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**New Zealand Unions: Where have they  
come from and where are they going?**

**An Overview of the Changes Contained in  
the Employment Relations Act 2000 and  
their Effect on New Zealand Unions**

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## ***I INTRODUCTION***

This essay aims to examine the effects of recent industrial relations legislation on unions in New Zealand. It is important to understand where the union movement has been in the past and the factors which have shaped unions more recently. It is then necessary to identify the key changes which are likely to occur under the new Employment Relations Act 2000. The effect of those changes on unions, particularly the more philosophical and conceptual underlying changes, will then be analysed.

A dramatic change in philosophy led to the introduction of the Employment Contracts Act 1991. This followed almost a century of little philosophical development in terms of employment relations in New Zealand. The Employment Relations Act 2000 therefore represents a second major shift in thinking in less than a decade. The effects of these dramatic shifts on unions and union activities must be assessed in light of the philosophy accompanying the legislation.

The introduction of the concept of good faith, which has never before been encountered in New Zealand deserves special attention, as it is a change that will require a committed effort from both unions and employers to make it work. The Employment Relations Act 2000 provides a legislative framework for good faith, and unions must use those provisions to their best advantage.

## ***II HISTORY – THE EMERGENCE OF UNION ORGANISATION***

Over time, the industrial relations environment in New Zealand has experienced periods of great change, as well as extended periods of little philosophical movement. The history of unions is similarly characterised, with the rise of trade and then industrial unions, through periods of strongly-united workers to more recent attempts to remove the tools of collective action from those workers.

The beginnings of trade and industrial unions in New Zealand must be examined, as well as their subsequent development. This will assist the understanding of how unions will react to the new legislation being introduced today.

## A *The Early Years: 1800 – 1894*

Upon the arrival of English settlers in New Zealand, the industrial relations systems of the United Kingdom was imported almost unchanged into the work environment here. The rules of “master and servant” which applied to the employment contract relationship in England at that time were applied here.<sup>1</sup> These rules were oppressive by today’s standards. For example, disobedience was a breach of duty, and therefore punishable by imprisonment. However, there were colonists who saw the move to the other end of the earth as an opportunity for a new start in their approach to employment relationships.<sup>2</sup>

As New Zealand was just beginning to establish industries, and the population was growing by means of immigration, there were often shortages of labour. This meant that workers were able to use their skills as an effective bargaining tool. Among the earliest to do this was the well-known Samuel Duncan Parnell, who, in 1840, refused to construct a building unless the working day was restricted to eight hours. As there were few others available with the necessary skills, Parnell’s employer agreed to this arrangement. Word of this achievement spread to other workers, who had (individually) never contemplated having bargaining power over their employers in England.

In 1842 the Benevolent Society of Carpenters and Joiners was established,<sup>3</sup> and this was a starting point for the development of a trade union movement in New Zealand. While a number of unions were established in the 1850s, they were mostly short-lived, with those with their beginnings in the 1860s the first to survive in some form to the present day. For example, the Engineers Union, which was formed in 1863. These early unions, although described as trade unions, were truly of the “craft” variety, representing workers who were highly skilled, such as bakers, printers and

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<sup>1</sup> AJ Geare *The System of Industrial Relations in New Zealand* (Butterworths, Wellington, 1983) 64

<sup>2</sup> E Rasmussen and F Lamm *An Introduction to Employment Relations in New Zealand* (Longman, Malaysia, 1999) 20

<sup>3</sup> H Roth “Trade Unions” in J Howells, N Woods and F Young (eds) *Labour and Industrial Relations in New Zealand* (Pitman Pacific, Australia, 1974) 3, 3 [“Trade Unions”]

painters. As such, few workers had access to the benefits of such collectivisation, and those who did paid high membership fees for the privilege.<sup>4</sup>

During this period there was little co-operation between unions, although a Trades Council was formed in 1876.<sup>5</sup> This was short-lived however, as a result of the economic recession which was to come.

As time progressed, labour shortages began to ease, and workers found that their bargaining strength was being eroded by a growing population and an economic recession.<sup>6</sup> As workers were faced with poorer and poorer wages and conditions, the motivation for them to act collectively began to rise. Many workers still remembered the unions they had belonged to in Britain, and this inspired them to establish unions here for unskilled and semi-skilled workers, who had previously never been organised.<sup>7</sup> Unions established to represent seamen, miners and shearers through the 1880s were able to engage a relatively large number of members, despite the communication difficulties of the time. Total membership was estimated at 63,000 in 1890, although it is acknowledged that this may be an exaggeration.<sup>8</sup> The environment of economic depression and lower wages led to strong support for unions during the 1890s.<sup>9</sup> It was at this time that solidarity among workers came more to the forefront of union thinking, as opposed to benefits purely for existing members.

Publicity surrounding an inquiry into working conditions in New Zealand in 1890 resulted in increasing union support, as insanitary and oppressive working conditions were revealed.<sup>10</sup> Also, the impact of large-scale industrial action in Britain in 1889 – 1890 was the source of great inspiration for New Zealand workers.<sup>11</sup>

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<sup>4</sup> *Trade Unions*, above n 3, 4

<sup>5</sup> H Roth *Trade Unions in New Zealand: Past and Present* (Reed, Wellington, 1973) 6 [“*Trade Unions in New Zealand*”]

<sup>6</sup> N Woods *Industrial Conciliation and Arbitration in New Zealand* (Government Printer, Wellington 1963) 23

<sup>7</sup> *Trade Unions*, above n 3, 4

<sup>8</sup> *Trade Unions*, above n 3, 5

<sup>9</sup> Rasmussen and Lamm, above n 2, 21

<sup>10</sup> *Trade Unions in New Zealand*, above n 5, 11

<sup>11</sup> *Trade Unions*, above n 3, 5

The trade union movement had some impressive early successes in achieving improved wages and conditions for workers. For example, the Seamen's Union resisted wage reductions in 1886, and the Maritime Council, a national body consisting of seamen's, watersiders', miners' and railwaymen's unions, was formed. However, the defeat of the unions in the 1890 Maritime Strike was a crippling blow, and it was not until 1908 that any New Zealand union was able to present any substantial resistance to employer authority.<sup>12</sup> In the meantime, the Industrial Conciliation and Arbitration Act 1894 was introduced.

### **B**     *The Role of Unions*

Both trade and industrial unions did become established in New Zealand, but this does not adequately explain the functions they fulfilled for their members. Early unions were established to fight for "a fair day's pay for a fair day's work", but the influence of socialist literature, which began to arrive in New Zealand in the 1880s, meant that unions began to see themselves as representing a class rather than the members of a particular trade.<sup>13</sup> Workers began to associate with other workers as a result of a natural human desire to congregate with people of a like mind.<sup>14</sup> Unions were therefore fulfilling a largely social purpose. However, as time progressed they began to take on a life of their own, and developed into lobby groups and worker representatives.

### **C**     *Private Sector Unionism*

The Industrial Conciliation and Arbitration Act 1894 established an environment of heavy centralisation and compulsion in our industrial relations system. It was designed to encourage the establishment of industrial unions and therefore resolve disputes using conciliation and arbitration.<sup>15</sup> Unionism in New Zealand has therefore been largely created by the state, rather than the state responding to the natural

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<sup>12</sup> *Trade Unions in New Zealand*, above n 5, 16

<sup>13</sup> *Trade Unions*, above n 3, 5

<sup>14</sup> NS Woods *Industrial Relations: A Search for Understanding* (Hicks Smith & Sons, Wellington, 1975) 19

<sup>15</sup> Industrial Conciliation and Arbitration Act 1894, Long Title

emergence of unions formed spontaneously by workers. This is at least partly the result of great geographical separation of workers in the 1800s.<sup>16</sup>

Industrial unions exist as separate entities from their membership, while trade unions are simply combinations of employers and/or employees, or groups formed to regulate relations between employers and employees, or to impose restrictions on business.<sup>17</sup> As the workers' representative body, industrial unions must be identifiable in order to engage in conciliation.<sup>18</sup>

By encouraging industrial unions to be established, it was then open for governments to try to regulate them, as they had distinct legal "personalities" from their members. Unions were subjected to rules with regard to their relationships with workers and employers, and also in terms of their internal operations.<sup>19</sup>

Unions were forced to register themselves with respect to a particular industry in order to gain the exclusive right to speak on behalf of workers in that industry. When an industrial dispute arose, either party could refer the dispute to the Conciliation Board presiding in their district. The Board could then investigate the dispute and reach some sort of resolution. If the Board was unable to reach a decision, or either party was dissatisfied with the outcome, the matter could then be referred to the Arbitration Court, to make a final decision on the outcome.<sup>20</sup> This system recognised registered unions as having the legal status to represent workers in a particular industry.

Registration of trade unions began in 1878,<sup>21</sup> and was continued under the Trade Unions Act 1908. However, unions registered under these Acts did not have the distinct legal personality of industrial unions, and therefore could not use the rights granted under the Industrial Conciliation and Arbitration Act 1894. As a result, very few unions remained registered under the Trade Unions Act 1908, as registration as

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<sup>16</sup> A Hare *Industrial Relations in New Zealand* (Whitcombe & Tombs Ltd, Wellington, 1946) 174

<sup>17</sup> Trade Union Act 1908, s2

<sup>18</sup> BT Brooks *The Practice of Industrial Relations in New Zealand* (CCH, Auckland, 1978) 46

<sup>19</sup> Brooks, above n 18, 54

<sup>20</sup> J Deeks, J Parker, and R Ryan *Labour and Employment Relations in New Zealand* (2 ed, Longman, Malaysia, 1994) 45

<sup>21</sup> Trade Union Act 1878



an industrial union under the Industrial Conciliation and Arbitration Act 1894 gave unions greater legal status.<sup>22</sup>

Government also regulated registered industrial unions in terms of their internal organisation. The requirements that a union must meet before registration attempted to ensure that unions had established appropriate rules, which they were obliged to follow in operating their business. For example, unions were required to have rules covering how workers could join or leave the union, procedures for making collective agreements and calling meetings.<sup>23</sup>

There was something of a trade-off in this situation for industrial unions, because although they were quite heavily regulated by government, they were recognised as a legitimate party principal in industrial disputes, and therefore had standing in the eyes of the law to take part in negotiations and appear before a Conciliation Board or other legal institution.

At this time, unions existed primarily to represent their members in conciliation and arbitration hearings. World War One and growing unemployment in the 1920s meant that unions were unable to achieve the level of wages and conditions that their members expected, which led to a decline in membership.<sup>24</sup>

In 1936 compulsory unionism in the private sector was introduced,<sup>25</sup> replacing the system of qualified preference which existed in some awards before then.<sup>26</sup> While compulsory unionism was not initially favoured by unions or employers, both groups argued for its retention when subsequent governments threatened to remove it.<sup>27</sup>

Revitalised by the election of a Labour Government, unions formed the New Zealand Federation of Labour, which aimed to organise all workers by class and industry, and thereby extract the full value of their labour.<sup>28</sup> A sympathetic government meant that

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<sup>22</sup> Brooks, above n 18, 47

<sup>23</sup> Industrial Conciliation and Arbitration Act 1894, s 175

<sup>24</sup> *Trade Unions*, above n 3, 11

<sup>25</sup> Industrial Conciliation and Arbitration Amendment Act 1936, s 118

<sup>26</sup> Geare, above n 1, 95

<sup>27</sup> Geare, above n 1, 95

<sup>28</sup> New Zealand Federation of Labour *Constitution and Rules* (Wellington, 1937) 1

union leaders were able to play a more active role in the political arena, particularly over the war years from 1939 to 1945.<sup>29</sup> After the war was over, the union movement experienced a considerable period of in-fighting, with the Trade Union Congress established in opposition to the Federation of Labour. However, the Congress lacked strong support and disintegrated after the heavy defeat of their base union in the Waterfront Dispute in 1951.<sup>30</sup>

1961 saw the removal of compulsory unionism, to be replaced by provision for unqualified preference sections to be inserted in award agreements.<sup>31</sup> In effect, compulsory unionism continued, as almost all awards contained such sections.<sup>32</sup> Legislative change in 1976 and 1978 was aimed at reducing the desirability of unqualified preference sections.<sup>33</sup> However, unionism became truly voluntary only briefly, following the passage of the Industrial Relations Amendment Act 1983. The Labour government, elected in 1985, quickly reverted to the unqualified preference model.<sup>34</sup> It was then not until the passage of the Employment Contracts Act 1991 that unionism became truly voluntary in New Zealand.

#### **D Public Sector Unionism**

Section 91 of the Industrial Conciliation and Arbitration Act 1894 makes it clear that the Act does not cover those workers employed in the public sector. Groups within the public sector did have their own unions, for example the railway workers and postal workers. A more general union for civil servants was the Public Service Association, formed in 1890. This union collapsed soon after, so the PSA which exists today dates back only to 1913.<sup>35</sup>

The relevant legislation for public sector employees was the Public Service Act 1912, which classified workers into categories, and then graded them within those categories. Provision was often made for automatic promotion within grades.

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<sup>29</sup> *Trade Unions*, above n 3, 12

<sup>30</sup> *Trade Unions*, above n 3, 15

<sup>31</sup> Industrial Conciliation and Arbitration Amendment Act 1961, s 98

<sup>32</sup> Geare, above n 1, 97

<sup>33</sup> Geare, above n 1, 98

<sup>34</sup> Industrial Relations Amendment Act 1985

<sup>35</sup> Geare, above n 1, 34

Compulsory unionism for civil servants was not legislated for, although a number of public sector unions required membership within the industry. For example, the Railways unions demanded membership, while the PSA retained voluntary membership.<sup>36</sup>

Problems began to arise as it became clear that the processes provided for in the 1912 Act were becoming unworkable in the changing industrial relations environment. Advances in technology meant that there were new breeds of workers emerging which the Act had not contemplated when creating the regime of categorisation. The State Services Act 1962 aimed to update the system, and provide for a more rigorous approach to wage calculation.<sup>37</sup>

A similar update in 1977<sup>38</sup> further refined the wage setting process, and co-ordinated negotiations between state employers generally (as the State Services Coordinating Committee) and employees generally (as the Combined State Unions). Wage determinations were arrived at following negotiations between these parties. This process was comparable to the award system operating in the private sector. The distinction between private and public sector industrial relations was becoming increasingly blurred.

### *E The Situation by 1990*

Although there were changes to the industrial relations environment in the period from 1894 to 1990, workers and employers were largely accustomed to a system of compulsory union membership, industry awards, and mediation followed by court action. The push for change which had begun in the 1970s was about to gain momentum, which would eventually result in the most radical change in industrial relations legislation in almost a century.

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<sup>36</sup> Geare, above n 1, 102

<sup>37</sup> Deeks, Parker and Ryan, above n 20, 58

<sup>38</sup> State Services Conditions of Employment Act 1977

### III DEREGULATION OF INDUSTRIAL RELATIONS

Deregulation and decentralisation of the New Zealand economy began in earnest in 1983 and 1984, although changes to the industrial relations system did not happen so early. Nevertheless, both public and private sector employees were affected by the changes which did occur. The Industrial Relations Amendment Act 1984 removed the system of compulsory arbitration that had been in place for 90 years, and this year also saw a brief flirtation with voluntary unionism. In 1986, 1987 and 1988 the employment relations system was faced with three major legislative changes, the State-Owned Enterprises Act 1986, the Labour Relations Act 1987 and the State Sector Act 1988, all of which encouraged enterprise-level bargaining and an increasing focus on wages as a function of productivity and profitability.<sup>39</sup> Negotiating collective contracts was still encouraged, such that agreements reflected the profitability of the organisation as a whole. The notions of industry-wide awards and wage relativities were swept aside, and replaced by pure economic calculations of value.

The beginnings of the restructuring, after almost a century of little change in industrial relations philosophy, caught unions unaware. There was a twelve percent decline in union membership between December 1985 and May 1991, which can be attributed to increasing numbers of employees on individual contracts and higher levels of unemployment during those years.<sup>40</sup>

This restructuring of the system contributed to the growth of an environment expecting change. New Zealand's entire economy was undergoing huge changes in its philosophy and approach, with the promotion of the free market, and the fading presence of government operations in commercial activities. However, it was the election of the National government in 1990 that paved the way for a fundamental shift in industrial relations philosophy and action in New Zealand. The question to be answered is how this shift has affected unions, and how are they likely to respond to a second major change in philosophy within one decade?

<sup>39</sup> Deeks, Parker and Ryan, above n 20, 70

<sup>40</sup> J Henning "Commentary: The Employment Contracts Act and Work Stoppages" (1995) *New Zealand Journal of Industrial Relations*, 20 (1) 77, 85

## A *The Employment Contracts Act: 1991 – 2000*

The election of a National Government in 1990 was a defining moment in the change in industrial relations philosophy in New Zealand. Within months the Employment Contracts Act 1991 had been enacted, and it represented a new era in the governance of employment relationships. Underlying the Act was a philosophy founded on individual freedom of contract, flexibility and efficiency in the labour market and reliance on the free market to determine wages and conditions. These beliefs grew from the neo-classical economic theory being promoted at the time.<sup>41</sup> Indeed, only minimal state intervention in the employment relationship was retained, such as the minimum wage and personal grievance procedures. It was believed that all individual employers and employees were free to create contracts on their own terms, and there was no place for the state to be interfering with that freedom.

However, the apparent simplicity of this approach contained numerous difficulties for unions. The advent of the Employment Contracts Act in 1991 was a severe blow for union negotiating power and organisation, in a number of ways.

### 1 *The Status of Unions*

The Employment Contracts Act 1991 effectively removed the legal status that unions had held for 97 years.<sup>42</sup> The fact that the Act did not even recognise the existence of unions in its language, referring instead to “employee representatives”, undermines the legitimacy of union representation.<sup>43</sup> Unions were confined to being merely the agents of workers, rather than parties to negotiated agreements in their own right. This led to the perception of unions as being outsiders to the employment relationship, thus undermining their place as providing the voice of workers.<sup>44</sup> Unions were now third parties in employment matters, and had no legal status whatsoever, until they

<sup>41</sup> Deeks, Parker and Ryan, above n 20, 83

<sup>42</sup> W Grills “Commentary: The Impact of the Employment Contracts Act on Labour Law: Implications for Unions” (1994) *New Zealand Journal of Industrial Relations*, 19 (1) 85, 85

<sup>43</sup> J Hughes “The Potential Benefits of the New Employment Relations Act”

<http://library.psa.org.nz/collection/ctu/> (last accessed 22 August 2000)

<sup>44</sup> Hughes, above n 43

had been authorised by the workers to represent them.<sup>45</sup> The question of how a union can become a worker's authorised agent when they have no right to enter the workplace to speak to the worker is not addressed by the Act. Access to workers was limited to that of an authorised agent entering the workplace to discuss contract negotiations.<sup>46</sup>

## 2 Membership Levels

Part 1 of the Employment Contracts Act – Freedom of Association, gives individual employees the right to choose whether or not they wish to belong to any “employee organisation”.<sup>47</sup> This freedom not to associate has contributed to diminishing union membership levels over the last decade. Falling membership levels cannot be attributed solely to those who were dissatisfied with the unions' performance, and who only belonged previously out of compulsion. It must be accepted that many members will have simply faded away, as unions have been forced to shore up their support in larger areas, and therefore neglect members in smaller workplaces.<sup>48</sup>

In May 1991, when the Employment Contracts Act was introduced, union membership stood at 603,000, with a density of 65%. Within six months, the level of membership had dropped to 514,000, and 14 unions had gone out of existence.<sup>49</sup> By December 1998, union membership had dropped even further, to just 306,000, with union density at 17.7%.<sup>50</sup> This fall in membership – almost halved in ten years – has meant that unions have been forced to change the way they operate, both with respect to members, employers and other unions.<sup>51</sup>

Additionally, the freedom not to associate, as provided in the Employment Contracts Act 1991<sup>52</sup>, has undermined the freedom of workers to associate. This is the result of

<sup>45</sup> Grills, above n 42, 85

<sup>46</sup> Employment Contracts Act 1991, s 14

<sup>47</sup> Employment Contracts Act 1991, s 6

<sup>48</sup> Henning, above n 40, 86

<sup>49</sup> R Harbridge and K Hince “Organising workers: the effects of the Act on union membership and organisation” in R Harbridge (ed) *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 224, 231

<sup>50</sup> “Utu: Revenge of the Unions” *North & South*, Auckland, New Zealand, July 2000, 54

<sup>51</sup> “Utu: Revenge of the Unions” *North & South*, Auckland, New Zealand, July 2000, 54

<sup>52</sup> Employment Contracts Act 1991, ss 5 and 6

a free-rider problem that emerges when some employees are union members and some are not. Any gains made by the union for its members, for example, improved workplace safety, are public goods to all workers in that workplace. Neither the union, the firm, nor union members are able to exclude non-members from enjoying the benefits of the safer environment. As a result, there is no incentive for any worker to continue to pay their union dues, when all other non-paying workers receive the same benefits. Inevitably, this leads to a fall in membership.

### 3 *Strike Activity*

It is accepted that the level of strike action taken in New Zealand has fallen dramatically since the introduction of the Employment Contracts Act 1991. This is at least partly the result of falling union membership levels, as discussed above. The Employment Contracts Act 1991 severely limits the circumstances in which a strike will be legal,<sup>53</sup> and as workers find themselves more alone in the workplace, they are less likely to stand up to their employer on issues such as wage rates.

### 4 *Collective Agreements*

As unions have lost members, the number and coverage of collective contracts have shown a similar downward trend.<sup>54</sup> With a corresponding increase in the number of employees on individual contracts, it has become difficult for unions to gain members through representing workers in negotiations. It was clear to unions that the Employment Contracts Act 1991 was aimed at reducing the level of coverage of collective employment contracts.

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<sup>53</sup> Employment Contracts Act 1991, ss 63 and 64

<sup>54</sup> R Harbridge, A Crawford and P Kiely, *Employment Contracts: Bargaining Trends and Employment Law Update 1998/99* (Graduate School of Business and Government Management, Victoria University of Wellington, Wellington, 1999) 68

## 5 *Streamlined Union Activity*

Unions today have been forced to operate much more efficiently, and run themselves more like businesses than at any time in the past.<sup>55</sup> If they had not made this change, it is unlikely they all could have survived on the much lower level of revenue now available. Competition for members between unions has also grown. This has led to unions employing marketing strategies to attract members.<sup>56</sup>

This streamlining of union activity has also contributed to the falling level of membership. It is simply uneconomic for union officials to visit small workplaces, as there would be insufficient revenue generated from members there to cover the costs of visiting the workplace. This is a consequence of the downsizing of unions over the period 1985 – 1999. Additionally, there are no rights of access to workplaces for union officials, unless they are visiting a worker who is already a union member to discuss contract negotiations.<sup>57</sup> It is therefore very difficult to recruit new members in workplaces where there are no existing union members. Although recruitment is prohibited, even on authorised workplace visits, the presence of a union official is likely to attract the attention of other non-unionised workers.

## 6 *Conclusion*

Unions clearly saw the Employment Contracts Act 1991 as a deliberate attempt to eliminate them from the industrial relations arena in New Zealand, but they were not prepared to give in easily. Instead, these harsh economic realities have meant that the focus of unions has been forced away from the socialist goals that many unions were founded on. Although there is no doubt that many union supporters still see a role for unions in the wider political environment, the battle for survival has forced them to put those goals to one side. For the time being, many unions have transformed their activities into being focussed on political lobbying for change and retention of as many members as possible.

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<sup>55</sup> D Neilson *A Trade Union Perspective of New Zealand's Political Economy* (Workers Institute for Scientific Socialist Education, Auckland, 1993) 150

<sup>56</sup> Conversation with Leanne Peden of the New Zealand Engineering, Printing and Manufacturing Union, 30 August 2000

<sup>57</sup> Employment Contracts Act 1991, s 14



This has perhaps hurt unions also. The key to union success is organisation and effective communication with members.<sup>58</sup> Once a fundamental common goal is no longer the focus of a union and its members, loyalty is likely to be diminished.

#### **IV NEW DEVELOPMENTS: 2000 – ?**

What are the key changes embodied in the Employment Relations Act 2000? Will those changes allow unions to regain at least some of the ground they have lost over the last decade? Additionally, can employers' fears of some aspects of the Act be allayed?

The changes embodied in the Employment Relations Act 2000 run deeper than simply alterations to processes and increased recognition of workers' rights. There is a shift in the fundamental thinking behind the legislation about the rights of workers and their unions, and the role of the state in industrial relations.

##### **A The Concept of Good Faith**

Perhaps the most fundamental change is in the philosophy underlying the Employment Relations Act 2000. The Employment Contracts Act 1991 regarded the employment contract in an almost identical light to any other commercial contract. There were few extra protections and regulations provided for, and it was assumed that individuals (employers and employees) were free to enter into any contract which they agreed upon. In contrast, the Employment Relations Act sees the employment relationship as more complex than simply an agreement between two parties.<sup>59</sup> It recognises the human side of the relationship and the on-going nature of the interaction between the parties.

There is therefore a need for higher levels of co-operation and stronger protections for workers from employer exploitation. Section three specifically refers to the "inherent

<sup>58</sup> A Kirk "The Trade Union Response to Structural Change" (1983) *New Zealand Journal of Industrial Relations* 2 (3), 211

<sup>59</sup> Employment Relations Bill 2000, no 8-1, Explanatory Notes

inequality of bargaining power in the employment relationship". The belief that employers are able to pressure workers into accepting inferior conditions, as a result of their control over whether or not to employ the individual worker at all, is firmly held by this government. The Act is aimed at somehow balancing out that inequality, as mentioned by the Minister of Labour, the Honourable Margaret Wilson.<sup>60</sup>

It is clear that the Honourable Margaret Wilson sees the requirement of acting in good faith as essential to building employment relationships and reducing the inequalities.<sup>61</sup> Indeed, the courts have begun to recognise this, even when deciding cases under the Employment Contracts Act 1991.<sup>62</sup> The difficulty, of course, is in defining what is meant by good faith and determining when it has been breached. The Employment Relations Act legislates good faith in eight key "employment relationships". These relationships are between employers, unions, union members and other workers.<sup>63</sup> It is immediately obvious that the Act views unions as a vital part of industrial relations affairs, and not as a supporter on the sideline.

The Employment Contracts Act 1991, in contrast, did not even recognise the existence of unions. Instead, unions received recognition as employees' bargaining agents, once appointed to the position by the employees. Even then, unions only have the status of party principal to any agreements reached if that is agreed to by employers and employees. They existed only to represent employees, on the employees' terms. Unions were in no way preferred to any other group or individual who employees could appoint to represent them in negotiations. This undermined not only almost a century of union recognition, but also left workers to their own devices if disputes involving costly legal action arose.

### *1 Good Faith Bargaining*

Although good faith is applied to all the relationships listed in section 4, most attention has been directed towards good faith bargaining – the relationship between union(s) and employer(s), when negotiating a collective contract. This is perhaps

<sup>60</sup> Speech given by Margaret Wilson to the New Zealand Employers' Federation, 24 May 2000

<sup>61</sup> M Wilson, above n 60

<sup>62</sup> *Ali & Ors v Savoy Capital Ltd t/a Hyatt Regency Auckland* To be reported in [1999] ERNZ

<sup>63</sup> Employment Relations Act 2000, s 4(2)

reflected by the length of section 32 – Good faith in bargaining for a collective agreement. This section does list some specific duties that both unions and employers must fulfil, but the section clearly states that these are minimum requirements, suggesting that later interpretations by the courts may require more extensive obligations. Some guidance is also likely to be provided by the taskforce established to draft guidelines on good faith bargaining.<sup>64</sup>

The New Zealand Employers' Federation's main objection to the good faith requirement appears to be that the definition of good faith is so vague and subjective that the only benefit that will result from legislating good faith will be to lawyers, arguing the point in the courts.<sup>65</sup> An example given is that of a party who goes through the motions of acting in good faith, but all along in fact has no intention of reaching agreement, which is demonstrated by later actions.<sup>66</sup> It therefore appears to any enforcement body that the party is acting in good faith, when this is not actually the case. Employers also see the requirement as a back-door way for the State to intervene in the substance of bargaining.<sup>67</sup> Requiring courts (or equivalent bodies) to intervene when bad faith is alleged makes it very difficult for that body to reach a decision on whether there has been bad faith without delving into the substantive issues being negotiated.

## 2 *Codes of Good Faith*

In response to these criticisms, the development of a general Code of Good Faith has already begun.<sup>68</sup> Provisions promoting the development and implementation of Codes of Good Faith are an important aspect of good faith, as they will provide some level of certainty in an otherwise murky area. Although good faith has long been a feature of the industrial relations environment in other countries (for example Canada and the United States), it will be difficult to import the rules established by case law in those countries into the New Zealand context. Indeed, the overseas experience suggests that

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<sup>64</sup> M Wilson, above n 60

<sup>65</sup> *The Employer* No 192, June 2000, 5

<sup>66</sup> *The Employer*, above n 65, 5

<sup>67</sup> *The Employer*, above n 65, 5

<sup>68</sup> M Wilson, above n 60

large numbers of cases will need to be tried before any substantive definitions and processes will be established with any certainty.<sup>69</sup>

Codes can relate to general or specific employment matters, and they will provide guidance as to application of the duty of good faith in relation to collective bargaining.<sup>70</sup> It is still difficult to see that there will be sufficient detail within the code or codes to avoid the need for further clarification in the courts. There is also a concern that codes will be developed in an ad hoc fashion, in response to specific situations which arise. It is hoped that a greater focus on mediation as the preferred method of problem solving will reduce legal costs and wasted time. However, it is to be expected that issues of good faith which do result in court action will be approached in a common-sense manner, as the legislation which relates to mediation requires.<sup>71</sup>

### 3 *Legislative Requirements*

There are some specific requirements in the Act which are examples of behaviour satisfying the duty of good faith. These are covered in sections 33 to 35, and include:-

- Unions and employers must do their best to reach an agreement as soon as possible
- Unions and employers must meet, and consider the proposals put forward by the other party
- Unions and employers must recognise and respect the authority in each other to act for the represented party
- Employers must provide such commercial information to the union, that is reasonably necessary to support or substantiate claims made for the purposes of bargaining

While some of these requirements can be objectively measured, there are obvious problems with measuring whether a party has used its best endeavours to reach an

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<sup>69</sup> The Employer, above n 65, 5

<sup>70</sup> Employment Relations Act 2000, s 35

<sup>71</sup> Employment Relations Act 2000, s 147

agreement, for example. These are the areas in which it is possible that the courts will make themselves heard under this legislation. It should be noted that good faith does not require a concluded collective agreement.<sup>72</sup> While these requirements give some indication of what is expected of parties engaged in negotiations, section 32 explicitly states that these requirements are the minimum level of acceptable behaviour. This suggests that there may be more onerous duties on both employers and unions, presumably to be decided by the courts. Whether it is desirable to give this level of policy making over to judges is questionable, and somewhat surprising, given the prescriptive nature of the rest of the Act.

Although the concept of good faith is being promoted as essential to developing effective relationships among the parties involved in employment issues, it is so fundamental to these legislative changes that it should be examined from perspectives other than these social goals. Employers have expressed concern that the Employment Relations Act will cause an economic downturn, for example through higher transactions costs.<sup>73</sup> This calls for an economic examination of good faith bargaining, to establish whether these fears are well-grounded.<sup>74</sup> Although the Employment Relations Act 2000 is not primarily an economic tool, its effects must be consistent with overall economic policy.<sup>75</sup>

### ***B An Economic Analysis of Good Faith Bargaining***

Let us consider an economic model of the labour market in which both employers and unions have some ability to influence wage rates and the current level of employment.<sup>76</sup> This will be a fair analysis of the situation under the new legislation. Employers will retain the right to employ as many staff as they wish, but unions will also be able to influence the level of employment to some degree. Both employers and unions have distinct goals which they hope to achieve by interacting in the labour

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<sup>72</sup> Employment Relations Act 2000, s 33

<sup>73</sup> The Employer, above n 65, 3

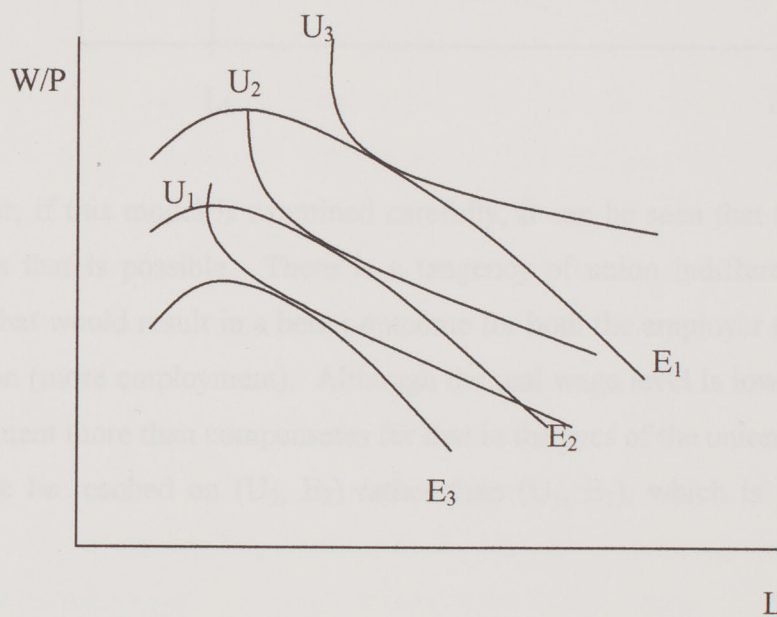
<sup>74</sup> Submission of the New Zealand Employers' Federation to the Employment and Accident Insurance Legislation Committee on the Employment Relations Bill, 4 May 2000

<sup>75</sup> Speech given by Peter Conway, CTU Economist, to a Union Seminar "Employment Relations; the new era" 15 May 2000

<sup>76</sup> S Hargreaves-Heap *The New Keynesian Macroeconomics: Time, Belief and Social Interdependence* (Edward Elgar, Worcester, 1992) 137

market. Employers wish to maximise their profits, which cannot be achieved without workers supplying their labour to the firm; and unions wish to achieve higher levels of employment and real wages for their members. This cannot be achieved without employers giving jobs to those members.

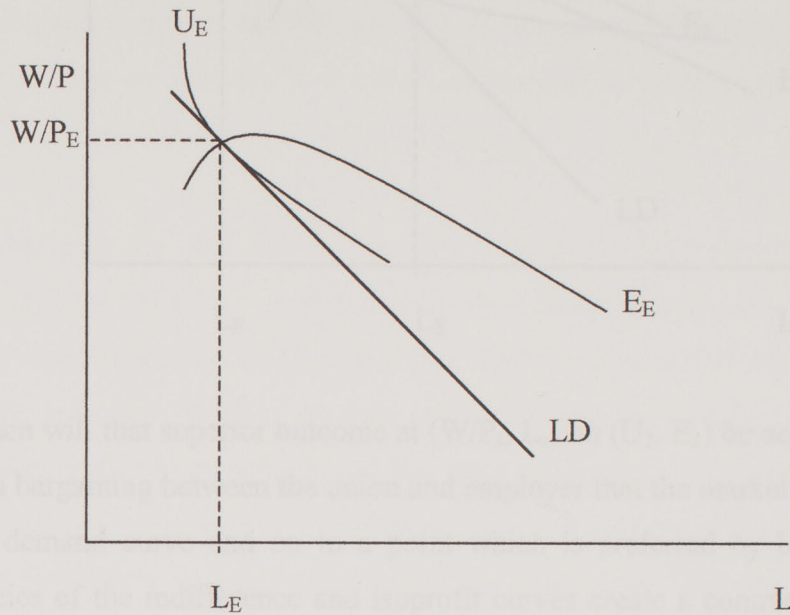
Diagrammatically we can represent this situation using isoprofit and indifference curves for employers and unions respectively.<sup>77</sup> Each curve represents combinations of the level of employment and real wage at which the firm or union is indifferent. Therefore, the isoprofit curves each represent a single level of profit, and each union indifference curve represents a single level of union satisfaction. By mapping those curves on a single set of axes we can see points at which employers and unions could reach agreement. (It is important to remember that there is an infinite number of these curves which are not drawn on the diagram.)



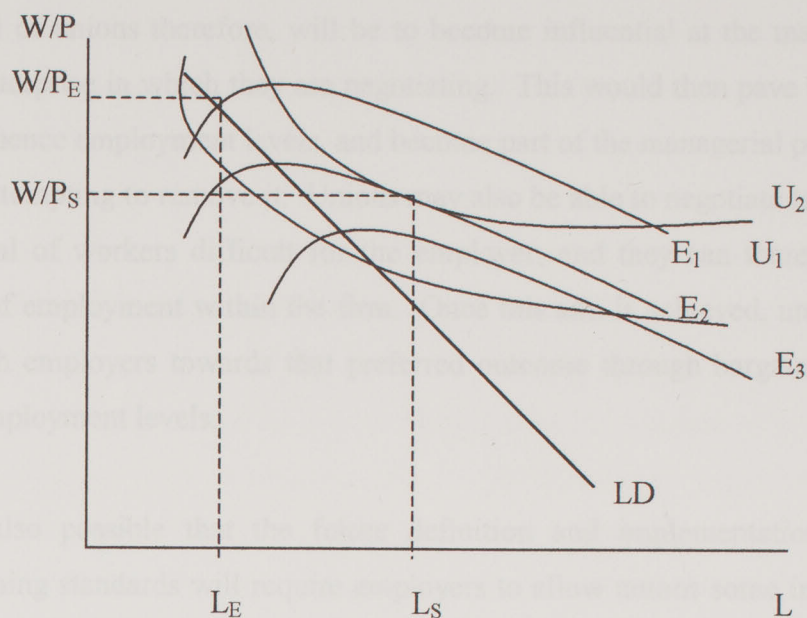
There is one more factor to add to these curves before any results begin to emerge. This is the demand for labour by firms, and this demand is derived from the demand firms are experiencing for the goods or services they produce. The labour demand curve is downward sloping in real wage/employment space because firms can afford to employ more workers only when the real wage they need to pay workers is lower.

<sup>77</sup> Hargreaves-Heap, above n 76, 137

By adding in the labour demand curve of employers, we can see a single point which would be reached in the market without any negotiation between employers and unions. This point defines a certain level of employment and the real wage, which is acceptable to both unions and employers.



However, if this model is examined carefully, it can be seen that there is a superior outcome that is possible. There is a tangency of union indifference and isoprofit curves that would result in a better outcome for both the employer (higher profit) and the union (more employment). Although the real wage level is lower, the increase in employment more than compensates for that in the eyes of the union. Equilibrium can therefore be reached on  $(U_2, E_2)$  rather than  $(U_1, E_1)$ , which is preferred by both parties.



How then will that superior outcome at  $(W/P_s, L_s)$  on  $(U_2, E_2)$  be achieved? It is only through bargaining between the union and employer that the market will move off the labour demand curve and on to a point which is preferred by both parties. The tangencies of the indifference and isoprofit curves create a contract curve, which is the locus of those tangencies. The model cannot tell us exactly where on that contract curve agreement will be reached, as that depends on the relative bargaining strengths of the two parties. However, it can be seen that by using the original isoprofit and indifference curves that met on the labour demand curve as boundaries, there is a specific segment of the contract curve on which the final outcome will exist.

Reaching this superior outcome is dependent on unions being able to negotiate in terms of both wages and employment levels. In the past however, union influence has been restricted largely to wage levels, with little ability to alter the level of employment.<sup>78</sup> If this continues to be the case, then the original agreement on the labour demand curve will be the outcome. This is because the union does not want to set a wage lower than the one at this level. If it did so, the employer would then take that wage and use it to determine the level of employment they will offer from the labour demand curve. This would leave the union in an inferior position, so it would prefer to remain at the original level of wages and employment.

<sup>78</sup> Hargreaves-Heap, above n 76, 138



A goal of unions therefore, will be to become influential at the managerial level of any enterprise in which they are negotiating. This would then pave the way for them to influence employment levels, and become part of the managerial prerogative, rather than attempting to remove it. Unions may also be able to negotiate terms which make removal of workers difficult for the employer, and they can thereby influence the level of employment within the firm. Once this aim is achieved, unions will be able to push employers towards that preferred outcome through bargaining on the wage and employment levels.

It is also possible that the future definition and implementation of good faith bargaining standards will require employers to allow unions some influence over the level of employment, rather than retaining their full managerial prerogative to employ as many or as few workers as they wish. On the basis of this model, employers should not resist union influence at this level, as it can lead to superior outcomes for both parties. However, employers seem very wary of letting union representatives become too closely involved with their business activities. The motivation behind this is unclear.

### *C Other Legislative Changes*

Using the concept of good faith as a base, the Employment Relations Act is highly prescriptive in terms of providing guidelines for negotiation procedures. This degree of prescription is considered necessary to ensure that good faith is maintained throughout all procedures, and that any problems which do emerge can be quickly addressed.<sup>79</sup>

#### *1 The Status of Unions*

Unions are particularly recognised in Part Four of the Act, in terms of their rights to represent workers, collective bargaining, entering the workplace and having access to workers for educational purposes.<sup>80</sup> These changes will allow unions to focus on their goals of improving pay and conditions for members, rather than the battles for

<sup>79</sup> M Wilson, above n 60

<sup>80</sup> Employment Relations Act 2000, ss 18, 20 and 73

recognition they faced under the Employment Contracts Act 1991. There is some evidence however, that the courts were accepting that once a union had been recognised as the bargaining representative for employees under the Employment Contracts Act 1991, it was illegal for employers to then try to persuade employees directly into making an agreement. Only the provision of factual information directly to employees was permissible.<sup>81</sup>

The new Act is premised on unions being inherently capable of initiating collective negotiations. This is a return to the recognition of the legal status of unions as provided for in the Industrial Conciliation and Arbitration Act 1894. It is also in stark contrast to the Employment Contracts Act 1991, which provided that each individual worker must authorise a representative before that agent is able to represent the worker in negotiations.<sup>82</sup> It is now accepted that if workers are members of the union, that union is the representative of those workers. Additionally, the union will be a party to any negotiations in its own right, not as merely an agent. This enhanced position will give unions a stronger starting point for their negotiations, and they will also be helped by an increase in the number of members.

While the Employment Relations Act does not represent a return to compulsory unionism,<sup>83</sup> any employee who wishes to be part of a collective agreement must be a member of the union which has negotiated the agreement.<sup>84</sup> This will give unions a considerable boost, particularly as any new employee to a firm where a collective agreement is in place must be given the opportunity to join the relevant union and become covered by the current collective contract. During the thirty days which the employee has from the beginning of their employment to decide whether to join the union, that worker cannot be given conditions that are inferior to those in the collective contract.<sup>85</sup> It is difficult to imagine substantial numbers of new employees declining their right to be covered by the collective, when the alternative is an individually negotiated contract. This is particularly true for low-skilled workers,

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<sup>81</sup> Harbridge, Crawford and Kiely, above n 54, 58

<sup>82</sup> Employment Contracts Act 1991, s 12

<sup>83</sup> Employment Relations Act 2000, s 8

<sup>84</sup> Employment Relations Act 2000, s 56

<sup>85</sup> Employment Relations Act 2000, s 63

who have little bargaining power in negotiations with employers.<sup>86</sup> This system then assures unions that once a collective agreement is in place, they are most likely to have a good number of new members when any new workers are hired by the employer.

Now that unions are again recognised in law as the rightful voice of the workers, they no longer need to compete with others to be the workers' representative in contract negotiations. This will help to ensure unions are truly independent, although there it can be argued that this undermines the workers' freedom of choice.<sup>87</sup> While there was no explosion of non-union employee representatives under the Employment Contracts Act,<sup>88</sup> even though it allowed for almost anyone to be an "employee representative", unions must take advantage of the fact that they need no longer fight to become representatives or to become recognised. Unions now have the exclusive right to negotiate collective contracts, and they must produce results for their members in order to retain them.

## 2 *Collective Contracts*

While the Employment Contracts Act 1991 purported to make the decision of whether to form a collective or individual contract one for individual employers and employees to decide,<sup>89</sup> its structure was clearly aimed at minimising collective contracts.

Because the Employment Relations Act is not a return to compulsory unionism, a poor showing from unions could result in a reluctance of employees to belong to unions. This could then mean a return to employee preferences for individual employment contracts, which allow them to negotiate their own wages and conditions. Dissatisfaction with union performance, when compulsory unionism allowed unions

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<sup>86</sup> Submission of the New Zealand Council of Trade Unions to the Employment and Accident Insurance Legislation Committee on the Employment Relations Bill, 20 April 2000, 12

<sup>87</sup> C French "Bargaining and Bargaining Structures under the Proposed New Legislation: Continuities and Changes" in *Proceedings of the Employment Relations Bill Seminar* (7 April 2000) 21, 23

<sup>88</sup> Colmar Brunton Research, "Executive Summary: Survey of Labour Market Adjustment under the Employment Contracts Act" prepared for *Department of Labour, Industrial Relations Service*, August 1997

<sup>89</sup> Employment Contracts Act 1991, Long Title

to lose sight of their members' interests and begin to promote their own agendas, contributed to the push for change<sup>90</sup> that ultimately resulted in the Employment Contracts Act 1991. Unions must be prepared for this challenge, and not allow a return to the era of demarcation disputes. While unions are competitors in the marketplace of employee representation, they will only damage themselves if they engage in and focus on territorial disputes.

However, an important consideration here is the number of collective contracts which still exist today. With the Employment Contracts Act's focus on individual bargaining and contracts, there are 250,000 – 300,000 fewer workers covered by the collective contracts today than there were in the 1980s.<sup>91</sup> In 1998/99 only 24% of the workforce was covered by collective contracts.<sup>92</sup> Unions are starting from a long way behind in their fight to represent a large number of workers in collective agreements, and the Employment Relations Act perhaps fails to sufficiently acknowledge this. It appears that the drafters of the Act expect unions to be able to quickly regain the membership levels and collective bargain coverage that existed before 1991. In order to make substantial ground therefore, unions must take full advantage of the new provisions for education leave and recruitment of workers as union members.

### 3 *Recruitment/Entry to Workplaces*

Section 22 of the Employment Relations Act specifically allows union representatives to enter workplaces solely for the purpose of recruiting new members. There is no requirement that the union have existing members at the workplace. The onus is therefore on unions to take advantage of this opportunity to increase membership levels. In comparison with section 14 of the Employment Contracts Act, which provided that authorised agents could enter the workplace to discuss negotiations with employees, it is clear that the new provisions provide unions with a good opportunity to extend their sphere of influence and recruit many new members. Case law

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<sup>90</sup> P Brook *Freedom at Work: The Case for Reforming Labour Law in New Zealand* (Oxford University Press, Auckland, 1990) 71

<sup>91</sup> Harbridge, Crawford and Kiely, above n 54, 68

<sup>92</sup> NZCTU, above n 86, 6

subsequent to the passing of the Employment Contracts Act 1991 also indicates that legitimate union visits to workplaces are restricted to very limited circumstances.<sup>93</sup>

As the last decade has demonstrated, unions must behave like private businesses in order to survive, and they are capable of doing that.<sup>94</sup> They must therefore promote themselves effectively to workers. This involves marketing the benefits of union membership to workers in a professional manner. Union workers should be prepared to give presentations, distribute advertising brochures and answer any questions workers may have about union membership. The responsibility therefore falls on unions to ensure they have an appropriate level of well-trained staff. There is already evidence of unions increasing staff levels, and moving their recruitment focus to currently non-unionised areas.<sup>95</sup> While union officials have always fulfilled these tasks, the retention of voluntary unionism means that unions must present an attractive package for workers, in order to convince them that they should join a union.

A key to more general union success is understanding the enterprise in which its members are employed and ensuring union representatives have the required skills to foster good relationships with management and members.<sup>96</sup> Unions must use the new opportunities to visit workplaces to achieve better understanding of the enterprise that they are contributing to.

Ross Wilson clearly sees a role for unions at the level of strategic decision-making in the firms which employ their members.<sup>97</sup> He believes the unions' interests are more than just the wages and conditions members receive. Areas of concern extend to use of technology, health and safety, allocation of resources and workplace organisation. All of these factors are relevant to the job security of union members, and are therefore seen as relevant areas of influence for the union to be involved in. In order to be successfully involved at this level of decision-making, unions must have the internal strength and structure to maintain a business-like relationship with

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<sup>93</sup> *National Distribution Union v Foodstuffs (Auckland Ltd)* [1994] 1 ERNZ 653

<sup>94</sup> Interview with Andrew Little, "Good Faith Bargaining" on *Nine 'til Noon*, National Radio, 31 May 2000 9.25am

<sup>95</sup> "PSA Hires More Union Organisers" *The Evening Post*, Wellington, New Zealand, 7 April 2000

<sup>96</sup> Speech given by Ross Wilson to Massey University College of Business, 24 May 2000

<sup>97</sup> Speech given by Ross Wilson to the PSA Congress, 1 May 2000

management. Ross Wilson believes that such relationships are vital to success for all businesses in the modern economic environment.

Improved bargaining power for unions can be achieved, but it will not come easily, despite the almost guaranteed increase in union membership. Union workers must demonstrate to employers that they understand the commercial environment in which the employer is operating. By doing this, employers are more likely to accept that unions do want them to be successful, so will see unions as business partners, rather than adversaries. It is difficult to understand how employers could not reach this conclusion, as there could be no worse result for a union than having an employer close down. This would result in mass unemployment of members, so would not be desired by the union. The interdependence of firms and workers seems to be too easily forgotten in the provocative political statements that often dominate industrial relations debate. Both sides rely on each other to survive.

#### 4 *Employment Relations Education*

Unions must also ensure their members are well-educated, and use the sections in Part Seven of the Employment Relations Act 2000 – Employment Relations Education Leave – to their best advantage. These sections provide for employees a minimum of three days of paid leave per year for “employment relations education” purposes. Employees from larger workplaces would be entitled to more leave.<sup>98</sup>

Informed members will help the union in a number of ways. They will be capable of passing on their knowledge to co-workers, thereby saving the union from using resources on that task. By attending education sessions, workers are also more likely to become involved in and identify with the fundamental union values of solidarity and collective action that modern unions cannot afford to promote in the first instance. This is vital, as union officials do not want to let go of their underlying principles, yet if they spend time and money promoting these aspects of unionism, they are in danger of losing other members who see them purely as a means of achieving better employment outcomes. This would directly affect the viability of the union as a

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<sup>98</sup> Employment Relations Act 2000, ss 73 and 74

business enterprise, and as such its registration with the Registrar of Unions and status as an incorporated society would be affected. That the Employment Relations Act requires incorporation and registration of unions before they are able to represent members in negotiations<sup>99</sup> reflects the historical position that existed from 1894, and indicates that the government intends to regulate unions in terms of their rules and internal processes.

## 5 *Dispute Resolution*

The prescriptive nature of the Employment Relations Act in terms of dispute resolution, and the renewed focus on mediation will also mean a change in strategy for unions. The philosophical basis for these changes is a belief that employment disputes are more effectively overcome if they are promptly resolved by the parties concerned, but with the assistance of expert negotiators or mediators.<sup>100</sup> The Act requires that the parties must attempt to resolve all disputes through mediation, and the Employment Relations Authority has no jurisdiction to hear disputes until satisfactory mediation processes have been completed.<sup>101</sup> Mediation services will be provided by the Department of Labour, and unions will be forced to adapt their strategies in such a way that will give more satisfactory results in mediation style negotiations, rather than the more adversary approach taken under the Employment Contracts Act 1991. Although mediation assistance is available on application under the Employment Contracts Act,<sup>102</sup> there is no requirement that the parties attempt mediation before proceeding to adjudication. Section 147 of the Employment Relations Act provides that the appropriate approach to mediation of any individual dispute is to be decided by the mediator. This removes some of the freedom of unions, employees and employers to attempt to resolve disputes in their own way. This provision is a little surprising, given that the object section refers to the preference given to parties resolving disputes in their own way.<sup>103</sup>

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<sup>99</sup> Employment Relations Act 2000, ss 14 and 15

<sup>100</sup> Employment Relations Bill 2000, no 8-1, Explanatory Notes

<sup>101</sup> Employment Relations Act 2000, s 159

<sup>102</sup> Employment Contracts Act 1991, s 80

<sup>103</sup> Employment Relations Act 2000, s 143

The establishment of the Employment Relations Authority, in place of the Employment Tribunal, and separate from the mediation process, is seen as vital in overcoming technical barriers to what is the "just" result of a particular case. The Authority will be the next stop after mediation has failed, and sections 160 and 161 of the Employment Relations Act indicate that they will take a common sense approach to any ruling they may make. Any evidence can be considered, regardless of whether it is "legal" evidence, and all circumstances can be taken in to account. It is hoped that this will result in efficient yet fair decision-making in an environment which is less legalistic than that of its predecessor.

However, if disputes cannot be resolved within this informal setting, it is likely that there will be an increase in litigation, due to the lengthy statutory obligations imposed by the Act, and a corresponding lack of precise definitions. It is extremely difficult to avoid extensive use of lawyers in an area as complex as employment relations, and it seems certain that there will be a need for the courts to interpret and apply the new provisions.

## 6 *Strike Action*

Strike action under the Employment Relations Act is likely to have increased potency, largely due to the effect of section 97, which prevents employers from hiring replacement workers or requiring non-striking employees to do the work of striking ones. Unions must take advantage of this change in their drive to achieve improved outcomes for their members. The change puts real power back in to the unions' hands, as under the Employment Contracts Act employers could usually carry on their operations with almost no disruption, due to the use of replacement workers. The ability of employers to lock out staff changes little under the Employment Relations Act 2000.

Despite this, strike action is still not an option that unions use lightly. It is accepted that the Employment Contracts Act has significantly reduced the level of strike activity in New Zealand, but this does not mean workers are more satisfied with their situation than in the past. The decline in strike activity is more likely to be due to the systematic disorganisation of labour (as union membership falls, fewer workers are



sufficiently organised to take strike action)<sup>104</sup> and an increased fear of the consequences of striking.<sup>105</sup> It is difficult to imagine then, that as union membership grows and the industrial relations environment becomes more worker-friendly, that there will not be an increase in strike activity. This is not an ideal scenario for unions, as an era of high strike rates can be unpopular with workers as well as with employers, particularly when strikes are prolonged. The level of strike activity under the Employment Relations Act will hinge on the extent to which the duty of good faith is embraced, and the maturity of the parties entering in to mediation. If these methods can be utilised effectively, there is no need for a large increase in strike activity.

The Employment Relations Act will not return unions to the high level of strike activity which occurred in the 1976 – 1985 period.<sup>106</sup> The majority of those strikes were in relation to the breakdown of wage negotiations, and were therefore a result of the inflexibility of wage relativities. These relativities, although not officially recognised in legislation, were the driving force of wage negotiations until the passing of the Employment Contracts Act in 1991. They had become ingrained in the negotiation process, after many years of being the major factor in setting the level of industry awards. The Employment Relations Act, therefore, has more in common with the Employment Contracts Act than the earlier legislation in this regard.<sup>107</sup>

There is nothing in the Act which provides for the creation of a centralised bargaining system, as unions cannot claim any industry as exclusive territory. It therefore seems unlikely that large-scale, full strikes will significantly increase under the Act. The Act requires negotiations to continue for at least 40 days before strike action is legal,<sup>108</sup> although the legality of strike action is not generally at the forefront of the minds of aggrieved workers. While good faith does not require an agreement to ever be reached, it is difficult to imagine large numbers of negotiations not making sufficient

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<sup>104</sup> Henning, above n 40, 86

<sup>105</sup> Speech given by Ross Wilson to the Work Relations New Zealand Conference, Wellington, 28 – 29 February 2000

<sup>106</sup> Interview with Peter Boxall, "Employment Relations Bill Replaces ECA" on *ZB Holmes*, 15 March 2000 7:15am

<sup>107</sup> "Employment Bill Offers Plenty of Flexibility" *The Evening Post*, Wellington, New Zealand, 29 May 2000, 5

<sup>108</sup> Employment Relations Act 2000, s 86

progress within 40 days to prevent full strike action, if all parties are indeed acting in good faith.

There may however, be an increase in the level of strikes which do not involve a complete stoppage of work. Section 81 of the Employment Relations Act 2000 includes reducing normal work performance in the definition of a strike. This conceivably includes working to rule and rolling strikes. These smaller scale disruptions can be more damaging to employers than complete stoppages, as they tend to be sustainable over longer periods of time.

Another possible source of increased industrial action is in terms of stoppages in support of multi-employer agreements. These were not permitted under the Employment Contracts Act 1991,<sup>109</sup> but are permitted under the Employment Relations Act. Therefore, there are potentially wide-spread actions available to all workers in an industry, for example all port workers could strike to support colleagues in one area of the country.

## V CONCLUSION: THE FUTURE FOR UNIONS

How should unions proceed from now, given the opportunities they have to increase membership and gain influence in workplaces throughout New Zealand?

While some workers are joining unions of their own initiative, unions must get out into workplaces to promote themselves to workers who may never have experienced union membership. Indeed, some unions have already begun more active promotions in workplaces.<sup>110</sup> Recruitment in the early stages of the Employment Relations Act's life will be key to increasing membership levels. Unions will seek to identify industries which currently have very low levels of coverage, and engage in intensive recruitment campaigns in those areas.<sup>111</sup> It must be remembered that few workers under 30 will ever have been union members. To attract these workers, unions must

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<sup>109</sup> Employment Contracts Act 1991, s 63

<sup>110</sup> "Workers Flock Back to Unions" *The Nelson Mail*, Nelson, New Zealand, 19 August 2000

<sup>111</sup> Peden, above n 56

present themselves as professional and effective organisations, and brand themselves in the union market.<sup>112</sup>

Unions must show that they will take a sensible approach to negotiations, and will place their members' interests, and not any political agenda, as their first priority. As New Zealand's economy becomes increasingly service-oriented, unions must see themselves as providing a service to their members, and realise that those members will expect a high level of satisfaction. The unions will not be able to rely on the political loyalty of members to retain them, they must instead focus on providing the best possible service. Unions are again operating in an environment in which they must compete against each other for members, and they must act to differentiate their "product" from that of their competitors.

If unions wish to co-operate with each other in order to avoid demarcation disputes and obtain better bargaining results for their members, they need to make this explicit to members. This will allow workers to make an informed choice about the union they join. By joining forces, unions may well be able to gain more concessions for their members than they would otherwise have been able to achieve.

In order to achieve good results for their members, unions must establish relationships of trust and confidence with employers; effectively good faith relationships. By reminding employers that unions and workers all want the enterprise to succeed, and demonstrating flexibility, unions can become more like business partners in individual firms.<sup>113</sup> This will give unions more scope for control over the direction of the business, and therefore allow them to achieve better results for their members. Once unions have some degree of control over employment levels within organisations, they can direct the eventual employment outcome towards the superior point demonstrated by the wage bargaining model.

Employers are more likely to accept a union into the decision-making process if that union has voluntarily put in place a Code of Practice, distinct from the Codes of Good Faith to be developed under the Employment Relations Act. This would demonstrate

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<sup>112</sup> Peden, above n 56

<sup>113</sup> Neilson, above n 55, 150

a real commitment to developing a constructive relationship with employers and their businesses, and may encourage employers to produce a similar code for themselves. Such levels of co-operation can help both unions and employers to achieve superior outcomes. Each would not be able to reach those outcomes without the other, and this must remain uppermost in the minds of negotiators.

Although the Employment Relations Act allows unions to return to the bargaining table in their own right, after a lengthy term of being the employees' representative, unions must be sure not to become too steadfast in negotiations, in terms of compromising demands.<sup>114</sup> Unions have the opportunity to make progress for their members and their own cause, but if they become greedy, then everyone will be worse off.<sup>115</sup> This will be a result of employer opposition, rather than inclusion, and worker backlash when their interests are not prioritised. If unions wish to gain and retain members who will help promote their fundamental principles of solidarity and collectivism, they will first need to win them over by providing a professional and effective service to those members. Once this is achieved, it is through education that the unionists of tomorrow will be developed and encouraged.

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<sup>114</sup> "Responsibility to Unions" *The Southland Times*, Invercargill, New Zealand, 8 August 2000

<sup>115</sup> "Goodwill Hunting" *New Zealand Management Magazine*, Auckland, New Zealand, May 2000, 16,

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