

CLEW'D IN

NEWSLETTER OF THE CENTRE FOR LABOUR, EMPLOYMENT AND WORK (CLEW)

NOTICES

Employment Agreements Update 2014/2015 still available

If you are heading into bargaining in the next six months make sure you have checked out our publication ***Employment Agreements: Bargaining Trends and Employment Law Update 2014/2015***.

The book is seen as the essential reference for employment relations experts and the only source of information on current provisions in employment agreements. It includes information on wages/ salaries, all forms of leave, work hours and penal/ overtime rates, kiwisaver, redundancy, and much more.

Our stocks are getting low but we expect to order more early next year if there is sufficient demand.

[Order forms](#) are available on our website.

Thanks to all our supporters

A big thank you to those who have supported the Centre over this year. We wish you all a very restful holiday and a break from your labours and work.

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In our final issue for 2015 the findings from our latest Union Membership Survey are revealed and our legal experts at Kiely Thompson Caisley discuss the recently released Employment Court ruling in the NZ Meatworkers Union v AFFCO New Zealand Ltd.

RESEARCH UPDATE: THE STATE OF NEW ZEALAND UNION MEMBERSHIP IN 2014

Report from Sue Ryall and Dr Stephen Blumenfeld

The Centre for Labour, Employment and Work (CLEW) has collected data on union membership each year since enactment of the Employment Contracts Act in 1991. In that time, there has been a dramatic decline in the share of New Zealand's workforce that belong to a trade union, as well as a concomitant shift in the composition and structure of union membership in New Zealand. While declining union membership over the past three or four decades is an international phenomenon and much has been written on the impact of this on employment conditions and the rise of social and income inequality, the drop in trade union membership and density experienced in New Zealand in the first few years of the ECA 1991 was far more precipitous than in virtually any other country around the globe.

Within the labour movement and amongst academics in the field of industrial relations, there has been much discussed and written on the need for union 'renewal' and 'revival'. Unions have attempted to address this pressing need by taking a broader approach to organising new members, often manifest in terms of a shift away from collective bargaining as the primary means of achieving better pay and conditions for union members. The 'Living Wage' (SFWU), the movement to end 'zero-hour' contracts (Unite), and that to promote gender equity in pay (NZPSA and SFWU) are but three examples of such campaigns, which reflect attempts by organised labour to extend

unions' influence and support base to workers who may feel disenfranchised from traditional bargaining relationships.

So what does union membership in New Zealand look like in 2014?

CLEW Survey

The union membership survey conducted by CLEW is distributed to all registered trade unions in New Zealand in late March of each year with a target closing date of 30 April. That survey asks those unions to account for their membership numbers as at 31 December of the previous year. At September 2015, the time of initial processing of CLEW's latest union membership survey, 78 of the 137 registered unions had returned completed surveys to CLEW. Union membership data for a further 48 registered unions was sourced from the Registrar of Unions. All unions have a statutory obligation to submit a return to the Registrar by 1 June each year of their membership numbers at 1 March in that year. This leaves 11 registered trade unions for which union membership tallies for the year ending 31 December 2014 are unknown.

For the purposes of interpreting our data it is important to note the following:

1. One union, in education and training, has changed the way it categorises 'membership' for the purposes CLEW's survey.¹ That union now includes only financial members in their survey return, whereby they had previously included other categories of membership – student members and 'suspended' memberships – in its tally. This change in practice has resulted in an apparent reduction of close to 5000 members in CLEW's accounting for December 2014 and a discrepancy of around 3000 from that returned to the Registrar of Unions for March of this year.
2. Across the 48 unions for which membership data was sourced from the Registrar, the distribution of total membership across sectors has been estimated from past survey returns or assumptions based on the industry coverage area, as indicated in the Register of Unions.²
3. Where unions did not allocate 100% of their membership to an industry or where no industry was indicated on the union membership return to CLEW, those membership numbers have been added to the category 'no industry'.

Total union membership (Table 13)

The drop in union membership did not occur during or immediately after the GFC (2008-2010), when overall employment in New Zealand fell. But, rather, New Zealand trade union membership declined, instead, between 2011 and 2013, hence commencing nearly two years after the end of the GFC and recession in New Zealand.

With these caveats in mind, total union membership in New Zealand appears to have continued its decline since the beginning of the global financial crisis (GFC) and recession. To this end, there appears to have been in excess of 20,000 fewer union members in New Zealand at the end of 2014 than six years prior, at the end of December 2008. Noteworthy in this regard is that the drop in union

¹ In this regard, CLEW asks respondents to its survey to account for their 'total financial membership'. MBIE, on the other hand, ask for 'total membership' by industry (at level 1 ANZSIC) and gender. CLEW further asks for the composition of the membership (as a percentage) by gender, by industry (at level 2 ANZSIC) and by ethnicity.

² See <http://www.societies.govt.nz/cms/registered-unions/register-of-unions>.

³ All tables are available on CLEW's website - <http://www.victoria.ac.nz/som/clew/research/our-publications>

membership did not occur during or immediately after the GFC (2008-2010), when overall employment in New Zealand fell. But, rather, New Zealand trade union membership declined, instead, between 2011 and 2013, hence commencing nearly two years after the end of the GFC and recession in New Zealand.

Also important to note in this regard is that the decline in union membership since 2011 has slowed in the year to December 2014, notwithstanding that there was also a concomitant increase of around 4 percent in both total employment and wage and salary earners in 2014. Nonetheless, as employment has increased during the economic recovery, union membership numbers have been virtually static. One possible explanation for this phenomenon lies in the age distribution of union members. That is, some have suggested that unions have failed in the past several years to attract young people to their ranks to replace older members as they retire and that union membership is, therefore, effectively aging faster than both the workforce in general and the country's population.

Although similar data is not currently available for New Zealand, recent data published by the Australian Statistics Bureau⁴, which includes a breakdown of age structure of union membership and union density, suggests it is more likely that those in employment aged 55-64 are trade union members than is the case

for younger workers across the ditch. To this end, whereas more than one-fifth (21 percent) of employed Australians in the 55-64 age group belong to a union for their main job, only 15.7 percent of Australian workers in the 35-44 age group and 11 percent in the 25-34 age group are union members. Moreover, while the union density is higher in the older age-groups,

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more than one fifth (22 percent) of trade union members are aged 20-34 years, and half of Australian trade union members are aged 35-54.

Industry Spread of trade union membership (Table 2)

Union membership remains predominantly in the public sector and community services industries with 62 percent of union members employed in these parts of the economy. A quarter of union members in New Zealand work in health care or social assistance, and just over a fifth (22 percent) work in education and training. Outside of these predominantly public sector industries, union membership remains highest in manufacturing, and transport, postal and warehousing, all of which represent a far smaller share of the economy than was the case three decades ago. Furthermore, with the exception of education and training, the largest numeric drop in union membership in the year to 31 December 2014 has occurred in healthcare and social assistance, and professional, scientific, technical and administrative services (business services). Construction also experienced a large drop in union membership (11.2 percent) in 2014, despite employment in the industry growing 12.6 percent over that 12 month period.

Despite these trends, a number of industries saw growth in union membership in the year to 31 December 2014. Union membership in the wholesale trade industry, for instance, grew by 70 percent, albeit off a very small level of membership and low industry union density (approximately 1 percent). The 'utilities' industries and information media and communications industry group – at 16.8 percent and 13.9 percent,

⁴ Australia Bureau of Statistics *Characteristics of Employment, Australia, August 2014*, Cat. No. 63330DO010_201408. <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6333.0>

respectively – both experienced substantial growth in union membership during 2014, and both of these increases are at a greater rate than the growth in employment in these parts of the labour force. This was also true for a number of industries located in the private sector, including manufacturing, retail trade and accommodation, financial and insurance services, and rental, hiring and real estate services. Nevertheless, public sector union membership decreased over that period, during which time the number of people employed in the sector increased, hence resulting in a fairly substantial decline in public sector union density in the 12 months to the end of December 2014.

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Union density (Tables 3 and 5)

Overall, union density in New Zealand fell from 19.1 percent to 18.5 percent of wage and salary employees

in the year to 31 December 2014, after sitting at 20 percent two years earlier, at the end of 2012. The country’s public service still maintains the highest levels of union density with close to two-fifths of employees in that sector belonging to a union. However, over the last five years, union density in New Zealand’s public sector has fallen, as growth in employment has outstripped that in union membership.

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Furthermore, the only private sector industry that comes close to matching public sector union density is transport, postal and warehousing (38 percent). Mining (26.5 percent), manufacturing (21.5 percent), and utilities services (20 percent) are the only other parts of the private sector where union density is greater than one in ten. It is also of concern for unions that their areas of greatest numbers are those where total employment is, in fact, decreasing. For that matter, it is this, rather than an increase in union membership, that is driving increased density in those parts of the labour force. In order to keep pace overall, therefore, unions will need to grow their membership numbers at least at the same pace as employment in the growing technology and service industries.

Despite this gloomy picture for its unions, New Zealand is not alone in experiencing a declining trend in trade union density. Of the four countries that we monitor for trade union membership levels (Australia, UK, USA and Canada), only Canada has maintained union density (30.5 percent) across the last five years. Australia, where union density among wage and salary workers currently stands at around 16.7

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percent, has experienced a similar rate of decline in union membership and density to New Zealand over the past three years.

Union membership in the public and private sectors (Table 5)

Underscoring the fact that union membership in New Zealand – much like in most other OECD countries – remains primarily a public sector phenomenon, 59 percent of wage-and- salary employees in the country’s public sector belong to a trade union, while only 12 percent of private sector employees are unionised. Also, as in 2013, 57 percent of trade union members in New Zealand work in the public sector, despite a fall of 2 percent for total union membership in that sector.

The higher level of union density in the public sector is common across the four comparator countries to which we refer in Table 5. Canada has the highest concentration of union members in the public sector, with three quarters of such employees in that country belonging to a union. As for Australia, a media release accompanying the August 2014 release of the Australian Bureau of Statistics’ *Characteristics of Employment in Australia* notes, “...a higher proportion of public servants were trade union members in their main job (39 percent) compared to those in the private sector (11 percent).” Only the USA has fewer union members who work in the public sector than in the private sector. But, for the other countries in our comparison, there is 30- 40 percent more public sector union members than private sector.

Size of Unions (Table 6)

There is very little change in the spread of union membership across different size of unions in New Zealand from that which we last reported for the year to 31 December 2013. One union that had previously reported a membership of more than 10,000 members is now just under that figure, thus increasing the proportion of unions who have a membership in the range 5000 to 9999.

While the average size of a New Zealand trade union, based on those who returned surveys, is 2891 members, the median is only 145 members. It would have to be questioned, though, as to how unions with such a small membership are able to sustain a level of service to their members such as is required

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in today’s workplace. Forty-five unions (36 percent of the total) have a membership of under 100 members, 31 of which are private sector unions, 10 are in local government and local government trading organisations, and 4 are in central government. Many of these small unions are clearly only operating in one workplace

or with one employer. It is also likely that most are reliant on the goodwill of volunteers to service their membership or that the union exists only to ensure the continuation of a collective agreement.

Despite the significant number of relatively small unions, 83 percent of union members in New Zealand belong to one of twelve unions. This implies that the vast majority of employees who belong to a union in this country are members of unions with a solid membership base and which are likely to be well-resourced organisations. As would be expected from the earlier discussion of dominance of the public sector with regard to union membership, of the four unions with a membership greater than 30,000 members, only one is in the private sector.

Union amalgamation is also likely to continue as a trend in the face of declining overall union membership. In the past few years the Tertiary Education Union was formed with the amalgamation of

the unions for university staff and polytechnic staff; FIRST Union was formed from the FINSEC and NDU amalgamation; and the Engineering, Printing and Manufacturing Union (EPMU) merged with the NZ Building Trades Union. Although not covered in our 2014 survey year, in 2015 the NZ Public Service Association has merged with Southern Local Government Officers Union and E Tū was formed from the amalgamation of the Service and Food Workers Union and the EPMU. Preparations are also well underway for the Flight Attendants and Related Services Association (FARSA) to join E Tū and bring its membership to more than 50,000.

Gender (Table 7)

As has been the case for more than a decade, a majority of union members in New Zealand (57.5 percent)

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are female, but a closer look shows that female membership is largely concentrated in the three large state sector unions – the Public Service Association, the NZ Nurses Organisation (NZNO) and NZEI (primary teachers union). These are also the three largest unions in New Zealand at 31 Dec

2014, and among them is 60 percent of the total female union membership in the country. In addition, smaller unions tend to have higher male membership. Only twenty-four of the eighty-four unions with less than 500 members have a majority of female members, and only 35 percent of the total membership in unions with less than 500 members is female. In contrast, eight of the fourteen unions with more than 4000 members have a majority of female members and 61 percent of the total membership of these unions is female.

NZ Council of Trade Unions (NZCTU) affiliation (Table 8)

The number of unions affiliated to the NZCTU has also decreased in the past year, as has the percentage of union members who are affiliated (through their union) to the CTU. However, the change in reporting of the NZCTU-affiliated education union's membership has impacted these figures. The NZCTU affiliated unions tend to be the larger unions. Of the 84 unions with less than 500 members only seven are affiliated to the NZCTU and three of those affiliated unions have more than 400 members. With the exception of one union, all the unions with membership over 4000 (a total of 14 unions) are affiliated to the CTU.

The NZCTU affiliated unions tend to be the larger unions. Of the 84 unions with less than 500 members only seven are affiliated to the NZCTU and three of those affiliated unions have more than 400 members.

Finally, with many of the recent union amalgamations happening amongst NZCTU affiliated unions, it seems that future amalgamations are unlikely to impact small unions. That is, it will likely be the mid-sized and larger unions which look to amalgamate in the foreseeable. But, if the NZCTU is looking to maintain union membership, it may need to work with the smaller unions, whether they be affiliated or not, to form stronger, better resourced unions through amalgamation.

LEGAL UPDATE: NZ MEAT WORKERS & RELATED TRADES UNION INC AND ROBERTA KEREWAI RATUI AND OTHERS V AFFCO NEW ZEALAND LIMITED [2015] NZEMPC 204.

The Employment Court has ruled that a lockout of AFFCO union members was unlawful and AFFCO did not act in good faith during collective bargaining with the New Zealand Meat Workers & Related Trades Union.

Background

AFFCO New Zealand Limited ('AFFCO') is a meat processing company which operates plants around New Zealand. This case directly relates to the AFFCO plants at Rangiora (Bay of Plenty), Imlay (Whanganui) and Feilding (Manawatu), but the issues decided will also affect several of their other plants around the country.

Meat processing is a seasonal industry in New Zealand. During the 'off season', employees are 'laid off', and are then 're-engaged' before, at or after the commencement of the next season.⁵

New Zealand Meat Workers & Related Trades Union Inc ('the Union') was a party to a collective agreement with AFFCO which expired on 31 December 2013. The collective agreement continued in force until 31 December 2014 pursuant to the statutory 12-month extension allowed under the Employment Relations Act 2000. During this time the parties had been engaged in collective bargaining but this had not made significant process by the time the collective agreement expired.⁶

From 31 December 2014 to the 2014/2015 seasonal closure of each plant, union members were employed under individual employment agreements ('IEA') based on the expired collective agreement.

The Rangiora plant closed for the season on 17 April 2015. On or about 2 June 2015 AFFCO informed those who had worked at the plant the previous season and had been laid off of its intention to reopen on 22 June 2015. They invited them to attend introduction presentations from 8 June 2015 for a new intended IEA at the plant.⁷ At the introduction presentations, each person was given an information document and a proposed IEA.⁸ The documentation stated that AFFCO required a signed IEA with each employee before they commenced work.

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The Union learnt of this process from its members and objected on their behalf, but these objections were effectively ignored by AFFCO.⁹ The Court asserted:¹⁰

AFFCO's specified timeframes [for considering and signing the proposed individual employment agreements] were short and there is no evidence, as we would have expected if this had

⁵ At [8].

⁶ At [15].

⁷ At [6].

⁸ At [6].

⁹ At [23].

¹⁰ At [23].

happened, that the Union had been forewarned of these significant changes to the usual process of re-engagement at the start of the season or involved in its formulation or management.

That was despite AFFCO being aware that a significant number of employees were union members and despite the fact that it was then in collective bargaining with the Union for a replacement collective agreement that was intended, at least by the Union, to operate in respect of the coming season.

On 9 June 2015 the Union filed proceedings in the Employment Court alleging an unlawful lockout and seeking an interim injunction to stop AFFCO's actions. This application for an interim injunction was denied.¹¹ Following this, almost all members of the Union at the Rangiora plant signed the proposed IEA without seeking any changes to the document, and were engaged for employment from 22 June 2015.¹²

During June and July 2015 this process also occurred at the Imlay and Manawatu plants before the commencement of the new season.

The Union brought a case to the Employment Court challenging AFFCO's actions.

The issues before the Employment Court were:

- *Did AFFCO unlawfully lock out the union's members by refusing to re-engage them in employment at the start of the 2015/2016 killing season other than on AFFCO's terms and conditions of employment set out in the new IEAs?*
- *Did AFFCO breach its statutory obligations of good faith in collective bargaining?*

Was there continuous employment from season to season?

For AFFCO to have committed an unlawful lockout, the union's members would need to have been employed at the time of the lockout, and the lockout would need to be unlawful.

A key issue was whether the union members were continuously employed from season to season (the Union's position), or were no longer AFFCO employees after being laid off at the end of the 2014/2015 season and so would have been applicants for new employment for the new 2015/2016 season (AFFCO's position).¹³

The Court analysed the terms of the expired collective agreement; the working arrangements of the parties; the differences between the expired collective agreement and the new IEA; the definition of 'employee' under the Employment Relations Act 2000; and the relevant case law on the meat working industry.

The Court held that the union members were employees during the seasonal lay-off.¹⁴

¹¹ At [6].

¹² At [6].

¹³ At [30].

¹⁴ At [179].

Quote from judgment

'The off-season is, however, a period during which it is agreed that the employees will not perform work and will not be paid but will have, nevertheless, an expectation that they will be re-engaged'.

seniority and their satisfactory performance during the previous season.

That is not to say that the work is not seasonal: clearly it is. The off-season is, however, a period during which it is agreed that the employees will not perform work and will not be paid but will have, nevertheless, an expectation that they will be re-engaged (although termed "re-employed") subject to the fulfilment of conditions relating to the date or dates on which that occurs, their

Was there an unlawful lockout?

The Court concluded that on the basis that the union members were employees of the defendant when seeking to be re-engaged at the end of their seasonal lay-off, the lockout was unlawful:¹⁵

The Court held:¹⁶

Combined with its actions in current collective bargaining for a collective agreement with which the Union did not agree, AFFCO's refusal to re-engage the [union members] amounted to a lockout under s 82 of the Act. They were the acts of the employer of those employees in refusing or failing to engage those employees for work for which the employer usually employed employees, with a view to compelling those employees to accept terms of employment, or, alternatively, to comply with the employer's demands (s82(1)(a)(iv) and (b)).

AFFCO was intent upon achieving its outcome in difficult collective bargaining, by purporting to re-engage the employees for the coming season effectively on its desired collective terms and conditions of employment, but contained in IEAs rather than a collective agreement.

Quote from judgment

'AFFCO was intent upon achieving its outcome in difficult collective bargaining, by purporting to re-engage the employees for the coming season effectively on its desired collective terms and conditions of employment, but contained in IEAs rather than a collective agreement'.

The lockout was also unlawful because it was imposed without the required notice to the employees.

Did AFFCO breach its duties of good faith in collective bargaining?

The Court found that AFFCO had breached its duties of good faith in collective bargaining. AFFCO's actions in engaging or attempting to engage the union members in re-employment under the IEAs breached its duties of good faith in collective bargaining.¹⁷

AFFCO was held to have acted in bad faith by:¹⁸

- Directly approaching the employees because it had failed or refused to involve the Union. AFFCO's strategy in approaching the employees and engaging directly with them was, directly or

¹⁵ At [194].

¹⁶ At [197] and [198].

¹⁷ At [201].

¹⁸ At [202] – [205].

indirectly, likely to mislead or deceive the Union and the union members. This was misleading conduct concerning AFFCO's intentions both in the collective bargaining and for employment in the new season. AFFCO's actions were not active or constructive in building a productive employment relationship with the Union or the employees.

- By bargaining directly with the individual employees about matters relating to the terms and conditions of their employment, who were represented by the Union. The Union was not given an opportunity to agree to AFFCO contacting the employees. AFFCO had an obligation to consult fully and openly with the Union, but refused or failed to do so.

The Court stated:¹⁹

The terms and conditions of AFFCO's standard or generic form of IEA, agreement to which in substance it insisted upon before work was provided, were essentially its claims to, or demands for, those terms and conditions for which it was bargaining collectively with the Union.

AFFCO sought to short-circuit collective bargaining by seeking to achieve its objectives therein by insisting upon them as a condition of re-engaging individual employees for the current season.

The Court also commented that in the alternative, the actions of AFFCO undermined, or were at least likely to undermine, the collective bargaining and/or authority of the Union in bargaining.

The Court also commented that in the alternative, the actions of AFFCO undermined, or were at least likely to undermine, the collective bargaining and/or authority of the Union in bargaining. Once many employees were signed onto the IEAs, there was little point in AFFCO continuing to bargain with the Union.²⁰

Remedies

The Court declined to award the remedies sought for several reasons including the possibility of further mediation or facilitated collective bargaining where the parties may come to an agreement as to how to proceed.²¹

MBIE AND CLEW PARTNER ON COLLECTIVE AGREEMENTS DATABASE

CLEW has recently reached an agreement with the Ministry of Business, Innovation and Employment (MBIE) to provide database services for the collective employment agreements submitted to the Ministry in compliance with Employment Relations Act 2000.

The CLEW database has operated since 1992 and we collect data on a wide range of provisions and calculate an annualised increment for the term of the agreement as part of our longitudinal research on employee provisions through collective agreements. Since 2000 collective agreements must be sent to

¹⁹ At [207].

²⁰ At [209].

²¹ At [212] - [214].

the Registrar on Unions and until recent years the Ministry also collected data across a range of provisions. But the Ministry only needs a small range of data on the agreements (parties, industry, coverage, wage increments) for their reporting purposes and is now makes sense for CLEW to store the data for MBIE and produce the data reports required.

While many unions and some employers send all their agreements to both the Ministry and CLEW this is not always the case and CLEW will ensure that the agreements sent to MBIE are kept separately in our database and not used for our research unless we have the permission of one of the parties to the agreement.

However, we would like to be able to add all agreements to our database to provide a more comprehensive set of data for our research and to include in our annual reports in the *Employment Agreements: Bargaining Trends and Employment Law Update*. So if we receive an agreement from MBIE that we do not have in our data we will contact unions and/or employers for permission to include in our research. The data on specific agreements we collect for the CLEW database remain confidential to CLEW and only aggregated data is published or released to other parties. Copies of agreements are only released to the respective parties to the agreements or with permission of one of those parties.

This is an exciting new collaboration that will be of benefit to everyone involved.

CLEW – WHO ARE WE?

The Centre for Labour, Employment and Work (CLEW) is situated in the School of Management at Victoria University of Wellington. Our research and public education programme are centred on three pillars of research:

<p>Organisational dynamics and performance - What happens in organisations matters. From strategies, business processes, management practices, worker experiences to knowledge sharing, collaboration, innovation, productivity, engagement and trust – these all impact how individuals and organisations perform.</p> <p>Contact person: Dr Geoff Plimmer Tel: 04 463 5700 Email: geoff.plimmer@vuw.ac.nz</p>	<p>Employment rights and institutions - What is the role of trade unions and of collective bargaining in New Zealand’s contemporary economy and society? Is the current system of employment rights and the institutions and processes for enforcement of those rights in New Zealand still relevant? Is it efficient, and does it contribute to overall productivity growth?</p> <p>Contact person: Dr Stephen Blumenfeld Tel: 04 463 5706 Email: stephen.blumenfeld@vuw.ac.nz</p>	<p>Changing nature of work and the workforce - Rapid and increasing change in the external environment of organisations has fundamentally changed the world of work. Factors shaping how we organise and participate in work include rapid technological development, intensifying environmental and resource pressures, globalised markets, mobile workforces and changing demographics.</p> <p>Contact person: Dr Noelle Donnelly Tel: 04 463 5704 Email: noelle.donnellv@vuw.ac.nz</p>
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