. The authors propose that the project-based contracting arrangements meant that production workers felt they had to claim the short-term gains of another period of temporary employment rather than work together for longer-term, less certain gains of industry-wide, collectively-negotiated, arrangements.

The Amendment: Redefining employment status

The "Hobbit Law", the amendment to the ERA 2000 that resulted from the dispute, is also the subject of critiques. Nuttall (2011) argues that the existing law at the time of the dispute was not problematic, and public beliefs that there were major flaws largely stemmed from "misunderstanding and misinformation" (p.73). The government and others lobbying for legislative change presented the view that, due to the *Bryson* case, 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 (Nuttall 2011, p. 73). 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 (2011) 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. On that basis, the law and its application in the *Bryson* case were not faulty and did not need fixing.

The original enactment of the ERA 2000 had sought to address situations where employers could purportedly label individuals as contractors to avoid responsibility for employee rights and entitlements. The label approach asserts that the written statement made by the parties at the time of commencing the working arrangements, labelling them 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 alone determined employment status (s6). 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. 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 (2011) 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. The “uncertainty” that the Minister criticised was the fact that the written statement was not the sole determining criterion. Nuttall (2011) therefore argues that in imposing the “label” criterion, the amendment potentially serves 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 2010 Amendment to the ERA 2000 overturns the *Bryson* Supreme Court decision and the intent would seem to make all workers in the film industry contractors, unless an employment agreement provided otherwise. Wilson (2011) suggests that the labelling approach becomes more problematic when dealing with organisations such as a major multinational corporation with very clear preferences regarding working arrangements; despite claims to the contrary, workers are likely to have little choice as to the type of arrangement they will enter into. If an employer proposes an arrangement and labels it as a contract for services then the worker will have little opportunity to challenge either that offer or the subsequent working arrangements.

Together, these factors offer a very pessimistic prognosis for the future of unions. The expansion of international companies in an increasingly global marketplace presents a formidable challenge which demands a new inter-country union response. The ability of unions to provide this type of response however is severely constrained by a range of factors including negative public attitudes, the role of governments and local legislation. Non-standard work and particularly contracting appears to create a growing area where unions are excluded with little influence or involvement.

Legislating for non-standard employment

The Hobbit case points however to a need to challenge the deeper assumptions regarding the rights of contractors and others in non-standard employment. There is a question as to whether the rights and protections of contractors should be less than employees. Writers such as Spoonley (2004) 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 is still heavily premised upon notions of 'standard' employment that stem from an earlier era. Changes to the nature of work and the labour market are leaving an increasing number of workers with few employment rights.

Wilson (2011) argues that the "current unreality" of the law suits the political interests of government (p.93). 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 neo-liberal economic ideologies. In the Hobbit case, the fact that the changed nature of work is no longer reflected in the law is seen as allowing a government to "conveniently change the legal definition on the grounds of clarifying the law", and so the reclassification of workers served 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 (Wilson 2011, p.92). From that perspective, the Hobbit case therefore highlights the vital need to bring the law into line with the reality of the modern labour market and changed work arrangements, addressing the consequences that these situations can have for individual workers (Wilson, 2011). It could be argued that there is an unrealistic legal vacuum surrounding contracting arrangements and that 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 generally remove that flexibility. A necessary starting point for action may therefore be to address the apparent inability of contractors to combine together to negotiate arrangements for their employment services. Wilson (2011) and Kelly (2011a) both contend that it is crucial to allow employees in non-standard employment to unite in collective action through trade unions in order to protect and further their interests. 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 (2011) for example, has suggested adopting provisions similar to Britain, 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” (p.54).

The rights of contractors: local and international labour standards

Existing international conventions and local statutes may already support these options, especially the rights of workers to engage in collective approaches. Haworth (2011) refers to the ILO 1998 Declaration on Fundamental Principles and Rights at Work which he argues gives, in the first instance, trade unions the ability to use international action in support of extended collective bargaining. ILO member countries such as New Zealand are required to adhere to these core labour standards even if they have not ratified them (Wilson 2011). Furthermore, Kelly (2011a) notes that ILO conventions 87 and 98 regarding the Freedom of Association and Protection, and the Right to Organise and Collective Bargaining, extend to contractors who are explicitly recognised in the decisions of the Freedom of Association Committee;

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 (ILO, 2008: 53)

Similarly, the ILO states that “No provision in Convention No 98 authorizes the exclusion of staff having the status of contract employee from its scope” (ILO, 2008: 180). Howarth (2011) therefore proposes that while the Hobbit dispute placed considerable emphasis on protecting investment issues, there appeared to be less attention to exploring global labour standards.

The restraint of trade provisions contained in New Zealand’s Commerce Act were cited as a major obstacle that prevented contractors on the Hobbit production from engaging in collective action to establish terms and conditions. Various conflicting legal opinions were

sought but no consensus was reached. Kelly (2011a) raises a number of questions regarding the application of this legislation to the situation of contract workers, including whether contractors are in competition, and whether the situation would represent grounds for the Commerce Commission to grant exemptions, as provided in the Act. Furthermore she points to the provisions of the Trade Union Act which evolved from legislation that was designed to refute claims that union activity was anti-competitive, and instead explicitly permit workers to combine to regulate arrangements with employers. If these alternative opinions prove to be correct, then the belief expressed in the Hobbit dispute, that contractors were barred from engaging in collective activities in negotiating their terms and conditions, may be erroneous.

These international and local issues have the potential to prompt significant debate among law makers, workers and business groups in each state. The outcomes are likely to have a pivotal influence on both the rights of workers, and the future of union membership and involvement.

Conclusion

The Hobbit case study highlights a set of pivotal, inter-related factors which have previously received comparatively less attention, yet are likely to determine the future of unions and worker representation worldwide. Kelly (2011b) 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. Their ability to do this was constrained by a wide range of factors. Metcalf (2005) proposed a set of six issues which have been cited as potential explanations for the changing status of trade unions. These comprised (i) the changing composition of the workforce and jobs, (ii) business cycles, (iii) the role of the State including economic policies and legislation, (iv) the attitudes of employers, (v) employees' perceptions of trade unions, and (vi) the strategic approach and structures of the unions.

That list now needs to be extended to acknowledge the factors shown in the Hobbit case. 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 now needs to be seen in the context of the growing power of multinational organisations that are often larger and more influential than nation states. An important point that can be overlooked however is that although the critiques highlight a range of issues concerning worker rights, those criticisms need to be considered alongside the question of whether, without making concessions to the

international corporations, New Zealand would have lost the productions, leaving local industries without the direct involvement or benefits. International corporations have the potential to influence or even prescribe government policies and legislative frameworks. The existence of these corporations presents a need for unions to enter into new types of cross-border collaborative action with renewed urgency. Associated with this, the Hobbit events illustrate 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 events have identified the fragility of employment rights in relation to the area of non-standard employment and particularly contracting. This area may represent a new frontier where fundamental issues such as worker rights and union involvement are yet to be negotiated. While some groups of workers may currently benefit from this setting, others can be disadvantaged. The international conventions agreed by member states may form one area of regulation and protection with the potential to uphold workers' rights, yet as the Hobbit episode illustrates, this is dependent on the way in which these are interpreted at local levels. If the outcome of the debates surrounding non-standard work proves unfavourable then the Hobbit events may provide an indication of a rather unhelpful future of worker representation worldwide. Conversely, the Hobbit events may prompt a renewed attention to addressing fundamental rights and lead to improved conditions for those workers who do not fare well in non-standard employment, bringing a new dimension to worker representation that may become extended to contractors.

References

- Alach, P. and Inkson, K. (2004), The new "office temp": alternative models of contingent labour *New Zealand Journal of Employment Relations*, 29 (3): 37-52
- Burgess, J., et al. (2004), Temporary agency work in Australia and New Zealand: out of sight and outside the regulatory net *New Zealand Journal of Employment Relations*, 29 (3): 25-36
- Casey, C. and Alach, P. (2004), 'Just a Temp?' Women, temporary employment and lifestyle *Work, Employment and Society* 18 (3): 459-480
- De Cuyper, N., et al. (2008), Literature review of theory and research on the psychological impact of temporary employment: Towards a conceptual model *International Journal of Management Reviews* 10 (1): 25-51
- Fenton, D. (2011), Insights into Contracting and the Effect on Workers *New Zealand Journal of Employment Relations*, 36 (3): 44-58

- Green, C. P. and Heywood, J. S. (2011), Flexible contracts and subjective well-being *Economic Inquiry*, 49 (3): 716-729
- Haworth, N. (2011), A Political Economy of 'The Hobbit' Dispute *New Zealand Journal of Employment Relations*, 36 (3): 100-109
- Kelly, H. (2011a), The Hobbit Dispute *New Zealand Journal of Employment Relations*, 36 (3): 30-33
- Kelly, H. (2011b) The Hobbit Dispute *Scoop*. <http://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm>.
- Kirkpatrick, I. and Hoque, K. (2006), A retreat from personal employment? Accounting for the rise of professional agency work in UK public services *Work, Employment and Society*, 20 (4): 649-666
- Kunda, G., et al. (2002), Why do contractors contract? The experience of highly skilled technical professionals in a contingent labour market *Industrial and Labour Relations Review* 55 (2): 234-261
- McKeown, T. (2005), Non-standard employment: When even the elite are precarious *Journal of Industrial Relations* 47 (3): 276-293
- McKeown, T. and Hanley, G. (2009), Challenges and changes in the contractor workforce *Asia Pacific Journal of Human Resources* 47 (3): 295-317
- Metcalf, D. (2005) British Unions: Resurgence or Perdition? *Provocation Series, volume 1 (1)*. London, The Work Foundation.
- Nuttall, P. (2011), "...Where the Shadows lie": Confusion, misunderstanding, and misinformation about workplace status *New Zealand Journal of Employment Relations*, 36 (3): 73-90
- Rowlands, L. and Handy, J. (2012), An addictive environment: New Zealand film production workers' subjective experiences of project-based labour *Human Relations*, 65 (5): 657-680
- Smeaton, D. (2003), Self-employed workers: Calling the shots or hesitant independents? A consideration of the trends *Work, Employment and Society*, 17 (2): 379-391
- Spoonley, P. (2004), Is non-standard work becoming standard? Trends and Issues *New Zealand Journal of Employment Relations*, 29 (3): 3-24
- Tyson, A. F. (2011), A Synopsis of The Hobbit Dispute *New Zealand Journal of Employment Relations*, 36 (3): 5-13
- Walker, B. (2011), How does non-standard employment affect workers? A consideration of the evidence *New Zealand Journal of Employment Relations*, 36 (3): 14-29
- Watson, I. (2005), Contented workers in inferior jobs? Re-Assessing casual employment in Australia *Journal of Industrial Relations*, 47 (4): 371-392
- Wilkinson, K. (2011), One Law to Rule them All *New Zealand Journal of Employment Relations*, 36 (3): 34-36
- Wilson, M. (2011), Constitutional Implications of 'The Hobbit' Legislation *New Zealand Journal of Employment Relations*, 36 (3): 91-99

