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I THE EMPLOYMENT RELATIONS ACT 2000: DEVELOPMENT OF UNION RIGHTS

The purpose of this paper is to examine the development of union rights under the 2000 Employment Relations Act (ER Act). Focusing on the practical legal issues unions face in exercising their rights.

Enactment of the Employment Relations Bill was widely perceived to counter the hostile union environment that had arisen under the 1991 Employment Contracts Act (EC Act). Unions are given a central role under the ER Act in promoting the collective organisation of employees to counter the inherent imbalance of power in the employment relationship.

The first section of this paper presents an historical perspective of union rights, summarising the main legislative environments New Zealand unions have operated under. The second section then sets out ER Act objectives upon which to base our analysis of union rights. The role and health of the New Zealand union movement is then examined so we may determine the impact expanded union rights have had.

The main body of the paper then identifies the key practical issues facing unions in exercising their rights. Analysis of these issues involves identifying unions’ legal entitlements, how unions utilize those provisions and then assessing whether interpretation of those rights has been successful in achieving the relevant objectives of the Act. This section presents the main arguments for reviewing the ER
Act's union rights provisions to ensure more effective union workplace participation.

II HISTORICAL DEVELOPMENT OF NEW ZEALAND UNION RIGHTS

As a young colony New Zealand enacted the 1878 Trade Union Act, based on an earlier British statute. Prior to this legislation English law often sought to regulate worker's wages and prohibit collective worker organisations in particular industries and locations, often in the form of criminal statutes. The Trade Union Act legally recognised and protected New Zealand's unions from criminal prosecution for collective action.

A Industrial Conciliation and Arbitration Act 1894

The pluralist principles of the 1894 Industrial Conciliation and Arbitration Act were to govern New Zealand industrial relations until the passing of the EC Act nearly a century later.

The Act and its many amendments gave registered unions statutory protection, support and monopoly bargaining rights in return for restricting their collective actions and complying with operation rules.

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1 Trade Unions Act 1871 (UK); H Roth Trade Unions in New Zealand: Past and Present (A H & A W Reed LTD, Wellington, 1973) 93.
3 Roth, above, 93.
As worker representatives unions were essential to the arbitration and conciliation process. Employers were obliged to participate in conciliation proceedings. In the event of failure to agree parties had access to the Arbitration Court, which could issue blanket industry coverage awards enforceable by law.\(^6\)

Union membership was compulsory from 1936 until 1961. However, ‘union shop’ rules and union preference clauses inserted into agreements and awards effectively provided for compulsory unionism until 1991.\(^7\)

**B The Fourth Labour Government**

While the New Zealand labour law did not escape the reformist brush of the 1984 Fourth Labour Government unions retained many of their rights and protections.

Compulsory arbitration was abolished in 1984, forcing unions to primarily rely on conciliation as a means to successfully conclude employment agreements.

The 1987 Labour Relations Act encouraged collective bargaining and sought to end union dependence on government support.\(^8\) However, registered unions continued to enjoy statutory protection and were granted broader powers of operation.\(^9\) The Act’s major change was that all unions were

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\(^6\) Brosnan and Wilson, above, 2; Woods, above, 12.
required to register and have a minimum size of 1000 members, starting the trend of union consolidation that was to continue until enactment of the ER Act.

The 1988 State Sector Act bought the public sector under the reformed private sector industrial relations system.

C Employment Contracts Act 1991

The new National Government completed the deregulation and decentralisation of New Zealand’s industrial relations system with the introduction of the 1991 Employment Contracts Act. Based on neo-classical ideology, it aimed to provide a framework for the efficient operation of the labour market.\footnote{As stated by the Employment Contracts Act’s Long Title; Peter Agnew Employment Law Guide (6 ed, LexisNexis New Zealand Ltd, Wellington, 2002) 30.} Efficiencies were to be achieved by the removal of industrial regulation and a flexible workforce.\footnote{A J Geare “The Employment Contracts Act 1991-2000: A Decade of Change” (2001) 26(3) NZJIR 287, 291.}

While a strict purist reading of the Act may concur with the view of Hardie Boys J that “the Act is not anti-union; it may fairly be described as union-neutral”,\footnote{United Food and Chemical Workers Union v Talley [1993] 2 ERNZ 360, 370 (CA) per Hardie Boys J.} the removal of statutory support relied on by unions for decades had the object and effect of being anti-union.\footnote{Geare, above, 292; Jane Kelsey The New Zealand Experiment: A World Model For Structural Adjustment? (Auckland University Press, Auckland, 1997) 181-182; Agnew, above, 31.}

Employers and employees were viewed as two equal, freely contracting parties. Unions had no legal recognition or role. As “employee organisations” under the Act, unions were generally seen as “outside influences” with no partnership role
in the workplace. Their function was to act as a choice of bargaining agent and provide employees with information on their legal rights and obligations.

Union membership was voluntary, union workplace access and strike action severely restricted. Once a union had gone to the expense of obtaining specific authority to represent individual workers the employer could still refuse to negotiate with them. The Act did not adequately provide for negotiation or mediation, encouraging an adversarial and litigious approach to dispute resolution.

This hostile legislative environment lead to further union consolidation, and union membership plummeted from 684,825 in September 1989 to 302,405 in December 1999. Collective employment agreement coverage also collapsed through legislative promotion of individual employment contracts.

Health and Safety in Employment Act 1992 further deregulated the workplace, removing enforceable union rights to be involved in the management and policing of workplace health and safety issues.

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15 Agnew, above, 151.
19 Kelsey, above, 188.
22 Kelsey, above, 202-203.
III Employment Relations Act 2000

Enactment of the ER Act 2000 fulfilled the election promises of the new Labour/Alliance Coalition Government to appeal the EC Act; it came into force on 2 October 2000.

The ER Act has very different objectives to all preceding New Zealand labour legislation. Unlike the EC Act that viewed employment relationships from a purely contractual and economic standpoint, the ER Act acknowledges the wider social and intrinsic components of those relationships. However, the Act does not signal a return to exclusive representation rights, or compulsory unionism and arbitration. It has been described as a moderate shift in New Zealand’s employment law.

A Employment Relations Act Objectives

Section 3 sets forth the guiding principles of the ER Act, designed to encourage co-operation and partnership between parties to the employment relationship:

[The object of this Act is-]

a) to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship-

i) by recognising that employment relationships must be built on good faith behaviour; and

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26 Employment Relations Act 2000, s 3.
ii) by acknowledging and addressing the inherent inequality of bargaining power in employment relationships; and
iii) by promoting collective bargaining; and
iv) by protecting the integrity of individual choice; and
v) by promoting mediation as the primary problem-solving mechanism; and
vi) by reducing the need for judicial intervention.

The ER Act seeks to acknowledge the special character of employment relationships and the power imbalance between employer and employee. Unions are fundamental to the operation and achievement of the Act’s objectives. Collective bargaining is encouraged to counter inequality. This exclusive union role is granted in Part 4, which provides the framework for union rights and recognition.

1 International Labour Organisation Conventions

Recognition of unions’ right to participate in the employment relationship is strengthened by the inclusion in section 3 of the objective to observe the principles underlying International Labour Organisation (ILO) Conventions 87 and 98.

Convention 87 provides for Freedom of Association rights for both employers and employees in establishing and joining employer and employee organisations. Convention 87 has yet to be ratified, as minor areas of incompatibility between the ER Act and Convention exist.28

28 Areas of incompatibility include strike restrictions and the failure to allow lawful secondary, sympathy or political strikes; Agnew, above, 71.
New Zealand has recently ratified Convention 98 on the Protection of the Right to Organise. It requires the State to protect unions and union members against acts of discrimination and provide mechanisms for the promotion of collective bargaining.29

2 Good Faith

The ER Act seeks to promote productive employment relationships by requiring good faith conduct and use of mediation, rather than judicial intervention to resolve employment disputes. As a recognised party to the employment relationship unions have a right to good faith behaviour in dealings with other parties.30

Noticeably the good faith concept is not defined; rather its meaning will develop over time.31 Good faith does not restrict negotiating parties’ freedom by requiring them to negotiate certain agreement provisions or reach agreement.32 Good faith obligations are expressly elaborated through the Act’s provisions, notably for unions in sections 4(4) and 32.

In NZ Public Service Association Inc v Auckland City Council 33 the full Employment Court considered whether the Auckland City Council was obliged in good faith to consult with staff and their union regarding an independent review’s proposals.34 The Union claimed it should have been consulted at the time the review was received by the council, because

29 Roth, above, 147.
30 Employment Relations Act 2000, s 4(1) and (2); Section 4(2) states the employment relationship includes one between a union and an employer, or a union and a member of that union.
32 Employment Relations Act 2000, s 33.
33 The New Zealand Public Service Association Inc v Auckland City Council (21 March 2003) Auckland Employment Court ARC 17/02 Goddard CJ, Travis, Colgan JJ.
34 The New Zealand Public Service Association Inc v Auckland City Council, above, paras 5, 74.
that review included ‘proposals’ that fell within section 4(4)(d).\textsuperscript{35} Section 4(4) sets out examples of situations where good faith obligations apply, including the section 4(4)(d) obligation to consult where there is “a proposal by an employer that might impact on the employer’s employees…”\textsuperscript{36}

The Court rejected that when received the independent review constituted a ‘proposal’ for the purposes of section 4(4)(d).\textsuperscript{37} It held that a ‘proposal’ requiring the council to consult with the union existed when the Council adopted or pursued a course of action that would, or potentially would, impact on employees.\textsuperscript{38}

\textbf{B Rights of Representation}

Any group or person may represent an employee in employment negotiations. However, for an employee organisation to be entitled to the rights granted to unions under the Act they must register in accordance with sections 13-17.

Under section 18(1) unions are granted exclusive rights to represent their members’ collective interests. Unions may only represent a member employee’s individual rights if the member has given the union the authority to do so under section 236.\textsuperscript{39} This exclusive representation right is restricted to collective interests presumably to preserve individual choice of representation in dealing with personal employment matters.

\textsuperscript{35} The New Zealand Public Service Association Inc v Auckland City Council, above, paras 43, 46.
\textsuperscript{36} Employment Relations Act 2000, s (4)(4)(d).
\textsuperscript{37} The New Zealand Public Service Association Inc v Auckland City Council, above, para 87.
\textsuperscript{38} The New Zealand Public Service Association Inc v Auckland City Council, above, paras 90, 101.
\textsuperscript{39} Employment Relations Act 2000, s 18(3).
The courts have yet to draw the distinction between individual rights and collective interests of union members. Can individual rights be defined as those rights that come under employment actions or issues that identify an individual by name? Or may judicial reasoning under the Industrial Relations Act 1973 help draw the distinction? Where ‘interests’ were identified as negotiable issues and ‘rights’ being benefits established by legislative provisions.

Unions would presumably be entitled to represent individual members in individual employment agreement negotiations if given authority under section 236(1).

C State of the Unions

Before examining key issues that face unions in exercising their rights it is important to establish unions’ state of health in New Zealand. By doing so we may form a clearer picture on the impact those rights issues have on unions and whether ER Act provisions have achieved their objectives.

Section 16 of the ER Act resumes the requirement for unions to provide membership numbers to the Department of Labour. As at 1 March 2003 175 unions were registered. Union membership stands at 334,044 for the same period, representing 21.9 per cent of wage and salary earners and 17.6 per cent of the total employed labour force.

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42 This requirement was abolished under the Employment Contracts Act 1991.
44 Employment Relations Service, above, 6; The total employed labour force density figure is the most commonly used measure of union density.
Union membership

Under the ER Act union membership has increased by 31,000 members. But growth has slowed each consecutive year since its enactment. In 2000 union membership grew by 5.4 per cent,\(^{45}\) for the 12 months to March 2003 union membership only grew by 0.8 per cent and this is compared to a 1.5 per cent increase in the total labour force for the same period.\(^{46}\) Only 15 per cent of workers are covered by collective agreements.\(^{47}\)

Despite limited membership growth under the ER Act union density remains static; 17.5 per cent of the total employed labour force as at December 2000, 17.7 per cent as at December 2001 and 17.6 as at March 2003.

These trends indicate stagnating union growth despite union membership of 334,044 standing at less than half the 684,825 union members prior to the enactment of the EC Act in 1990.\(^{48}\) Although it must be noted those numbers were achieved during a period of compulsory union membership.

We may get a more accurate picture of New Zealand unions’ performance by comparing union density figures to those from common industrial relation systems. Throughout the developed world union densities have been dropping for at least a decade.\(^{49}\) New Zealand experienced the largest decline

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\(^{46}\) Employment Relations Service, above, 6.


\(^{48}\) May, Walsh, Harbridge and Thickett, above, 310.

in union density of all surveyed OECD countries during the industrial relations reform period of the mid-eighties and nineties, dropping from 47 per cent union density in 1989 to 17 per cent in 1999.\textsuperscript{50} Australia, whose union movement went through a similar downturn, has a 2002 union density figure of 23.1 per cent, slowly declining from 25.7 per cent in 1999.\textsuperscript{51}

So what conclusions can be drawn from these statistics? Union density has not reached pre EC Act levels or those currently experienced by Australia. While union density appears not to be falling, levels have failed to increase substantially beyond the 17 per cent low experienced during 1999 under the EC Act environment.\textsuperscript{52}

The union movement states that the ER Act was only a moderate legislative change to the hostile union environment under the EC Act.\textsuperscript{53} These statistics appear to strengthen those calls that the ER Act’s objectives, which include the promotion of collective bargaining and ILO Convention 98 on the right to organise and bargain collectively, are not being achieved.

2 The changing face of unions

Following the 1000 minimum membership requirement of the 1987 Labour Relations Act the number of unions dropped and average size increased dramatically.\textsuperscript{54} These


\textsuperscript{52} May, Walsh, Harbridge and Thickett, above, 310.


\textsuperscript{54} May, Walsh, Harbridge and Thickett, above, 309; Peter Boxall “Evaluating Continuity and Change in the Employment Relations Act 2000” (2001) 26(1) NZJIR 27, 34.
large ‘old’ unions traditionally represented workers at an industry and national level. Those that survived the EC Act environment now account for 98.1 per cent of union membership, with their growth contributing 35 per cent to the overall union membership increase.\textsuperscript{55}

The ER Act environment and dissatisfaction with traditional unions has encouraged the growth of ‘new’ unions; those enterprise-based unions whose establishment is linked to the enactment of the ER Act.

The ER Act encourages ‘new’ unions by conferring exclusive benefits on registered unions and lowering the threshold for union membership to 15.\textsuperscript{56} Former enterprise-based ‘workplace consultative groups’ or ‘staff associations’ established under the EC Act’s non-unionised workplace environment to represent employees, had to register to continue to collectively bargain and represent collective employee interests.\textsuperscript{57}

‘New’ unions account for only 1.9 per cent of total union membership, yet contributed 31 per cent to the overall growth in union membership in the 12 months to 1 March 2003.\textsuperscript{58} Over half of all registered unions have less than 100 members, reflecting a significant change in union structure and focus under the ER Act.\textsuperscript{59}

‘New’ unions typically have little connection to the wider union movement, including affiliation with the CTU.\textsuperscript{60}

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\textsuperscript{55} Employment Relations Service \textit{The Report on Employment Relations in New Zealand} (Department of Labour, Wellington, July 2003) 6.
\textsuperscript{56} Employment Relations Act 2000, s 13.
\textsuperscript{57} May, Walsh, Harbridge and Thickett, above, 311.
\textsuperscript{58} Employment Relations Service, above, 6.
\textsuperscript{59} Employment Relations Service, above, 6.
\textsuperscript{60} May, Walsh, Harbridge and Thickett, above, 316.
\end{flushright}
Primarily enterprise based they often enjoy close working relationships with management. These site-based unions raise the issue of union independence.

3 Industry representation

Department of Labour statistics show that almost three-quarters of all union members are employed in the public and manufacturing sectors. This reflects the historically strong unionised State and manufacturing workforce. However, unions are making inroads into traditionally un-unionised sectors; energy and utility services, construction and building services made the largest gains in union membership change between 2001 and 2003. This indicates unions working with the ER Act to promote collective organisation at greenfield sites. Increases in the retail, service, finance and insurance industries may reflect unions’ concerted efforts to capture workers in the growing service sector.

It is clear from the union density, membership and growth statistics above that unions have not flourished under the ER Act. The question may then be asked; with stagnating union growth and union density at 17.6 per cent can the ER Act be said to be sufficiently achieving its objectives of promoting ILO Conventions 87 and 98, and collective bargaining?

61 Employment Relations Service, above, 6.
62 Employment Relations Service, above, 6; May, Walsh, Harbridge and Thickett, above, 314.
63 May, Walsh, Harbridge and Thickett, above, 312-314; Employment Relations Service, above, 6.
64 May, Walsh, Harbridge and Thickett, above, 312-314.
IV  KEY UNION RIGHTS ISSUES

A  Freeloading and Union Fees

Freedom of association is a hard won and fundamental human right. It forms the basis of union rights to collectively organise, represent and be a legitimate party to the employment relationship. The ER Act preserves freedom of association rights to belong or not to belong to a union. This freedom presents the issue of freeloading.

Under the ER Act only union members may be covered by collective employment agreements, but non-union employees may still be given individual employment agreements that contain essentially the same terms and conditions as collective agreements negotiated by the union. Employers may inform employees that there is no benefit in joining a union, as they will receive the same benefits as union members under their individual employment agreement.

Unions argue that freeloading is a major problem with the ER Act as it stands; it undermines union membership, collective bargaining, and the objectives of the ER Act and ILO Convention 98 in failing to promote collective bargaining.  

65 As expressed in New Zealand Bill of Rights Act 1990, section 17. New Zealand has also ratified two international covenants that protect the freedom of association, the International Covenant of Civil and Political Rights 1966 (16 December 1966) and the International Covenant on Economic, Social and Cultural Rights 1966 (16 December 1966). However, it has lodged reservations related to the Convention’s union provisions.

Union efforts to counter freeloading have been met with mixed success. They are lobbying the government on its current review of the ER Act.

1 Bargaining agent’s fee

Union efforts to counter freeloading include the negotiation and deduction of bargaining agent’s fees from non-union employees’ pay packets.

Unions see the bargaining agent’s fee as compensation for negotiating collective agreement terms and conditions for its union members that then appear in individual employment contracts of non-union members.67

The issue of bargaining agent’s fee deductions was raised in *New Zealand Dairy Workers Union Inc v NZMP Ltd,*68 where the plaintiff union (NZDWU) and defendant employer included a bargaining agent’s fee clause in their collective agreement. The clause had the effect of compelling non-union employees to pay a bargaining fee for improved terms and conditions that were negotiated by the union during collective bargaining. The parties sought clarification as to the lawfulness of such a provision.

The clause provided that for non-union employees to be eligible for improved wages and conditions they had to agree to the insertion of a union bargaining fee clause into their individual employment contracts.69

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68 *New Zealand Dairy Workers Union Inc v NZMP Ltd* [2002] 1 ERNZ 361 (Employment Court) per Colgan J.
69 *New Zealand Dairy Workers Union Inc v NZMP Ltd*, above, 364-366.
New employees, initially covered by section 63 of the ER Act, were also affected. For the first 30 days of employment new employees enter into individual employment agreements identical to any applicable collective agreement’s terms and conditions. Following the first 30 days employees may vary the terms and conditions of their individual employment contracts by mutual consent with the employer. NZMP Ltd stated that it would not agree to the removal of the bargaining fee deduction clause from individual employment contracts of new employees.

The Employment Court held that the clause was in breach of sections 4 and 12 of the Wages Protection Act 1983, as it stipulates how employees are to spend their wage. Section 16 of the Wages Protection Act provides for the deduction of union fees without the written consent from each employee where such a provision is contained in an applicable collective agreement. However, the Court held that section 16 cannot permit the unlawful deduction of fees under sections 4 and 12 simply because the provision is contained in a collective employment agreement.

ER Act section 8 states that any employment agreement, contract or arrangement cannot require a person to remain, join or cease to join a union. Accordingly, a union cannot require a person to remain a member despite any contractual obligations that may be contained in the membership agreement. However, the union

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70 Employment Relations Act 2000, s 63.
71 New Zealand Dairy Workers Union Inc v NZMP Ltd, above, 376; Employment Relations Act 2000, s 63(5).
72 New Zealand Dairy Workers Union Inc v NZMP Ltd, above, 377.
73 New Zealand Dairy Workers Union Inc v NZMP Ltd, above, 378.
74 New Zealand Dairy Workers Union Inc v NZMP Ltd, above, 378.
75 Employment Relations Act 2000, s 8(a).
may have the right under general contract law to impose contract provisions that do not infringe on employees’ freedom of association rights. Enforceable membership rules may require former members still employed by the applicable employer to pay union fees for the remaining length of the collective employment agreement.

The Employment Court in *New Zealand Dairy Workers Union Inc v NZMP Ltd* held that the bargaining agent’s fee clause breached section 8 of the ER Act. As inserted into the individual employment agreement it effectively required employees to become or remain members of the NZDWU. Non-NZDWU members would have to pay the bargaining agent’s fee to the plaintiff on top of fees to any other union they wished to join or form. This was held to go beyond an incentive and in effect amounted to compulsion, which is prohibited by section 8. The clause did not breach section 9 on prohibition on preference.

The Employment Court also found that the bargaining agent’s fee clause also breached section 11 of the ER Act. Section 11 provides that union members have the right not to be subject to undue influence with the intention of inducing the member not to become, or cease to become a member of a union or particular union. The fixed cost of the bargaining fee exerted undue influence on non-NZDWU employees not

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77 Note that resignation of the member from the union does not release them from their collective employment agreement obligations until its expiry; Employment Relations Act 2000, s 58.
78 *New Zealand Dairy Workers Union Inc v NZMP Ltd* [2002] 1 ERNZ 361 (Employment Court) per Colgan J.
79 *New Zealand Dairy Workers Union Inc v NZMP Ltd*, above, 378.
80 Following the reasoning in *Air New Zealand Ltd v Kippenberger* [1999] ERNZ 390 (HC) per Randerson J.
81 *New Zealand Dairy Workers Union Inc v NZMP Ltd*, above, 378.
82 *New Zealand Dairy Workers Union Inc v NZMP Ltd*, above, 378.
83 Employment Relations Act 2000, s 11(1).
to form or join another union.\textsuperscript{84} The clause was a “real and compelling disincentive to employees to join another union as the legislation contemplates and permits”.\textsuperscript{85}

For the defendant employer to insist through the negotiation and re-negotiation of new and existing individual employment agreements that a bargaining fee clause must be included amounts to unfair bargaining under section 68(2)(c).\textsuperscript{86}

The court made a declaration under section 10 that the collective and individual employment contracts were invalidated to the extent that the bargaining agent’s fee remained in them.\textsuperscript{87}

\textit{New Zealand Dairy Workers Union Inc v NZMP Limited} reveals that New Zealand employment legislation does not give unions the right to bargain with employers for the inclusion of a bargaining fee clause in collective agreements.\textsuperscript{88}

Unions request that the current government ER Act review come up with proposals that allow bargaining agent’s fee deductions, for example where a majority of workers vote in favour of such a clause.\textsuperscript{89} They also propose that unions and employers be allowed to negotiate union security arrangements that would permit union membership to be a condition of employment.\textsuperscript{90} Such ‘union shop’ provisions

\begin{itemize}
  \item \textsuperscript{84} New Zealand Dairy Workers Union Inc \textit{v} NZMP Ltd, above, 378.
  \item \textsuperscript{85} New Zealand Dairy Workers Union Inc \textit{v} NZMP Ltd, above, 378.
  \item \textsuperscript{86} New Zealand Dairy Workers Union Inc \textit{v} NZMP Ltd, above, 379.
  \item \textsuperscript{87} New Zealand Dairy Workers Union Inc \textit{v} NZMP Ltd, above, 379.
  \item \textsuperscript{88} The case (\textit{New Zealand Dairy Workers Union Inc v NZMP Ltd}, above.) is currently on appeal.
  \item \textsuperscript{89} Service Food Workers Union “Hands Up Who Doesn’t Like Freeloaders!!” (Winter 2003) \textit{Our Voice Wellington S.}
  \item \textsuperscript{90} New Zealand Council of Trade Unions \textit{Employment Relations Act Review} (New Zealand Council of Trade Unions, Wellington, 2003).
\end{itemize}
would address the freeloading issue but breach section 9 prohibitions on preference, as raised by the issue of lump sum payments to union members below.

2 Lump sum payments

The Public Service Association (PSA) has employed the use of lump sum payments in an attempt to deal with freeloading. The Public Services Association (PSA) negotiated exclusive bonus payments to PSA members with State employers, and in one case payment to non-union members if they subsequently joined the PSA. 91

No legal challenge has been mounted against this freeloading combat method to determine whether the payments amount to a breach of the ER Act section 9.

Section 9(1) prohibits any arrangement, agreement or contract to confer on a person any preference in obtaining or retaining employment, or employment conditions and benefits because they are, or are not, members of a union.

Opponents of lump sum payments argue that they breach section 9, because they focus entirely on the union relationship in conferring preferential conditions and benefits of employment on union members only. 92

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91 Inland Revenue Department; Interview with Rodney Hide, ACT Party Member of Parliament and Richard Wagstaff, PSA National Secretary (Susan Wood, Holmes Program, Television One, 9 July 2003) transcript provided by Newstel News Agency Ltd (Auckland).
The PSA, CTU, State Services Commissioner and State Services Minister Trevor Mallard disagree with this interpretation of the ER Act.93

Section 9(2) states that section 9(1) prohibition on preference is not breached simply because an employee’s employment terms and conditions are different from another employee.94 Proponents argue that different terms and conditions in the form of lump sum payments to union members do not breach section 9, because they are not paid out accordingly to whether someone is or is not a member of a union.95

The PSA maintains that lump sum payments are negotiated in recognition of its contribution to workplace organisational improvements.96 The State Services Commission also endorses the payment of lump sums to union members, “in recognition of identifiable benefits arising out of the collective relationship with a particular union.”97 Accordingly, it may be said lump sum payments are lawful on the basis that they recognise benefits unions bring to the workplace and do not confer preference on a person simply because they are a member of a union.

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94 Employment Relations Act 2000, s 9(2).
95 Public Services Association “Myths and Facts About PSA-Negotiated Payments” (28 November 2002) Email to PSA Delegates.
It may be further argued that lump sum payments fit within and advance the general purpose of the ER Act. The Act aims to promote collective bargaining and observance of ILO Convention 98 on the Right to Organise Collectively.

The ILO Committee on Freedom of Association in its final 1994 report on the EC Act compliant lodged by the CTU, found that as a member of the ILO New Zealand employment legislation should actively promote collective bargaining. This obligation is inherent even if a country has not ratified ILO Conventions 87 and 98.

Unlike the EC Act that simply allowed collective bargaining, the ER Act specifically seeks to promote collective bargaining. The recent formal ratification of ILO Convention 98 also exerts increased responsibility on the New Zealand government to ensure promotion of collective bargaining.

Lump sum payments fit within the Act’s objectives and enable ILO Convention 98 to be given effect to, by encouraging employees to favour collective bargaining and agreements. As unions and employers are the only parties able to negotiate and be party to a collective agreement, lump sum payments can only be paid to union members as bound by that collective agreement.

99 The Employment Relations Act 2000, s 3.
101 Paul Roth, above, 148.
102 Paul Roth, above, 150.
103 Employment Relations Act 2000, s 56.
As it currently stands the ER Act allows freeloading, a situation clearly untenable to unions and seemingly at odds with the Act’s objectives. Lump sum payments may go some way to address this issue in the absence of judicial or legislative intervention.

3 Union fees

Section 55(1) inserts into all collective agreements a requirement for automatic deduction by the employer of an employee’s union fees on a regular basis. These fee deductions must then be paid to the union. The member must consent to the deduction. The employer and union may bargain on, and contract out of this provision.

This Section is seen to overcome the problems experienced under past Acts in not requiring the automatic deduction of union fees by the employer. The requirement for automatic deduction saves union administration costs and encourages union membership by implementing a simple fee collection process.

If the parties negotiate out of the automatic fee deduction provision and the employer attempts to impose a levy on collection of the fees, a union may access the workplace pursuant to section 20(1)(b) for purposes of union business and collect the union fees itself.

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104 Employment Relations Act 2000, s 55(3).
105 Employment Relations Act 2000, s 55(1).
106 Employment Relations Act 2000, s 55(2).
108 Agnew, above, 298.
**B Union Registration**

Recognising the role of unions in promoting members' collective employment interests the ER Act grants exclusive rights and benefits to unions.\(^{110}\) For an employee organisation to take advantage of these entitlements they must be registered and comply with sections 13-16.

**I Union Independence**

Over three-quarters of registered ‘new’ unions are enterprise based.\(^{111}\) This new trend of smaller decentralised unions is reflected in union statistics. As at 1 March 2003 the median number of members per union was 95, with over half of all registered unions having less than 100 members.\(^{112}\)

As examined above these ‘new’ unions were often established under the EC Act environment as enterprise-based employee associations and informal groups to act as worker bargaining agents.\(^{113}\) Their registration as unions bought about by the ER Act requirement that they register to enjoy ‘union’ status.\(^{114}\)

Old unions often suspiciously view some new unions as products of management techniques, designed to supplant traditional bargaining unions' presence in the workplace.\(^{115}\)

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\(^{110}\) Employment Relations Act 2000, s 12.


\(^{112}\) Employment Relations Service, above, 6.

\(^{113}\) See Part III C 2 The changing face of unions.


raise questions of employer influence and union independence.

Section 14(1)(d) of the ER Act states that for an incorporated society to be registered as a union it must be constituted and operate at “arm’s length from, any employer.”

The Full Employment Court in *Meat and Related Trade Workers Union of Aotearoa Inc v Te Kuiti Beef Workers Union Inc* considered the section 14(1)(d) issue of union independence during establishment, registration and subsequent operation of the union. The rival plaintiff union bought action to cancel the registration of defendant union Te Kuiti Beef Workers Union (TKBWU).

Director for the employer UBP Ltd facilitated the establishment of TKBWU through hiring a law firm to give a presentation on union formation and operation, and help constitute TKBWU. Apart from the initial contact with the director of UBP Ltd and payment of fees, the employees and latterly TKBWU members were in primary contact with the law firm. UBP Ltd also provided funding for union education leave and a loan to purchase a computer. It allowed a TKBWU official leave for administration work.

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118 *Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated*, above, para 1.
119 *Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated*, above, paras 35-42.
120 *Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated*, above, paras 41-42, 87, 91.
121 *Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated*, above, paras 43-44, 47, 50.
The Court in its conclusion considered this employer assistance and facilitation in line with the ER Act's philosophy of building cooperative and productive employment relationships.\textsuperscript{122} It held that TKBWU was constituted and operated at arm's length from the employer for a number of reasons; the initiative came from employees to form the union,\textsuperscript{123} information presented to employees on union formation was balanced,\textsuperscript{124} the director remained neutral throughout the process and did not attach conditions to the support given,\textsuperscript{125} TKBWU was administrated exclusively by members and subsequent dealings with UBP did not point to lack of independence from the employer.\textsuperscript{126}

The Court provided a number of tests for adherence with section 14(1)(d), including:\textsuperscript{127}

\ldots it [the defendant union] must not depend on the authority or control of an employer but must, rather, be self-governing... It must be self-reliant. As MWUA conceded, financial assistance in formation and registration may not, of itself, mean an absence of independence.

The union must be constituted and operate far away enough from the employer to avoid what may be objectively viewed as "intimate contact" between the union and employer.\textsuperscript{128}

\begin{itemize}
  \item \textsuperscript{122} Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated, above, paras 69.
  \item \textsuperscript{123} Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated, above, paras 91.
  \item \textsuperscript{124} Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated, above, para 87.
  \item \textsuperscript{125} Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated, above, para 91.
  \item \textsuperscript{126} Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated, above, para 92.
  \item \textsuperscript{127} Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated, above, paras 73-77.
  \item \textsuperscript{128} Meat and Related Trade Workers Union of Aotearoa Incorporated v Te Kuiti Beef Workers Union Incorporated, above, paras 76, 77.
\end{itemize}
2 Employee organisations

Solidarist or employee organisations that do not satisfy the independence test as interpreted by the Employment Court in *Meat and Related Trade Workers Union of Aotearoa Inc v Te Kuiti Beef Workers Union Inc* would not be entitled register as unions under the ER Act, or conclude collective agreements as a result of successful collective negotiations.

However, the Act does recognise such employee organisations to a limited extent under section 110. Section 110 prohibits duress in relation to membership or non-membership of “any group, society, association, or other collection of employees other than a union.” In the absence of duress, an employer supported employee organisation would be permitted to represent an employee, with their authority, on issues relating to their individual rights despite any conflicts of interest.

3 Challenges to union registration

Rival unions are the most likely party to challenge the registration of another union over the section 14(1)(d) requirement that the union be independent. A union may initiate proceedings to cancel another union’s registration under section 29 if it has a “direct interest in the proceedings.” The Registrar of Unions may cancel the union’s registration under section 17 if ordered by the Employment Relations Authority. This order will only be made if the union has ceased to comply with section 14(1) requirements.

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130 Employment Relations Act 2000, s 110(2).
131 Employment Relations Act 2000, s 236; Paul Roth, above, 154.
The Registrar of Unions must register an incorporated society as a union if it meets sections 13 and 14 requirements. Section 15(3)(a) states that the issue of a certificate of registration “is conclusive evidence that all the requirements of this Act relating to the registration of the union have been complied with.” The Employment Court in *Meat and Related Trade Workers Union of Aotearoa Inc v Te Kuiti Beef Workers Union Inc* held that registration of a union by the Registrar “creates a statutory presumption of compliance with section 14(1) at that point.”

The presumption of compliance with sections 13 and 14 prevents challenges to a union’s registration prior to and at the time of registration under section 17(1)(b) and (2). Challenges to union registration are therefore confined to post-registration behaviour.

This presumption may present an opportunity for employer controlled employee organisations to be established. However, the Court in *Meat and Related Trade Workers Union of Aotearoa Inc v Te Kuiti Beef Workers Union Inc* noted that a union has the right under section 194 to bring an action for judicial review of the decision to register another union.

Departure from the standard adversarial and centralised system of union organisation to one that includes unions

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132 Employment Relations Act 2000, s 15(1).
133 Employment Relations Act 2000, s 15(3)(a).
operating on an enterprise level, often closely with employers presents a new era for union management. The Employment Court has indicated that such ‘new’ unions are permitted and will generally conform to ER Act objectives and registration provisions.

C Workplace Access

The ER Act considerably broadens union access rights to those available under the EC Act. Enlargement of these rights help achieve the objectives of the Act by promoting unions as vehicles for the advancement and protection of employee interests.\(^{137}\) As with other union entitlements workplace access rights are given only to registered unions.

A representative of a union is entitled to enter a workplace for both purposes related to the employment of its members and purposes related to the union’s business.\(^{138}\)

A “workplace” for the purpose of the Act is expanded from a “premises under the control of the employee’s employer” under the EC Act,\(^{139}\) to any place where the employees concerned work.\(^{140}\)

I Employment related access

The Court of Appeal in *Carter Holt Harvey Ltd v National Distribution Union Inc* noted that the expanded definition of union access rights in section 20(2) for purposes

\(^{137}\) Employment Relations Act 2000, s 3(a)(ii) and (iii); *Carter Holt Harvey Limited v National Distribution Union Incorporated* [2002] 1 ERNZ 239, 248 (CA) Gault P for the Court.

\(^{138}\) Employment Relations Act 2000, s 20(1).

\(^{139}\) Employment Contracts Act 1990, s 14(1).

relating to employment of members is non-exhaustive.\textsuperscript{141} This highlights these expanded access rights have yet to be fully defined and are likely to be subject to future actions.\textsuperscript{142} Section 20(2) of the ER Act provides:\textsuperscript{143}

\begin{quote}
Section 20(2) of the ER Act provides:

(2) [t]he purposes related to the employment of a union's members include--

(a) to participate in bargaining for a collective agreement:
(b) to deal with matters concerning the health and safety of union members:
(c) to monitor compliance with the operation of a collective agreement:
(d) to monitor compliance with this Act and other Acts dealing with employment-related rights in relation to union members:
(e) with the authority of an employee, to deal with matters relating to an individual employment agreement or a proposed individual employment agreement or an individual employee's terms and conditions of employment or an individual employee's proposed terms and conditions of employment:
(f) to seek compliance with relevant requirements in any case where non-compliance is detected.
\end{quote}

The right to access a workplace is not limited to meet with or speak to union members. It includes access for the purposes of section 20(2) whether or not a member employee is present at the workplace.\textsuperscript{144} This right was upheld in \textit{Carter Holt Harvey Ltd v National Distribution Union Inc.}

\textsuperscript{141} \textit{Carter Holt Harvey Limited v National Distribution Union Incorporated} [2002] 1 ERNZ 239, 248 (CA) Gault P for the Court; However, workplace access provisions should be construed acknowledging the strong property rights of the employer.
\textsuperscript{142} Agnew, above, 185.
\textsuperscript{143} Employment Relations Act, s 20(2).
\textsuperscript{144} Agnew, above, 186.
In *Carter Holt Harvey Ltd v National Distribution Union Inc* union officials sought access to the plant area of the workplace during a strike under section 20(2) to monitor compliance with section 97 of the Act. Section 97 restricts the use of strikebreakers to perform the duties of striking or locked out employees.

Access to the plant area was denied, but access to the boardroom to talk to non-striking employees was offered. This offer was rejected. The union officials were arrested and charged with trespass in attempting to assert section 20 workplace access rights.\(^{145}\)

The Court held the union officials complied with all safety conditions so access could not be denied under section 21(2)(c).\(^{146}\) Importantly, it found that section 97 conferred employment related rights on employees for the purposes of section 20(1)(a) and (2)(d).\(^{147}\) Accordingly, the union had right of access to monitor compliance with section 97 for the purposes related to the employment of its members.

The offer of access to the boardroom and not the plant area where the striking union members normally worked and production was continuing was insufficient:\(^{148}\)

> [w]hat part or parts of the workplace may be assessed must be dictated by the purpose for which the entitlement to access is exercised.

Monitoring compliance with section 97 required access to the plant area. This follows the decision in *Service Workers*

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\(^{145}\) *Carter Holt Harvey Limited v National Distribution Union Incorporated* [2002] 1 ERNZ 239, 244

\(^{146}\) *Carter Holt Harvey Limited v National Distribution Union Incorporated*, above, 246.

\(^{147}\) *Carter Holt Harvey Limited v National Distribution Union Incorporated*, above, 249.

\(^{148}\) *Carter Holt Harvey Limited v National Distribution Union Incorporated*, above, 250.
Union of Aotearoa Inc v Southern Pacific Hotel Corp (NZ) Ltd\textsuperscript{49} that an employer may not limit access to certain areas of the workplace without good reasons, stipulated by health, safety or security legislative provisions.\textsuperscript{150}

2 Union business

Union officials have much greater access to greenfield sites to recruit members than under previous legislation. Section 20(3) provides union officials workplace access for purposes relating to union business, including discussing union business with union members, seeking to recruit union members and providing information on the union and union membership to any employee on the premises.

It is not required that any employee be a member of a union. But the official must reasonably believe that their union rules cover an employee that normally works in that workplace.\textsuperscript{151}

In \textit{Carter Holt Harvey Ltd v National Distribution Union Inc} union officials also attempted access under section 20(3).\textsuperscript{152} It was held that union officials were permitted to meet with the non-striking employees at the plant to explain the strike and union membership.\textsuperscript{153}

\textsuperscript{149} Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corp (New Zealand) Ltd [1993] 2 ERNZ 513 (Employment Court) per Goddard CJ.

\textsuperscript{150} Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corp (New Zealand) Ltd, above, 529-530 Goddard CJ.

\textsuperscript{151} Employment Relations Act 2000, s 21(1)(b).

\textsuperscript{152} Carter Holt Harvey Limited v National Distribution Union Incorporated [2002] 1 ERNZ 239, 243-244 (CA) Gault P for the Court.

\textsuperscript{153} Employment Relations Act, s 20(3); Carter Holt Harvey Limited v National Distribution Union Incorporated, above, 250.
3 Conditions of access

Under section 21 conditions of access are further expanded in line with ER Act objectives. Section 21 requires union officials to only enter a workplace at a reasonable time and in a reasonable way with regard to normal business practice. They must also comply with reasonable health, safety and security requirements.

The issue of entering at a reasonable time was highlighted in *Carter Holt Harvey Ltd v National Distribution Union Inc.* Union officials reasonably sought access to monitor compliance with section 97. The Court held that to delay access would defeat the purpose of access and the legislative rights of the union under section 20(2).

In discussing reasonableness of access the Employment Court referred to *Foodstuffs (Auckland) Ltd v National Distribution Union Inc* and previous cases decided under the EC Act. Where it was found the specific circumstances of the particular case, including the purpose for which access is sought, will determine whether it was a reasonable time to exercise access rights.

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155 Employment Relations Act 2000, s 21(2).
156 *Carter Holt Harvey Limited v National Distribution Union Incorporated*, above.
157 They held the reasonable belief that the company was using strikebreakers in production; *Carter Holt Harvey Limited v National Distribution Union Incorporated*, above, paras 242-243.
160 Decisions under the EC Act will remain relevant in the determination of what is 'reasonable time'; Peter Agnew Employment Law Guide (6 ed, LexisNexis New Zealand Ltd, Wellington, 2002) 188.
161 *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corp (NZ) Ltd* [1993] 2 ERNZ 513, 524 (Employment Court) per Goddard CJ; *Canterbury Hotel etc IUOW v Hancock & Co Ltd* [1989] 1 NZILR 358.
The Court of Appeal concurred with the earlier *Carter Holt Harvey Ltd v National Distribution Union Inc* Employment Court decision that the ER Act’s conditions of access are an express code to when entry can be denied.\(^{162}\) Section 21(5) states “[n]othing in subsections (1) to (4) allows an employer to unreasonably deny a representative of a union access to a workplace.” In accordance with the *Carter Holt Harvey Ltd v National Distribution Union Inc* decisions this section does not imply that an employer can impose further reasonable conditions outside of the conditions stipulated in sections 20-23 to deny union access to the workplace.\(^{163}\) Section 21(5) simply gives the employer the right to refuse access when those conditional provisions are not met.\(^{164}\)

### D Collective Bargaining

Registered unions have an exclusive right to bargain collectively.\(^{165}\) Unions are granted this role and collective bargaining is promoted to address the inherent inequality of power in the employment relationship and to promote the observance of ILO Convention 98.\(^{166}\)

In order to promote collective bargaining unions are given more advantageous terms over employers on when they may initiate bargaining.\(^{167}\)

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\(^{162}\) *Carter Holt Harvey Limited v National Distribution Union Incorporated* [2002] 1 ERNZ 239, 251 (CA) Gault P for the Court.


\(^{164}\) *Carter Holt Harvey Limited v National Distribution Union Incorporated* [2002] 1 ERNZ 239, 251 (CA) Gault P for the Court.

\(^{165}\) *Employment Relations Act* 2000, s 40.

\(^{166}\) *Employment Relations Act* 2000, s 3.

Collective bargaining may produce a collective agreement. Parties to the agreement are the employer and union. Union members covered by the agreement are bound under section 56. Individuals may bargain collectively, but these negotiations cannot produce collective agreements.

1 Multi-party bargaining

Despite the perceived promotion of collective bargaining under ER Act provisions, multi-employer bargaining and collective agreements have not grown significantly under the ER Act following their large decline under the EC Act.168

If a union or unions wish to bargain for a multi-party collective agreement they must gain majority support in a secret ballot of its members employed by the employer who is party to the intended bargaining.169

Employers on notification of the ballot results are not compelled to become party to a multi-party collective agreement. The Employment Authority in New Zealand Amalgamated Engineering Printing and Manufacturing Union (Inc) v Independent Newspapers Ltd stated that an employer was entitled to bargain on the matter.170

May, Walsh, Harbridge and Thickett171 argue the lack of promotion of, and growth in multi-employer agreements is

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169 Employment Relations Act 2000, s 45-47.
one explanation for the comparatively low union membership numbers as compared to pre EC Act levels. Small employers increasingly employ the majority of New Zealand’s workforce; 66 per cent of fulltime equivalent jobs are with businesses engaging less than 50 employees, compared to 48 per cent in 1991. Large traditional unions that make-up 98.1 per cent of union membership are increasingly faced with the high negotiation costs of bargaining individually with small to medium size workplaces.

Multi-employer industry awards prior to the EC Act worked to counter these costs. Unions claim that for effective promotion of collective bargaining there needs to be “greater encouragement of multi-employer collective agreements through requirements for employers to establish bargaining units in response to union claims.”

Employers also face costs in establishing and organising these bargaining units, involving large numbers of small employers. The Labour Party policy on the ER Act review advocates looking at whether more administrative support is needed to facilitate multi-employer collective bargaining, assistance that the New Zealand Council of Trade Unions (CTU) would support.

172 Statistics New Zealand <http://64.4.26.250/cgi-bin/linkrd?_lang=EN&lah=81f2/8649ca36eb9cde7a2c11a30059&lat=1062033367&hm_action=http%3a%2f%2fwww%2fstats%2fegovt%2fdomino%2fexternal%2fpasswd%2fpasswd%2f217cf46ac26dcb6800cc256a62000a2248%2f4c2567e00247c6acc256c63006b0274%3fOpenDocument > (last accessed 23 August 2003); Robyn May, Pat Walsh, Raymond Harbridge and Glen Thickett “Unions and Union Membership in New Zealand: Annual Review for 2001” (2002) 27(3) 307, 318.


174 May, Walsh, Harbridge and Thickett, above, 318.

175 May, Walsh, Harbridge and Thickett, above, 318.


178 New Zealand Council of Trade Unions, above, 2.
2 Good faith in collective bargaining

Section 32 sets out the minimum good faith requirements to be followed in collective bargaining and builds on the general employment relationship good faith requirements stipulated in section 4.

Exactly what constitutes good faith behaviour in the collective bargaining context, and the rights each party has in relation to the expectation of good faith conduct will be developed through judicial interpretation over time. These decisions may have reference to codes of good faith approved by the Minister under sections 35-39.

The Employment Relations Authority in NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd highlighted the difficulty in defining good faith in the collective bargaining process.

[...] failure to act in good faith is not behaviour that is easy to describe. However, it cannot simply be defined as bad faith. Parties may do something that is found to be not in good faith that is not necessarily in bad faith.

Unions see good faith in the employment relationship as clearly extending beyond the implied duty of trust and confidence.

Parties are not required to reach agreement or continue to meet each other about proposals that have been considered and responded to, but they are required to firstly consider and

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180 New Zealand Council of Trade Unions, above, 3.
respond to each proposal.\textsuperscript{181} Surface bargaining would not be negotiating in good faith.\textsuperscript{182} If a party considers then rejects a particular proposal, it may not in good faith then restrict the proposals it will consider or reject without further consideration of the entire bargaining package or counter proposals.

Such surface bargaining activity occurred in *NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd.*\textsuperscript{183} The employer refused to consider and respond to the union’s wider bargaining proposals and had restricted their bargaining to a single issue.\textsuperscript{184} The Employment Authority held that this was bargaining in a “very limited way” and was a breach of good faith.\textsuperscript{185}

The CTU seeks stronger measures to ensure settlement of collective agreements; through strong penalties for employers who conduct surface bargaining and a good faith assumption that if collective negotiations are initiated that a collective agreement will follow.\textsuperscript{186}

In order to better achieve real promotion of collective agreements unions also look for (on application) Employment Relations Authority intervention for serious good faith breaches, protracted negotiations or where collective

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{181} Employment Relations Act 2000, ss 32(1)(c), 33.
\item \textsuperscript{183} *New Zealand Amalgamated Engineering Printing and Manufacturing Union (Inc) v Independent Newspapers Ltd* (2001) Employment Relations Authority WA 51/01 G J Woods (member).
\item \textsuperscript{184} Agnew, above, 229; *Mazengarb’s Employment Law* (looseleaf, LexisNexis New Zealand Ltd, Wellington, 2003) para ER 32.04.
\item \textsuperscript{185} Agnew, above, 229; *Mazengarb’s Employment Law*, above, para ER 32.04.
\item \textsuperscript{186} New Zealand Council of Trade Unions *Employment Relations Act Review* (New Zealand Council of Trade Unions, Wellington, 2003) 2.
\end{enumerate}
\end{footnotesize}
agreements are being bargained for the first time.\textsuperscript{187} Intervention sought may involve arbitrated settlement of collective agreements.\textsuperscript{188}

3 Communication, direct and indirect bargaining

The duty for bargaining parties to deal with each other in good faith includes the minimum standards set out in section 32(1)(d).\textsuperscript{189} Section 32(1)(d)(ii) provides that the bargaining parties must not directly or indirectly bargain with represented members without agreement. Section 32(1)(d)(iii) states the parties must not “do anything that is likely to undermine the bargaining or authority of the other in the bargaining.” This requirement extends to statements made to the media and public.\textsuperscript{190}

The Employment Relations Authority in \textit{NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd} held that the defendant employer breached good faith requirements stipulated in section 32(1)(d)(i) and (ii) by attempting to initiate individual bargaining with a union member and not their union.\textsuperscript{191}

\textsuperscript{188} Service Food Workers Union “Hands Up Who Doesn’t Like Freeloaders!!” (Winter 2003) \textit{Our Voice Wellington} 5.
\textsuperscript{189} Clause 33 that prohibited communication "about matters relating to terms and conditions of employment" was removed from the ER Bill at select committee stage. This move was in part a response to employer opposition based on the fact that it appeared to ban all “communication”. The removal on the ban of communication was countered by the insertion of section 32(1)(d)(ii) and (iii) requirements; Ellen Dannin “Good Faith Bargaining, Direct Bargaining and Information Requests: The US Experience” (2001) 26(1) NZJIR 45, 54; John Hughes “The Collective Bargaining Code of Good Faith” (2001) 26(1) NZJIR 59, 73-74; Mazengarb’s \textit{Employment Law} (looseleaf, LexisNexis New Zealand Ltd, Wellington, 2003) para ER 32.11.
\textsuperscript{190} Employment Relations Service \textit{Collective Bargaining Under the Employment Relations Act 2000: In Good Faith} (Department of Labour, Wellington, 2001), 35.
\textsuperscript{191} New Zealand Amalgamated Engineering Printing and Manufacturing Union (Inc) v Independent Newspapers Ltd (2001) Employment Relations Authority WA 51/01 G J Woods (member).
Under section 4(3) the ER Act’s good faith requirements do not prohibit parties from “communicating to another person a statement of fact or of opinion reasonably held about an employer’s business or a union’s affairs.”

Whether or not an employer can provide factual information to employees to support and explain their bargaining position as under the EC Act is questionable.

The issue was raised in AMI Insurance LTD v FINSEC INC. The defendant union published updates to its members and non-member managers critical of the plaintiff employer’s conduct towards collective organisation and agreements. Publication occurred despite the union agreeing not to publish earlier critical statements during collective negotiations. The parties had also agreed to a bargaining process arrangement that included parties were to provide the other with a copy of any communication before disclosing it to employees during the bargaining process.

The employer firstly alleged that it had been undermined because the union failed to comply with its contractual obligation (the bargaining process arrangement). The second cause of action was based on a breach of good faith including the duties contained in section 32(1)(d).

In dismissing the claim, Chief Judge Goddard held the bargaining process arrangement was not a contractual arrangement.
The agreement not to undermine bargaining by publishing the applicable update was not a promise by the union to limit their freedom of expression indefinitely and never publish the statements. The relevant update was only subject to the obligation of showing it to the plaintiff in advance if the parties were in negotiations. The update came out after negotiations had ended and the defendant’s members had ratified the collective employment agreement.

Chief Judge Goddard then addressed whether the defendant union breached section 4(3) prohibiting it from communicating unreasonably held statements of fact or opinion about the plaintiff employer’s business. It was held the union genuinely believed in its statements and had some “reasonable basis for thinking as it did and saying so to its members.” For the statements to be reasonably held it was not necessary that the union was right in its assertions of fact or opinion about the plaintiff’s business.

In Service & Food Workers Union Inc v Sealord Group Ltd the employer’s behaviour was held to breach section 32(1)(d) requirements.

The employer met with employees during collective negotiations and discussed the firm’s viability. This was found to be direct bargaining with members and did not recognise the union’s authority as the employees’ representative. He also

199 AMI Insurance v FINSEC Inc, above, para 68.
200 AMI Insurance v FINSEC Inc, above, para 30.
201 AMI Insurance v FINSEC Inc, above, paras 31, 35.
202 AMI Insurance v FINSEC Inc, above, paras 34-35.
203 AMI Insurance v FINSEC Inc, above, para 37.
204 AMI Insurance v FINSEC Inc, above, paras 60-67.
205 AMI Insurance v FINSEC Inc, above, para 67.
206 Service & Food Workers Union Inc v Sealord Group Ltd (27 August 2002) Employment Relations Authority CA 82/02 N Taylor (member).
undermined the union’s authority by making public a letter criticising the union before it had received a copy. 207

These decisions give substance to section 4(3). It appears on AMI Insurance v FINSEC Inc circumstances parties may provide information to employees to support and explain their bargaining positions. This is so long it be reasonably held fact or opinion, has regard to any applicable bargaining process arrangement and not breach section 32(1)(d) good faith requirements.

4 Right to information

Good faith information disclosure requirements are designed to promote informed bargaining and redress the inequality of bargaining power between the parties. 208 As demonstrated during the Employment Relations Bill’s passage New Zealand employers tend to resist disclosing business information. 209

During collective bargaining either party may request and be required to provide “information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.” 210 This implies an objective reasonable or relevance standard to whether the information is necessary to substantiate claims, despite any subjective views held by the provider. 211 Parties

210 Employment Relations Act 2000, s 32(1)(e); The ER Act’s information disclosure provisions do not affect the Privacy Act 1993; Employment Relations Service, above, 46.
cannot in good faith frustrate the bargaining process by “trawling” for relevant information, or disclose information beyond the bargaining representatives.212

The term “information” has a wide definition and is not limited to physical information such as documents; it may include statements and responses to specific questions.213 The provision of information requirement is only restricted by the “reasonably necessary” test and the confidentiality constraint of the independent reviewer in section 34.214

If the party asked to provide the information “reasonably considers that it should be treated as confidential” then the information can be given instead to an independent reviewer.215 The independent reviewer is appointed by the parties’ general agreement.216

The reviewer reviews the information and decides whether, and to what extent the information should be treated as confidential. If the reviewer finds information to be confidential they must decide to what extent the information supports the claims and give an answer to the requester of the information, while maintaining the information’s confidentiality.217

Where an employer knows of circumstances that will seriously affect employees or the bargaining parties’ position

212 Employment Relations Service, above, 48-9; Employment Relations Act 2000, s 34(7).
213 Employment Relations Service, above, 47.
216 Employment Relations Act 2000, s 34(4).
217 Employment Relations Act 2000, s 34(5) and (6).
it may amount to misleading conduct to not inform the other bargaining party.\textsuperscript{218}

These information disclosure provisions enable parties to access information necessary in conducting conducive bargaining and substantiating claims, while providing disclosure protection for sensitive information. However, once the collective agreement has been settled there exists no requirement for a continuing process of information sharing. Such requirements may be desirable where an objective of the Act is to forge productive partnership relationships between the parties, or to police the collective agreement itself.\textsuperscript{219}

5 Coverage

Unions have been apprehensive about the scope for employers to limit collective employment agreements to employees named in the coverage clause and who remained members of the union, thereby limiting future potential union membership.\textsuperscript{220} Employers could claim that no relevant collective employment agreement existed for the purposes of section 62 of the ER Act, excluding new staff from joining the collective.

Under section 62 new employees are covered by the terms of a relevant collective agreement for the first 30 days of employment, with the option of joining the collective agreement after that period.


\textsuperscript{220} Mathew Dearnaley “Unions Claim Partial Victory” (26 May 2003) \textit{The New Zealand Herald} Auckland A9.
The Employment Relations Authority in *National Distribution Union v Foodstuffs Ltd*\(^{221}\) dealt with a restrictive collective agreement coverage clause that named covered employees. The Authority held that coverage clauses must “be specified by reference to the work or type of work” that the agreement covers, as provided for by the section 5 coverage clause definition.\(^{222}\) Accordingly, employers are bound by the provisions of section 62 and cannot exclude new employees from joining an applicable collective agreement.\(^{223}\) To then enter the collective employment agreement the employee must join the contracting union.

However, the Authority left open the question of whether existing employees, who are currently party to an individual employment agreement, can then choose to join the union and the applicable collective agreement if the coverage clause limits it to named employees who remain members of the union and new employees who choose to join the union.\(^{224}\)

The ER Act remains silent on this issue. Any interpretation that allows the new member to join an existing collective agreement would fit within the Act’s collective bargaining promotion objectives. The collective agreement is a contract between the employer and the union, so presumably they would have to mutually agree to the inclusion of the new member. Union members are bound to the collective agreement by section 56.
E Performance of Duties of Striking or Locked Out Employees

Union rights in relation to strikes and lockouts can be found in Part 8. Definitions established under previous employment legislation remain intact. But the ER Act does alter some restrictions relating to strikes and lockouts in keeping with its promotion of collective organisation and cooperation.

Section 92 may be seen as stating an additional aim, that where there is an intention to strike or lockout mediation is provided to parties to avoid such action.225

Section 97 is a major departure from the EC Act. It is designed to support the objectives of the Act, including the observance of ILO Conventions 87 and 98. The Employment Court in National Distribution Union Inc v Carter Holt Harvey Ltd stated the purpose of this provision:226

[The Act supports and sets out to promote collective bargaining and recognises and addresses `the inherent inequality of bargaining power in employment relationships`: s3(a)(ii). Section 97 is one of the provisions that does so. Its purpose is to ensure that employers cannot use strikebreakers to blunt the economic effect of a strike (or equally a lockout) by limiting the circumstances in which an employer may employ other persons to perform the work of striking or locked out employees.

Section 97 states that an employer may only employ another person to perform the work of a striking or locked out

225 Employment Relations Act 2000, s 92; Mazengarb’s Employment Law (looseleaf, LexisNexis New Zealand Ltd, Wellington, 2003) para ER 80.01.
employee where they are already employed by the employer and not for the purpose of performing the work of a striking or locked out employee. The strikebreaker must also agree to perform the work.

The employer may employ a strikebreaker to perform the work if it is reasonably necessary for reasons of safety or health, but only to the extent necessary for that purpose.

The strikebreaker must not perform the work of a striking or locked out employee beyond the duration of industrial action.

The Employment Relations Authority in \textit{NZ Engineering, Printing and Manufacturing Union v The New Zealand Herald} addressed whether The New Zealand Herald had used strikebreakers in violation of section 97.

The Authority held that casual employees could be used to perform the duties of striking employees, as like other non-union employees they were already employed and were not prohibited by the ER Act in performing striking employees work. The Herald could legitimately use employees from other company divisions to perform the work (if they agreed), as the company already employed them. Hiring freelance

\begin{itemize}
  \item \textsuperscript{227} Employment Relations Act 2000, s 97(3)(a) and (b).
  \item \textsuperscript{228} Employment Relations Act 2000, s 97(3)(c).
  \item Presumably for the wider community not simply other employees safety and health; \textit{Mazengarb's Employment Law} (looseleaf, LexisNexis New Zealand Ltd, Wellington, 2003) para ER 97.04.
  \item \textsuperscript{230} Employment Relations Act 2000, s 97(4).
  \item \textsuperscript{231} Employment Relations Act 2000, s 97(5).
  \item \textsuperscript{232} \textit{NZ Engineering, Printing and Manufacturing Union v The New Zealand Herald} (24 June 2002) Employment Relations Authority Auckland Office AA190/02 J Wilson (member).
  \item \textsuperscript{233} \textit{NZ Engineering, Printing and Manufacturing Union v The New Zealand Herald}, above, para 23.
  \item \textsuperscript{234} \textit{NZ Engineering, Printing and Manufacturing Union v The New Zealand Herald}, above, para 14.
\end{itemize}
workers specifically to perform work that would have been
done by striking employees was found to violate section 97. 235

The Court of Appeal upheld the Employment Court
decision in Carter Holt Harvey Ltd v National Distribution
Union Inc that section 97 conferred employment related rights
on employees, and therefore under section 20 the union was
entitled to workplace access without delay to monitor
compliance with section 97. 236 Any delay may give
opportunity to conceal a breach and would be akin to denying
access. 237 Access must be granted to the actual work area
where section 97 activities are in question to protect this
employment right. 238

F Health and Safety Participation

1 Health and safety in employment

With the election of the Labour Alliance Government in
1999 a review of the Health and Safety in Employment Act
1992 was undertaken. The review recommended increased
partnership between employers, employees and their
representatives to ensure effective health and safety outcomes.

The Health and Safety in Employment Amendment Act
2002 was enacted in response to this review. Part 2A of the
Act provides a role for union participation in the health and
safety process. The employer under section 19B has a general
duty to provide reasonable opportunities in good faith for

235 NZ Engineering, Printing and Manufacturing Union v The New Zealand Herald, above, paras 19,
20, 25.
236 Carter Holt Harvey Limited v National Distribution Union Incorporated [2002] 1 ERNZ 239, 249
(CA) Gault P for the Court.
(Employment Court) Judgement of the Court.
238 Carter Holt Harvey Limited v National Distribution Union Incorporated, above, 250.
employees and their unions to be involved in health and safety matters.\textsuperscript{239} This includes the right under section 19C to be involved in the development of an employee health and safety participation system.

Unions have the right to initiate the process of developing an employee participation system where 30 or more workers are employed at the workplace, or at an employee's request where there are less than 30 workers employed.\textsuperscript{240}

Pursuant to section 19C(2) of the Health and Safety in Employment Act all employees and their union must agree to the proposed employee participation system for it to be valid. If a system is not agreed to within six months a system based on the minimum statutory entitlements will be automatically adopted in a workplace with 30 or more employees, pursuant to section 19D of the Act.\textsuperscript{241}

2 ACC partnership programme

The ACC Partnership Programme is a self-managing workplace accident insurance option for employers. The programme recognises the role employees and their unions have to play in workplace health and safety management. It requires employers to include these parties in the development of health and safety systems necessary for accreditation under the programme.\textsuperscript{242}

\textsuperscript{239} Health and Safety in Employment Amendment Act 2002, s 19B(1) and (5)(f).
\textsuperscript{240} Health and Safety in Employment Amendment Act 2002, s 19C(1).
The Minister for Accident Insurance established a framework under section 326C of the Accident Insurance Act 1998; it sets out the minimum criteria to be observed and implemented by employers to gain entry to the accredited employers programme.243

The employer is to involve the employees’ union in the identification and management of all workplace hazards.244 This involvement extends to the ongoing development of health and safety procedures and dispute resolution procedures that must be formulated under the partnership programme.245

Unions are to be actively involved in developing and implementing workplace rehabilitation policies and procedures.246 These procedures and policies are to recognise the concerned employee’s need for union support and representation during the rehabilitation process.247

Both the Health and Safety in Employment Act and ACC Partnership Program recognise and expand the rights and role of unions in the employment relationship outside of the ER Act framework.

244 Accident Insurance (Framework for the Accredited Employers Programme) 2000, reg 11.3(a)(vi).
245 Accident Insurance (Framework for the Accredited Employers Programme) 2000, regs 11.3(i)(i), (e)(vi).
246 Accident Insurance (Framework for the Accredited Employers Programme) 2000, reg 11.3(f)(ii).
247 Accident Insurance (Framework for the Accredited Employers Programme) 2000, reg 11.3(c)(iii).
V CONCLUSION

Enactment of the ER Act and recent health and safety requirements herald a new era for union participation in the workplace. Through examination of the key issues unions face in exercising their legislative rights it is evident that development of those rights present many challenges for New Zealand’s union movement. Unions have failed to prosper under legislation aimed at promoting their growth and involvement.

Issues of union independence, workplace access, collective bargaining and performance of striking employees’ duties are beginning to take shape through recent interpretation. These developments along with health and safety participation give substance to unions’ expanded rights in the employment relationship. However, pressing issues of freeloading and multi-party bargaining clearly need legislative attention to ensure the achievement of the ER Act’s objective in promoting collective bargaining and for unions to exercise their rights to there intended extent.
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