Bargaining In Good Faith
In The New Zealand Labour Market

Rhetoric or Reality?

by

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ABSTRACT

New Zealand presently operates a “free market” system of employment and labour relations in which there are no prescribed or mandatory bargaining procedures. When this system was introduced by the Employment Contracts Act 1991 (the “ECA”) it represented a dramatic departure from the previous system of state regulated collective bargaining, conciliation and arbitration: a system that had existed in New Zealand for almost a century.

Although this change in approach was supported by free market advocates, it also generated considerable international and domestic criticism. In response to that criticism, a number of New Zealand politicians stated in 1996 that they would consider imposing on employers and employees a statutory duty to bargain in good faith. However, since the end of 1996, very little has occurred in respect of this issue. Indeed, it now appears that the current New Zealand Government may have abandoned this proposal altogether.

If this is, in fact, the Government’s decision, it ought to be viewed with concern, for it has been made without the benefit of informed debate. Little, if any, substantive consideration has been given to whether such a duty ought to be introduced, and if so, the form it might take and impact it might have. If an informed decision is to be made to enact a duty of this nature, or not, as the case may be, its merits must be the subject of further debate. This thesis will endeavour to contribute to that debate by examining how one approach to the duty to bargain in good faith, that which applies in British Columbia, Canada, might operate in New Zealand.

This examination will consist of six chapters. The first will contextualise the New Zealand arguments on whether a duty of this nature ought to be introduced into the ECA. Chapter two will then examine the duty to bargain in good faith as it applies in British Columbia industrial relations. Chapter three will take that duty, and examine the extent to which it is currently replicated in New Zealand. It will be concluded that little of the substance of this duty is to be found in the law which presently governs the New Zealand labour market. Chapter four will assess the costs of introducing a duty of this nature into the ECA, particularly in terms of reduced efficiency and freedom. Chapter five will identify a number of specific issues that will require resolution if the duty is to operate effectively in New Zealand, and the terms of a suggested statutory amendment will be proffered.

It will be concluded in chapter six that introducing a duty to bargain in good faith, akin to that which applies in British Columbia, would benefit New Zealand employers, employees and society as a whole. Further, it will be argued that such a duty must be introduced if labour bargaining in New Zealand is to occur in any meaningful way for most employees. And finally, it will be suggested that if this duty is to be introduced effectively, legislative amendment will be required. For these reasons, it will be asserted that the New Zealand Government ought to revisit the issue of introducing into the ECA a statutory duty to bargain in good faith.
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CHAPTER 1: THE NEW ZEALAND DEBATE CONTEXTUALISED

1.1 Labour Relations in New Zealand Prior to the ECA

The ECA was enacted on 15 May 1991.¹ Prior to that date the system of labour relations in New Zealand was based on state facilitated collective bargaining which occurred between unions (representing collectives of employees) and employers or their representatives, and which produced collective awards and agreements. This system commenced with the Industrial Conciliation and Arbitration Act 1894 (the "ICAA"). The stated purpose of the ICAA was "to encourage the formation of industrial unions and associations and to facilitate the settlement of industrial disputes by conciliation and arbitration." Whilst there were several versions of labour relations legislation in New Zealand following the ICAA, each revision retained a central framework of collective bargaining.² That is, of course, until the enactment of the ECA.

Awards were usually occupationally based,³ and generally covered most or all of the country. These awards bound all the employees and employers involved in the work to which they applied, even although the vast majority of those employers and employees had no input into award negotiations (an affect referred to as "blanket coverage").⁴ As a result, in most workplaces upwards of three or four awards were operative at any one time, depending on the number of work classifications present. Agreements also tended to be multi-employer arrangements and applied to those parties who agreed to be covered by them.⁵

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¹ ECA, s. 1(2).
³ Such as the Clerical Workers Award and the Meat Workers Award. The term "award" is misleading in that it suggests an arrangement imposed or awarded by a third party. In most cases, however, awards were negotiated by unions and employers.
⁴ LRA, ss. 160(2) and 165(b).
⁵ Prior to 1988 there were separate collective bargaining procedures for the public and private sectors. Following the enactment of the State Sector Act 1988, both sectors operated under a system of awards and
The broad application of these awards and agreements had three principal consequences: centralised wage fixing; the equalisation of wages and other terms of employment within occupations; and the creation and enforcement of settled wage relativities between occupations. Indeed, the overall trend in wage movement was generally set by only one or two key awards. Thus, employees with little bargaining power benefited from deals struck by those in stronger bargaining positions, a process known as “comparative wage justice”.

Unions enjoyed a position of prominence under this system of labour relations. In the first place, unions, rather than their members, were parties to awards and agreements. Accordingly, the ability of most employees to enforce their terms of employment stemmed from their union membership. Secondly, a registered union enjoyed the \textit{exclusive and continuing} right to negotiate on behalf of a certain sector of the workforce. Thus, no other potential representative was able to challenge a registered union’s status as authorised bargaining agent. And thirdly, compulsory unionism, whether imposed by statute or by union membership clauses, had existed in the private sector in New Zealand from 1936 until the enactment of the ECA, except for a brief period from 1983 to 1985.

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7 For example, a grievance had to be instituted by a union on behalf of its member. However, in practice an employee who was not a union member still had a statutory right to the terms and conditions set out in the applicable award or agreement; but he or she was responsible for any associated grievance. See R. Harbridge, “Bargaining and the Employment Contracts Act: An Overview”, in New Zealand Experiences, 31 at 34.

8 Usually an occupational sector, although this depended on the membership rule of the particular union.

The union membership scheme under the ECA’s predecessor, the Labour Relations Act 1987 (the “LRA”), was based on legally permitted compulsory membership clauses. These clauses had to be agreed upon by the union and employer parties to the particular award or agreement or inserted pursuant to a ballot of employees.\(^\text{10}\) Such clauses were common place in the private sector, and, where present, compelled employees to join the applicable union or face dismissal.\(^\text{11}\) As a result, during the tenure of the LRA most private sector workers were union members. The same was true in the public sector, although in this sector high membership levels were due primarily to traditional worker allegiance rather than compulsory membership clauses, which were rarely included in public sector awards and agreements.\(^\text{12}\)

In terms of specifics, there have been various estimates as to the degree of unionism in New Zealand during the period preceding the ECA. Studies have suggested that membership as a percentage of the total salaried, full time, work force fluctuated between 60 and 73 percent during the period from 1985 until May 1991.\(^\text{13}\) The percentage of full time workers covered by collective awards and agreements was however, slightly higher than the percentage of union members, due to the affect of blanket coverage.\(^\text{14}\) Those remaining employees who were not union members \textit{and} who were not covered by a collective award or agreement,\(^\text{15}\) were covered by common law contracts of service.

\(^{10}\) LRA, s. 61.

\(^{11}\) Such clauses were subject only to a very limited “conscience or deeply held personal conviction” exemption. See LRA, s. 83.


\(^{15}\) Most executives fell within this category. See Deeks & Boxall, \textit{supra} note 5 at 71.
The primary purpose of the bargaining regime that pre-dated the ECA was the promotion of orderly collective bargaining. To this end, the LRA promoted unionism, and conciliation and arbitration played a central role. According to Geare:

While collective bargaining was seen as desirable if peaceful solutions could be reached, the state provided conciliators to chair the bargaining sessions. Strikes and lockouts were illegal and, if negotiation failed, arbitration was provided to achieve a settlement.

1.2 The Introduction of the Employment Contracts Act

The ECA effected radical reform by establishing a free market system of employment and labour relations. In doing so, the ECA swept away entirely the previous emphasis placed on collective bargaining and the associated support provided by conciliation and arbitration, a system that had existed for 97 years. In substitution, there now exists a system of employment and labour relations based on economic liberalism. This system endorses many of the beliefs inherent in liberal economics including the primacy of the individual and of individual freedom, the inefficiency of welfarism and the importance of self-reliance. Consistent with these beliefs, the ECA treats all employment as simply a matter of contract to be negotiated in a free labour market. “Free” in this context essentially means a labour market that is not subject to state intervention or any legislatively imposed bargaining procedures.

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16 Not only through granting unions the prominent status referred to previously, but also through provisions such as section 57 which guaranteed all union members a minimum of two paid union meetings per year and sections 56 and 196 which provided union officials with the right to enter worksites to interview members, inspect wage records and monitor compliance with existing awards and agreements. In reality, this broad right of access also provided unions with a valuable mechanism for organising.

17 Geare, supra note 2 at 194. The LRA did, however, introduce a degree of flexibility into the system by providing limited scope for strikes and lockouts, and by making arbitration voluntary provided both parties agreed to conciliation.
Bargaining under the ECA is notable for three reasons: the status of bargaining representatives; the form of bargaining and employment contracts; and the manner of bargaining.

The Status of Bargaining Representatives

A view central to the ECA is that employment contracts are arrangements between employers and employees, not between unions and employers or their representatives as was the case under the LRA. While bargaining representatives may be engaged by either party, the previous system of compulsory unionism has been abolished.

Moreover, where a representative is engaged, that representative negotiates only on behalf of those who have expressly appointed it. The sections in the LRA that granted a registered union the exclusive right to negotiate on behalf of a particular group of employees, and that extended the coverage of awards and agreements to all employees in a particular sector of the workforce, have not been replicated in the ECA. Unions must now actively recruit, and retain, members, and in so doing, compete with other prospective representatives. Moreover, membership, once secured, remains vulnerable, for union membership is revocable at will by an employee. As a result of these changes,

18 In order for a union to be a party to an employment contract under the ECA, both the employer(s) and employee(s) bound by the contract must agree. ECA, s. 17.

19 For example, an employee cannot be compelled by any contract or arrangement to join a union. ECA, s. 6. Accordingly, the compulsory membership clauses that operated under the LRA are no longer lawful.

20 Nor are “majority votes” and “bargaining units”, concepts central to labour relations in Canada and the United States of America, of any relevance under the ECA.

21 Significant competition for members has developed between unions, with a number of unions now representing employees who would traditionally have fallen outside their membership rules. As a result, it is not uncommon for more than one union to represent employees of the same work classification in the same workplace. C.f., the position in British Columbia, where certification provides a particular union with the exclusive right to represent all employees in the applicable bargaining unit (some of whom may not be union members at all).

22 Thus, successfully negotiating a collective contract in no way guarantees a union the right to act in any renewal negotiations that may occur. Rather, the securing of ongoing work depends on a union retaining membership. Again, this can be contrasted with the position in British Columbia. Once certified, a union remains the exclusive bargaining representative for all employees in the bargaining unit for all future
representation, bargaining and the content of an employment contract are now the concern of each individual employee.

Significantly, with the exception of one transitional provision, the term “union” does not appear at all in the ECA. Reference is made only to the generic terms “representatives” and “employee organisations”. While an employee’s representative may be a union, a representative for the purposes of the ECA can be any individual, group or organisation.

According to the Government in power at the time the ECA was enacted, the use of these generic terms reflected the freedom of employees to appoint any type of bargaining agent, not just unions. Others suggest the omission of the term “union” reflected a deliberate strategy on the part of the Government to direct labour relations away from the traditional institutions of unions and collective bargaining.

Quite clearly, then, the status of unions (and all representatives) under the ECA is secondary to that of employers and employees, and far less significant than under previous legislation. As Harbridge describes:

Whilst unions are free to play a role in industrial relations under the [ECA], they no longer have automatic and exclusive rights in the workplace.

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23 This is a startling turnaround, when one considers that nearly a third of all the sections in the LRA dealt with aspects of unionism.

24 Subject only to the right of the other negotiating party to object where a nominated representative has committed one of a number of prescribed criminal offences. ECA, s. 11.

25 See infra note 160 at 59.


27 Harbridge & Hince, supra note 12 at 230. Consistent with the reduced status of unions, the provisions in the LRA which guaranteed paid union meetings, and general union access to worksites, have not been replicated in the ECA. Moreover, unions have no privileged position under other workplace legislation, such as the Health and Safety in Employment Act 1992 (the Act which governs standards of safety in all workplaces). In contrast, unions enjoy the automatic right to be involved in certain health and safety issues in British Columbia. For example, where an inspector from the Workers Compensation Board
The Form of Bargaining and Employment Contracts

The ECA on its face expresses no preference for the form of bargaining or the form of employment contract to be entered into. This is a matter of "choice" for the negotiating parties, the two options in both cases being "collective" or "individual". This choice is set out in section 9 of the ECA, the material portion of which provides:

(a) Any employee or employer, in negotiating for an employment contract, may conduct the negotiations on his or her own behalf or may choose to be represented by another person, group, or organisation; and

(b) Appropriate arrangements to govern the employment relationship may be provided by an individual employment contract or a collective employment contract, with the type of contract and the contents of the contract being, in each case, a matter for negotiation....

Whether the "neutrality" provided for in section 9 (as regards the form of bargaining and contract to be entered into) actually exists in practice is, however, a source of considerable debate. As a number of commentators have noted, several provisions within the ECA have the effect of promoting individual bargaining and contracts at the expense of their collective counterparts. The most notable of these provisions is section 19(4) which...
provides that upon the expiry of a collective contract, the employment relationship in question converts to a series of identical individual contracts.

Section 2 of the ECA defines a collective employment contract as one that covers at least one employer and at least two employees and an individual employment contract as one that covers one employee and one employer. Notably, however, the form of the contract entered into does not depend on the form of bargaining that may have preceded it. For example, employees could collectivise and seek to negotiate a collective contract but the bargaining power and stance of their employer may be such that the employees are compelled to settle instead for individual contracts. In short, collective action will not necessarily result in a collective outcome.  

In the same vein, an employer can sign employees to a collective contract by approaching each of them individually. Additionally, a collective contract may contain a "new parties" clause which provides that an employee starting employment after the commencement date of the contract may become a party to that contract. Where a clause of this nature applies, it is possible for an employee to become a party to a collective employment contract without being, or having to become, a member of the collective that may have negotiated it.

30 In contrast, once a union has been certified in British Columbia, collective bargaining commences and, barring decertification, a collective agreement will result.


32 Such clauses are expressly permitted by section 21 of the ECA. By the same token, where an employer is not contractually obliged to offer an existing contract to a new recruit, the employer is free to engage the new employee on terms which differ from those specified in the contract(s) of its existing employees. A number of employers have used this process as a means of engaging new staff on salaries which are inferior to those of existing employees. See e.g., H. Roth, "Chronicle" (1992) 17:2 N.Z.J.Ind.Rel. 247 at 248; E. Rasmussen, "Chronical" (1997) 22:1 N.Z.J.Ind.Rel. 111 at 112 & 115.
The reference to “choice” in section 9 of the ECA assumes an individual employee has sufficient power to choose the form of bargaining and contract he or she prefers. Moreover, by not expressing any preference for the form of bargaining to be entered into, the ECA presumes that negotiations between an individual employee and his or her employer will be as meaningful as those between an employer and a collective of employees represented by a bargaining agent. In essence, the ECA assumes equality between an employee and an employer without the need for state intervention or collective bargaining.33

The Manner of Bargaining

The third notable feature of the ECA in relation to bargaining, is the absence of any mandatory or prescribed procedures. The Act gives no guidance as to how employment contracts are to be negotiated, and, as such, leaves the parties to determine the procedure for bargaining in each case. As one adjudicator has noted:

The Act generally contemplates that there will be ‘negotiation’. That expression is used several times with reference to the formation of employment contracts. There are, however, no regulations, rules or other machinery provisions as to the ‘how’, ‘when’, ‘where’ and ‘for how long’ in respect of the negotiation process.34

A consequence of this laissez faire philosophy is that the ECA does not, in fact, require parties to bargain at all. In the absence of any obligation of this kind, the New Zealand Court of Appeal has held that a party has the right to refuse to bargain,35 stating, for

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example, that "an employer is free not to negotiate with anyone." The Employment Court has taken an identical view:

The legal position is quite simple: employees are entitled to appoint a representative and where they do so the employer must ... negotiate, if at all, with that representative.

As a result, an employer can lawfully proffer a proposal on the basis of "take it or leave it", refuse to discuss the matter at all, and if any resistance arises, immediately lock out those employees who have refused to accede to its demands. Those employees who are locked out will then have the right to return to work only if they accept their employer's proposal or if their employer voluntarily chooses to end the lock out, something the employer is under no lawful obligation to do.

Moreover, if parties do choose to bargain, there is no obligation to bargain in good faith. As Kiely notes:

Negotiations for employment contracts proceed on the same basis as negotiations for any other contract, such as negotiations for an overdraft at the bank, or

36 Ibid. at 787. The decisions of the Court of Appeal in this context are particularly significant for two reasons. First, they bind the New Zealand Employment Court and Employment Tribunal, the institutions with exclusive jurisdiction in New Zealand to hear employment related claims at first instance. And secondly, there is no right of appeal to the Privy Council on matters covered by the ECA. See De Morgan v. Director General of Social Welfare [1997] 3 NZLR 385 (P.C).


38 A practise that has been judicially condoned in numerous cases. See e.g., Hyndman v. Air New Zealand Ltd [1992] 1 ERNZ 820 (E.C.); Hawtin v. Stellerup Industrial Ltd [1992] 2 ERNZ 500 (E.C.); Northern Distribution Union Inc v. 3 Guys Ltd [1992] 3 ERNZ 903 (E.C.). Note however, that the right to strike or lockout is not entirely unfettered. In order to be lawful under the ECA, a strike or lockout must relate to the negotiation of a collective contract; it must not occur while a collective contract is still in force; and it must not relate to a personal grievance, a dispute of right, matters dealing with freedom of association, or the issue of whether a collective contract will bind more than one employer. If the strike or lockout is to occur in an essential service, the requisite notice must also be given. See ECA, ss. 63-64.

39 Notably, the right to return to work is also subject to an employer's continuing right to effect restructuring and dismiss a striking employee on the basis of redundancy. See e.g., N. Newland, "Hawera Meatworks to be Dismantled: Deal Leaves Striking Staff Out of Work" (1996) The Daily News (N.Z.), 22 October, 4.
negotiations for a lease with the landlord. There is no obligation to conduct these negotiations in good faith ... Employers can adopt a ‘take it or leave it’ approach to negotiations, and the Court will not inquire as to the reasonableness of the employer’s attitude.40

The current free market approach to bargaining is rendered complete by the ECA’s failure to prescribe any procedures for resolving bargaining impasses, other than economic sanctions (strikes and lockouts). Consistent with its free market philosophy, the ECA discarded the conciliation and arbitration mechanisms incorporated in the previous legislation, so that market forces could determine the manner and outcome of bargaining in each case. In effect, the ECA represents the complete elimination of the State’s role as moderator and facilitator of the bargaining process, the theory being that bargaining is now to be facilitated, and moderated, by the market place.

1.3 Views and Consequences of the ECA

As with most radical legislative reform, the ECA polarised its supporters and critics.41 Many with business interests favoured the new free market philosophy. According to Bill Birch, the Minister of Labour responsible for introducing the ECA, a free market system of labour relations would eliminate inefficiencies and foster widespread prosperity:

That is what labour market reform is all about - increased productivity and better ways of doing things, leading to better output, more exports, better profits, a higher standard of living, and better wages. That is the bottom line. It is time for us to seek improvements in our work arrangements so that we are more efficient, more productive, and more export orientated.42


41 For discussion on the debate that surrounded the introduction of the ECA, and how it was reported in the media, see J. Scott, “Contesting Symbolic Space: The Struggle over the Employment Contracts Act 1991” (1996) 21:3 N.Z.J.Ind.Rel. 277.

The adoption of market flexibility also found favour with various employer organisations, a number of whom lobbied strongly for the ECA. The New Zealand Employers’ Federation (the “NZEF”) explained how it saw the legislation working:

The Employment Contracts Act has introduced absolute flexibility into labour relations. Irrespective of whether they employ one person or one thousand people, individual employers have the ability - indeed, the responsibility - to work with their staff to reach an agreement that meets their joint needs and aspirations. The focus must be on working together, rather than working to the dictates of a bland, impersonal document fixed nationally and without individual employers’ input or responsibility.43

This “vision” was endorsed by the New Zealand Business Roundtable (the “NZBRT”),44 which had argued that the institutional arrangements of collective bargaining, and the legal procedures of conciliation, arbitration and dispute settlement in the LRA had interfered with the effective operation of the labour market.45 The ECA was, in its view, a considerable improvement on the LRA.

Likewise, the ECA was heralded among international business groups as inspired and innovative. Reports in the *Economist* referred to New Zealand’s “brave recipe”,46 and its “trail-blazing reforms”,47 and to the ECA as “an international model for economic reform.”48 Similar accolades appeared in the *Times*,49 the *Wall Street Journal*,50 and the

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44 A lobby group representing large companies and employers in New Zealand.

45 Deeks & Boxall, *supra* note 5 at 127. This was a viewed shared by the New Zealand Treasury (see Harbridge & Hince, *supra* note 12 at 236) but not necessarily by many small New Zealand employers (see I. McAndrew & P. Hursthouse, “Southern Employers on Enterprise Bargaining” (1990) 15 N.Z.J.Ind.Rel. 117 at 127).


48 *Ibid*.

49 “New Zealand Strides Down the Hard Road to Economic Recovery” (1992) 22 June.

50 “Kiwi School of Economics” (1994) 14 December.
Globe and Mail.\textsuperscript{51} As it transpires, several jurisdictions have either replicated the ECA,\textsuperscript{52} or are considering doing so.\textsuperscript{53}

In stark contrast, many employees in New Zealand viewed the ECA as legislation that would undermine their collectives, wages and job security. At the time the ECA was enacted, 500,000 people (a sixth of the population) took part in demonstrations and strikes protesting against the legislation.\textsuperscript{54} According to critics of the ECA, its apparently "neutral" stance in respect of bargaining would actually undermine employees because in many instances individuals would have insufficient power to insist on meaningful bargaining. As opposition Member of Parliament Lianne Dalziel argued:

All that [the ECA] will do is establish unilateral management control over the way in which labour is used rather than providing positive measures that are needed so that the workforce can adjust and respond to the economic changes in a modern democratic society.\textsuperscript{55}

As it turns out, the ECA has dramatically affected bargaining in New Zealand. Accurately summarising that affect is, however, no easy task. Unfortunately, the ECA provides for no central data collection. Only employers who are parties to collective contracts covering twenty or more employees are obliged to file those contracts with the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{51} “Radically Sensible New Zealand” (1994) August.
\item \textsuperscript{53} Finland, The Netherlands, Germany, Sweden, Japan and Alberta (Canada) are all reported to be considering models based on the ECA. See Dannin, Working Free, at 4; E. Dannin, “We Can’t Overcome? A Case Study of Freedom of Contract and Labor Law Reform” (1995) 16 Berkeley J.Emp. & Lab.L. 1 [hereinafter, “‘We Can’t Overcome’” at 7.
\item \textsuperscript{54} Dannin, “We Can’t Overcome”, at 82-84.
\end{itemize}
\end{footnotesize}
Department of Labour. As the majority of New Zealand work sites are considerably smaller than this, the information filed presents only part of the story. To make matters worse, there is no way for the Government to know whether all large employers are complying with this filing requirement, nor have any steps been taken to enforce compliance. It is, then, difficult to assess the accuracy of the Department’s statistics, a deficiency noted by a number of researchers.

As a result, it has been left largely to private studies to ascertain the consequences of the ECA. Yet, in some instances, these studies have been of questionable value. According to Dannin, a number of recent surveys have reflected the political interests of those who commissioned them and have failed “to meet with basic research standards.” The scarcity of objective and reliable data has also been noted by Harbridge:

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56 ECA, s. 24. C.f., the LRA under which all awards and agreements had to be filed with the Department of Labour. The abolishment of this requirement was deliberate, and reflected the Government’s desire that employment contracts should be negotiated to suit the requirements of a particular worksite, and not on the basis of industry or national relativities. See Harbridge, supra note 7 at 45.

57 More than a quarter of all New Zealand employees work in worksites of less than 10 employees (see J. Kelsey, “Employment and Union Issues in New Zealand, 12 Years On” (1997) 28 Cal.West.Int.L.J. 253 at 261), while the average New Zealand worksite comprises only eleven employees (see D. Harvey, “The Unions and the Government: The Rise and Fall of the Compact”, in J. Deeks & N. Perry eds., Controlling Interests: Business, the State and Society in New Zealand (Auckland, Auckland University Press, 1992) at 63). This average is, however, greatly affected by a few large employers. Indeed, over 85% of all enterprises have less than six employees, with a further 7% having between 6 and 9 (see Statistics New Zealand, Business Activity Statistics 1997 (Wellington, Statistics New Zealand, 1997) at 96. Interestingly, British Columbia also has a high proportion of small workplaces. According to a 1994 report, 73% of all enterprises in British Columbia have less than 5 employees, and a further 18% have 5-19 employees. See M. Thompson, Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia (Ministry of Skills, Training and Labour, 1993) at 145.


59 Dannin describes the absence of data as “truly appalling” (Dannin, “We Can’t Overcome”, at 165), while Hughes refers to a “significant information gap”. See J. Hughes, “Personal Grievances”, in New Zealand Experiences 89 at 128. Even the International Labour Organisation cited the absence of objective data as a significant limitation in its study of New Zealand labour relations during the period 1992-1994. See infra note 160, at 87.

60 Dannin, Working Free, at 181.
There is a great shortage of knowledge about what is actually happening in the labour market. Rhetoric and anecdotal evidence supporting one view or another have become the primary mechanisms for evaluating the legislation. Unions have a bag of stories about hardships experienced by individual workers; the Minister of Labour has his bag of stories showing how successful the legislation has been; and employers organisations have a selection of kites they fly from time to time to see whether further deregulation can be achieved.  

Accurately summarising the affects of the ECA on bargaining is also made difficult by the fact that a number of the legislative and economic initiatives introduced in the 1970s and 1980s provided some impetus for what followed. However, despite these difficulties, it can be fairly asserted that the ECA has resulted in, or contributed significantly to, the following bargaining processes and outcomes:

1. The focus of bargaining has shifted from national and occupational agreements to individual work sites. As a result, there has been a dramatic decline in the number of multi-employer and industry agreements. Under the LRA, over 70% of New Zealand employees were employed under multi-employer awards and agreements. By 1995 (within 5 years), this figure had dropped to 14%, and by

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62 Including for example, the corporatisation and privatisation of many State activities (including Telecom, NZ Rail and the Bank of New Zealand) which resulted in 35,000 redundancies; the elimination of export and domestic trade subsidies and tariffs; the restructuring of the taxation system (including the introduction of a goods and services tax); and the reduction of Government spending in health, education, community services, housing and the like. For discussion of these reforms see e.g., A. Sharp, ed., Leap into the Dark: The Changing Role of the State in New Zealand Since 1984 (Auckland, Auckland University Press, 1994); B. Jesson, Fragments of Labour: The Story Behind the Labour Government (Auckland, Penguine, 1989); I. Duncan & A. Bolland, Corporatisation and Privatisation: Lessons From New Zealand (Auckland, Oxford University Press, 1992); S. Walker, Rogernomics: Reshaping New Zealand’s Economy (Wellington, GP Books, 1989). For discussion on the reforms dealing specifically with collective bargaining see G. Anderson, “Developments in the Legal Regulation of Collective Bargaining in New Zealand” (1990) 3 A.J.L.L. 227.


1996, to just 7%.\textsuperscript{65} According to figures released by the Department of Labour in February 1998, now only 2% of the 1621 active collective contracts on its files cover more than one employer.\textsuperscript{66}

2. Most New Zealand employees are now employed on individual, rather than collective, contracts.\textsuperscript{67} Estimates of individual contract coverage range as high as 78% of the salaried workforce.\textsuperscript{68} This represents a marked turn around from the position under the LRA when, at times, as few as 28% of the workforce were covered by individual contracts of service.\textsuperscript{69}

\textsuperscript{65} Department of Labour - Industrial Relations Service, \textit{Survey of Labour Market Adjustment Under the Employment Contracts Act} (Wellington, Department of Labour, August, 1997) [hereinafter, "Department of Labour 1997 Survey"] at 2.

\textsuperscript{66} Department of Labour, \textit{Contract-The Report on Current Industrial Relations in New Zealand} (Wellington, Department of Labour, 1998) Vol. 24, at 1. According to freemarket advocates, this reduction is the result of employers \textit{and} employees choosing not to enter into multi-employer contracts. (See \textit{e.g.}, Roger Kerr, "The New Zealand Employment Contracts Act: Its Enactment, Performance, and Implications" (1997) 28 Cal.West.Int.J.L. 89 at 95). More likely, it is employers rather than employees exercising this choice, particularly given that employees cannot lawfully strike to secure such contracts (see \textit{infra} notes 697-698).

\textsuperscript{67} A trend which is consistent with international developments. As Lord Wedderburn describes, there is an increasing paradox between "the global rise of multinational employers in international coalitions of collective capital" and "the decollectivisation of their employees". See Lord Wedderburn, \textit{Labour Law and Freedom: Further Essays in Labour Law} (London, Lawrence & Wishart, 1995) at 286-287.

\textsuperscript{68} New Zealand Council of Trade Unions, \textit{Post-Election Priorities - A Union View} (Wellington, Council of Trade Unions, 1996) at 62-63. This estimate accords with the findings of Harbridge, Rasmussen, and Boxall. See R. Harbridge & A. Crawford, "The Impact of New Zealand’s Employment Contracts Act on Industrial relations" (1997) 28 Cal.West.Int.L.J. 235 at 249-250; Rasmussen & Deeks, \textit{supra} note 61 at 279; P. Boxall, "Models of Employment and Labour Productivity in New Zealand: An Interpretation of Change Since the Employment Contracts Act" (1997) 22:1 N.Z.J.Ind.Rel. 22 at 26. C.f., the Department of Labour’s account that only 49% of employees are on individual contracts. See \textit{Department of Labour 1997 Survey}, at 18. Notably, however, the Department acknowledged that it could not rule out significant bias in its data, due to a response rate of just 42%. (See \textit{Department of Labour 1997 Survey}, at 15).

\textsuperscript{69} The present coverage of collective contracts (between 20% and 30% of the workforce) may, however, overstate the present bargaining strength of unions in New Zealand. As some commentators have noted, a number of collective contracts have been renewed because this form of contract suited the employers in question, and not because their employees had the bargaining power to insist on this form of outcome. See \textit{e.g.}, A. Pringle, "The Pursuit of Flexibility in the New Zealand Supermarket: The Employment Contracts Act, Continuities and Discontinuities" (1993) 18 N.Z.J.Ind.Rel. 306 at 321; L. Hill, & R. Du Plessis, "Tracing the Similarities, Identifying the Differences: Woman and the Employment Contracts Act" (1993) 18:1 N.Z.J.Ind.Rel. 31 at 41.
3. Union membership has fallen considerably. According to the Department of Labour, in May 1991, 603,118 employees belonged to unions. By December 1997 this figure had fallen to 327,800 (a 46% drop in membership and, even more significantly, a 54% drop in union density, in just six and a half years).

4. Not surprisingly, considerable restructuring has occurred within and among unions. Various unions have ceased to exist, some have split into separate organisations, while others have amalgamated. Friction within union hierarchies has also lead to a number of unions withdrawing from the Council of Trade Unions to form the New Zealand Trade Union Federation.

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70 A figure which equated to 65% of the total, full time, salaried workforce (see Harbridge & Hince, supra note 12 at 228), and 41.5% of the total full time and part time salaried workforce (see A. Crawford, et al. “Unions and Union Membership in New Zealand: Annual Review For 1996” (1997) 22 N.Z.J.Ind.Rel. 212).

71 A level which equates to only 19.2% of the total full time and part time workforce. See Crawford et al, Unions and Union Membership in New Zealand: Annual Review for 1997 (Unpublished Research Note, July 1998) at 4. The difference in union membership as a percentage of the workforce (19.2%) and the coverage of collective contracts as a percentage of the workforce (around 25%) can be explained largely by “free-riding” (non-union members enjoying the benefits of a collectively negotiated contract). See R. Harbridge et al, Employment Contracts: Bargaining Trends & Employment Law Update 1996/1997 (Wellington, Victoria University, 1997) at 7.

72 According to Roger Kerr, this decline is the result of employees freely choosing not to join unions (see Kerr, supra note 66 at 96). While some of the reduction in membership will no doubt be due to such decision making, much of the decline is the result of union exclusion from workplaces, and employees becoming disillusioned with their union’s inability to engage with employers, all of whom enjoy the lawful right to refuse to negotiate. See infra note 724-728 and accompanying text.

73 Such as the 18,000 member Communication and Energy Workers Union (Dannin, Working Free, at 282); and the 40,000 member Clerical Workers Union (M. Gay & M. MacLean, “Six Years Hard Labour: Workers and Unions under the Employment Contracts Act” (1997) 28 Cal.West.Int.L.J. 45 at 53).

74 For example, 300 customs workers resigned from the Public Service Workers Association (“PSA”) in 1991 and formed the Customs Officers Association, while 1000 psychiatric workers resigned in 1992 and formed the National Union of Public Employees. See Dannin, Working Free, at 281-282.

75 See e.g., the New Zealand Engineers Union which merged with the Printing, Packaging and Media Union to form a membership of 60,000 (see Dannin, Working Free, at 292) and the merger of the Combined Union of Railway Workers, the National Union of Railway Workers and the Harbour Workers Union, to form the Maritime Transport Union (see A. Crawford, et al. “Unions and Union Membership in New Zealand: Annual Review For 1995” (1996) 21:2 N.Z.J.Ind.Rel. 188 at 192).

76 For a discussion on this split see Gay & MacLean, supra note 73; Kelsey, New Zealand Experiment, at 186-187.
5. Consistent with the decline in multi-employer agreements, unions are now conducting significantly more negotiations than they were before the ECA was enacted. The National Distribution Union, for example, conducted in the order of 700 negotiations during the year after the ECA was passed, compared to 55 during the year before. Increasing workloads, in combination with falling membership dues, have meant that many unions have found it impossible to represent all existing members. As a result, increasing numbers of employees are losing representation, particularly those in small and isolated work sites, and those in the secondary labour market. As Kelsey has noted, "most unions [have] stopped organising in workplaces of less than 10, effectively abandoning a quarter of the workforce."

6. Although unions are now conducting more negotiations, most employment contracts are formed without any union involvement. According to a study by McAndrew conducted in 1992, unions were involved in the negotiations of only 25% of collective employment contracts. A survey by the NZEF confirmed this finding. Although this percentage now appears to have increased, it is, in fact,
misleading to refer to this trend as an "increase", given the continuing decline in
the overall number of collective contracts.\textsuperscript{84} Additionally, according to Whatman,
as of late 1993, unions were involved in the negotiation of less than 6% of
individual employment contracts,\textsuperscript{85} a trend which has continued.\textsuperscript{86} Accordingly,
based on this data, less than 27% of all employment contracts are now negotiated
by unions.

7. New Zealand has experienced the consolidation of a bifurcated labour market.\textsuperscript{87}
Those employees with bargaining power (usually those in the primary labour
market) are no longer limited by inter-occupational relativities. And those in the
secondary labour market have largely been left behind.\textsuperscript{88} As Harbridge argues:

\begin{quote}
[T]here can be no doubt that a bifurcated labour market has been further
developed with the industrially strong becoming stronger and the
industrially weak becoming even weaker. Any concept of comparative
employment justice has gone and the very disparate findings indicate that
'market rules' are the sole arbitrator of employment negotiations. That for
New Zealand is an astonishing turnaround.\textsuperscript{89}
\end{quote}

\textit{Industrial Relations in New Zealand} (Wellington, Department of Labour, 1998) Vol. 24, at 1). Harbridge
suggests a higher degree of involvement, estimating that 87% of collective contracts are now negotiated by

\textsuperscript{84} These figures suggest that collective contracts are tending to be retained only where a union has a
strong presence in a particular workplace.

\textsuperscript{85} R. Whatman, et al, "Labour Market Adjustment under the ECA" (1994) 19:1 N.Z.J.Ind.Rel. 53 at 60.

\textsuperscript{86} The \textit{Department of Labour 1997 Survey} (produced in August 1997) reported that unions were involved
in the negotiation of only 3% of concluded (new and renewed) individual employment contracts. See the
\textit{Department of Labour 1997 Survey}, at 27.

\textsuperscript{87} A market in which there exists an expanding wage differential between the primary and secondary
labour markets.

\textsuperscript{88} Harbridge, \textit{supra} note 7 at 49.

\textsuperscript{89} R. Harbridge, “Collective Employment Contracts: A Content Analysis”, in \textit{New Zealand Experiences},
70 at 88. See also Rasmussen & Deeks, \textit{supra} note 61 at 295; McAndrew, \textit{supra} note 29 at 122;
Whatman, \textit{supra} note 85 at 71; Hector, \textit{supra} note 78 at 340; R. Harbridge, & M. Street, “Labour Market
Ken Douglas concurs, having noted that the ECA has been:

> [A] key instrument in widening inequality in the distribution of income, wealth, and power in New Zealand, both between classes and within classes.\(^9^0\)

8. Pay cuts have meant that many in the poorest sector of the work force have incurred a substantial loss in income compared to pre-ECA levels, some suggest by as much as twenty percent.\(^9^1\) The effect of these cuts has been exacerbated by their coinciding with high unemployment, reduced Government spending on social services\(^9^2\) and cuts to unemployment benefits.\(^9^3\) As Kelsey argues, the burden of free market labour relations has fallen most heavily on those who already had the least.\(^9^4\)

9. Consequently, increasing numbers of New Zealanders are living in poverty. According to Dannin, those in poverty rose from 360,000 in 1990 to 510,000 in

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\(^9^2\) The ECA was introduced as part of expansive economic reforms. Other changes included no general increases in Guaranteed Retirement Income rates from April 1991; no increase in social security benefits from April 1991; abolition of universal family benefit payments; and the introduction of new stand down and work test provisions for those claiming the unemployment benefit. See Harbridge, supra note 7 at 31. Initiatives of this kind have continued in recent times. For example, those aged between 16 and 17 years of age are no longer eligible for the unemployment benefit (see “Cuts to Teen Benefits Now In Force” (1998) One Network News, 1 January (http://www.tvone.co.nz)). In addition, most benefits are now subject to strict service and work-testing requirements. See e.g., “Dole Suspension Threatened” (1998) The Press (N.Z.), 23 April; NZPA, “Dying Man Told to Attend Workshop or Lose Benefit” (1998) The Press (N.Z.), 26 May.

\(^9^3\) In April 1991, for example, the weekly unemployment benefit for a single person between the ages of 20 and 24 was cut by 25% from $143.57 to $108.17. See M. O’Brien, “New Wine in Old Bottles: Social Security in New Bottles” (1991) Reports and Proceedings, Social Policy Research Centre, Sydney, at 45. According to recent New Zealand Governments, these cuts serve to ensure that those on the unemployment benefit have sufficient “incentive” to find work.

\(^9^4\) Kelsey, New Zealand Experiment, at 271.
1993, a level which has reportedly continued to rise. Whilst the validity of these reports obviously depends on how ‘poverty’ is defined, this trend is nevertheless supported by the increasing demand for food parcels in some sectors of New Zealand society, the rapid expansion of the number of annual bankruptcy petitions filed since 1991, and the fact that more employees than ever are working for free just to gain experience. Dependency is becoming an increasing feature of New Zealand society, a point noted by Kelsey:

The victims of reform were being forced into dependency on the state. At the same time, the state was shedding its responsibilities for their welfare. The rigid ideology of the reformers was brought face to face with human despair as stories of poverty, suffering and tragic anomalies appeared in the media almost every day.

10. Against this, many employees in the primary labour market have secured significant pay increases since the enactment of the ECA. For example, a study by Harbridge conducted a year after the ECA was passed revealed that although 47% of the 110,000 workers surveyed had received pay cuts or no increase in wages during the preceding 12 months, 19% had received increases of 7% or more. Whilst there have been variations in these figures subsequently, the basic trend of

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95 Dannin, Working Free, at 171.
98 Kelsey, Rolling Back the State, at 335.
99 The Minority Report, at 3 and 5.
100 Kelsey, Rolling Back the State, at 337.
101 See Harbridge, supra note 89 at 78.
separation between the primary and secondary labour markets continues. Even former Prime Minister Jim Bolger has acknowledged this disparity, noting that those employees who have received wage increases have been counterbalanced by those who have not, to such an extent that from 1990 to 1995 the average real wage growth was just 0.1%.

Employers have, in many cases, secured the removal of penal rates and enhanced their contractual discretion to flexibly allocate work. For some, these developments occurred even before the ECA was passed, as a number of unions engaged in concessionary bargaining in order to secure agreement before 15 May 1991. The net result is that many employees are now working longer for less.

According to Dannin:

The ECA made wage cutting an easy option when employers faced financial difficulty or wanted higher profits. Most popular was eliminating premium or penal wages for overtime, weekends, or shift work. Workers were also doing more unpaid work, so they received less money for time worked. Workers were expected to work harder or faster for no increase in pay and to cover for laid off employees or increased workloads that, in
the past, meant hiring a new worker. The average worker was experiencing an intensification of work.\footnote{Dannin, \textit{Working Free}, at 173. (Footnotes omitted).}

12. The NZBRT, NZEF and numerous employers have repeatedly claimed that the ECA has resulted in enhanced productivity.\footnote{See \textit{e.g.}, W. Kasper, \textit{"Free To Work: The Liberalisation of New Zealand's Labour Market"} (1996) 32 Policy Monograph 51 (Centre for Independent Studies, Sydney, 1996).} By way of example, Roger Kerr, Executive Director of the NZBRT,\footnote{And an ex-employee of the New Zealand Treasury.} advised an Australian conference in 1993 that the ECA had led to productivity increases of 17\%.\footnote{R. Kerr, \"The Challenge for the 90's: Labour Reform in Australasia,\" (1993) Address to the Australasian Institute of Company Directors, 19 February, at 3.} Two years later Kerr wrote that “remuneration has changed from pay for attendance to pay for achievement. The focus is on productivity and profit.”\footnote{R. Kerr, \"Bargaining Under the Employment Contracts Act" [1995] N.Z.Emp.L.Bul. (N.Z.) 97. See also R. Kerr, \"Employment, Productivity and Growth All Blossom Under the Employment Contracts Act\" (1996) The Herald (N.Z.), 5 October.} Others are more sceptical, noting that many employers have simply cut wages rather than introducing innovation;\footnote{K. Douglas, \"Organising Workers: The Effects of the Act on the Council of Trade Unions and its Membership\", in \textit{New Zealand Experiences}, 197 at 199; R. Ryan, \"Flexibility in New Zealand Workplaces: A Study of Northern Employers\" (1992) 17:2 N.Z.J.Ind.Rel. 129 at 145.} that most employment contracts do not link pay to performance,\footnote{According to Harbridge, in 1994/1995, 84\% of the 2688 contracts surveyed made no connection between pay and performance. See R. Harbridge et al, \textit{Employment Contracts: Bargaining Trends & Employment Law Update 1994/1995} (Wellington, Victoria University, 1995) at 17.} and that the assertions of Kerr and others regarding enhanced productivity frequently lack credible empirical support, and are, in many instances, fundamentally flawed.\footnote{See \textit{e.g.}, Easton, \textit{supra} note 61; Gilson & Wagar, \textit{supra} note 80.} According to New Zealand economist, Brian Easton:

\begin{quote}
There appears to have been little economic benefit, if any, from the ECA, other than perhaps for employers at the expense of workers. In particular, there is no evidence of significant productivity gains ... \footnote{Easton, \textit{supra} note 61 at 209.}
\end{quote}
13. Proponents of the free market also claim that the ECA has led to the creation of numerous new jobs and the reduction of unemployment. However, as will be discussed in chapter four, there are deficiencies with both assertions.\(^{116}\)

14. In terms of bargaining conduct, there is considerable empirical and anecdotal evidence that many employers are engaging in dictation rather than negotiation:

- There is evidence that numerous employers are presenting contracts to their staff on the basis of "take it or leave it".\(^{117}\) Legal challenges to this practice have been unsuccessful.\(^{118}\) Dictation has been particularly prevalent in negotiations for individual contracts and in negotiations for collective contracts that have not involved unions.\(^{119}\)

- There is also evidence that contracts have been presented to employees for signature without any mention of wage rates, suggesting that wages are, at least in some instances, being set unilaterally and without discussion.\(^{120}\)

- Some employers have taken advantage of the absence of any obligation to disclose information material to the negotiation or re-negotiation of an employment contract. In one case, a Government department negotiated with a worker a 3% pay increase in exchange for a 50% reduction in redundancy entitlements. The worker was made redundant two days later and received $20,000 less than he would have under his previous contract.\(^{121}\)

\(^{116}\) See infra notes 636-650.

\(^{117}\) The Minority Report, at 5; McAndrew, supra note 30 at 171; Harbridge, supra note 89 at 88; Dannin, Working Free, at 236-237.

\(^{118}\) See supra note 38.

\(^{119}\) McAndrew, supra note 29.

\(^{120}\) Harbridge, supra note 102 at 11; R. Harbridge & J. Lane, "The Effect of a Minimum Youth Wage in New Zealand" (1993) 18 N.Z.J.Ind.Rel. 275 at 278.

Employers have been successful in unilaterally dictating the scope of negotiations. In one instance, the New Zealand Nurses Association sought to raise with an Area Health Board issues of training, workplace design and employer-employee communication. The management negotiators rejected those topics outright, taking the intransigent stance that such issues fell outside the negotiations and would not be discussed.122

Employers are also aware that there is no legal requirement to ever conclude negotiations or to end a state of lockout (unless their employees agree to the terms proffered). As a result, some employers have effected lengthy lockouts and appointed 'temporary' outside replacement workers in the interim.123

Various employers have utilised their power of veto over bargaining to undermine unions and collective bargaining. For instance, in 1992 the Department of Social Welfare refused to commence bargaining until the Public Service Association (the "PSA") had provided it with signed bargaining authorities from each of the Department's employees who were represented by the union (6,259 in all). After receipt of the authorities (procured by the union at considerable expense and effort) the Department still refused to bargain,124 a stance which is lawful under the ECA.125

Proponents of the ECA have sought to dismiss reports of this type of conduct as "anecdotal".126 They further argue that to the extent such conduct does occur, it

125 Most, if not all, of the conduct noted would, if it arose in British Columbia, constitute evidence of a failure to bargain in good faith. See infra notes 210-235.
126 See the advice of the Public Sector, infra notes 186-187; Kerr, supra note 66 at 102.
arises only in the minority of cases,\(^{127}\) and would have occurred whether or not the ECA had been enacted.\(^ {128}\) Against this, critics of the ECA cite empirical studies indicating that dictation is now occurring in the formation of most employment contracts,\(^ {129}\) and further, that this dictation is significantly more likely to occur now that unions have been eliminated from the majority of labour negotiations.\(^ {130}\)

16. Conflict has also continued to arise in New Zealand workplaces. Immediately following the passage of the ECA there was a reduction in strikes and lockouts.\(^ {131}\) However, between 1993 and 1996, strikes and lockouts occurred more frequently, with the associated number of days lost increasing every year.\(^ {132}\) Since 1996, the number of reported strikes and lockouts appears to have declined,\(^ {133}\) although various queries have been raised as to the accuracy of these figures.\(^ {134}\) The existence of continuing workplace conflict is also evidenced by increases in

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\(^{128}\) Carroll & Tremewan, supra note 6 at 195.

\(^{129}\) See infra notes 558-568.

\(^{130}\) Harbridge, supra note 89 at 88; McAndrew, supra note 30 at 181.

\(^{131}\) Proponents of the ECA hailed this as evidence of reduced workplace conflict. See *e.g.*, the references in Dannin, Working Free, at 304. In contrast, critics of the ECA argue that this initial decline was due to the severity of the economic depression that existed in the early 1990s, and to union disorganisation. See J. Henning, 'The Employment Contracts Act and Work Stoppages' (1995) 20:1 N.Z.Ind.Rel. 77; Douglas, supra note 112 at 199; Harbridge & Crawford, supra note 68 at 244.

\(^{132}\) In 1993 over 23,000 workdays were lost to strikes and lockouts. By 1996, this figure had increased to 72,900. See the New Zealand Official 1997 Yearbook, 100th ed., (Wellington, Department of Statistics, 1997) at 363-364.


\(^{134}\) There are a number of limitations in the accuracy of the strike and lockout statistics reported by the Department of Statistics. Significantly, there is no legal compulsion on employers, employees and unions to report strikes and lockouts. Moreover, in order to be included in the Department's findings, a strike or lockout must involve at least one day's action by 10 employees. And thirdly, the data omits various manifestations of conflict, such as the issuing of stopwork notices, worker marches, lunchtime meetings and the like. See Kirk, *ibid.*
employment related litigation,\textsuperscript{135} employee dissatisfaction,\textsuperscript{136} and workplace turnover.\textsuperscript{137}

\section*{1.4 The Winds of Change}

The domestic criticism of bargaining under the ECA has been persistent and widespread. The ECA has been variously described as “a direct repudiation of those labour laws which support collective action and bargaining',\textsuperscript{138} as legislation which enacts “industrial warfare”,\textsuperscript{139} and as the “most hostile anti-union legislation in the OECD.”\textsuperscript{140} It has also been said that collective bargaining in New Zealand is now the “anti-thesis” of bargaining,\textsuperscript{141} that the process of bargaining has collapsed;\textsuperscript{142} and that the majority of employees feel compelled to accept the terms offered to them by employers.\textsuperscript{143} Indeed a judge of the New Zealand Employment Court recently stated that the “negotiations”

\begin{itemize}
\item \textsuperscript{135} The number of claims filed in the Employment Tribunal and Employment Court have risen significantly over the last six years. For example, in its first year of operation (1991/1992) the Employment Tribunal received 2,332 applications for hearings (an average of 194 per month). This figure has increased in every subsequent year, to the extent that 5,144 claims were received in the year to June 1996 (an average of 428 per month, and an increase of 220\% in just four years). See New Zealand Department of Labour, \textit{Annual Report for the Year Ended June 30, 1996}. According to proponents of the ECA, this increase in litigation is due to the ECA expanding the personal grievance jurisdiction to all employees (whereas the LRA limited personal grievances to those covered by collective agreements and awards). However, while this expansion may serve to explain an initial increase in the claims filed, it fails to address the continuing increase that has occurred over a number of years, and the extent of that increase.
\item \textsuperscript{136} Whatman, \textit{supra} note 85 at 66-68.
\item \textsuperscript{137} See \textit{e.g.}, E. Rasmussen, “Chronical” (1997) 22:1 N.Z.I.Ind.Rel. 111 at 111-118. Interestingly, the \textit{Department of Labour 1997 Survey} reported a 31\% level of employee turnover for the year to July 1996 (see \textit{Department of Labour 1997 Survey}, at 57).
\item \textsuperscript{138} Dannin, \textit{Working Free}, at 3.
\item \textsuperscript{139} Kelsey, \textit{Rolling Back the State}, at 207.
\item \textsuperscript{140} R. Webster, “Operating under the Act: One Union’s Experience”, in \textit{New Zealand Experiences}, 237 at 238.
\item \textsuperscript{142} Dannin, \textit{supra} note 33 at 490.
\item \textsuperscript{143} McAndrew & Ballard, \textit{supra} note 29.
\end{itemize}
which take place under the ECA bear no resemblance to the actions normally associated with that term.\textsuperscript{144} In his view, negotiations under the ECA can be no more than:

\begin{quote}
[A] presentation by one intended party to the contractual relationship of a form of contract to the other and the former’s refusal to deviate from its offer.\textsuperscript{145}
\end{quote}

In 1993 the New Zealand Parliament commissioned a select committee to investigate the impact of the ECA on the New Zealand labour market. For reasons best known to the politicians involved, two reports were produced. One by the committee members who were Opposition Members of Parliament (the \textit{Minority Report})\textsuperscript{146} and the other by those who were Government Members of Parliament.\textsuperscript{147} According to the \textit{Majority Report}:

A much repeated statement by employees was that the Act has given too much power to employers. Employees feel powerless to negotiate suitable conditions if employers refused to take account of their wishes. ...[A] factor much commented upon is the lack of a good faith bargaining provision in the Act. This related to the feelings of powerlessness which employees feel, to in some way ensure an employer enters into meaningful negotiations.\textsuperscript{148}

The \textit{Majority Report} also noted that the ECA:

[C]ontains no provision to ensure an employer actually bargains with employees. Unions told the committee that in many cases, employers either made a token attempt to negotiate, without taking on board agent’s concerns, and then offer a contract for signing; or do not negotiate at all and offer a contract on a ‘take it or leave it’ basis. Unions said the effect of a lack of a good faith bargaining requirement is that employees are denied the opportunity to have a say in their conditions of employment.\textsuperscript{149}

\textsuperscript{144} \textit{Northern Distribution Union, Inc v. 3 Guys Limited,} [1992] 3 ERNZ 903.

\textsuperscript{145} \textit{Ibid.} at 915. See also \textit{Hawtin, infra} notes 389-390.

\textsuperscript{146} \textit{Supra} note 58.


\textsuperscript{148} \textit{The Majority Report}, at 16.

\textsuperscript{149} \textit{The Majority Report}, at 38.
Yet despite acknowledging these concerns, the *Majority Report* failed to recommend the introduction into the ECA of a duty to bargain in good faith, stating at 39:

> The committee listened to the arguments with interest, but felt the evidence presented in favour of a good faith bargaining provision was inconclusive. There would be substantial difficulty in defining what “good faith” means in an industrial context without leading to considerable regulation of the various parties’ freedom to reach agreement relevant to particular workplaces. The committee has no recommendation to make on this matter.150

Various commentators have subsequently called for the introduction of a duty to bargain in good faith. Anderson has argued that such a duty would enhance the prospects of meaningful negotiation.151 Dannin takes a similar view, arguing that any system of labour relations that fails to require good faith participation will struggle to deliver genuine bargaining.152 And according to Webster:

> Introducing [the ECA] in a time of economic recession without even the barest acknowledgement of bargaining in good faith (included even in United States labour law) has completely slanted the balance of power against workers and unions.153

International criticism has also been levelled at the bargaining regime instituted by the ECA.154 In February 1993 the New Zealand Council of Trade Unions filed a complaint about the ECA with the International Labour Organisation.155 The Council of Trade

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153 Webster, *supra* note 140 at 238.

154 Although, as noted, some jurisdictions have viewed the ECA as a model worthy of duplication. See *supra* notes 52-53.

Unions alleged that the ECA contravened ILO Conventions 87\textsuperscript{156} and 98.\textsuperscript{157} This led to an investigation by the ILO’s Freedom of Association Committee, which lasted almost two years. The Committee’s interim report was adopted by the Governing Body in March 1994,\textsuperscript{158} and was damming of the ECA. One of the report’s many criticisms was that the ECA failed to support collective bargaining.\textsuperscript{159}

After further information gathering by a direct contacts mission, and a number of subsequent cases in the Employment Court and Court of Appeal, the ILO Committee issued its Final Decision, which was adopted in November 1994.\textsuperscript{160} The Final Decision, whilst less critical than the interim report,\textsuperscript{161} reiterated the Committee’s concern that the ECA did not incorporate a duty to bargain in good faith. On this point the Committee stated:

While recognising that the question as to whether one party adopts an amenable or uncompromising attitude towards the demands of the other is a matter for negotiation between the parties within the law of the land, the Committee stressed the importance which it attaches to the principle that both employers and trade unions should bargain in good faith and make every reasonable effort to come to an agreement and that satisfactory labour relations depend primarily on the parties’ attitudes towards each other and on their mutual confidence.\textsuperscript{162}

\textsuperscript{156} ILO Convention 87 Concerning the Freedom of Association and Protection of the Right to Organise.

\textsuperscript{157} ILO Convention 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. Although New Zealand has not ratified Conventions 87 and 98, the jurisdiction of the ILO to investigate this complaint stemmed from New Zealand’s membership of the ILO. See the International Labour Organisation, Digest of Decisions and Principles of the Freedom of Association Committee; cited in Mazengarb, at A/203.

\textsuperscript{158} Supra note 155.

\textsuperscript{159} Supra note 155 at 235-238.


\textsuperscript{161} For a description of the changes in the Committee’s views see Anderson, supra note 141 at 105-108.

\textsuperscript{162} Supra note 160 at 80.
The Government of the day, the NZEF and the NZBRT all sought to marginalise the ILO’s findings. The Minister of Labour at the time, Doug Kidd, asserted that the ILO’s criticisms “directly challenge the democratic and parliamentary process of member states” and that the “ILO risks being portrayed as a partisan advocate in domestic policies.” \(^{163}\) Similarly, Steve Marshall, the chief executive of the NZEF claimed:

> The ILO, in its 75th year struggling to retain its former relevance has, in criticising the ECA, found a method of reasserting itself. \(^{164}\)

However, the opposition political parties in New Zealand appeared to take note of what the ILO had said. In 1995 New Zealand voted by way of referendum to adopt a Mixed Member Proportional (“MMP”) electoral system of Government. \(^{165}\) In the lead up to the first MMP election, a number of political parties responded to the international and domestic criticism of the ECA by pledging to modify the Act to include, amongst other things, a duty to bargain in good faith. \(^{166}\) One of the most vociferous advocates of this proposal was the New Zealand First Party. According to its Industrial Relations Policy Release, \(^{167}\) the party promised to amend the ECA to require all employers and employees to bargain in good faith. This pledge was reiterated in various media statements issued by both the leader and deputy leader of the party, in which they criticised the ECA for creating a significant imbalance of bargaining power in favour of most employers. \(^{168}\)

As a result of the election on 12 October 1996, a Coalition Government was formed by the National Party (the previous Government) and the New Zealand First Party. Many in


\(^{165}\) Up until that time the New Zealand Government had been elected on a “first past the post” system.


organised labour viewed this result with at least a degree of optimism, and looked ahead to the introduction of a duty to bargain in good faith. Since the election, however, little has happened to justify that optimism. It would appear that in the course of negotiating the terms of the coalition, (negotiations which occurred after the election), New Zealand First may well have chosen to renge on its earlier pledge.

The *Coalition Agreement*,\(^{169}\) which records the terms of agreement reached between National and New Zealand First, contains a section entitled *Policy Area: Industrial Relations*. According to the eighth *Key Initiative of Policy* detailed in that section, the Coalition Government promised to:

> Introduce the concept of “fair” bargaining into the Employment Contracts Act, by describing areas where compliance is necessary to abide by the principles underlying the Act (e.g. the obligation to respect the choice of the bargaining agent and not to undermine the bargaining process by bypassing the agent).\(^{170}\)

Although it is by no means clear, this statement of intent could be read as a substantial repudiation of New Zealand First’s pledge to introduce into the ECA a duty to bargain in “good faith”. According to Hughes:

> [C]ontrary to the promise in New Zealand First’s policy, apparently the ECA will not be substantively amended to introduce any form of good faith bargaining properly so called. Instead, “fair bargaining” will be represented by statutory amendment to incorporate the existing interpretation given to the relevant provisions of the ECA. (This will result, of course, in no change to the legal principles applicable prior to the general election, which New Zealand First has criticised as being unfairly biased in the employer’s favour).\(^{171}\)

Such a view is supported by statements subsequently released by Government Officials. According to Max Bradford (the current Minister of Labour) the *Coalition Agreement*:

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\(^{170}\) Ibid. at 41.

\(^{171}\) Hughes, *supra* note 168 at 171.
[P]roposes to introduce fair bargaining to promote compliance with the underlying principles of the Act. This includes describing the obligations to respect the choice of bargaining agent and not undermine the bargaining process by bypassing the agent, which have been underlined by various court decisions since the Employment Contracts Act was passed. Fair bargaining will reflect the New Zealand experience and is not to be modelled on United States or Canadian concepts of Good Faith Bargaining.\(^{172}\)

Bill Birch, the current Minister of Finance, has echoed these sentiments:

The Coalition Agreement states that the Government will introduce the concept of “fair” bargaining to more clearly outline the responsibilities of parties under the ECA. This may include clarifying the obligations to recognise and not to bypass an authorised agent. The basic principles of the ECA will remain... I want to emphasise that this is not “good faith bargaining,” North American style. We remain committed to a permissive framework for industrial relations, the opposite of the North American system, which prescribes when people must meet to bargain and what they have to bargain, and a host of other controls on bargaining behaviour. The last six years have taught us that such control is not necessary.\(^{173}\)

Yet, even these statements now appear to have been reneged upon. On 23 July the Coalition Government released its long awaited “Industrial Relations Package”.\(^{174}\) Whilst this package referred to a number of changes which will be introduced to the personal grievance and remedial sections of the ECA, no mention was made of introducing a duty of “fair” bargaining. On the contrary, Max Bradford stated in his supporting release that:

The Government has also carefully considered the Coalition Agreement key initiative with respect to introducing the concept of “fair” bargaining into the Employment Contracts Act. After carefully examining the case law, the Coalition

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\(^{173}\) Address by the Minister of Finance, Bill Birch, to the Wellington District Law Society (1997) 7 June. [Emphasis added].

Government concluded the case law supports fairness in bargaining, given the interests of both parties to an employment contract.\footnote{M. Bradford, "Industrial Relations Package - Good For New Zealand" (1998) Executive Government News Release, 27 July, 2.}

Subsequent to Max Bradford issuing this statement, the Coalition Government has dissolved, with the National Party now functioning as a minority Government, at least for the time being.\footnote{See e.g., H. Bain, “Peters Walks Out. Shipley Now Running a Minority Government” (1998) The Dominion (N.Z.), 13 August, 1.} This, combined with Bradford’s statement, may well have signalled the death of what had already become a remote prospect at best.\footnote{Primarily because the calls for the introduction of bargaining controls into the ECA emanated from the New Zealand First Party and not the National Party (who introduced the ECA in the first place). Indeed, it now appears the Minority National Government may be reconsidering all policy initiatives introduced by New Zealand First. See N. Venter, “All Coalition Legislation Under Review” (1998) The Dominion (N.Z.), 26 August, 2; “Nats aim to axe NZ First Policies” (1998) The Waikato Times (N.Z.), 26 August, 1.}

What is most remarkable about this “back-down” is that it occurred without any substantive and informed debate. The Government has stated that the current law is sufficient; that it supports fairness; but provides no justification or reasoning for that conclusion. Bradford asserts the Government has “consulted widely”,\footnote{Supra note 175.} but fails to specify with whom, and what was said. In effect, the New Zealand public is asked simply to trust the Government’s judgement.

Determining why “good faith” bargaining was watered down to “fair bargaining” and then abandoned altogether is difficult, primarily because both National and New Zealand First agreed to keep their coalition negotiations confidential.\footnote{Hughes, supra note 168 at 170.} However, it is possible to glean at least a partial explanation from a document which has subsequently been made public. In the course of the coalition negotiations, the various political parties involved sought particular information from various Government departments and agencies.\footnote{Including the Department of Labour. For the sake of simplicity, these departments and agencies will be referred to herein as the “Public Service”.}
questions asked, and the answers given, have been recorded in a document entitled
Information Supplied by the Public Service in Response to Requests made by Political
Parties Taking Part in Coalition Formation Talks.\textsuperscript{181}

Request 501 included the following:

What are the implications of amending the Employment Contracts Act to:

1. Ensure a neutral bargaining environment between employer and employee by extending good faith provisions to all employers and employees (\textit{i.e.}, to apply to all contracts, collective and individual, and all bargaining agents).\textsuperscript{182}

The response of the Public Service was far from enthusiastic, and included the following statements:\textsuperscript{183}

\begin{itemize}
\item “regulations are not always successful in affecting people’s behaviour. Rather they may encourage game playing around the rules rather than the development of the employment relationship.”
\item “good faith bargaining provisions increase the likelihood of third party interventions in the bargaining process. This may reduce the degree to which agreements reached reflect the needs of local situations.”
\item “greater perscriptiveness over bargaining arrangements risks reducing flexibility and adaptability to changing circumstance.”
\item “greater prescription over the process is also likely to increase the costs associated with bargaining and the degree of litigation involved.”
\item “experience overseas has suggested that once good faith bargaining provisions are established there is potential for their coverage to extend over time, partly through judicial decision making.”
\end{itemize}

Not one of these statements was supported by specific research or data. The Public Service then went on to suggest that good faith bargaining is already promoted by the existing law in New Zealand:

\textsuperscript{181} (Wellington, State Services Commission, February 1997).
\textsuperscript{182} \textit{Ibid.} at 217. The document released to the author is not paginated, hence all page references have be calculated by the author.
\textsuperscript{183} \textit{Ibid.} at 219.
There is a range of provisions in the Employment Contracts Act which set some limits on bargaining behaviour, and which may contribute to the establishment of good faith bargaining.\(^{184}\)

Perhaps most significant, however, was the Services’ willingness to treat concerns regarding exploitation and bad faith conduct under the ECA as “anecdotal”, but the alleged costs of introducing a duty to bargain in good faith as “fact”.\(^{185}\) This inconsistency is illustrated by the following four excerpts:

*Anecdotally*, there is a *perception* that employers use the option of not negotiating to resist claims considered legitimate by employees, particularly in the context of individual negotiations. New contracts at the point of hire may also be offered on a “take it or leave it” basis, without negotiation. In the absence of reliable data the extent of this *perception* cannot be accurately assessed. In addition, it is not clear whether or not this approach can be attributed to a lack of good faith bargaining provisions.\(^{186}\)

There is also a *perception* that employers may refuse to re-negotiate contracts after they expire. In practice there are a wide range of reasons why contracts may not be immediately re-negotiated and employees are always covered by an employment contract. ... The voluntary nature of the bargaining framework allows a range of bargaining behaviours, and a range of outcomes. It is a matter of *perception* as to the extent to which these behaviours and outcomes constitute a “problem”.\(^{187}\)

The Employment Contracts Act liberalised bargaining processes and options and has contributed to adjustment processes over a period of sustained economic growth and employment growth. Amending the Employment Contracts Act to reintroduce procedures *incurring significant transaction costs* or constraining outcomes should only be considered if the identifiable benefits from doing so are sufficient to offset these costs.\(^{188}\)

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\(^{184}\) *Ibid.* at 221.

\(^{185}\) Hughes, *supra* note 168 at 174.

\(^{186}\) *Ibid.* at 132. [Emphasis added].


\(^{188}\) *Ibid.* at 465. [Emphasis added].
The uncertainty that results from increased litigation, the undermining of the finality of concluded contracts; and the need for the courts over time, to develop a consistent approach out of widely divergent ad hoc situations would be likely to have a significant impact on the efficient functioning of the labour market, with flow-on effects to lower employment.\footnote{Hughes, supra note 168 at 174.}

Not only do these comments represent an unbalanced approach to the issue of good faith bargaining, as Hughes argues, they also represent the Public Service seeking simply to reinforce existing Government policy.\footnote{Ibid, at 466. [Emphasis added].} In the end result, a significant component of New Zealand First's manifesto appears to have been cast aside on the basis of conjecture and unsubstantiated rhetoric.

1.5 The “Here and Now”

The foregoing serves to contextualise the New Zealand debate on introducing a duty to bargain in good faith into the ECA. As is apparent, the call for this duty arose in response to the changes implemented in New Zealand employment and labour relations by the ECA. The dramatic swing from state facilitated collective bargaining to free market employment and labour relations has left many questioning whether the current legislation has gone too far. Yet, recent statements made by the New Zealand Government suggest that earlier pledges for reform are now in jeopardy. These statements highlight the need for timely and informed debate on the need for a duty of this nature, and the possible consequences of its introduction.

Yet, if such debate is to move beyond the conjecture which arguably pervades many of the New Zealand Government’s recent statements on this issue, a substantive frame of reference is required. In other words, without an example to work from, this debate will struggle to move beyond the abstract. The example to be used in this thesis in that which applies in British Columbia, Canada. British Columbia, has been selected for a number of
reasons. In the first place, although various labour relations jurisdictions invoke a duty of 
this nature,\footnote{Including the United States of America, Australia and Japan. See W. Hodge, “Employment Law” [1995] N.Z.L.Rev. 107 at 123.} many of the fundamental issues that arise in respect of the duty do so in 
each jurisdiction. Considering a number of jurisdictions would, then, be of limited value. 
Secondly, the selection of one jurisdiction is appropriate given that the purpose of this 
thesis is to consider one possible approach to the issue, rather than advocating one single 
approach as best suiting New Zealand. Such an assertion would be premature without 
there first having been debate on various options.

Thirdly, in terms of selecting a particular jurisdiction, Canada, like New Zealand, is a 
member of the commonwealth with a legal system that is, for the most part, derived from 
British common law.\footnote{The civil law system in Quebec aside.} Commonality such as this enhances the relevance of the Canadian 
approach. Moreover, the duty to bargain in good faith has been operative in Canada for 
over fifty years, and, as such, a considerable and valuable body of jurisprudence has 
developed on the issue. And finally, the focus has been narrowed further to British 
Columbia, because the manner in which the duty to bargain in good faith is applied in this 
province is largely indicative of the position taken throughout Canada. Indeed, a review 
of labour law texts in Canada reveals the law on good faith bargaining to be remarkably 
homogeneous throughout the various Canadian jurisdictions, with labour boards routinely 
while reference will be made primarily to British Columbia legislation and case law, decisions of general 
application issued by labour boards in other Canadian provinces will also be referred to where appropriate.}

Before consideration is given to the approach taken in British Columbia, it is important to 
ote the limitations of such an assessment. It is readily conceded that what may work in 
one jurisdiction may not necessarily succeed in another. As one commentator has noted,
comparing different labour laws poses "nearly insurmountable problems because it ultimately reaches into a comparison of social structures and attitudes."\textsuperscript{194}

However, although these difficulties cannot be ignored, as will be discussed in chapter five, idiosyncrasies of a particular jurisdiction can be accommodated for in an appropriate statutory amendment. Moreover, there is much to be commended in countries seeking to learn from the experiences of others, particularly when their own experience is limited or non-existent. That is precisely the case at hand, for New Zealand has never previously enacted a statutory duty to bargain in good faith in labour relations.\textsuperscript{195} A domestic comparison is, then, impossible, and it is suggested that drawing on a concrete example, albeit one from a foreign jurisdiction, is a considerable improvement on invoking conjecture and rhetoric.

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In 1995 the Alliance Party sought to introduce into Parliament the Employment Contracts (Employment Rights) Bill, which made mention of the concept of good faith bargaining, but the Bill was defeated at its first reading. See Hansard, \textit{Parliamentary Debates of New Zealand} (1995) 22 March, 6345-6365. See \textit{infra} notes 777-778, for a discussion of the one other previous instance where a duty of this nature was drafted into statute, but was not enacted (due to a change in Government).
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CHAPTER 2: BRITISH COLUMBIA LABOUR RELATIONS AND THE DUTY
TO BARGAIN IN GOOD FAITH

2.1 The Duty Defined

In Canada a union certified in respect of a bargaining unit and the employer of that unit are
obliged by statute to bargain in good faith.196 This statutory duty was introduced into
Canada by federal Wartime Labour Regulations. These regulations were enacted in
1944,197 and were based on the American Wagner Act of 1935. The duty was
subsequently incorporated into federal law in 1948 and provincial law shortly thereafter.198
The duty is presently embodied in the Canada Labour Code199 and in various provincial
statutes including the British Columbia Labour Relations Code (the “BC Code”).200

While there are minor differences in the wording used in some of these statutes, the
general approach is illustrated by section 11(1) of the BC Code:

A trade union or employer must not fail or refuse to bargain collectively in good
faith in British Columbia and to make every reasonable effort to conclude a
collective agreement.201

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196 This statutory duty is confined to collective bargaining. There is presently no equivalent duty in
Canada in respect of the negotiation of individual employment contracts (contracts of service). The extent
to which the Canadian common law has recognised a duty of good faith in employment dismissals and in
the negotiation of non-employment relationships will be discussed in chapters three and four, respectively.
197 PC 1003, 1944, s. 10(2).
Dimension 29.
199 R.S.C. 1985, c. L-2, s. 50.
200 R.S.B.C. 1996, c. 244, ss. 11 and 47. See also Alta., Labour Relations Code, S.A. 1988, c. L-1 2, s.58;
Man., Labour Relations Act, R.S.M. 1987, c. L 10, ss. 62 and 63(1); Ont., Labour Relations Act, R.S.O.
1995, c. L.2., s. 17; N.B., Industrial Relations Act, R.S.N.B. 1973, c. 1-4, s. 34; N.S., Trade Union Act,
R.S.N.S. 1989, c.475, s. 35(a); P.E.I., Labour Act, R.S.P.E.I. 1988, c. L-1, s. 22(a); Que., Labour Code,
201 See also section 47. The requirements of “good faith and reasonable efforts” are also found in the
Canada Labour Code and in the statutes of Alberta, Manitoba and Ontario. The New Brunswick, Nova
Scotia and Prince Edward Island statutes all refer to a standard of “reasonable efforts”, whilst the Quebec
Code requires negotiations to be carried out “diligently and in good faith”. Newfoundland’s statute refers
Once triggered by the issuing of a notice to bargain (or the actual commencement of bargaining, whichever occurs first), the duty subsists until the final resolution of an agreement. The duty continues, for example, notwithstanding the appointment of a mediator or the commencement of arbitration or a strike or lockout.

The term "good faith" is not defined in the BC Code. It has, then, been left to the British Columbia Labour Relations Board (the "BC Board") and, to a lesser degree, appeal courts, to determine the scope of the duty on a case by case basis. Whilst incapable of one single definition, the duty to bargain in good faith can be viewed as a set of procedural requirements developed by tribunals and courts over time. These requirements are aimed at bringing the parties to the bargaining table to:

[O]utline their issues, present their proposals, articulate the underlying rationale [for those proposals] and make every reasonable effort to reach common ground in order to enter into a collective agreement.

In addition to mandating certain procedural requirements, the duty is also aimed at eliminating bad faith conduct. As the BC Board has stated:

only to good faith, while the Saskatchewan legislation requires the parties to meet and bargain towards a collective agreement. See ibid.

202 NABET and CKLW Radio Broadcasting Ltd (Re), 77 C.L.L.C. 16,110 (Can.); CALPA and Eastern Provincial Airways Ltd, 84 C.L.L.C. 16,012 (Can.).

203 Centre Jubilee Centre v. United Steelworkers of America, 95 C.L.L.C. 220-005 (O.L.R.B.); New Method Laundry and Dry Cleaners, 57 C.L.L.C. 18,059 (O.L.R.B.); Glass, Molder, Pottery & O'rs and Barber Industries, 89 C.L.L.C. 16,024 (Alta. L.R.B.).

204 Nor in any other collective bargaining legislation in Canada.

205 Such cases now generally take the form of unfair labour practice claims, although prior to the 1970s the usual avenue for securing compliance with the duty was through a prosecution in the general courts. Then, in the 1970s, labour boards, or their equivalent, were given jurisdiction over the duty, and a body of jurisprudence involving unfair labour practice claims has since developed. See G. Adams, at para. 10.1440; D. Carter, The Expansion of Labour Board Remedies. A New Approach to Industrial Conflict (Kingston, Industrial Relations Centre, 1976).

206 Corry, at 8-1.
The duty to bargain in good faith places an onus on the parties to engage in a process of give and take, of making acceptable compromises, and of seeking solutions to the issues before them. This is the real form and process of contracting that society seeks to preserve when it looks at the underlying values of freedom of contract. Our society does not seek to protect the conduct of a party who seeks to deliberately frustrate or prevent the rights of another party to engage in the process of free collective bargaining.\footnote{Yarrow Lodge Limited and HEU (Re) (1994), 21 C.L.R.B.R. (2d) 1 (B.C.) [hereinafter “Yarrow Lodge”] at 25. (Sub nom, Yarrow Lodge Ltd v. Hospital Employees Union, 94 C.L.L.C. 16,047 (B.C.)).}

This comment is indicative of the approach that has been taken by the BC Board when assessing a claim that a party has failed to bargain in good faith. In essence, it is easier to identify bad faith conduct than it is to state what it is that a party must do in order to bargain in good faith. As a result, the duty has been applied by the Board so as to prohibit certain bad faith conduct.\footnote{G. Adams, at para 10.1400. To some extent, however, this is a matter of phraseology. By describing a prohibited act in the negative (i.e., a "refusal" to do something), the BC Board is, in effect, saying that a party is obliged to carry out that act (hence the description of the duty as encompassing a set of procedural requirements).} Thus, in order to make out a claim that its counterpart has failed to bargain in good faith, an applicant will be required to adduce sufficient evidence of prohibited conduct.

In terms of assessing a party's conduct, the test applied by the BC Board is both subjective and objective:

Board decisions have established that the question of whether a party is bargaining in good faith is governed by both an objective and a subjective test. The subjective test relates to the motivation of the parties. If it is determined that one of the parties is only going through the motions, that party has failed the subjective test of bargaining in good faith. The Board can, however, determine that a party is failing to make every reasonable effort to conclude a collective agreement by an objective analysis of that party's actions.\footnote{Labour Relations Board of British Columbia, Information Bulletin No. 10: Duty to Bargain in Good Faith (Effective 4/1/1995) at 2. See also Royal Oak Mines Inc v. Canada (Labour Relations Board) (1996), 133 D.L.R. (4th) 129 (S.C.C.) where the Supreme Court discusses the subjective and objective limbs of good faith bargaining; and further, G. Adams, at para. 10.1575.}
In practice, however, the distinction between the objective and subjective limbs of the duty is frequently blurred, for a court's or adjudicator's conclusions regarding the subjective test are often grounded in a global assessment of a party's conduct. Conduct which may evidence breach of either (or both) the subjective or objective elements of good faith bargaining includes:

1. Refusing to bargain, without proper reason.\(^{210}\) A justifiable reason could be that the other party has refused to specify who has authority to bargain on its behalf,\(^{211}\) or that an impasse has been reached and that a further session would not be fruitful.\(^{212}\)

2. Imposing unjustified or extraneous preconditions to bargaining.\(^{213}\)

3. Refusing to meet on a timely basis,\(^{214}\) or avoiding meetings.

4. Sending a representative to the bargaining table who does not have authority to settle or knowledge of the issues involved in the negotiations,\(^{215}\) or frequently changing the makeup of a negotiating team.\(^{216}\)

5. Seeking to dictate the makeup of another party's negotiating team.\(^{217}\)

6. Refusing to disclose one's proposals or demands.\(^{218}\)

7. Refusing to explain and justify one's proposals.\(^{219}\)

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\(^{211}\) BFCSD and Diversey Wyandotte Inc. (Re), [1985] O.L.B.Rep. 405 (Ont.).

\(^{212}\) IAM Loc. 2309 and Nordair Ltd (Re), 85 C.L.L.C. 16,023 (Can.L.R.B.).

\(^{213}\) BC Rail Ltd v. Council of Trade Unions on BC Rail, 93 C.L.L.C. 16,072 (B.C.L.R.B.); School District No. 44 (North Vancouver) and North Vancouver Teachers Association (Re), 92 C.L.L.C. 16,067 B.C.I.R.C.; Northwood Pulp & Timber Ltd v. CEP Loc 603, 95 C.L.L.C. 220-001 (B.C.L.R.B.).


8. Refusing to discuss or explore the proposals of the other side.\textsuperscript{220}

9. Refusing to disclose such information as is necessary to ensure rational and informed discussion (such as the wages rates, benefits, and classification structures of those represented by the union).\textsuperscript{221}

10. Deliberately tabling an inflammatory proposal which would likely provoke a breakdown in negotiations.\textsuperscript{222}

11. Engaging in “surface bargaining”\textsuperscript{223} (giving the appearance of engaging in collective bargaining with no real intent to ever conclude an agreement).\textsuperscript{224}

12. “Boulwarism”.\textsuperscript{225}

13. Effecting a misrepresentation or refusing or failing to disclose material information, whether solicited or unsolicited.\textsuperscript{226}

14. Insisting on demands that are illegal,\textsuperscript{227} contrary to the provisions or scheme of the BC Code,\textsuperscript{228} or beyond the power of the other party to grant.\textsuperscript{229}


\textsuperscript{220} Pulp & Paper Industrial Relations Bureau, 77 C.L.L.C. 16,109 (B.C.L.R.B.); Corry, at 8-15.

\textsuperscript{221} Starbucks Corporation and N.A.A.A.I.W.U., Loc. 3000 (1997), 35 C.L.R.B.R. (2d) 244 (B.C.); Hey-Way ‘Noqu’ Healing Circle for Addictions Society v. B.C. Government and Service Employees’ Union (B.C.L.R.B. No. B414/95) (B.C.); Noranda, at 162. Claims of poor financial performance, for example, will require supporting information.


\textsuperscript{223} The Daily Times and Toronto Typographical Union No. 91, [1978] 2 Canadian L.R.B.R. 446 (Ont.).

\textsuperscript{224} Yarrow Lodge at 29. A history of “anti-union animus” and unfair labour practices may be relevant in determining whether an inflexible position constitutes “surface bargaining”. See Starbucks Corporation and N.A.A.A.I.W.U. Loc. 3000 (1997), 35 C.L.R.B.R. (2d) 244 (B.C.).

\textsuperscript{225} A term coined in the 1940s in the United States after Lemuel Boulware, then vice president of General Electric, who promoted the strategy of presenting a one off proposal on the basis of “That’s it. Either take it or leave it”. For United States authority prohibiting this practice, see e.g., N.L.R.B. v. General Elec. Co. 418 F.2d 736 (2d Cir. 1969). The term “ultimatum bargaining” has been used analogously in British Columbia. See e.g., School District No. 44 (North Vancouver) and North Vancouver Teachers Association (Re) (1992), 17 C.L.B.R. (2d) 254 (B.C.).

\textsuperscript{226} Starbucks Corporation and N.A.A.A.I.W.U. Loc. 3000 (1997), 35 C.L.R.B.R. (2d) 244 (B.C.); Noranda, at 162; Westinghouse Canada Ltd, 80 C.L.L.C. 16,053 (O.L.R.B.).


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15. Seeking to undermine the relationship between a union and its members (by, for example, sending bargaining material to employees without first having discussed it with their union).  

16. Bypassing a union (without its consent or acquiescence) and negotiating directly with employees.  

17. Suddenly tabling a new demand or revoking an existing offer without a compelling reason.  

18. Reneging on agreements made during the course of bargaining.  

19. Withdrawing from negotiations without proper reason (for example, withdrawing before a genuine impasse is arrived at).  

20. Taking a strike vote without first having discussed all collective bargaining issues in dispute.  

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An example would be an insistence by an employer that it not be required to re-engage striking employees following settlement (see Labour Relations Board of British Columbia, Information Bulletin No. 10: Duty to Bargain in Good Faith (Effective 4/1/1995) at 4). See also Health Employers Association of British Columbia and BC Government and Service Employees Union (1997) 33 C.L.R.B.R. (2d) (B.C.). Note that section 49(3) of the BC Code provides that a party is not required to execute an agreement that conflicts with a requirement of or under the Code.


These actions can be contrasted with a number which have been held not to constitute evidence of a breach of the duty, including:

1. Hard bargaining (taking an uncompromising position on an issue, whilst at the same time genuinely seeking a resolution)\(^{236}\)
2. Sending to employees non-coercive communications detailing such matters as the status of the workplace or its operation, the outcome of negotiation meetings,\(^{237}\) the likely effect of industrial action, and proposals already provided to union officials.\(^{238}\)
3. Shutting an operation down because of financial necessity, notwithstanding the existence of unresolved labour negotiations.\(^{239}\)
4. Continuing to operate during a strike or lockout, subject to the prohibitions on using replacement labour.\(^{240}\)
5. Failing to reach agreement or make concessions.

In respect of this final point, it is important to note that the underlying philosophy of the duty:

> [E]mbraces “a freedom of contract” rationale, that the parties are best able to determine the content of their agreement and, failing agreement, each has recourse


\(^{239}\) *Starbucks Corporation and N.A.A.A.I.W.U. Loc. 3000 (1997), 35 C.L.R.B.R. (2d) 244 (B.C.).* See also BC Code, s. 63(1).

\(^{240}\) For discussion on these prohibitions, see *infra* notes 252-253.
to economic sanctions. The cases therefore reveal a reluctance by labour boards to review the fairness of proposals...

... [Accordingly] a resulting impasse in bargaining will not be found to stem from breach of the duty of good faith if it can be said that the proponent is merely using its economic position to negotiate terms which favour its legitimate interests.

In accordance with this philosophy, the BC Board has repeatedly refused to enter into an assessment of whether a particular proposal is reasonable. As the BC Board has stated:

A failure to reach a collective agreement because of a determination not to make the concessions necessary to secure the consent of the other side is not, in and of itself, an unfair labour practice. It would be inconsistent with the fundamental policy of the Code - the fostering of free collective bargaining - for the Board to evaluate the substantive positions of each party, to decide which is the more reasonable, and then to find the other party to be committing an unfair labour practice for not moving in that direction. ... The theory of the Code is that each side in collective bargaining is entitled to adopt the contractual proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength in a strike to force the other side to make concessions.

Accordingly, the BC Board will not inquire into the substance of a party's proposal, except in certain limited circumstances:

In regulating the statutory duty to bargain in good faith now contained in Section 11 of the Code, the Board is primarily concerned with the process of collective bargaining. There may nonetheless be occasions where the substance of collective bargaining (i.e., a proposal being advanced by one of the parties) overlaps with process or otherwise calls for scrutiny. The circumstances in which the Board will intervene are where specific demands are illegal, are inconsistent with the law and policy of the statute, or constitute evidence of bad faith bargaining.

241 G. Adams, at para. 10.1400.
242 G. Adams, at para. 10.1540.
244 Noranda, at 159.
245 Northwood Pulp & Timber Ltd v. CEP Loc 603 (1994), 23 C.L.R.B.R. (2d) 298 (B.C.) at 319-320. A proposal which is extreme in its unreasonableness is likely, for example, to constitute evidence of bad faith conduct. For discussion on the extent to which labour boards examine the substance of proposals, see B. Adell, The Duty to Bargain in Good Faith: Its Recent Development in Canada (Kingston, Industrial
Nor is the BC Board willing to intervene in negotiations between parties committed to achieving a resolution, even although considerable “to-ing and fro-ing” may occur in the process, including the use of lawful strikes and lockouts. As was noted in the *Noranda* case, while the duty requires adherence to certain fundamental principles of reasonable bargaining procedure, the Board has recognised that it “must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement.”

In summary, then, the duty to bargain good faith compels preparation, attendance, disclosure of one’s proposals, justification, consideration of counter-proposals, discussion and perseverance with bargaining until either a settlement or a genuine impasse is reached. The duty also prohibits conduct likely to undermine rational and constructive bargaining. Beyond that, it is generally for the parties to determine what is agreed upon, and, in the usual course, provided both parties have bargained in good faith, each will be entitled to effect economic sanctions in the event of impasse.

### 2.2 The Substance of the Duty to Bargain in Good Faith

To appreciate fully the nature of the duty to bargain in good faith as it applies in British Columbia, it is necessary to look beyond the core enacting provision, to those sections of the BC Code that give the duty substance and support.

First, as noted, the duty to bargain in good faith is triggered by a notice to bargain, which can be given by either party. The recipient of the notice is obliged to commence

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246 *Noranda*, at 161.

247 Note, however, the potential for arbitration in relation to first collective agreements (see infra notes 291-292) and for the imposition of terms in extreme cases (see infra notes 308-316).
bargaining within ten days.\textsuperscript{248} Where an existing collective agreement is due to expire and the parties have not given notice 90 days or more before the expiry date, notice is deemed to be given and both parties are then obliged to commence bargaining.\textsuperscript{249} These provisions support the obligation of good faith by establishing an enforceable commencement mechanism, thereby reducing the opportunity for procrastination or deliberate delay.

Secondly, the BC Code encourages good faith bargaining by restricting alternatives. Section 59(1) of the Code prohibits employers and unions effecting strikes or lockouts until after they have bargained collectively in accordance with the requirements of the Code. Although this section does not require the discussion of a particular checklist of proposals or demands,\textsuperscript{250} before a party can take a strike (or lockout) vote they must have discussed with the other party their respective positions on the issues in dispute.\textsuperscript{251} A failure to do so will likely result in a labour board holding that a strike or lockout notice is invalid, thereby sending the parties back to the bargaining table.

Additionally, section 62(1) of the BC Code provides that:

\begin{quote}
If employees are lawfully on strike or lawfully locked out, their health and welfare benefits, other than pension benefits or contributions, normally provided directly or indirectly by the employer to the employees must be continued if the trade union tenders payment to the employer or to any person who was before the strike or lockout obligated to receive the payment.
\end{quote}

This provision eliminates one avenue of bad faith bargaining conduct: the ability of employers to exert pressure on their employees not through bargaining, but by cancelling their health and welfare benefits. If permitted to occur, conduct of this kind could impact

\begin{footnotes}
\item[248] BC Code, s. 46.
\item[249] BC Code, s. 46(4).
\item[251] \textit{Ibid.} See also \textit{Yarrow Lodge}, at 11.
\end{footnotes}
significantly on the well-being of both striking or locked out employees, and their dependants, thus providing considerable (albeit bad faith) leverage in a bargaining dispute.

The BC Code also restricts the use of replacement labour during a strike or a lockout. Section 68(1) of the BC Code prohibits the use of outside replacement workers to cover for employees who are lawfully striking or locked out, while section 68(2) further provides that an existing employee cannot be directed against his or her will to perform the work of a striking or locked out colleague. These provisions could be viewed as enhancing the prospects of good faith bargaining (to the extent that they require an employer to look to an agreed resolution as the primary means for ending an impasse, rather than simply engaging replacement workers and continuing a strike or lockout indefinitely), although this view is not universally endorsed throughout British Columbia and Canada.

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252 See e.g., Davis Wire Industries Ltd (Re), [1998] B.C.L.R.B.D. No. 148 (B.C); A.B. Lumber Co. (Re), [1998] B.C.L.R.B.D. No. 53 (B.C); Fletcher Challenge Canada Ltd (Re), [1997] B.C.L.R.B.D. No. 387 (B.C); Glenwood Label and Box Manufacturing Ltd and Communication, Energy and Paperworkers Union of Canada, Loc. 226, [1996] B.C.L.R.B.D. No. 300 (B.C). Section 68 is often used by unions as an organising tool, in that employees are encouraged to vote for the certification of a union on the basis that they will then have the option of striking in furtherance of their contractual demands whilst protected against the use of outside replacement workers. See M.A. Hickling, “Flexibilization of the Workplace: Observations on Aspects of the Canadian Position” (Paper delivered to the XVth International Congress on Comparative Law, Bristol, 1998) at 45.

253 It is of interest to note that while the BC Code does not specifically address the issue of whether lawfully striking employees can be dismissed, section 1(1) of the Code provides that a persons “does not cease to be an employee within the meaning of this Code by reason only of ceasing work as a result of (a) a strike that is not contrary to this Code ... [or] ... (c) a lockout.” In practice, unions will generally insist that striking employees are re-engaged as a condition of settlement (see Corry, at 9-44). Moreover, a refusal to re-engage a striking worker after a strike has concluded (or a refusal to arbitrate the matter) could expose an employer to an unfair labour practice claim (on the basis of discriminatory conduct against union members). For these reasons, the issue of employers refusing to re-engage strikers seldom arises.

254 A practice which has occurred in New Zealand. See supra note 123.

255 Only British Columbia and Quebec operate this prohibition, Ontario having repealed a similar provision in 1995. Given that good faith bargaining is already a prerequisite to an employer effecting a lockout, it could be argued that the prohibition on the use of replacement workers serves primarily to enhance the bargaining power of unions and the associated vulnerability of employers to shut down, rather than promoting good faith bargaining. Because of these conflicting views, this type of prohibition was, and remains, controversial. See e.g., J. Baigent et al., A Report to the Honourable Moe Sihota Minister of Labour: Recommendations for Labour Law Reform (Ministry of Labour and Consumer Services, September 1992) at 43-44; P. Weiler, Reconcilable Differences (Toronto, Carswell, 1980) at 77-78; D. Carter, The Changing Face of Labour Law ((Kingston, Industrial Relations Centre, 1993) at 8, G.
Thirdly, the BC Code facilitates good faith bargaining by restricting the ability of an employer to alter the terms of its employees’ employment during negotiations. In the case of a recently certified union, for example, an employer is unable to effect changes until four months after the date of certification or until the date an agreement is executed, whichever occurs first.\textsuperscript{256} Certain restrictions also apply in cases where parties are seeking to negotiate the renewal or replacement of an expired agreement.\textsuperscript{257} Unless prior approval of the BC Board is obtained,\textsuperscript{258} unilateral changes effected in breach of these restrictions will ground an unfair labour practice claim.\textsuperscript{259} Good faith is enhanced by these restrictions, for without them an employer could seek to undermine or discredit a union, or “punish” its employees for having chosen to engage in collective bargaining, by altering terms unilaterally during negotiations.

Fourthly, the BC Code reinforces the obligation of good faith by restricting what an employer can convey directly to its employees during the certification procedure and

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\textsuperscript{256} BC Code, s. 45(1)(b). Notably, the 1998 review on the BC Code recommended the extension of the four month period to eight months. See \textit{Managing Change}, at 53-54.

\textsuperscript{257} BC Code, s. 45(2), which prohibits the unilateral alteration of any term or condition of employment until a strike or lockout occurs, or an agreement is reached, or the union is decertified (a period often referred to as the “statutory freeze” period). This provision was enacted in response to the decision in \textit{Paccar of Canada Ltd v. C.A.I.M.A.W.} (1990), 62 D.L.R. (4th) 437 (S.C.C.) in which the Supreme Court held that the previous restrictions on unilateral alteration applied only to first agreements.

\textsuperscript{258} BC Code, s. 45(3).

\textsuperscript{259} See e.g., \textit{D & D Pallets and Lumber (Re),} [1998] B.C.L.R.B.D. No. 273 (B.C.); \textit{J.R.J. Trucking Ltd and Teamsters Loc. 213} (1994) B.C.L.R.B. No. 3505/94 (B.C.). Interim relief against alterations of this nature may also be available, pending a full hearing of an unfair labour practice claim. See e.g., \textit{RBA Canada Inc and Loc. 213 of the International Brotherhood of Electrical Workers,} [1997] B.C.L.R.B.D. No. 31 (B.C.). Note, however, that unilateral changes can be effected after the expiry of a collective agreement \textit{and} the statutory freeze period. \textit{C.f.,} the binding effect of terms of employment in New Zealand notwithstanding the expiry of a collective employment contract, at least in theory. See \textit{infra} notes 404-405.
subsequent negotiations. Sending coercive or intimidating communications to an employee in an attempt to influence his or her initial decision to vote for certification will constitute a breach of an employee’s right to freedom of association.\textsuperscript{260} Sending such communications following certification will likewise contravene the duty to bargain in good faith. Similarly, an employer will be in breach of the duty if it bypasses a certified union (without the union’s consent or acquiescence) and negotiates directly with its employees.\textsuperscript{261} The distinction between direct bargaining and permissible communications is covered, in part, by section 8 of the BC Code, which provides:

Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer’s business.

The BC Board has elaborated on this provision in a number of decisions, including \textit{Cardinal Transportation v. CUPE Loc. 561 and Ors.}\textsuperscript{262} In order to comply with section 8, the statement made must be accurate (if it is a statement of fact) or reasonably held (if it is an opinion), particularly in the final stages of negotiations or where employees are directed to attend “captive” meetings during work time.\textsuperscript{263} However, minor inaccuracies in statements conveyed will seldom if ever constitute a breach of the duty. In this regard, the Board has taken a pragmatic approach by recognising that if it:


\textsuperscript{261} Some collective agreements expressly contemplate additional direct negotiations between employer and employee. Examples include the collective agreements governing major league baseball, hockey and basketball (all of which are played in Canada and the United States). In each of these sports, the applicable collective agreement sets out the core provisions, but allows players to negotiate their own salaries directly with the owners or general managers of their teams. See B. Burke, “Negotiation Involving Agents and General Managers in the NHL” (1993) 4 Marq.S.L.J. 35. Moreover, even where a collective agreement makes no mention of direct negotiations, a union may be held to have delegated its authority to bargain if it consents or acquiesces to direct negotiations. See M. A. Hickling, “Status of Collateral, Ancillary or ‘Side’ Agreements in Labour Relations” (Continuing Legal Education Society of British Columbia, December 1986) at 17.

\textsuperscript{262} \textit{Cardinal Transportation}.

\textsuperscript{263} \textit{Ibid.} See also \textit{B.C. Hydro and Power Authority} (B.C.L.R.B. No. B 395/94) (B.C.).
Communications that will clearly fall outside the scope of section 8 will include comments which are disparaging of a union or a union official or which constitute an anti-union campaign; statements which would reasonably have the effect of coercing, intimidating or exercising undue influence over an employee as regards his or her decision to engage in collective bargaining through a representative; and proposals or offers that have not yet been discussed with the union.

Fifthly, good faith bargaining is enhanced by section 49(3) of the BC Code, which provides that if "an agreement is reached as the result of collective bargaining, both parties must execute it." This section wards against a party reneging on a previously agreed settlement. Whether an "agreement" has been reached, is a question of fact to be determined objectively by reference to all the circumstances of a particular case.

The BC Code further facilitates good faith by requiring that all collective agreements contain certain specified provisions, including a minimum one year term, a "consultation committee provision", a clause prohibiting strikes and lockouts during the term of the

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264 Noranda, at 161.
267 See e.g., B.C. Hydro and Power Authority (B.C.L.R.B. No. 395/94) (B.C.).
270 BC Code, s. 50(1).
271 BC Code, s. 53. In the absence of an agreed clause, the following clause applies by default: "On the request of either party, the parties must meet at least once every two months until this agreement is terminated, for the purposes of discussing issues relating to the workplace that affect the parties or any employee bound by this agreement." (See BC Code, s. 53(3)). For discussion on the operation of clauses of this nature, see e.g., Pacific Press and GCIU, Loc. 25-C (1995), B.C.L.R.B. No. B52/95.
agreement, and clauses detailing procedures for the resolution of grievances and disputes of right. The BC Code also provides that where requested by a union negotiating a first collective agreement, an employer must agree that all employees in the bargaining unit will pay union dues. In rendering these clauses mandatory, the BC Code removes them as a source of bargaining conflict, and facilitates the orderly settlement of particular disputes that may arise during the term of an agreement. In so doing, the Code fosters co-operation and the avoidance of acrimonious economic sanctions.

The BC Code also recognises that bargaining can be impeded by employers that operate in more than one province, or in more than one corporate form. Section 52 of the Code provides that an extra-provincial company must appoint a resident of British Columbia as its bargaining representative, or face one being appointed by the Minister of Labour. Companies cannot, then, use the provincial line, or the existence of a distant head office, to frustrate collective bargaining. In addition, section 37 of the Code details a “successor” employer procedure which wards against employers seeking to evade the duty to bargain in good faith by restructuring. As the BC Board noted in Wilson Place Management Ltd (re) and Hospital Employees’ Union:

[Section] 37 can play an important role where a union seeks to enforce the duty to bargain in good faith against an employer that arbitrarily shifts its work force from the payroll of one legal entity to another.

272 BC Code, s. 58.
273 BC Code, s. 84(1).
274 BC Code, s. 84(3).
275 BC Code, s. 6(3)(f). This is the minimum union security clause which an employer must agree to when requested, and is known as the "Rand Formula". See G. Adams, at para. 10.1550; Corry, at 2-15.
276 A review of BC Board decisions failed to locate any reported instance where the Minister of Labour had exercised the power conferred by this section, presumably because employers would be loath to be represented by an appointee.
277 For discussion on “successor employers” see e.g., Wilson Place Management Ltd (re), [1997] B.C.L.R.B.D. No. 397 (B.C.); Napier Intermediate Care Home Ltd (Re), [1997] B.C.L.R.B.D. No. 191 (B.C.).
278 Ibid.
279 Ibid. at 5.
Similarly, section 38 provides the BC Board with the power to treat two or more employers as one for the purposes of the Code, a power which can also be utilised to prevent an employer evading the duty of good faith. Depending on the circumstances of a particular case, it may be possible for a union to invoke both sections 37 and 38. The duty of good faith derives further, and considerable support from the various dispute resolution procedures provided for in the BC Code, including mediation and arbitration. In terms of mediation, the Associate Chair of the Mediation Division may appoint a mediator to assist in the negotiation of a first collective agreement. He or she can also appoint a mediator to assist in the negotiation of any collective agreement, provided at least one party has applied in writing for the appointment of a mediator. Significantly, if a mediator is appointed under either of these procedures, the parties are prohibited from striking or locking out for a prescribed period.

Additionally, the Minister of Labour can, at any time, appoint a mediation officer if the Minister considers that an appointment is likely to facilitate settlement, and he or she also has the power to appoint a special mediator to assist in collective bargaining. The Code further provides for the appointment of Fact Finders and Industrial Inquiry Commissions, both of which can be utilised to resolve bargaining impasses.

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281 See e.g., White Spot Ltd v. CAW-Canada, 98 C.L.L.C. 220-018 (B.C.S.C.).

282 BC Code, s. 55. See infra notes 291-293 and accompanying text.

283 BC Code, s. 74(1).

284 See BC Code, ss. 60(3)(b)(iv) and 55.

285 BC Code, s. 74(4).

286 BC Code, s. 76.

287 BC Code, s. 77.

288 BC Code, s. 79.
These procedures, together with others such as Last Offer Votes, facilitate good faith bargaining by providing avenues for settlement that avoid the acrimony and conflict inherent in economic sanctions. Such procedures can be extremely effective. For example, an experienced mediator can enhance the prospects of a good faith settlement by the use of various techniques including reality checks, issue identification and contextualisation, caucusing, shuttle diplomacy and confidential discussions. The existence of a number of different dispute resolution procedures also has the added benefit of allowing the Associate Chair or the Minister to select the process most likely to resolve a particular dispute.

The BC Code also provides for "med/arb"290 in cases where a union and an employer are negotiating a first collective agreement. This procedure is now set out in section 55 of the BC Code,291 and can be summarised as follows:

1. Either party to collective negotiations may apply to the Associate Chair of the Mediation Division for the appointment of a mediator if they have failed to bargain a first agreement and the employees have voted to strike. A mediator must be appointed within five days and the parties must supply the mediator with a list of disputed issues and their positions in respect of those issues.

2. Once an application for first agreement mediation is made, the parties may not strike or lockout until such time as the Associate Chair directs that they may do so.

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289 BC Code, s. 78.

290 A process that combines mediation and arbitration.

291 Section 55 was enacted in January 1993. Prior to that, first collective arbitration was governed by section 137.5 of the Industrial Relations Act 1979 (amended by the Industrial Relations Reform Act 1987), and before that, by section 70 of the Labour Code 1973 (enacted by the Labour Code of British Columbia Act 1973). Initially a remedial response to unfair labour practice claims, the first agreement procedure is now considerably broader in scope. For discussion on the history of the procedure in British Columbia and the current policy of the BC Board as regards section 55, see Yarrow Lodge, and infra notes 317-321.
3. If an agreement cannot be secured within 20 days of the appointment of the mediator, the mediator must recommend to the Associate Chair one or more of the following:

- proposed terms and conditions for consideration by the parties;
- the appointment of a mediator-arbitrator to conclude an agreement (“med/arb”);
- the referral of the dispute to arbitration by a single arbitrator or a board;
- allowing the parties to strike and lockout.

4. If the mediator recommends terms of settlement and they are not accepted by the parties, or if a collective agreement is not concluded within 20 days of the submission of the mediator’s report, the Associate Chair must direct one of three methods for resolving the dispute: med/arb, arbitration, or allowing the parties to effect economic sanctions. If the Associate Chair directs med/arb or arbitration, neither party may effect a strike or lockout.\textsuperscript{292}

This procedure provides considerable support for good faith bargaining, for as Paul Weiler has noted:

The law needs to be concerned about a different first-contract history, one which poses a major threat to the integrity of the statutory representation scheme. There are stubbornly anti-union employers who in spite of the certification, refuse to accept the right of their employees to engage in collective bargaining. They simply decide to fight the battle on a different front, to go through the motions of negotiations and to try to talk the union’s bargaining authority to an early demise.\textsuperscript{293}

\textsuperscript{292} Similar processes are utilised in seven other Canadian jurisdictions. See Canada Labour Code, R.S.C. 1985, s. 80; Man., Labour Relations Act, R.S.M. 1987, c. L 10, s. 87; Ont., Labour Relations Act, R.S.O. 1995, c. L. 2, s. 43; P.E.I., Labour Act, R.S.P.E.I. 1988, c. L-1, s. 22(2) to (6); Que., Labour Code, R.S.Q. c. C-27, s. 93.1 - 93.9; Sask., Trade Union Act, s. 26.5; Nfld., Labour Relations Act, R.S.N. 1990, c. L-1, s. 81 - 83.

The BC Code promotes good faith bargaining not only at the time of contract formation, but also during the tenure of an agreement. It does so by providing for dispute resolution procedures in respect of matters arising after settlement. For example, section 54 of the Code provides, in part:

(1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom the collective agreement applies,
   (a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and
   (b) after notice has been given, the employer and the trade union must meet, in good faith, and endeavour to develop an adjustment plan ...

A failure to comply with section 54 will ground an unfair labour practice claim and may expose an employer to an award of damages.295

Finally, good faith bargaining receives considerable support from the remedial powers of labour boards. As noted, a failure to bargain in good faith will ground an unfair labour practice claim which, if successful, can result in wide ranging remedies. For example, a party in breach of the duty can be ordered to attend meetings, pay the costs incurred by the aggrieved party in the course of "bad faith" negotiations, cease, and desist from,

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294 Section 54 replaced the previous "technological change" provisions which existed in the former Labour Code, and which continue to exist in a number of other Canadian jurisdictions (see e.g., Canada Labour Code, R.S.C. 1985, c. L-2, s. 51-52; Man., Labour Relations Act, R.S.M. 1987, c. L 10, ss. 83-86). Interestingly, in the recent review of the BC Code, no submissions were received from employers regarding section 54, while those from unions tended to call for a strengthening of the procedure (by, for example, the introduction of arbitration where parties failed to agree on an adjustment plan). See Managing Change, at 22.


certain conduct,\textsuperscript{298} remove from the bargaining table a proposal previously presented in bad faith,\textsuperscript{299} re-table a proposal previously withdrawn in bad faith,\textsuperscript{300} table a contract that it would be willing to execute;\textsuperscript{301} disclose information pertinent to issues on the bargaining table;\textsuperscript{302} agree to a particular proposal that is guaranteed by law (such as the minimum union security clause),\textsuperscript{303} or execute an agreement reached as a result of collective bargaining.\textsuperscript{304}

Canadian labour boards have also, on occasion, ordered employers to pay their employees compensatory damages for the loss of opportunity to negotiate a collective agreement, where that loss has resulted from the employer’s breach of the duty to bargain in good faith.\textsuperscript{305} This practice has been rare, presumably because labour boards do not wish to become embroiled in assessing what parties would have agreed upon had they negotiated in good faith from the outset (an necessary assessment in the calculation of quantum). However, the BC Board arguably has the power to grant relief of this kind under section 133 of the BC Code,\textsuperscript{306} and one could envisage instances where compensatory damages

\textsuperscript{299} CCH Canadian Limited, 74 C.L.L.C. 16,114 (O.L.R.B.).
\textsuperscript{300} Fotomat Canada Limited, [1981] Can. L.R.B.R. 381 (Ont.).
\textsuperscript{302} See e.g., Westinghouse Canada Ltd, 80 C.L.L.C. 16,053 (O.L.R.B.). The prospect of being ordered to disclose financial information serves to deter employers from making false or unsustainable claims of financial hardship.
\textsuperscript{304} See supra note 268.
\textsuperscript{306} Section 133(1)(b) provides the BC Board with the power to order a person to “rectify a contravention of the Code”; while section 133(1)(d) permits the Board to make an order setting the monetary value of an injury or loss suffered by a person as a result of a contravention of the BC Code.
might be an effective remedy, particularly where a party has been guilty of prolonged and flagrant breaches of the duty to bargain in good faith.\textsuperscript{307}

Traditionally, it had been considered that labour boards lacked the jurisdiction to impose entire agreements on parties, except where there existed express statutory power to do so (such as in the case of arbitrated first collective agreements).\textsuperscript{308} This view was modified by \textit{Royal Oak Mines Inc v. Canada (Labour Relations Board)}.\textsuperscript{309} In this case, the Supreme Court upheld a decision by the Canada Labour Relations Board to order the parties to agree on a collective agreement within a prescribed period or have one imposed through arbitration. However, in endorsing this remedy, the Supreme Court emphasised the extreme circumstances involved in the case. The dispute had involved an extremely acrimonious 18 month strike; brawls and violence had been common place on the picket line;\textsuperscript{310} nine replacement employees had been murdered in an explosion (in respect of which a striking worker was subsequently convicted); beatings, death threats and bomb threats were common place; and the possibility of imposing martial law had been considered by Yellowknife\textsuperscript{311} and federal officials.

Given these extraordinary circumstances, an extraordinary remedy was held to be justified.\textsuperscript{312} According to Cory J:

\begin{itemize}
\item \textsuperscript{307} The BC Board has indicated that damages for "loss of opportunity" to bargain could be awarded in an appropriate case. See \textit{Fletcher Challenge Canada Ltd and CEPU, Loc. 1092}, [1997] B.C.L.R.B.D. No. 255. Although this decision was concerned with a breach of section 68 (the prohibition on engaging replacement workers during a strike), and not a general breach of the duty to bargain in good faith, arguably the statements of the Board in this case are cast in sufficiently broad terms to be of general application to other unfair labour practice claims.
\item \textsuperscript{308} See \textit{e.g.}, \textit{Re Canadian Union of Public Employees and Labour Relations Board (Novia Scotia)} (1983), 1 D.L.R. (4th) 1 (S.C.C.) [the "Digby School Board" case].
\item \textsuperscript{310} 151 criminal charges were laid in respect of one day's violence alone, and over 40 strikers had been dismissed for their actions on the picket line.
\item \textsuperscript{311} The town in which the mine was located.
\item \textsuperscript{312} See \textit{e.g.}, Lamer CJ at 133; "[E]xceptional and compelling reasons" will be required in order to justify this remedy."
\end{itemize}
In fashioning an order the board was obliged to take into account the long violent and bitter history of the dispute. Moreover, the facts of this case are so extraordinary that, if it were necessary, the board was justified in going to the limits of its powers in imposing a remedy.\footnote{Supra note 309 at 154. The Supreme Court distinguished its previous decision in the \textit{Digby School Board} case primarily on the basis that the remedial powers set out in the Canada Labour Code were held to be more extensive than those in the Nova Scotia legislation (the statute at issue in the earlier case).}

Critical in the Court's finding was the impact of the dispute on the small and isolated community of Yellowknife. The strike, and the resulting violence had, in effect, divided the township. In Cory J's opinion:

\begin{quote}
The impact of the dispute had extended well beyond the company and the union involved. Therefore, the order had to take into account the very real public interest in resolving the dispute fairly yet expeditiously.\footnote{Supra note 309 at 158.}

... The remedy struck an appropriate balance between the public interest and the interests of the parties.\footnote{Supra note 309 at 166.}
\end{quote}

While \textit{Royal Oak Mines} admittedly represents an extreme illustration, it nevertheless serves to highlight the width of the BC Board's powers.\footnote{Although the remedial powers of the BC Board as regards unfair labour practice claims (see BC Code, ss. 14 & 133) are not expressed in identical terms to those considered in \textit{Royal Oak Mines} (Canada Labour Code, s. 99(2)), the BC Board's powers are arguably broad enough to permit it to impose an agreement in extreme cases. For example, section 133(1)(a) of the BC Code provides, in part, that the BC Board may "order a person to do anything for the purposes of complying with the Code." [Emphasis added].} Those powers serve both as an effective deterrent against bargaining conduct inconsistent with the duty of good faith and as a source of meaningful relief in cases of non-compliance.

\subsection*{2.3 Statements of Policy Issued by the BC Board}

The duty to bargain in good faith acquires substance not only from supporting provisions in the BC Code, but also from statements of policy issued by the BC Board. The BC
Board's decision in *Yarrow Lodge* is an illustrative example.\textsuperscript{317} The Board used the opportunity of this dispute to set out in detail its policy as regards the first collective agreement procedure set out in the BC Code.\textsuperscript{318} Included in that policy were a number of important guidelines:\textsuperscript{319}

1. The first contract procedure is not simply about bad faith conduct; it is to be used to repair a breakdown in first contract negotiations, whether or not the conduct leading to the breakdown constitutes a breach of the duty to bargain in good faith.

2. The appointment of a mediator should occur in a timely fashion, so as to aid the parties in building a relationship and fostering a bargaining process.

3. Where the parties are unable to conclude an agreement notwithstanding the assistance of a mediator, the mediator shall identify the "stumbling block(s)" in his or her report, together with a recommendation(s). Such reports are to constitute an important feature of the process.\textsuperscript{320}

4. Arbitration is to be viewed as an exceptional remedy; collective bargaining is to be viewed as the preferred vehicle for achieving a collective agreement.

5. Where an agreement is to be imposed through arbitration, it too should be imposed in a timely fashion, so as to avoid an irreparable breakdown in the employment relationship.

6. Where a collective agreement is imposed through arbitration, it ought not to include innovative or unusual clauses.\textsuperscript{321}

Two features of this policy statement are of particular significance. The first is its detail (which has provided valuable guidance to employers, unions, mediators and arbitrators

\textsuperscript{317} *Supra* note 207.

\textsuperscript{318} BC Code, s. 55 (see *supra* notes 291-292).

\textsuperscript{319} *Yarrow Lodge*, at 28-33.

\textsuperscript{320} For discussion on the time restriction for the filing of a mediator's report, see *Famous Players Inc. and Cineplex Odeon Corporation* (B.C.L.R.B. No. B125/95) (B.C.).

alike). The second is the manner in which the policy was formulated. In addition to hearing from the parties involved in the case, the BC Board accepted submissions from more than 10 interveners, including the British Columbia Government, the Business Council of BC and the BC Federation of Labour, thus ensuring it canvassed a wide range of views prior to the policy's formulation.

The policy statement in *Yarrow Lodge* is but one example of the guidance the BC Board has provided on those aspects of the BC Code which impact upon the duty to bargain in good faith. Policy statements and information bulletins have been released on all manner of issues, including direct communications to employees during the bargaining process, the first contract procedure, the extent to which the Board will take into account the substance of a bargaining proposal when determining whether a party has failed to bargain in good faith, the scope of the duty to bargain in good faith, the procedures for the appointment of mediators, facilitators and fact-finders, and the content of the duty of fair representation.

The publication of these policies and guidelines is commendable. Not only do they provide guidance to employers and unions, they also foster consistency in mediation and arbitration proceedings. Perhaps most importantly, however, they illustrate a

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322 *Cardinal Transportation.*


preparedness on the part of the BC Board to take a pro-active role in promoting compliance with the duty of good faith: a role which is far preferable to one of simply imposing "after the event" sanctions in instances of proven breach.

2.4 The Good Faith "Culture"

Whilst it is necessary to look to the BC Code and the BC Board's statements of policy as the source of the duty to bargain in good faith in British Columbia, an assessment of the duty would be incomplete without also considering the decisions of the BC Board, together with those cases which have gone on to judicial review, and the statistics kept by the BC Board on the applications it receives. That is to say, it is also necessary to consider the extent to which the duty is being honoured by the parties rather than being enforced by the BC Board and the courts.

In carrying out this assessment, one notices something very significant. In recent times in British Columbia there have been very few cases involving claims that a party has failed to bargain in good faith. Indeed, an assessment of the statistics kept by the BC Board (or its equivalent) over the last twenty years reveals a number of interesting results. First, as noted in Appendices one and two,\(^{330}\) the number of claims involving allegations that a party has failed to bargain in good faith have been minimal in comparison to the overall number of unfair labour practice claims (9.3%). Moreover, as Appendix three illustrates,\(^{331}\) of those claims which have involved allegations of bad faith bargaining, 75% have been settled voluntarily between the parties, 15% have been dismissed, 2.5% have been withdrawn, and in only 7.5% of cases has the BC Board (or its equivalent) ruled that a violation of the duty has occurred. This statistic translates into an average of less than three findings per year.

\(^{330}\) Infra pages 216-217.

\(^{331}\) Infra page 218.
The absence of controversy surrounding the duty to bargain in good faith is further evidenced by the statistics kept in relation to the first collective agreement procedure. Over the period from 1973 (when section 70 of the Labour Code of British Columbia Act 1973 was enacted) to the beginning of 1993 (when section 137.5 of the Industrial Relations Act 1979 was replaced by section 55 of the BC Code), only 12 collective agreements were imposed through arbitration.332 And, as is illustrated by Appendix four,333 from the time section 55 was enacted until the end of 1997, 80% of the 175 first agreement applications disposed of were voluntarily settled; 8% were withdrawn, 4% went on to strikes and lockouts, and just 5.1% resulted in arbitration.

A number of conclusions can be drawn from these statistics. First, the duty to bargain in good faith is an accepted component of labour relations in British Columbia.334 It is neither controversial or exceptional.335 A reading of the decisions of the BC Board further reveals that where disputes have continued to arise, they have tended to be in respect of smaller employers who have had little or no experience of the duty nor dealings with unions. For those employers with a history of union relations, compliance with the duty to bargain in good faith is now the expected, and effected, norm. Yet, even where “first

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332 See the Annual Reports of the BC Board and the Industrial Relations Council of British Columbia (1974-1993). One of the primary reasons for the scarcity of imposed agreements was that under the 1973 Code a discretion vested in the Minister of Labour in respect of whether any dispute would be referred to the Labour Board. As it transpired, this discretion was seldom exercised. For a discussion on the operation of the procedure under the 1973 Code, see D. Cleveland, First Agreement Arbitration in British Columbia: 1974-1979 (Masters Thesis, University of British Columbia, 1982).

333 See infra page 219.

334 As it is in the other jurisdictions in Canada. For this reason, the duty cannot be said to suit the agenda of any one particular genus of political party. The duty is as accepted in Ontario (where the Progressive Conservative Government presently holds power) as it is in British Columbia (which is currently governed by the New Democrat Party).

"time" negotiations have encountered difficulties, the first contract procedure has resulted in an overwhelming level of voluntary settlement.336

Secondly, the absence of litigation suggests that the standard of conduct required by the duty has been adequately defined, largely by the BC Board. Parties know in advance what is expected of them. They can also recognise when their counterparts are acting in breach of the required standards, and can challenge that conduct at the bargaining table.

And thirdly, the mediation functions included in the enforcement mechanisms of the duty appear to be working well. When bargaining disputes do arise, mediators have been made available to assist the parties. As the statistics referred to reveal, this has resulted in the vast majority of claims being resolved voluntarily and without the need for litigation or arbitration.

2.5 Summary: Good Faith Bargaining and the BC Code

The duty to bargain in good faith in British Columbia derives much of its meaning from the jurisprudence developed by the BC Board. Various obligations have been developed over time, the breach of which will support a claim that a party has failed to bargain in good faith. However, it is impossible to appreciate the full affect of the duty as it applies in British Columbia without canvassing the BC Code in its entirety. Much of the content and effectiveness of the duty stems from supporting provisions. Various sections in the BC Code govern how the duty commences and operates. Others serve to facilitate good faith by inhibiting bad faith conduct, and by providing procedures for dispute resolution. Still others govern the consequences of breach.

336 Often it is a case of educating parties about a process with which they are unfamiliar. The experience in British Columbia has shown that initial and timely assistance from mediators can be extremely effective in facilitating bargaining.
Much of the duty's effectiveness has stemmed from the pragmatism of the enforcement body, in this case the BC Board. Generally speaking, the duty has been developed in British Columbia in a practical fashion by Board officials who appreciate the complexities and realities of industrial bargaining. This pragmatism is evidenced by the Board's willingness to take a proactive stance through the formulation of policies and guidelines. The result of the Board's efforts speak for themselves. The duty is not the subject of significant levels of litigation, and where unfair labour practice claims do arise, the vast majority are resolved through mediation and voluntary settlement.

As a final point, it is important to note that while the duty has encouraged good faith bargaining, it has not eliminated industrial conflict in British Columbia. Quite clearly strikes and lockouts continue to occur. Yet, as the statistics on the first collective agreement procedure indicate, there would have been many more strikes and lockouts were it not for the duty and its supporting mechanisms. Moreover, the existence of economic sanctions cannot be taken to mean that the duty is ineffective. Quite the contrary, a fundamental feature of the duty is that parties ought to be able to strike and lockout provided they have first bargained in good faith. What the absence of litigation over the duty indicates, is that parties in British Columbia are making every reasonable effort to secure agreement, and are doing so in good faith, before resorting to economic sanctions.

In sum, the duty to bargain in good faith has played, and continues to play, a very relevant and important role in securing and promoting industrial harmony in British Columbia.

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337 See infra page 179.
CHAPTER 3: IS LEGISLATIVE AMENDMENT NECESSARY IN NEW ZEALAND?

Bill Birch and Max Bradford have said that a duty to bargain in good faith is not needed in New Zealand employment and labour relations. They are supported in this view by the Public Service, which has stated that New Zealand law, and in particular, the ECA, already promotes good faith bargaining. One way to test these views is to consider the extent to which the existing law in New Zealand replicates the duty to bargain in good faith, as it applies in British Columbia.

3.1 The Existing Provisions of the ECA

Section 57: “Harsh and Oppressive” Behaviour

Section 57(1) of the ECA provides:

Where any party to an employment contract alleges-
(a) That the employment contract, or any part of it, was procured by harsh and oppressive behaviour or by undue influence or by duress, or
(b) That the employment contract, or any part of it, was harsh and oppressive when it was entered into,-
that party may apply to the Court for an order under this section.

Where a party makes out a claim under section 57(1), the Employment Court has the power to set aside an employment contract (either wholly or in part) or to award compensation, or both.

338 Supra notes 172-175.
339 Supra note 184.
340 ECA, s. 57(4). The Court does not, however, have the power to re-write a contract or impose terms of employment on the parties. See infra note 490.
The ECA does not define what is meant by “harsh and oppressive”, “undue influence” or “duress”, except to say that “the Court shall have no jurisdiction to set aside or modify, or grant relief in respect of any employment contract under the law relating to unfair or unconscionable bargains.”

This section would appear to cover much of the ground that falls within the scope of a duty to bargain in good faith, given that a considerable range of bad faith conduct would arguably fall within the plain meaning of “harsh and oppressive”, “undue influence” or “duress”. Yet, on closer examination, it is apparent that section 57 has a number of significant limitations.

The first is that section 57 has been held to apply only to concluded employment contracts. The section cannot, then, be used in a proactive manner to initiate or guide negotiations, nor to require parties to persist with bargaining in a meaningful manner until either a settlement or a genuine impasse is reached. The most an aggrieved party can do is seek a retrospective review of bad faith conduct after they have acceded to another party’s demands. By then much of the damage in terms of conflict, the entrenchment of views and oppression will have occurred.

Moreover, given this limitation, it is difficult to envisage the available sanctions countering bad faith bargaining effectively. If a contract is set aside, the parties are back to “square-one” - presumably further polarised as a result of the litigation - and without the benefit of a mechanism which could then foster good faith in any subsequent negotiations. Alternatively, if compensation is awarded, an employer may well view this as a cost of achieving its objectives, and its employees have no guarantee that such conduct will not occur again.

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341 ECA, s. 57(7).
342 For example, in United Food and Chemical Workers of NZ and Ors v. Talley [1992] 3 ERNZ 423 (E.C.) [hereinafter “Talley”], a number of employees alleged that oppressive tactics were used by their employer to obtain a contract variation. Notwithstanding that the employer’s conduct was held to be in breach of the section, those employees who refused to agree to the variation were denied relief.
The second limitation of the section is that it prohibits class actions. An individual employee cannot, then, derive support from a collective action involving a number of his or her colleagues. If an employee is to challenge an employment contract under section 57, he or she will, in most cases, be required to step forward as an individual plaintiff. Nor can the Employment Court grant relief of its own motion: a party to the contract must apply for this relief.

One might question how realistic these requirements are. It is arguably naive to expect an employee to take the witness stand, and describe how he or she has been oppressed by a manager, when that employee knows that immediately following the hearing he or she must, once again, work under the supervision and control of that manager. Ironically, those employees worst affected by this kind of oppression (such as those without the support of a strong union presence in the workplace) will be those least likely to have the resolve to confront their employer in this manner.

The third, and most fundamental, limitation inherent in section 57 is its scope, which has been restricted in a number of respects. In the first place, the ambit of section 57 is undermined by subsection 7, which, as noted, prohibits the granting of relief on the basis

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344 While a bargaining representative can bring an action under section 57, this can only occur when the representative is a party to the contract, something which is occurring less and less under the ECA.
345 Such as in a case brought before the Court under another section of the ECA.
346 ECA, s. 57(3).
347 In Adams the Employment Court found it material in its decision to dismiss the claim under section 57 that the witnesses, while in the witness box, were not assertive in their criticism of their employer’s conduct. The Court took this lack of outrage to indicate an absence of employer coercion. However, as the union’s counsel has subsequently pointed out, a more plausible explanation is that the employees did not have the personal strength to publicly confront their employer. See “Interview with Robyn Haultain”, noted in Dannin, supra note 33 at 477 (note 117). Interestingly, those same employees launched a nationwide petition calling for the introduction of good faith bargaining (see H. Roth, “Chronicle” (1992) 17:2 N.Z.J.Ind.Rel. 247 at 257).
This restriction raises the threshold for intervention by the Employment Court beyond that which applies to all other contracts in New Zealand. Implied in this anomaly is the highly questionable assumption that all parties to all employment relationships (including all employees) are less vulnerable to oppressive behaviour and exploitation than other kinds of contracting parties, including individual consumers.

The ambit of section 57 has been further narrowed by the Employment Court, which has chosen to merge together the apparently separate grounds for relief set out in sections 57(1)(a) and 57(1)(b). According to the Court in Adams:

[T]here will be few cases in which the Court will grant relief by reason of harsh and oppressive behaviour, undue influence or duress unless the contract procured by these methods involves some substantive injury or detriment to the party subjected to such treatment.

This view not only undermines the plain wording of the section, it also ignores the fact that particular negotiating conduct may fail to secure a contract that is sufficiently unbalanced to be viewed as harsh and oppressive, but yet may still cause the aggrieved party considerable emotional distress, humiliation and financial outlay (in the form of paying for an advisor, for example). Such damage ought to be compensatable irrespective of the contractual outcome, yet under the Court’s view of section 57, it is not.

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348 When the Employment Contracts Bill was debated in Parliament, a number of opposition Members of Parliament unsuccessfully lobbied for the exclusion of this restriction, and the express extension of the section to cover unfair and unconscionable contracts. See Hansard, Parliamentary Debates of New Zealand (1991) 30 April, 1600-1608.

349 Hughes, supra note 168, at 186. Consumer contracts, for example, can be set aside on the basis of unconscionability, yet the same relief is not available to employees and employers. Not only is the Employment Court prohibited from granting such relief (whether in a claim under section 57, or otherwise), the exclusive jurisdiction of the Employment Court likely prevents employers and employees from seeking relief of this kind elsewhere (although see Horn, para. EC 57.23).

350 Adams, at 1014.

351 Mazengarbs, at para. 57.5.
However, perhaps the most significant restriction on the scope of section 57 stems from the philosophical underpinnings of the ECA. As noted, this legislation assumes equality of bargaining power between an employer and an individual employee. Accordingly, the “normal” operation of the employment relationship is not to be viewed as harsh and oppressive. As Dannin has noted:

> There is no reason to believe that Parliament was unaware of the employee’s normal dependence on and subservience to the employer and the employer’s control of the workplace. ... Parliament must also not have intended to define the normal employment relationship as illegal duress. As a result of what was the norm at the time the ECA was enacted, an employee has a heavy burden to prove illegal coercion.\(^ {352} \)

This view has been substantiated by decisions of the Employment Court and the Court of Appeal, both of which have stated that the employment relationship does not carry with it any presumption of undue influence.\(^ {353} \)

The difficulties facing a claimant under section 57 were starkly demonstrated by the Employment Court’s decision in Adams.\(^ {354} \) In this case the employer sought to introduce a new collective contract that reduced penal rates for overtime and night work and phased out various existing entitlements, including long service leave. The proposed contract also

\(^ {352} \) Dannin, *Working Free*, at 244-245.

\(^ {353} \) *Adams* (E.C.) at 1031. This aspect of the Employment Court’s decision in *Adams* was confirmed on appeal by the Court of Appeal. See *Eketone* (supra note 35) at 796. By way of comparison, the Canadian Supreme Court has taken the view that employment relationships (and their formation) typically involve unequal bargaining power. In *Wallace v. United Grain Growers* ((1998), 152 D.L.R. (4th) 1) the Supreme Court endorsed Swinton’s comment that “the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does.” (at 32). See also *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), and W. Rayner, *The Law of Collective Bargaining* (Ontario, Carswell, 1995) at 2-2. Similarly, in the United States on America, the National Labor Relations Act is predicated on the view that “the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organised in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce ... by depressing the wage rates and purchasing power of wage earners....” (See 29 U.S.C.S. s. 151, Findings and Declaration of Policy (West Supp.) at 270).

\(^ {354} \) *Supra* note 343.
permitted the company to change all conditions of employment at will, vary an employee's starting time by up to sixteen hours a day, and to control individual pay rates unilaterally based on the company's own rating of employees. Not surprisingly, the union responsible for negotiating the previous award vigorously opposed these changes.

Alliance responded by “inviting” employees to attend meetings during work time (from which the union was excluded), whereupon it was suggested to staff that they revoke their union authorities and sign the proposed contract. Many who refused were subsequently denied overtime (which significantly reduced their take home pay). After an extremely acrimonious dispute, the majority of staff signed. The remainder were locked out.

When the company began signing staff directly to its new contract the union sought relief on behalf of its members from the Employment Court. The union argued, in part, that the contract had been procured by harsh and oppressive behaviour. The Employment Court disagreed, stating that:

> The behaviour complained of must strike the court as reprehensible, as morally blameworthy and as meting out intolerable treatment. It will normally have elements of deliberation and of unwarranted severity. Deceptive or misleading statements of the kind alleged and aggressive marketing by strong personalities do not strike me as amounting to the behaviour described in the subsection.

The Employment Court went on to say that while a lockout could possibly comprise duress and oppression if it had the effect of “finally bringing employees to their knees by virtually starving them into submission,” that had not occurred in the present case.

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355 The plaintiffs’ statement of claim alleged that the employees had been “invited” (i.e., directed) to attend these meetings. See Adams, at 1024.

356 Adams, at 1027. This interpretation of section 57 has subsequently been endorsed by the Court of Appeal. See United Food and Chemical Workers Union v. Talley [1993] 2 ERNZ 360 (C.A.) at 378.

357 Adams, at 1029.
Since Adams there have been occasions where employees have successfully invoked section 57.\textsuperscript{358} Such results have, however, been few and far between, and have been notable for the severity of the employers' conduct. In Talley, for example, the employer provided its employees with the choice of either accepting a contractual variation (which would have absolved the employer from deducting union fees) or incurring a unilaterally imposed wage cut. This unlawful threat was effective in securing the variation, but was described by the Court as amounting to "oppressive and tyrannical arrogance".\textsuperscript{359} Similarly, in Marsh, the employer was held to have secured a replacement agreement by unlawfully threatening to breach its employees' existing contracts of employment.

The suggestion that oppression bordering on starvation, or unlawful threats, will be needed in order for employees to successfully invoke section 57 illustrates the limited scope of the section. In short, then, although this section may have promised much as regards the promotion of good faith bargaining, it has, in fact, delivered little.

\textit{Section 12(2): Recognition of Bargaining Agents}

Section 12(2) of the ECA provides:

Where any employee or employer has authorised a person, group, or organisation to represent the employee or employer in negotiations for an employment contract, the employee or employer with whom the negotiations are being undertaken shall, subject to section 11 of this Act, \textit{recognise the authority} of that person, group, or organisation to represent the employee or employer in those negotiations.\textsuperscript{360}


\textsuperscript{359} Talley, at 456.

\textsuperscript{360} Emphasis added.
Recognition of a bargaining agent is fundamental to the duty to bargain in good faith in British Columbia. On its face, then, the ECA would appear to already encompass a significant portion of the duty. Again, however, appearances are misleading.

While it is true that section 12 requires an employer to recognise an employee's bargaining agent, the section does not require the employer to negotiate with that agent. The employer still retains the lawful right to refuse to bargain at all. Whether employees are able to persuade an employer to engage with their agent will depend on their bargaining strength, not on section 12, for as the Court of Appeal has noted, section 12 has no role to play if negotiations have not started:

Section 12(2) is predicated on the view that negotiations for an employment contract are under way between the employer and the employees' authorised representative.

Accordingly, notwithstanding the existence of section 12, the freedom of employees to be represented in negotiations can be over-ridden by employers who have the bargaining power to refuse to negotiate. This is somewhat ironic given that in 1990 the Minister of Labour suggested in his drafting instructions for the ECA that the employee's choice of bargaining agent ought to be subject to a power of veto on the employer's part. Although this suggestion was considered too controversial to be adopted in the legislation, for many employees, this is exactly what occurs in practice.

What is missing from section 12 is any enforceable obligation to actually commence bargaining and to persist with the process until either a settlement or a genuine impasse is

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361 Supra notes 230-231, & 265-267.
363 Mazenganbs, at A/315.
364 C.f., the position in British Columbia, where the makeup of a counterpart's negotiating team cannot be used a reason to refuse to bargain. See supra note 217.
reached. The Court of Appeal has glossed over this deficiency, stating in a recent case that:

Negotiations are ... a process of mutual discussion and bargaining, involving putting forward and debating proposal and counterproposal, persisting, conceding, persuading, threatening, all with the objective of reaching what will probably be a compromise that the parties are able to accept and live with.\textsuperscript{365}

What the Court failed to acknowledge was that whether this process occurs as described depends not on section 12, but solely on the respective power and inclination of a particular employer and its employees. And, as Harbridge and Hince have pointed out:

Given the current economic recession experienced in New Zealand, the power to decide whether or not to bargain rests almost exclusively with the employer.\textsuperscript{366}

What, then, does section 12 mean? Its operative scope has, in fact, been limited to the issue of whether an employer can bargain directly with its employees when those employees have authorised a representative to bargain on their behalf. Whilst this issue is easily stated, resolving it has proven to be considerably more difficult.

From an employee’s perspective, the Employment Court’s initial interpretation of section 12 was far from promising. In \textit{Adams}, the Court held that employees who had authorised a bargaining representative to negotiate on their behalf, could still be approached directly by their employer and persuaded to revoke those authorities and enter into direct negotiations. The Court reasoned that by seeking the withdrawal of those authorisations, the employer was, in fact, recognising the authority of the bargaining agent.\textsuperscript{367}

\textsuperscript{365} \textit{Capital Coast Health v. NZ Med Lab Workers Union} [1996] 1 NZLR 7 (C.A.) at 19.
\textsuperscript{366} \textit{Harbridge & Hince}, supra note 14.
\textsuperscript{367} \textit{Adams}, at 1024.
Not surprisingly, the union appealed this decision to the Court of Appeal. Although the appeal was dismissed as *moot sub nom*, President Cooke questioned the Employment Court’s interpretation of section 12:

I am disposed to think that once a union has established its authority to represent certain employees ... then the employer fails to recognise the authority of the union if the employer attempts to negotiate directly with those employees. To go behind the union’s back does not seem consistent with recognising its authority. The contrary argument advanced for the employer here is that authority can be recognised by trying to persuade the giver of the authority to revoke it. That seems to me a rather cynical argument not necessarily in accordance with the true intent, meaning and spirit of the enactment.  

Justice Gault also made an interesting comment regarding the relevance of ILO conventions 87 and 98 to the interpretation of section 12:

As we made clear in *Noort* ... it is appropriate to have reference to the terms of, and decisions upon, international instruments dealing with fundamental rights when interpreting the scope of those rights under our ... legislation. ... It is not open to the Courts to depart from the plain meaning of the statute but where it can be done ... the statute is to be given meaning consistent with the freedom of association as internationally recognised.

Galvanised by these comments, the Employment Court set about interpreting section 12 with a view to ensuring that employee collectives were meaningfully recognised. This resulted in two promising decisions in *New Zealand Medical Laboratory Workers Union Inc v. Capital Coast Health Ltd*, 370 and *Ivamy v. New Zealand Fire Service Commission*. 371

In *Med Lab Workers*, the employer, Capital Coast Health, and the plaintiff union entered into negotiations for a new collective employment contract. Those negotiations were

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368 *Eketone*, at 787.
369 *Eketone*, at 795.
370 [1994] 2 ERNZ 93 (E.C.) [hereinafter “*Med Lab Workers*”].
371 [1995] 1 ERNZ 729 (E.C.) [hereinafter “*Ivamy*”].
unsuccessful. As tensions grew, Capital Coast Health sent to its staff various letters and memoranda personally attacking union officials and criticising the union for delaying settlement. The employer also called a meeting directly with staff to discuss its proposed collective contract. Although some staff refused to discuss this matter without their bargaining agent present, many were persuaded to attend.

The union responded by seeking an injunction from the Employment Court. The union alleged that the employer was in breach of section 12 by virtue of its actions in bypassing and belittling the union. The Employment Court agreed, and granted the injunction. According to the Court, no less than seven letters and memorandum sent out by the employer were in contravention of section 12. According to the Chief Judge, those communications “that had the effect of undermining the authority of the representative” were in breach of section 12, “regardless of the employer’s motive”.

In *Ivamy* the Fire Service Commission attempted to negotiate a new collective contract with its fire-fighters. Its proposals were met with resistance by the fire-fighters’ union. In an effort to advance its position, the Commission sent its employees an information pack consisting of a revised proposal, the details of which had not previously been given to the fire-fighters’ union, and an offer of a $4000 incentive payment for those employees who accepted the new proposal by a specified date. Although the Commission’s stated intention was to provide the union with a copy of the information pack at the same time the information was sent to the Commission’s employees, due to an administrative error the information pack was received by the fire-fighters well before their union. In response, the union commenced an action under section 12, alleging the Commission was attempting to negotiate directly with its employees, and thus by-pass the union.

Once again the Employment Court agreed with the plaintiff. According to the Court, the employer had acted deliberately so as to:

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372 *Med Lab Workers*, at 127-128.
[B]elittle the union, to reduce its importance and standing in the eyes of its members and to prejudice its ability to represent them or to do so effectively.\textsuperscript{373}

Chief Judge Goddard further stated that:

If the employer had anything to say on the subject of the negotiations, at any rate by advocacy of its terms, it should say it all to the representatives and none of it to the employees.\textsuperscript{374}

The rulings in \textit{Med Lab Workers} and \textit{Ivamy} signalled a significant advance from the position taken by the Employment Court in \textit{Adams}, and appeared to inject a degree of substance into section 12 by restricting the scope for employers to engage in bad faith and destructive bargaining tactics.\textsuperscript{375} That substance was, however, short lived. Both \textit{Med Lab Workers} and \textit{Ivamy} were overturned by the Court of Appeal.

In the \textit{Med Lab Workers} appeal, the Court of Appeal stated:

Once [the negotiating] process is under way with an authorised representative participating, the process may not be conducted directly with any party so represented. [However], the provision of factual information [directly to employees] does not impinge on that process.\textsuperscript{376}

In \textit{Ivamy} the decision of the Employment Court was overturned by a majority of three judges to two. According to the majority, the actions of the Commission in forwarding the information packs directly to its employees did not breach section 12. In reaching this conclusion, the Court affirmed what it had said in the \textit{Med Lab Workers} appeal, and went on to state:

\textsuperscript{373} \textit{Ivamy}, at 739.

\textsuperscript{374} \textit{Ivamy}, at 764.

\textsuperscript{375} The conduct of the employers in \textit{Ivamy} and \textit{Med Lab Workers} would, had it occurred in British Columbia, have clearly contravened the duty to bargain in good faith. See \textit{supra} notes 265-267.

\textsuperscript{376} \textit{Capital Coast Health v. NZ Medical Laboratory Workers Union} [1996] 1 NZLR 1 (C.A.) at 19.
The issue here is the construction and application of the statutory obligation imposed on employers in s. 12(2). ... The provision of factual information may well occur in such manner as to be persuasive. Indeed seldom will information be provided so as to be entirely free from any element of persuasion, at least as to its veracity. Therefore it does not advance matters to test communications solely by reference to whether it tends to persuade. What are significant, if there is attempted persuasion, are the subject matter and the target. Who does it persuade and of what? If ... there is persuasion of employees to exclude the representative and enter into contracts direct with the employer, then plainly it is persuasion of a kind that is inconsistent with the employer’s obligation under s 12(2). If it is persuasion as to the reasonableness of an employer’s stance on a particular issue which all parties understand is the subject of negotiations between representatives, it need not amount to a failure to recognise an authority so as to contravene section 12(2).377

On the facts of the case before it, the majority concluded:

Taken as a whole and read objectively (and not with regard to what combative recipients might want to read into them) the documents more appropriately fall within factual statements as to the Commission’s position in the negotiations than within direct negotiations of terms and conditions of employment.378

The fire-fighters’ Union was not impressed. Nor was Justice Thomas, who delivered one of the two minority judgments. In his view, condoning the Commission’s conduct would:

[S]eriously reduce the effectiveness of a bargaining agent to represent employees in negotiations for a collective contract [and] ... allow a strategy on the part of the employer which is alien to both the letter and spirit of s 12(2).379


378 Ibid. at 602. The same approach was taken by the Court of Appeal in its decision in Airways Corporation of New Zealand v. New Zealand Airline Pilots Association IUOW Inc [1996] 2 NZLR 622 (C.A.), which was released on the same day as its decision in Ivamy. In Airways Corporation, the employer solicited feedback directly from staff during negotiations about the employer’s proposals - conduct which was held not to breach section 12. In contrast, conduct of this nature has been held to breach the duty to bargain in good faith in Canada. See e.g., CUPE and Canadian Broadcasting Corporation (1995) 27 C.L.R.B.R. (2d) 110 (Can.).

379 Ibid. at 603.
It is not to be unexpected that employers and employees alike may conclude that collective bargaining in the form recognised in the Employment Contracts Act is largely vitiated.\footnote{\textit{Ibid.} at 621.}

However, notwithstanding Thomas J’s dissent, the Court of Appeal’s rulings in the \textit{Ivamy} and \textit{Med Lab Workers} appeals represent the current state of the law on section 12.\footnote{Not surprisingly, the response to these decisions has been as polarised as the debate on the ECA itself. Contrast, for example, S. Moran, “\textit{Ivamy and Airways - The Implications for Employees}” (1996) New Zealand Law Society Employment Law Conference Papers 163 (which is critical of these decisions) with D. Broadmore, “\textit{Airways - The Facts: Ivamy and Airways - The Implications for Employers}” (1996) New Zealand Law Society Employment Law Conference Papers 169.}

These cases represent a dramatic departure from the Employment Court’s post-\textit{Adams} interpretation of the section, and of the Appellate Court’s own comments in \textit{Eketone}. It was significant, for example, that the Court of Appeal made no mention in either appeal of Gault J’s comment in \textit{Eketone} that section 12 ought to be interpreted in accordance with the ILO’s conventions on freedom of association.\footnote{According to Gay and McLean, this judicial turn-around may have been politically motivated. They argue that the Court of Appeal may have taken the approach it did in \textit{Eketone} because the final ILO report was pending, but that once that report had been released, the Court of Appeal restored the previous “free market” interpretation of section 12. See Gay & MacLean, \textit{supra} note 73 at 59.}

Whatever the reason for this change in approach, the effect of these decisions is clear. There are now any number of ways in which employers can seek to undermine collective bargaining (assuming, of course that bargaining even commences).\footnote{See e.g., the comments of Justice Thomas in \textit{New Zealand Fire Service Commission v. Ivamy} [1996] 2 NZLR 587 (C.A.) at 620-621.}

In the first place, a bargaining representative will find it very difficult to co-ordinate a measured bargaining strategy, if it has no way of knowing what proposals have been, or will be, sent directly to its members, and when.\footnote{\textit{C.f.}, the position in British Columbia, where all negotiating proposals must be directed through the certified union, unless it agrees or acquiesces to proposals being sent directly to staff. See \textit{supra} note 230.}

Secondly, it is one thing for union representatives and employers (or their representatives) to exchange disparaging remarks to one another across the bargaining table: it is quite
another to expose employees to those comments without expecting at least some of them to become disillusioned with their decision to appoint a representative.\textsuperscript{385} Thirdly, any direct communications, whether disparaging or not, may well serve to undermine the reputation of representatives in the eyes of their principals. As Lord Cooke noted in his minority judgment in the \textit{Airways} case,\textsuperscript{386} direct communications necessarily carry with them an insinuation that the representative cannot be trusted to convey information accurately to and from its members.\textsuperscript{387}

Finally, the distinction between permissible persuasion on the one hand, and unlawful direct negotiation on the other, is arguably meaningless. Provided an employer expresses a willingness to continue negotiations with the representative, it can seek to influence the outcome of those negotiations through direct communications with its employees. Indeed, employers may well consider it more profitable to spend greater time and resources on direct communications than on bargaining with a representative, given the potential for significant gains in negotiations if a representative’s membership can be fragmented and undermined.

In sum, section 12, as currently interpreted, contributes very little to good faith conduct. One might say, in fact, that the Court of Appeal’s interpretation of section 12 encourages the very opposite.

\textit{Section 64: Lawful Strikes and Lockouts}

In order to be lawful, a lockout must relate to “the negotiation of a collective employment contract.”\textsuperscript{388} In \textit{Hawtin v. Skellerup Industrial Ltd},\textsuperscript{389} the plaintiff employees sought to

\textsuperscript{385} If for no other reason than the employer having the ability to simply ignore its employees stated wish that all bargaining communications should to be directed to their representative.

\textsuperscript{386} \textit{Supra} note 378.

\textsuperscript{387} \textit{Supra} note 378 at 626.

\textsuperscript{388} ECA, s. 64(1)(b). [Emphasis added].

\textsuperscript{389} [1992] 2 ERNZ 500 (E.C.).
argue that before they could be lawfully locked out, their employer had to have engaged in
genuine negotiations. The Employment Court disagreed:

[N]egotiation in a primary sense [means] 'conferring with another with a view to
compromise or agreement.' Having said that, however, I hold that such a process
of negotiation is not required as a prerequisite to a lawful lockout. ... The phrase,
within its particular context, 'relates to the negotiation of a collective employment
contract', enables an employer, I hold, to peremptorily and without any prior
process of negotiations with its affected work force, ... present an otherwise lawful
collective employment contract to its particular employees and to
uncompromisingly insist that unless they accept the collective terms within a
prescribed time, they will then be locked out.\(^{390}\)

This finding served to eliminate yet another possible basis upon which an obligation to
bargain in good faith in New Zealand labour relations might have been grounded.

Sections 7, 8 and 28: Undue Influence, Preference and Dismissal in Relation to Union
Membership, Involvement or Representation

Section 8(1) of the ECA provides:

(1) No person shall exert *undue influence*, directly or indirectly, on any other
person with intent to induce that other person-
   (a) to become or remain a member of an employees organisation or a
   particular employees organisation; or
   (b) To cease to be a member of an employees organisation or a particular
   employees organisation; or
   (c) Not to become a member of an employees organisation or a particular
   employees organisation; or
   (d) In the case of an individual who is authorised to act on behalf of
   employees, not to act on their behalf or to cease to act on their behalf; or
   (e) On account of the fact that the other person is, or, as the case may be,
   is not a member of an employees organisation or of a particular employees
   organisation, to resign from or leave any employment.\(^{391}\)

\(^{390}\) *Ibid.* at 536. A bargaining strategy of this nature would clearly constitute boulwarism in British
Columbia. See *supra* note 225.

\(^{391}\) Emphasis added.
Section 7 is of similar effect, prohibiting an employer from conferring any preference (as regards hiring or the terms of employment offered) by reason of an employee’s membership or non-membership of an employees organisation. Likewise, section 28 of the ECA prohibits the discrimination of an employee (defined as differential treatment or dismissal) by reason of the employee’s involvement in the affairs of an employees organisation. “Involvement” is widely defined as including holding an office in the organisation or representing it or any employees in negotiations.

One would expect these provisions to reduce bad faith and discriminatory conduct in labour bargaining. Yet it is important to note that notwithstanding these sections, an employer remains free to pressure an employee to leave a union, so long as that pressure does not cross the line from lawful persuasion to “undue” influence. The Court of Appeal has reinforced this distinction, by stating that employers are not required to be “union neutral”: rather they are free, at any time, “to express views against unionism”.392

Additionally, these sections fail to address undue influence in respect of an employee’s decision to authorise his or her union to bargain on his or her behalf.393 This anomaly arises because the ECA creates a dichotomy between membership and representation; the latter is not treated as flowing automatically from the former.394 Accordingly, up until the time of authorisation, employers remain free to impress upon their employees (often in captive settings) the ‘dangers’ of authorising a particular, or any, bargaining representative.395 Such ‘persuasion’ is not expressly covered by sections 7, 8 or 28,396 nor

392 Eketone, at 786.
393 Dannin, Working Free, at 202, Grills, supra note 26 at 92.
394 MP Jim Anderton unsuccessfully sought to introduce into the Employment Contracts Bill the notion that an individual’s membership of a union would constitute prima facie evidence of the authority of the union to represent that individual. See Hansard, Parliamentary Debates of New Zealand (1991) 23 April, 1580.
is it prohibited by section 12 which applies only once a representative has been authorised to act in negotiations.\textsuperscript{397}

The vulnerability of employees in this regard is heightened by the manner in which the ECA limits union access to the workplace. Although a union has a guaranteed right to enter a workplace to discuss the status of negotiations with those it represents,\textsuperscript{398} access for the purpose of securing new members and authorisations is at the sole discretion of the employer.\textsuperscript{399} Once again, then, employers are lawfully able to exercise a power of veto. Some employers have used this power to allow ‘employer friendly’ unions access to the workplace, whilst denying this privilege to other prospective representatives.\textsuperscript{400} Others have been more aggressive, steadfastly refusing access to any unions. Kelsey’s description of the National Distribution Union’s experience illustrates the extent of resistance unions have encountered:

Once the [ECA] was passed, the ... NDU... moved to secure benchmark contracts with major employers, especially at the national company level. Some were co-operative. Others displayed a range of tactics which became increasingly familiar: refusing to negotiate with unions, preventing access, running anti-union campaigns, pressuring non-union members to sign contracts, threatening mass redundancy or loss of investment, appointing consultation groups in which the

\textsuperscript{396} There is an argument that pressure of this kind could amount to indirect influence on a representative under section 8(1)(d). (See the obiter comments of Judge Goddard in Med Lab Workers, at 128, although the Judge’s comments in that case were principally directed at pressure exerted on an employee after they had authorised a union to bargain on their behalf).

\textsuperscript{397} According to the ILO, the ECA gives insufficient protection against actions intended to interfere with an employee’s decision to authorise a union to bargain on his or her behalf. See supra note 155 at 231.


\textsuperscript{399} ECA, s. 13. C.f., the broad rights of entry enjoyed by unions under the LRA (see supra note 16). In British Columbia, unions can, with the permission of the employer or the BC Board, access employees who reside on property controlled by an employer or a third party, for the purposes of recruitment (BC Code, s. 7(2)). Moreover, restraints on union activity (such as contract clauses prohibiting union activity on employer premises by employees during workbreaks) may also breach section 4(1) of the BC Code, which provides all employees with the freedom to participate in lawful union activities. See e.g., Cominco Ltd and CAIMAW [1981], 3 Can.L.R.B.R. 499 (B.C.).

\textsuperscript{400} In Adams, for example, (supra note 343) the employer created and funded the Mosgiel Independent Thought Society, and encouraged its employees to join.
union was only part, and encouraging the appointment of workplace representatives to speak for all workers, with unions representing only a few.\textsuperscript{401}

One further source of bad faith conduct must be added to the NDU's already extensive list. Under sections 12 and 59 of the ECA, a bargaining representative (such as a union) must establish its representative authority for each separate act of representation. Accordingly, a union is required to produce authorities for the renegotiation of a contract that is about to expire. As noted in respect of the Department of Social Welfare,\textsuperscript{402} this requirement has provided employers with the opportunity to frustrate bargaining and deplete the resources of unions, by imposing onerous evidential requirements as prerequisites to bargaining commencing. As Dannin has pointed out:

\begin{quote}
There has been little oversight to prevent employers from making the decision on grounds other than good faith doubt as to the workers' authorisation of the union.\textsuperscript{403}
\end{quote}

The actions described by the NDU, and those effected by the Department of Social Welfare, can hardly be said to be within the realm of good faith bargaining, yet none of these actions are prohibited by sections 7, 8 or 28.

\textit{Sections 19(4) and 43(a): No Unilateral Alteration of Terms of Employment}

A method by which employers can seek to exert bargaining pressure and undermine unions is through the unilateral alteration of terms of employment during the bargaining process. As noted, this practice is prohibited for a specified period by section 45 of the BC Code, a provision that provides considerable support for the duty to bargain in good faith in British Columbia.

\textsuperscript{401} Kelsey, \textit{supra} note 57 at 265. Once again, many, if not all of these actions would constitute a breach of the duty to bargain in good faith in British Columbia.

\textsuperscript{402} \textit{Supra} notes 124-125.

\textsuperscript{403} Dannin, \textit{Working Free}, at 207.
The ECA would appear to provide similar, if not more extensive, protection. Section 43(a) states that employment contracts are to "create enforceable rights and obligations", while section 23 provides that any variation to a collective employment contract requires the agreement of the parties affected by the variation. Section 19(4) further provides that following the expiry of a collective contract, the employment relationship continues on the same terms and conditions except that the collective contract is deemed to have been replaced by a series of identical individual contracts (which can then be altered only by agreement).

These provisions suggest that unilateral changes to terms of employment are prohibited at any time. This was certainly the view taken by the Employment Court when employers argued that they had the right to alter terms of employment provided the alteration enhanced their economic efficiency. In rejecting this argument the Employment Court stated:

It is quite fallacious to regard some obligations under an employment contract (for example, to pay wages) as being important and others ... as being some way subsidiary and requiring to be complied with only if the party on whom the obligation rests sees fit. The cardinal rule is that employment contracts create enforceable rights and obligations ... .

Yet the notion that employment contracts create binding rights has proven vulnerable. For two and a half years employers managed to persuade the Employment Court that unilateral changes to terms of employment could be lawfully imposed, provided they were referred to as "partial lockouts". This tenuous argument was first accepted by the

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404 All collective employment contracts must specify an expiry date. (See ECA, s. 21).


406 C.f., the position in British Columbia, where the terms of a collective agreement can be altered after the agreement and the "statutory freeze" period have both expired. See supra note 259.


408 This was a practice whereby an employer would wait until an existing collective contract expired, and then unilaterally reduce wages or other entitlements whilst at the same time requiring its employees to turn up for work and perform their jobs in full.
Employment Court in *Paul & NZ Community Services Union v. NZ Society for the Intellectually Handicapped*, a case in which the IHC imposed a 33% reduction in the pay rates of its employees by describing the imposed reduction as a lockout rather than a unilateral change to terms of employment.

It was not until June 1994 (two and a half years later) that the Court changed its mind on this issue. In *Witehira v. Presbyterian Support Services (Northern)* the Full Court held that partial lockouts were not lawful, stating:

> It cannot be the position that the law allows an employer, by resorting to a so-called partial lockout, to free itself from the obligation to pay wages while continuing to be entitled to receive the benefit of work. ... We find it unthinkable that parliament ever intended that employers could withhold wages without suffering any halt in production.

Unfortunately, this judicial enlightenment arrived too late for those employees who had already signed off on unilaterally imposed reductions to their terms of employment, having believed there was no viable alternative.

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410 Legal challenges against partial lockouts during the intervening period were singularly unsuccessful. See e.g., *Prendergast v. Associated Stevedores Ltd* [1991] 2 ERNZ 728 (E.C.); *Petricevich v. Transportation Auckland Corporation Ltd* [1992] 3 ERNZ 807 (E.C.); *Hawtin v. Skellerup Industrial Ltd* [1992] 2 ERNZ 500 (E.C.); *Northern Distribution Union (Inc) v. 3 Guys Ltd* [1992] ERNZ 903 (E.C.); *United Food and Chemical Workers Union of New Zealand v. Talley* [1992] 3 ERNZ 423 (E.C.).


412 Which sits as a bench of two or three, whereas in the usual course Employment Court hearings are presided over by a single judge.

413 *Supra* note 411 at 592. This judicial turn-around is made all the more remarkable by the fact that one of the three judges sitting on the full bench in *Witehira* was the judge who decided the *Paul* case, and that the finding in *Witehira* was unanimous. The ruling in *Witehira* has since been endorsed by the Court of Appeal. See *Transportation Auckland Corporation Ltd v. Marsh* [1997] ERNZ 532 (C.A.). As a point of interest, the inclusive definition of a “lockout” in the BC Code clearly envisages a cessation of work. (See BC Code, s. 1).

414 Employees presented with a partial lockout prior to the ruling in *Witehira* had three options: accede to the demand; refuse and risk dismissal, or go on strike. For those employees without bargaining leverage and economic security, this was no choice at all. See Macfie, *supra* note 152.
What is more, the decision in *Witehira* did not signal the end of unilaterally imposed changes to terms of employment. Some employers have simply continued to impose unilateral reductions despite the illegality of their actions.\(^{415}\) Many have avoided the censure because of the economic vulnerability of their employees.\(^{416}\) It has occurred to other employers to use the threat of restructuring and redundancy to ‘secure’ new and less costly labour arrangements. The standard scenario involves an employer pleading financial hardship or insufficient profitability; requesting its workforce to agree either to a variation of an existing collective agreement or to a less favourable renewal (depending on when the demand is made); and advising its staff that if this does not occur, the operation will be closed down, downsized or contracted out.\(^{417}\) Whilst in theory any resulting changes are bilateral, the reality is frequently something different.

In some instances, the threat is enough. Faced with the prospect of redundancy, employees have agreed to reduced entitlements. In other cases the threat has been carried out. Air New Zealand, for example, closed down its catering function at Auckland airport and brought in contractors, resulting in the dismissal of 159 staff.\(^{418}\) Many of the public hospitals did the same.\(^{419}\) Similarly, the Department of Conservation used a department wide restructuring process to justify numerous redundancies.

This type of “wholesale” restructuring continues to be popular among New Zealand employers.\(^{420}\) For example, on the 5th of May 1998 the New Zealand Fire Service announced that all of its fire-fighters would be made redundant as of the end of July, and

\(^{415}\) Dannin, “We Can’t Overcome”, at 122 (note 684).

\(^{416}\) See *e.g.*, the *Minority Report*, at 7.

\(^{417}\) A practise that was noted by the Employment Court without criticism in *United Food and Chemical Workers Union of NZ v. Talley* [1992] 3 ERNZ 423 (E.C.) and *Davis v. Ports of Auckland Ltd* [1991] 3 ERNZ 475 (E.C.).

\(^{418}\) See *Unkovich v. Air New Zealand* [1993] 1 ERNZ 526. According to Statistics New Zealand, there was a 22% increase in the use of contractors over the period from 1991 to 1996. (See Statistics New Zealand, *Labour Market 96* (Wellington, Department of Statistics, 1997) at 123).

\(^{419}\) See *e.g.*, the *Minority Report*, at 6.

\(^{420}\) See *e.g.*, the *Minority Report*, at 10-12.

As the foregoing illustrates, the notion that the ECA prohibits the unilateral alteration of employment contracts has been, and remains, largely illusory. Although variation requires agreement (at least since June 1994), in reality the consequences of employees not acceding to proposed changes is often dismissal. Such dismissal could be lawful (on the grounds of a genuine redundancy), or unlawful, but for those without the resources to challenge an unlawful dismissal through the legal system, the legality of their termination matters little. To argue, then, that the protection which could be fostered by a duty of good faith bargaining is not required in New Zealand because there is no prospect of unilaterally imposed changes to employees’ contracts, is to ignore reality.

It is, nonetheless, important to acknowledge that a duty to bargain in good faith would not prevent restructuring per se, nor should it.\footnote{See e.g., Starbucks Corporation, supra note 239.} But what the duty can do is prevent employers making unsubstantiated threats of contracting out simply as a means oflevering concessions from staff. Threats of contracting out would have to be substantiated with explanatory material.

The duty would also prevent employers from unilaterally deciding to contract out without first discussing this with their staff and providing them with an opportunity to consider
their own bargaining stance. As a consequence, this duty could well serve to encourage
the parties to work towards an agreed resolution that allows for the continuation of
employment, rather than the far more disruptive alternative. This would signify an
improvement on the present position, which comprises numerous employers viewing
wholesale restructuring as the “easy” option, when ultimately it may constitute a less than
optimum result.424

Section 64(2)(c) - The Protection of Strikers - Dismissal and Replacement

The ECA does not expressly address the issue of whether striking employees can be
dismissed, although it provides in section 46(2)(c) that a lawfully striking employee cannot
be sued for breach of contract. The Employment Court has interpreted this provision to
mean that an employee who is lawfully on strike cannot be dismissed.425

However, the value of this finding is undermined in New Zealand, in two important
respects. First, it can take months to process an unjustified dismissal claim through the
Employment Tribunal. Thus, barring interim relief,426 an employee must face a
considerable period of uncertainty and, in many cases, unemployment. Secondly, unlike
the BC Code, the ECA permits the use of outside replacement labour. Employers can, for
example, lock out existing employees for as long as it takes to secure their agreement to a
new and inferior employment contract, and hire replacement employees in the interim.
Accordingly, if an employer’s demands are sufficiently extreme, there may be no practical
difference between dismissing striking employees, and replacing them on a “temporary”
basis.427

424 See infra note 593.
425 Bickerstaff v. Healthcare Hawkes Bay Ltd [1996] 2 ERNZ 680 (E.C.) at 689. This interpretation over­
rides the common law position that all striking employees can be dismissed. (See Miles v. Wakefield
Metropolitan District Council [1987] AC 539 (H.L.)).
426 Which must be obtained in the Employment Court, and is, as a result, prohibitively expensive for many
employees.
427 See supra note 123.
One might argue that the legality of employers utilising replacement labour has nothing to do with good, or bad, faith: that it simply relates to the legitimate options available to (and hence the bargaining power of) employers. Indeed, employers might argue that the right to use replacement labour is simply the equivalent of employees obtaining alternative employment, or receiving financial support from their union, while striking.\footnote{428}

Yet, the difficulty with this analysis is that it fails to address the manner in which some New Zealand employers have utilised replacement employees. It must be remembered that unlike the position in British Columbia, the right to engage replacements under the ECA does not co-exist with a duty to bargain, let alone a duty to bargain in good faith. Consequently, employers are able to appoint replacement workers as an alternative to bargaining at all, and as a means of destroying unions.\footnote{429} In this context, then, the ability to use replacements cannot be described simply in terms of a legitimate bargaining option. It is, in fact, fundamental to whether bargaining occurs at all. As a result, this entitlement serves to encourage destructive and intransigent tactics and reduces the likelihood of parties bargaining in good faith.

\footnote{428}{Although it may be possible for striking employees to derive income in this manner, it must be noted that employees in New Zealand who are unemployed because they or their colleagues are on strike, are prohibited from collecting the unemployment benefit, except in extreme cases where a refundable special needs grant may be payable. See the Social Security Act 1964, s. 58; Mazengarbs, A/1430. The position in Canada is similar. A claimant who has lost his or her employment by reason of a work stoppage attributable to a labour dispute at his or her workplace is, save for limited exceptions, ineligible for the unemployment insurance benefit. See the Employment Insurance Act (S.Can 1996, c.23, s. 36). In Canada the objectives of this prohibition are said to be the preservation of government neutrality during labour disputes and the avoidance of the inequity of using an employer’s contributions to the unemployment insurance fund to finance a strike against the employer. (See \textit{White v. R} (1994), 94 C.L.L.C. 14,015 (sub \textit{nom, White v. Canada} (1994) 111 D.L.R. (4th) 517 (C.A.)) which was decided under the predecessor to section 36 - section 31 of the Unemployment Insurance Act, R.S.C. 1985, c-U.1). For discussion on the operation of unemployment insurance benefits in Canada generally, see M. A. Hickling, \textit{Labour Disputes and Unemployment Insurance in Canada and England} (Canada, CCH, 1975).}

\footnote{429}{This contrasts with the position in British Columbia, where bargaining in good faith is a prerequisite to any lockout. See \textit{supra} notes 250-251.}
Dispute Resolution

The ECA provides the Employment Tribunal with jurisdiction to offer mediation assistance in any matter where it deems its involvement will improve or maintain an employment relationship.\(^{430}\) In theory, then, mediation is available in the context of bargaining disputes. However, neither the Employment Court nor the Employment Tribunal has jurisdiction to compel parties to attend mediation. Thus, mediation will not occur unless both parties agree. In most cases one or both of the parties will resist, preferring instead to utilise their bargaining power. As a result, instances of such assistance being sought are rare.\(^{431}\)

Without legislative amendment, this reluctance to mediate is unlikely to change. This is because the ECA encourages a party to maximise its own bargaining position. It does this by setting few limits on the exercise of bargaining power.\(^{432}\) This approach is consistent with the neo-classical economic theory that each party will seek its own rational advantage.\(^{433}\) As Dannin notes:

Judge Palmer [an Employment Court judge] has pointed out that the ECA allows employers to negotiate contracts directly with their employees; thus it contemplated each side would seek its own advantage. This means that the employer and employee must be prepared to use every weapon available. The ECA offers nothing to protect parties if they refuse to use the power they have or if, when they use it, they are unsuccessful.\(^{434}\)


\(^{431}\) A study by McAndrew in 1992 revealed that only 3 out of the 557 employers who returned legible responses had sought the assistance a Tribunal mediator in a bargaining dispute. See McAndrew, supra note 30 at 176.

\(^{432}\) As noted, section 57 sets a high threshold for judicial intervention. Supra note 349.

\(^{433}\) S. O’Byrne, “Good Faith in Contractual Performance: Recent Developments” (1995) Can.Bar.Rev. 70 at 76; Gilson & Wagar, supra note 80 at 223-4; Kelsey, Rolling Back the State, at 348-349.

\(^{434}\) Dannin, Working Free, at 245.
Imposing a duty to bargain in good faith would help counter this resistance to mediation. Attendance could not be viewed as a sign of weakness if attendance was mandatory. Moreover, as was discussed in relation to the BC Code, the use of a mediator in a bargaining dispute can have numerous benefits.\footnote{Unfortunately, without legislative amendment, those benefits will continue to elude the majority of New Zealand employers and employees.}

\textit{Section 104: Misrepresentations and Misleading and Deceptive Conduct}

Relief may be available in circumstances where a party to an employment contract has procured that contract through misrepresentation,\footnote{ECA, s. 104(4) and the Contractual Remedies Act 1979 (although it remains unclear as to whether such claims fall within the jurisdiction of the Employment Court or the courts of ordinary jurisdiction. See \textit{Nitsche v. Classic Air Ltd} (Unreported, 13/6/1996, WEC 4A/96)).} or where a party has engaged in misleading or deceptive conduct.\footnote{Fair Trading Act 1986, ss. 9 & 12. Section 12 provides: “No person shall, in relation to employment that is, or is to be, or may be offered by that person, or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.”} However, although these avenues would appear to provide redress for bad faith bargaining, in truth they are of limited value. In the first place, complete silence will rarely amount to a misrepresentation. The jurisprudence on misrepresentation cannot, then, be used as a basis for imposing a duty to disclose information pertinent to a particular bargain.\footnote{In the end result, New Zealand employers are under no obligation to supply financial information to employees in the course of bargaining (other than the employees’ own wage records). See J. Brown, “Disclosure of Financial Information - Are New Zealand Employees and Unions Missing Out” (1996) 21:3 N.Z.J.Ind.Rel. 233; J. Brown, “Accounting to the Workforce” (1992) 17:2 N.Z.J.Ind.Rel. 207. In contrast, the duty to bargain in good faith in British Columbia compels disclosure of material information, both solicited and unsolicited. See \textit{supra} note 226.}

\footnote{Supra page 56.}

\footnote{ECA, s. 104(4) and the Contractual Remedies Act 1979 (although it remains unclear as to whether such claims fall within the jurisdiction of the Employment Court or the courts of ordinary jurisdiction. See \textit{Nitsche v. Classic Air Ltd} (Unreported, 13/6/1996, WEC 4A/96)).}

\footnote{Fair Trading Act 1986, ss. 9 & 12. Section 12 provides: “No person shall, in relation to employment that is, or is to be, or may be offered by that person, or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.”}

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has occurred can a party seek to litigate. By then, much of the damage will have been
done, for as Anderson has noted:

[T]he costs and delays that are inevitably associated with drawn out litigation are
often fatal to organising and bargaining initiatives.439

Section 18 and The Minimum Code

Although section 18 of the ECA provides that the content of an employment contract is to
be determined by negotiation, certain minimum employee entitlements are guaranteed by
statute. For example, all employees over the age of 20 are entitled to a minimum wage of
$7 per hour, while those between the ages of 16 and 20 are entitled to an hourly minimum
of $4.20.440 Employees are also entitled to a minimum of eleven public holidays a year,
fifteen days annual leave, five days annual sick leave, and a specified period of parental
leave.441 While an employer and an employee may agree to more favourable terms, in the
absence of agreement, or where a contract contains inferior terms, these statutory
entitlements will apply.

This minimum code serves as a safety net. Some might argue this net renders superfluous
a duty to bargain in good faith; that is to say, that such a duty is not necessary because all
employees are protected from the purportedly excessive bargaining power of employers.
There are, however, two primary reasons for treating such an argument with scepticism.
First, it assumes that the minimum code delivers to all employees an acceptable standard

439 Anderson, supra note 141 at 134. The Adams litigation is a case in point. By the time the case reached
the Court of Appeal, the contract in question had been replaced, and, as a result, the Court of Appeal
dismissed the union’s claim.

440 These levels were introduced in March 1997. See the Minimum Wage Act 1983 and the Minimum
Wage Order 1997. See also “Adult Minimum Hourly Wage to Rise to $7” (1996) The Dominion (N.Z.),
3. According to the NZBRT, this protection should be abolished because it creates a barrier to
employment. See J. Sloan, “Towards Full Employment in New Zealand: A Response to Employment: A
Report of the Prime Ministerial Task Force on Employment (1994) at 28-33; Kelsey, New Zealand
Experiment, at 195.

of living. It does not. In the first place, the minimum wage has no application to those under the age of 16. They must fend for themselves. This has resulted in the exploitation of school children in part time positions of employment, and a resulting displacement of existing employees in favour of this cheap source of labour.

Nor do those aged between 16 and 17 escape vulnerability. Those in this age bracket are now ineligible for the unemployment benefit. As a result, those 16 and 17 year olds who have left school have no alternative but to accept whatever work they can find, or go without. In terms of the adult entitlement, it is important to note that rather than ensuring the minimum wage keeps pace with inflation, the New Zealand Government has instituted cuts. This is undoubtedly one of the reasons why so many New Zealanders currently live below the poverty line.

The second fallacy that underlies the minimum code is that it is necessarily adhered to. Those most desperate for employment are also those least likely to be able to insist on, or enforce, their lawful entitlements. If a job is offered at below the minimum wage, insisting on a lawful level of pay will, more often than not, mean that the applicant in question will be passed over. And then to seek to enforce one’s entitlement after securing a job not only costs money, it also will usually result in dismissal at the hands of a resentful employer. Given these barriers to enforcement, it is remarkable that the Employment Tribunal heard over 300 arrears claims in 1996 alone. This statistic speaks volumes for employee vulnerability when one considers that the vast majority of arrears claims are unlikely to be filed.

442 The National Distribution Union, for example, has identified cases of young workers being paid $1.50 and $2.00 per hour. National Distribution Union, Under Contract: A Brief Report on the Use of the ECA in the Retail Sector (Wellington, National Distribution Union, Undated) at 3.

443 A practice that is particularly prevalent in the shop sales industry.


445 Supra note 93.

A duty to bargain in good faith will not stop all exploitation of vulnerable employees. But that is not the point. The point is that there is little validity to the claim that a duty to promote meaningful bargaining is not needed because all employees are already protected from employer oppression by an adequate minimum code.447

3.2 The Employment Court and The Implied Obligation to Bargain in Good Faith

Soon after the ECA was enacted, unions sought to argue that the provisions in the Act which dealt with bargaining ought to be interpreted in accordance with Canadian and American authorities on good faith bargaining. In Adams, the Chief Judge rejected this argument, stating:

Under Canadian legislation there is some preoccupation with bargaining in good faith and all that that involves and a body of rules has been built up one of which, for example, distinguishes between surface bargaining and hard bargaining. No such controls exist in New Zealand. The Canadian cases influenced by this consideration must be put to one side.448

Unions responded by arguing that the duty to bargain in good faith was a component of the implied term of trust and confidence, which New Zealand courts had recognised in cases such as Telecom South Limited v. Post Office Union:

There is an implied term in every employment contract that ... employers will not, without reasonable and proper cause, conduct themselves in a manner calculated

447 There are, in addition, one or two other provisions in the ECA that could be viewed as promoting good faith conduct, at least at the periphery. Section 16 prohibits a party from resiling from a settlement reached between representatives until such time as the other party has had a reasonable opportunity to ratify. See NZ Engineering Union Inc v. Shell Todd Oil Services (NZ) Ltd [1994] 2 ERNZ 536 (E.C.). Additionally, the ECA requires all contracts to contain procedures for resolving personal grievances and disputes of right, thus removing as a source of bargaining conflict the inclusion of such procedures in a contract. Yet, it is trite to say that these sections mean little without the fundamentals, namely a duty that requires parties to actually commence bargaining, explain proposals, respond to counter-proposals and persist until settlement or a genuine impasse is reached.

448 Adams, at 1019.
Gradually the Employment Court has begun to accept this argument. The first indication of this acceptance emerged in *Unkovich v. Air New Zealand Ltd.* In this case Air New Zealand terminated negotiations for a new catering staff collective contract at Auckland airport, in favour of contracting out the services in question. The union commenced a claim in the Employment Court alleging, *inter alia,* that the employer had effected this outsourcing in breach of an implied obligation to bargain in good faith. In respect of this submission, Judge Colgan stated:

I think it can be safely said that the law of employment in this country recognises the existence of mutual obligations of trust and confidence between employers and employees. ... The scope and the content of those obligations may be as variable as employment contracts are. ... Employment contracts are significantly different from other commercial arrangements in part because collective employment contracts ... periodically expire but in circumstances in which it is presumed that the parties will seek to continue the relationship ...

At such times the existing employment relationship continues as do, I think, the parties' obligations of trust and confidence. The law allows for hard bargaining, even the use of coercive tactics which might appear to be the very antithesis of trust and confidence in a subsisting relationship of employment. But even within that altered relationship during the period of bargaining and negotiation, I would find that the underlying obligations of trust and confidence which arise from an existing and continuing relationship survive, albeit perhaps modified in some

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449 [1992] 1 ERNZ 711 (C.A.) at 715. See also *Auckland Electric Power Board v. Auckland Local Authorities IUOW* [1994] 2 NZLR 415 at 419. For Employment Court authority to the same effect, see e.g., *U.F.C.W. v. Talley* [1992] 1 ERNZ 756 at 770. The Court of Appeal in *Brighouse Ltd v. Bilderbeck* [1995] 1 NZLR 158 expressed with confidence the view that Parliament must not have not intended the ECA to over-ride this implied term (first developed in New Zealand by industrial relations courts in the 1970s) or the Act would have expressly said so. Interestingly, the Canadian Supreme Court recently adopted a similar implied obligation (although more limited in scope) by holding that employers owe an implied obligation of good faith and fair dealing when effecting dismissals. See *Wallace v. United Grain Growers* (1998), 152 D.L.R. (4th) 1 (S.C.C.). For discussion in Canada of the development of a duty of broader application, see G. England, “Recent Developments in the Law of the Employment Contract: Continuing Tension Between the Rights Paradigm and the Efficiency Paradigm” (1995) 20:2 QLJ 557.

An implied obligation of mutual trust and confidence between an employer and an employee has also recently been recognised for the first time by the House of Lords. See *Malik v. Bank of Credit and Commerce International SA (in liq),* [1997] 3 WLR 95; 3 All ER 1 (H.L.).

stances to take account of the parties' conduct towards each other permitted by the law at the time of bargaining.\textsuperscript{451}

On the facts before the Court, Judge Colgan concluded that Air New Zealand was in breach of this obligation of trust and confidence:

[I]n the course of negotiations between the parties for a collective employment contract, the applicants' bargaining agents, the union officials, were told by the respondent that if talks for collective employment contracts broke down, individual employment contracts would be entered into either with individual employees or groups of employees.

In the event, however, the company either did not consider, or more probably belatedly considered and rejected, any prospect of entering into such contracts. It did not, however, so inform the applicants or their bargaining agents of its change of heart or of its withdrawal from the advice earlier given.

It was ... the prerogative of the respondent to insist ... upon collective contracts for all of its employees .... But having held out the prospect of such alternative arrangements to the bargaining agents in negotiations, I consider the respondents duty bound in fairness to have notified this important change of tack to its employees to have allowed them a proper opportunity of knowing of, and considering, the prospect of contracting out and therefore redundancy if a simple majority of employees collectively continued to reject the company's proposals.

I would find the respondent's unannounced and belated retraction of its offer to consider individual employment contracts to have been a material unfairness in all the circumstances of the contract negotiations and the consequent and closely related dismissals.\textsuperscript{452}

On the basis of this finding, among others, the redundancy dismissals effected by Air New Zealand were held to be procedurally unjustified, and the plaintiffs were awarded compensation.

\textsuperscript{451} Ibid. at 589. Interestingly, the New Zealand Government drew these comments to the attention of the ILO, in the course of responding to the CTU's compliant regarding the ECA. See supra note 160 at 66.

\textsuperscript{452} Ibid. at 589-590.
The implied obligation to bargain in good faith was further developed by the Employment Court in *Rasch v. Wellington City Council*.\(^{453}\) In this case the employer was held to have unduly rushed negotiations thereby failing to allow its staff sufficient time to consider whether they wished to be represented in negotiations, and if so, by whom. The Court was also critical of the employer’s subsequent tactics in “running down” the employees’ traditional union representative in communications sent directly to its employees. Chief Judge Goddard concluded that the employer had breached both section 12 of the ECA (by failing to recognise the authority of the representative) and the implied duty of fairness:

> I doubt whether what was done is a legitimate tactic in negotiations with employees. Brown & Marriott in *ADR Principles & Practise* ... refer to the European doctrine of culpa in contrahendo [meaning , roughly translated, “reprehensible conduct in negotiations”] which is apparently an extra-statutory concept of good faith and fair dealing developed by the European Courts. While the boundaries of the concept may be unclear, its application to a state of affairs as that disclosed by this case would not be difficult to imagine under any civilised legal system. It cannot lie too far away from the duty imposed by the Fair Trading Act 1986 to desist from misleading and deceptive conduct in business. In the present case the evidence discloses a serious abuse of power and position by the council, as well as conduct that was decidedly tricky... \(^{454}\)

Chief Judge Goddard next discussed this implied term in *Med Lab Workers*. As noted, the Chief Judge concluded that a number of the communications sent by Capital Coast Health to its employees were in breach of section 12.\(^{455}\) He also held that those communications were in breach of the implied duty of trust and confidence. In terms of the scope of that duty, and its relationship to good faith, Goddard CJ stated:

> A wide range of activities by both employers and employees in the course of negotiations may also breach the mutual obligations to maintain confidence and trust between employer and employee. ... [T]his implied term will require an employer and employee to negotiate in such a way that they do not contravene their mutual obligations in the continuing employment relationship. We adopt, in


\(^{454}\) *Ibid.* at 372.

\(^{455}\) *Supra* note 372.
their entirety the sentiments expressed by Colgan J in his judgment in *Unkovich* ... . In deciding whether or not on the particular facts of the case the conduct of the party in the negotiations has breached the mutual obligations, the question of motive or the presence or absence of good faith may be decisive ... The mutual obligations may also be enhanced in situations, such as the present case, where the employer is bound by statutory requirements to be a 'good employer'.

These views have been reiterated by the Employment Court in subsequent cases including *Ivamy*, *NZ Engineering Union Inc v. Shell Todd Oil Services (NZ) Ltd*, *Julian v. Air New Zealand Ltd*, *Caledonian Cleaners and Caterers (1992) Ltd v. Hetariki*, and *New Zealand Medical Laboratory Workers Union Inc v. Hamilton Medical Laboratory Ltd*. Perhaps the most definitive statement appeared in *New Zealand Educational Institute v. State Services Commission*, where the Employment Court stated that:

> There can be no doubting the existence of a duty to bargain in good faith as between parties to an existing contract of employment.

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456 *Med Lab Workers*, at 129-130. The 'good employer' requirement applies to state employers and is imposed by various statutes. Employers in the state education sector, for example, are required by section 77A of the State Sector Act 1988 to 'operate a personnel policy that complies with the principle of being a good employer'. Capital Coast Health (the defendant in *Med Lab Workers*) was bound by an equivalent duty applicable to state health care providers. (See section 11 of the Health and Disability Services Act 1993).

457 *Supra* note 371 at 767.

458 *Supra* note 447 at 548.


460 [1994] 2 ERNZ 400.

461 (Unreported, AEC 102/97). In this case the union discovered after the contract had been accepted by its members (at a meeting called for that purpose) that it had omitted to cover rostering issues in the contract. The union then sought to argue that a formal ratification vote had not been held, and that accordingly, the contract was not binding. The Employment Court refused to allow the union to resile from the settlement, holding that to do so would be to allow the union to act in a manner inconsistent with the duty to bargain in good faith.


The existence of this implied duty to bargain in good faith has also been accepted by the Employment Court in the context of the re-negotiation of an individual employment contract. In *Smith v. Radio i Ltd*, the plaintiff argued that her employer had a duty to re-negotiate her contract in good faith, and had breached that duty by raising stale complaints and irrelevant matters and by exaggerating the company’s financial difficulties. Although the Court held that the plaintiff had failed to substantiate these allegations, it nevertheless entertained the argument as a viable one.

Taking these cases as a whole, from *Unkovich* to *Radio i*, one might argue that a fully operative duty to bargain in good faith already exists in the New Zealand employment and labour relations, and that accordingly, statutory amendment is unnecessary. There are however, a number of reasons why such an assertion cannot be made with confidence. In the first place, the existence of an implied duty to bargain in good faith has never been upheld by the Court of Appeal. The Court of Appeal had an excellent opportunity to approve of this development in the *Med Lab Workers* appeal, but chose not to do so. Instead the Court of Appeal stated:

> The [ECA] must be seen as essentially practical legislation designed to deal with everyday practical situations. It is not appropriate to subject it to esoteric analysis or to draw fine distinctions in its applications.

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465 See also *Hearle v. Bay of Plenty Polytechnic Council* (Unreported, AEC 62/96, 8 October 1996), where the Employment Court again accepted the existence of this implied term in the context of an individual employment contract, but dismissed the claim on its facts.

466 Rossiter, for example, suggests that there is little significant difference between the implied obligation to bargain in good faith which has been developed in New Zealand and the statutory duty which operates in Canada. See G. Rossiter, “Fairness in Employment Bargaining” (1998) NZLJ June, 224.

467 Whilst Justice Thomas appears to endorse the concept in *New Zealand Fire Service Commission v. Ivamy* [1996] 2 NZLR 587 (C.A.) at 619), he then goes on to state (at 619) that a lack of good faith is “a further relevant factor” in deciding whether section 12 has been breached. Thus, he does not go as far as endorsing an independent obligation to bargain in good faith. More importantly, however, Thomas J’s decision was one of two minority judgments. Notably, the majority of the Court in the *Ivamy* appeal made no mention whatsoever of the implied obligation formulated by the Employment Court.

468 *Capital Coast Health v. NZ Med Lab Workers Union* [1996] 1 NZLR 7 (C.A.), at 18.
In relation to section 12 in particular, the Court of Appeal held that the section "should be allowed to speak for itself".\textsuperscript{469} The Court made no mention of an implied duty to bargain in good faith, nor of Capital Coast's statutory obligation to act as a 'good employer'.

The failure of the Court of Appeal to endorse this implied duty does not bode well for the future of the concept. Nor is the Court of Appeal's stance likely to change, at least in the foreseeable future. The current appellant bench is without doubt more conservative and 'black letter' than the bench in place in the early 1990s.\textsuperscript{470} This is due in no small part to recent changes in personnel, particularly the retirement of the President of the Court, Lord Cooke, and his replacement by Justice Richardson.\textsuperscript{471} Justice Richardson has traditionally emphasised the importance of contractual certainty, and appears to favour a unitarist view of employment.\textsuperscript{472} For example, in a previous decision regarding implied obligations of fairness in the context of redundancy, he expressed the view that:

\begin{quote}
In a contract of employment workers and employers have mutual obligations of confidence, trust and fair dealing. ... But those mutual obligations do not warrant the application of any different principles to the implication of terms in collective or individual employment contracts than are applicable to other contracts. ... In short, it is not open to the Courts to construct an extra-statutory concept of social justice...\textsuperscript{473}
\end{quote}

\textsuperscript{469} Ibid.


\textsuperscript{471} The president occupies a position of significant influence by virtue of his or her ability to influence the tenor of the court's decisions, and also to determine which judges sit on which cases.

\textsuperscript{472} Anderson, supra note 470 at 140.

\textsuperscript{473} Brighouse Ltd v. Bilderbeck [1995] 1 NZLR 158 (C.A.) at 169. While these views were expressed in a minority judgment, they now reflect the state of the law, following a change of direction by the Court of Appeal, which was lead by President Richardson. See M. Stevens, "Mixed Reaction to Redundancy Law Reversal" (1998) The Evening Post (N.Z.), 18 May, 15; "Unionists Attack Redundancy Ruling" (1998) The Dominion (N.Z.), 16 May, 7. President Richardson's views in Bilderbeck can be contrasted with previous comments of President Cooke to the effect that the present day judiciary has replaced strict application of formal legal logic with the "search ... for the solution that seems fair and just after balancing all the relevant considerations." (See R. Cooke, "Dynamics of the Common Law" (1990) Commonwealth Law Conference - Conference Papers, at 1).
Given these sentiments, and the recent stance taken by the Court of Appeal on implied terms,\textsuperscript{474} it is unlikely that President Richardson would endorse the \textit{Unkovich} line of cases, particularly if this were to result in the imposition of bargaining obligations beyond those specified in the ECA.\textsuperscript{475}

The second fundamental difficulty with the implied obligation as developed by the Employment Court is its limited scope. The obligation has never been used to force a party to commence, or persist with, negotiations.\textsuperscript{476} Nor is this likely to occur, given the finding of the Court of Appeal in \textit{Eketone} that an employer is under no obligation to negotiate with anyone. In addition, the implied obligation applies only in the context of existing employment relationships where the parties are concerned with the renewal of their employment contract. The duty, as developed by the Employment Court, has no application whatsoever to the formation of new employment relationships.

Indeed, it can be fairly asserted that the implied obligation, as applied by the Employment Court to date, has added little, if anything, to the existing (and unsatisfactory) provisions of the ECA. In \textit{Unkovich, Med Lab Workers, Ivamy}, and \textit{Shell Todd}, the existence of the implied obligation was referred to as a secondary ground for the Court's decision. In each of these cases, the employer was held to have also breached a provision of the ECA. It cannot, then, be said that the implied obligation has been used to break any new ground. As Anderson has noted:

\begin{quote}
It appears that once negotiations commence some good faith obligations may arise ... but that these obligations do not extend to receiving and considering proposals or to remaining in negotiations and making a good faith attempt to reach an agreement. ... What can be suggested is that the courts have now laid the
\end{quote}

\textsuperscript{474} \textit{Ibid.}

\textsuperscript{475} For example, the right to strike and lockout is lawful, subject only to the limitations expressed in the ECA (see supra note 38), one of which is \textit{not} that the strike or lockout is preceded by genuine negotiations. If the Employment Court utilised the implied duty to impose genuine negotiations as a prerequisite to a strike or lockout, the Court of Appeal might well hold this to be an inappropriate fetter on the freedom to effect economic sanctions, as guaranteed by the ECA.

\textsuperscript{476} \textit{Horn}, at EC 12.08.
foundation from which they are free to develop a broad obligation on employers, as well as employees and their union, to negotiate and to do so in good faith. ... The major missing element is now the starting mechanism and the fuel to maintain the process.

However, the reality is that the current Employment Court bench is unlikely to attempt to expand upon the foundation to which Anderson refers. This is primarily because in recent times the Employment Court has fielded severe criticism, particularly from the NZBRT and the NZEF, for perceived judicial activism. According to Roger Kerr, for example, recent decisions of the Employment Court have amounted to “a deliberate and conscious snub to parliament’s intentions in passing the Employment Contracts Act” and have usurped “a policy making role which should be the preserve of democratically elected and accountable institutions.”

Critics of the Court have persistently called for its abolishment and for the integration of employment and labour law into the jurisdiction of the ordinary courts, because, in their view, the courts of general jurisdiction are less prone to judicial activism. This attack on the Employment Court has been further fuelled by certain sectors of the media. The following excerpt from an editorial appearing in *The Independent* newspaper provides a representative example:

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How the Employment Court Fosters Unemployment

... Thus the Employment Court can be seen as a major contributor to unemployment. This body, topped off by chief judge Tom Goddard, seems to be out to usurp the power of Parliament. By making its own law rather than interpreting and enforcing that enacted by our elected representatives, the Employment Court seems hell-bent on becoming a law unto itself.\(^{480}\)

Not unexpectedly, this attack has begun to pay dividends for the NZBRT and the NZEF. The present Minister of Labour, Max Bradford (himself a former employee of the NZEF) has commenced a review of the Employment Court’s performance. According to Bradford, the purpose of the review is to determine:

[W]hether Parliament’s intentions have been clearly expressed in the legislation. If not, we need to clarify it in order to narrow the opportunities for the judicial activism we seem to be seeing in the separate court jurisdiction framework.\(^{481}\)

Yet even before the review is complete, Bradford himself has publicly criticised the Employment Court, stating; “[s]ome Court decisions are clearly inconsistent with the principles of the [ECA].”\(^{482}\) The future of the Employment Court has also been questioned by other leading Government Ministers. Recently the Minister of Finance (who happened to be the Minister of Labour responsible for introducing the ECA into law) stated that:

The time may have come to consider whether the industrial relations environment has changed since 1991, so that the Employment Court need no longer be separate.\(^{483}\)


\(^{483}\) Address by W. Birch, Minister of Finance, to the Wellington District Law Society (1997) 7 June.
The latest statements by the New Zealand Government indicate that the future of the Court remains in the balance. Winston Peters (then Deputy Prime Minister and Treasurer), stated categorically in the 1998 Budget (delivered on 14 May 1998) that the “Government ... recognises the unique nature of the employment relationship and is committed to maintaining a specialist Employment Court.” Yet, on the very next day the Prime Minister, Jenny Shipley, issued a press release to the contrary, stating that the future of the Employment Court is indeed under review.

Given this political uncertainty, it can be fairly suggested that the Employment Court is unlikely to expand on its conceptualisation of the implied obligation to bargain in good faith, when to do so would serve only to intensify the freemarketers’ attack on the Court’s future. That expanding the duty would result in further criticism is beyond doubt, for as Dannin has noted:

The ECA is premised on the view that neither employer nor employee needs protection. In other words, creating implied covenants is at odds with fundamental ECA purposes.

The third reservation that must be noted in respect of the Employment Court’s implied obligation, even if it, and the Court, were to survive, is its uncertainty. The Court itself has been singularly unhelpful in defining the scope of the obligation. In Med Lab Workers the Chief Judge stated that “a wide range of activities by both employers and employees in the course of negotiations may ... breach the mutual obligations”, yet failed to specify what those activities might be. Equally unhelpful is Judge Colgan’s statement in Unkovich

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485 C. Bell, “Peters Backs off Employment Court Stand” (1998) The Dominion (N.Z.), 29 April, at 1. According to the Government’s Industrial Relations Package, released in late July 1998, the review of the Employment Court will be completed later this year. See Bradford, supra note 175.


487 Supra note 456.
that “the scope and the content of [these] obligations may be as variable as employment contracts”.\footnote{Supra note 451.}

Nor is there any clarity as to the remedies available in the event of breach.\footnote{It may be, for example, that section 57(7) of the ECA prohibits the Employment Court from invoking the duty where the bargaining process under challenge has resulted in an employment contract (given that section 57(7) prohibits the setting aside of a contract on the ground of unfairness or unconscionability - the very type of conduct the duty would normally ward against).} It is unlikely, for example, that the Employment Court would consider itself to have the jurisdiction to direct parties to attend mediation, or to impose terms on parties such as in the \textit{Royal Oak Mines} case in Canada.\footnote{See, for example, the comments of Chief Judge Goddard to the effect that the Court does not have the jurisdiction to fix terms and conditions of employment. Goddard, supra note 478 at 105-106 (note 4). This accords with his finding in \textit{Adams} that section 57 permits the Court to set aside a contract, but not to rewrite or modify it. See \textit{Adams}, at 998.} Uncertainty of this nature can only encourage costly and acrimonious litigation, the very thing the duty should be minimising.

### 3.3 Developments in The Common Law Generally as Regards Good Faith Bargaining

There have been a number of recent developments in the common law which may conceivably provide impetus for courts in New Zealand implying into contracts generally a duty to bargain in good faith.\footnote{Whilst it is not suggested that employment contracts ought necessarily to be treated in an identical manner to commercial contracts (see for example, \textit{NZEI v. Shell} [1994] 2 ERNZ 536 and \textit{Telecom South} [1992] 1 ERNZ 711, where the Employment Court held that employment contracts are, at least in some respects, different to commercial contracts), trends in the common law generally may, nevertheless, influence developments in the specific field of employment law.} These are, respectively, the increasing number of cases in which courts have refused to condone bad faith conduct in negotiations; the possible reclassification of existing doctrines; the growing overlap between civil and common law principles, particularly in Europe; and the existence of opposition to the traditional rule that express agreements to negotiate in good faith are unenforceable.
Cases Decided on the Basis of an Implied Obligation to Bargain in Good Faith

The traditional position at common law has been that negotiating parties do not owe each other a duty to bargain in good faith.492 Courts have applied this rule when holding that a party is under no obligation to disclose facts known only to them even although they are aware that disclosure would deter the other party from concluding the contract.493 As Atiyah has noted:

Each party is entitled to make use of what information he has in order to obtain the best bargain he can get; neither party is under any obligation to assist the other.494

The pre-eminence afforded to self interest by the common law in this context was affirmed by the House of Lords in Walford v. Miles,495 a case involving failed negotiations for the sale of a business. The plaintiff in this case (the proposed purchaser) sought to argue that the owner was in breach of an implied obligation to negotiate in good faith. Lord Ackner (with whom the remainder of the court agreed) rejected the argument, stating:

[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.496

In recent times, however, there has been a perceptible movement away from this strict position. There appears to be an increasing willingness on the part of common law courts to imply an obligation of good faith into both the negotiation of contracts and their


494 Ibid. at 247.


496 Ibid. at 138.
performance. For example, recent Canadian cases involving tendering processes, real estate transactions, and the formation of ongoing commercial relationships have been decided in an manner consistent with an expanding duty of good faith. Moreover, the Supreme Court in Wallace v. United Grain Growers has expanded this development into labour and employment law, holding that employers must effect dismissals in accordance with a common law duty of good faith and fair dealing.

Similarly, courts in New Zealand, Australia, the United Kingdom and the United States have shown a willingness to imply terms (or collateral agreements) requiring good faith in the creation and performance of contracts. There has, in addition, been


498 See supra note 449.

499 See e.g., Gregory v. Rangitikei District Council [1995] 2 NZLR 208 (H.C) (a party considering tenders must do so in a genuine fashion); Artifakts Design Group Ltd v. N P Riggs Ltd [1993] 1 NZLR 196 (H.C.) (the defendant must use its best endeavours to promote the sale of the plaintiff’s goods); Livingstone v. Roskilly [1992] 3 NZLR 230 (H.C.) (the parties to a contract must act in good faith in making and carrying out the contract); Devonport BC v. Robbins [1979] 1 NZLR 1 (C.A.) (the parties to a contract are bound by an implied term requiring them to co-operate and not to hinder or impede the other party’s performance).

500 Renand Construction Pty Ltd v. Minister for Public Works [1992] 26 NSWLR 234 (there exists in contracts a duty upon the parties requiring good faith performance); Hospital Products Ltd v. United States Surgical Corp (1984) 156 CLR 41 (Aus.H.C.) (the distributor is bound by an implied term requiring it to use its best endeavours to distribute the plaintiff’s products); Secured Income Real Estate (Australia) Ltd v. St Martin’s Investments Pty Ltd (1979) 144 CLR 596 (Aus.H.C.) (each party must do all such things as are necessary on its part to enable the other party to have the benefit of the contract).

501 Golbelfret NV v. Cyclades Shipping Co Ltd (The Linardos) [1994] 1 Lloyds Rep. 28 (notice to be given under a loading contract regarding the readiness of the receiving ship must be given in good faith); Downsview Ltd v. First City Corp. Ltd [1993] AC 295 (P.C.) (a mortgagee of property must exercise the power of sale in good faith); Blackpool and Fylde Aero Club v. Blackpool Borough Council [1990] 1 WLR 1195 at 1204 (the decision to reject a timely tender must be made in good faith).

502 Fortune v. National Cash Register, 373 Mass. 96, 364 N.E. 2d 1251 (1977); Kern v. Levolor Lorentzen, 899 F. 2d 772 (9th Cir. 1990) (dismissal at will must be effected in good faith).

some discussion among commentators and courts about the development of a duty to bargain in good faith in tort and/or equity,\textsuperscript{504} although most of the recent common law developments have occurred in the context of contractual doctrines.

While the existence of these decisions is undeniable, it is difficult to draw from them a precise principle as to when a duty of good faith will apply. O’Byrne, for example,\textsuperscript{505} suggests that a duty of good faith importing an obligation to “speak up” may arise in cases involving three factors: first, a pronounced information asymmetry between the parties; second, profoundly misleading silence because the existence of the undisclosed information is consequential and unexpected; and third, a judicial focus on equitable values.\textsuperscript{506}

Beatson, on the other hand, suggests that judges will be critical of non-disclosure in cases where:

\begin{quote}
It is either impossible for the other party to acquire the relevant information from any source other than the counterparty to the contract either at all or without incurring considerable expense. Alternatively, the relationship between the
\end{quote}


\textsuperscript{505} S. O’Byrne, “Culpable Silence: Liability For Non-Disclosure In the Contractual Arena” (1998) 30 C.Bus.L.J. 239.

\textsuperscript{506} \textit{Ibid.} at 241.
contracting parties is not a pure arm's length commercial relationship but one of trust and confidence or one of dependence.\textsuperscript{507}

Hawkins proffers yet another four stage test for when standards of good faith conduct will be applied.\textsuperscript{508} Against these formulations, other commentators suggest that categorising recent cases of this nature according to only one principle or set of principles may be impossible.\textsuperscript{509} Yet, despite these classification difficulties, these cases illustrate a trend in favour of imposing an obligation of good faith in the formation and performance of contracts (particularly in long term relationship contracts, which many employment contracts are). Given the repositioning of New Zealand employment law squarely within the realm of contract, the Employment Court could look to invoke this trend in support of the implied obligation to bargain in good faith which it has developed.

\textit{The Re-Classification Debate}

There is also an emerging debate among commentators that existing contractual doctrines could be classified as falling within one broad obligation; specifically an obligation to negotiate in good faith. Carter and Furmston, for example,\textsuperscript{510} argue that concepts such as certainty of agreement, implied terms, promissory estoppel, restitution, and collateral contracts have all been used to promote standards of good faith in contract negotiations.\textsuperscript{511} In their view, an argument can, accordingly, be made for the classification

\textsuperscript{507} J. Beatson, "Has the Common Law a Future" (1997) CLJ 291 at 305.

\textsuperscript{508} Hawkins suggests that courts will be prepared to invoke a duty to bargain in good faith where there is a serious relationship between the parties; the breakdown in bargaining was occasioned by the fault of one of the parties; the aggrieved party suffered damage as a result, and from which it could not protect itself; and the wronged party cannot reasonably be expected to bear the costs associated with the breakdown in the negotiations. See Hawkins, \textit{supra} note 504 at 79-80.

\textsuperscript{509} See \textit{e.g.}, J. Carter & M. Furmston, "Good Faith and Fairness in the Negotiation of Contracts" (1995) 8:1 JCL 1; 8:2 JCL 93 at 118.

\textsuperscript{510} \textit{Ibid.} at 8.

of these doctrines under a general umbrella of “good faith”. Moreover, whilst English law has resisted the development of an overall doctrine of good faith, as Waddems points out, even in England good faith has been an important factor in contract interpretation and in the development and application of the doctrine of unconscionability.

Although the creation of one global doctrine of good faith is far from universally supported, what is significant for present purposes is that this development may gain momentum if common law courts continue to decide negotiation disputes on the basis of good faith obligations. Should this occur, the Employment Court could look to the common law generally as authority for its own implied term.

**The Influence of the Civil Law**

As Judge Goddard noted in *Rasch v. Wellington City Council*, a number of civil law jurisdictions utilise the concept of culpa in contrahendo, which, in effect, requires parties to negotiate in good faith. Similar obligations have been expressly incorporated into civil codes and legislation in countries such as Italy, Israeli, France, Germany and Argentina and in the Canadian province of Quebec.

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512 Some support for this view can be derived from the series *Laws of Australia*, which now includes a volume (35) combining common law, equity and statutory provisions under the heading “Unfair Dealing”.


514 See *supra* note 503.


516 Italian Civil Code, para. 1337; Argentine Civil Code, para. 1198; Code Civil (Fr.), art. 1134(3); Israeli Contracts (General Part) Law 1973, s. 12(a); German Civil Code (BGB), s. 242 & 157; Civil Code of Quebec, art. 1375. These provisions can be contrasted with instruments such as the Uniform Commercial Code and the Restatement (Second) Contracts in the United States, both of which require good faith performance of contracts but make no mention of good faith in negotiations. See, Uniform Commercial Code (US, 1990 Official Text), s. 1-203; Restatement (Second) Contracts (1981) s. 205 (although note the more limited duty of disclosure provided for in s. 161). For discussion on these later provisions, see E. Farnsworth, “Good Faith in Contract Performance” in J. Beatson & D. Friedmann, eds., *Good Faith and*
The civil law concept of good faith in negotiations has permeated into various international instruments. For example, the UNIDROIT Principles For International Commercial Contracts (1994) provides in Article 1.7(1) that “[e]ach party must act in accordance with good faith and fair dealing in international trade.” Article 2.15 further provides:

(1) A party is free to negotiate and is not liable for failure to reach an agreement.
(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach agreement with the other party.517

Similarly, article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods518 provides that “in the interpretation of the convention, regard is to be had to ... the observance of good faith in international trade.”519 This convention has been adopted in numerous jurisdictions, including British Columbia520 and New Zealand.521

As parties increasingly structure their dealings in accordance with principles of this nature, standards of good faith may become an expected component of a broad range of negotiations.522 Should this occur, courts will no doubt be asked to give legal effect to those expectations.523

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519 For discussion on this article, and its relevance to a duty to bargain in good faith, see J. Klein & C. Bachchi, “Precontractual Liability and the Duty of Good Faith Negotiations in International Transactions” (1994) 17:1 Hous.J.Int.L. 1.


522 Principles of good faith have also been incorporated into various consumer statutes such as those in a number of jurisdictions which regulate financial transaction between institutions and individual
The civil law influence is also apparent in the EC Directive on Unfair Terms in Consumer Contracts,\textsuperscript{524} which expressly incorporates notions of good faith. Significantly, for present purposes, this Directive has now been adopted by the United Kingdom.\textsuperscript{525} Whilst one could argue that the adoption in common law countries of these civil law concepts will be restricted to the specific context in which they arise (in this case consumer contracts), the more likely view is that expressed by Beatson:

The long term result is likely to be that the influence of the civil law concepts (good faith, significant imbalance) are likely to extend beyond the consumer transactions covered by the Directive and regulations and to percolate throughout our law of contract.\textsuperscript{526}

Assuming Beatson is correct, the ‘merging’ of civil and common law principles could provide further support for the development of an obligation to bargain in good faith in the New Zealand labour market.

\begin{itemize}
  \item \textsuperscript{522} See for example Lord Steyn, \textit{“Contract Law: Fulfilling the Reasonable Expectations of Honest Men”} (1997) 113 LQR 433 at 439.
  \item \textsuperscript{524} 1994 S.I. No. 3159.
\end{itemize}
Express Agreements

Recent developments in relation to express agreements to negotiate in good faith also warrant mention. The traditional view has been that such agreements are unenforceable. This view was recently confirmed in *Walford v. Miles*, where Lord Ackner held that notwithstanding the existence of a bare agreement to negotiate, a party could withdraw from negotiations for any reason at any time. In his view, any agreement which sought to restrict this freedom would be too uncertain to enforce.

What is interesting is the academic criticism that *Walford* has attracted, and the existence of cases and commentaries advocating a move away from this strict view. As Carter and Furmston argue:

> It is hard to feel that the House of Lords produced really conclusive reasons why parties who wish to assume mutual obligations to negotiate in good faith should be denied the court’s support in such a perfectly reasonable endeavour. It is suggested that there is no sufficient reason for the courts to refuse enforceability to

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528 *Supra* note 495.

529 *Supra* note 495 at 138.

530 *Supra* note 495 at 138. *C.f., Hills & Co Ltd v. Arcos Ltd* (1932) 147 LT 503; 38 Com. Cas. 23 (H.L.).


agreements to negotiate in good faith. There may be specific cases in which a
court cannot give effect to such a commitment, or where the damages are only
nominal, but it is over simplistic to assume all cases are of this kind.\textsuperscript{533}

Given the reaction to \textit{Miles}, it is at least conceivable that express agreements could
ground a duty to bargain in good faith in the New Zealand labour market.

3.4 Conclusion - The Existing Law

It would be untrue to say that notions of good faith bargaining are entirely absent from the
law that presently governs employment and labour relations in New Zealand. Clearly,
there are existing provisions in the ECA which deal with some of the issues that fall within
the scope of this duty as it applies in British Columbia. Moreover, the Employment Court
has itself begun to develop an implied obligation to bargain in good faith, which could gain
momentum from recent developments at common law.

However, despite what Bill Birch, Max Bradford and the Public Service might believe, the
existing provisions in the ECA barely scratch the surface. The ECA does not require
bargaining, let alone in good faith. There is no obligation to commence bargaining; no
obligation to justify one’s position or consider alternatives; no obligation to genuinely seek
agreement; and no obligation to persist with bargaining until a settlement or a genuine
impasse is reached. This void is rendered all the more significant given the recent stance
of the Court of Appeal. Rather than giving substance to sections 8, 12 and 57 of the
ECA, the Court has provided ample scope for employers to exercise powers of veto and
to engage in dictatorial and unilateral conduct; conduct which is clearly foreign to the
notion of good faith.

Nor are the statutory “good employer” obligations applicable to public sector employers
resulting in good faith bargaining practices. Public sector employers are now under

\textsuperscript{533} Carter & Furmston, \textit{supra} note 509 at 115.
pressure (akin to their private sector counterparts) to produce profitable operations. This pressure is inevitably resulting in employers dictating to their staff, and effecting bargaining practices which are inconsistent with notions of good faith.534

To the extent that employees and their representatives can sue under section 57 of the ECA, and for misrepresentation, misleading conduct and the like, such actions are retrospective, and costly in every sense of the word. As Rasmussen argues, litigation "is a cumbersome, drawn-out process which adds to the insecurity of employers and employees and has significant costs for the parties involved and for ... society as a whole."535 Litigation is no way to foster industrial harmony, co-operation and good faith. Nor, for that matter, does dictation.

In short, the existing statutory law in New Zealand is manifestly inadequate as regards fostering good faith bargaining. Nor is the present common law position any better. The implied obligation developed by the Employment Court has yet to be extended beyond the scope of the ECA, unsatisfactory as it is, nor is this likely to change in the foreseeable future.

In terms of the recent developments at common law generally, it is important to note that those who support the introduction of a duty to negotiate in good faith are in the minority. It remains to be seen whether their views will ever obtain prominence. Similarly, the merging of civil law concepts with the common law in the United Kingdom is still at its formative stages, and could, in any event, be distinguished as unique to Europe. And in terms of the enforcement of express agreements to negotiate, such advances are unlikely to be of significant impact, simply because those employees who are able to secure such agreements will generally have sufficient bargaining power to ensure that genuine bargaining takes place in any event. Conversely, the potential protection to be achieved

534 Of which clear examples are the approach taken to bargaining by the Department of Social Welfare (see supra notes 124-125) and the New Zealand Fire Service Commission (see supra note 421).
535 Rasmussen & Deeks, supra note 61 at 282.
from agreements of this nature will continue to elude those most vulnerable to employer
dictation.

It must also be pointed out that the existence of these general common law developments
will be of little relevance to New Zealand employment and labour relations if the
Employment Court is not prepared to adopt them. One suspects the Employment Court
will be reticent to do so, lest it invite its own abolition.

It the final analysis, it is suggested that Mr Birch, Mr Bradford and the Public Service
erred when they inferred that an obligation to bargain in good faith already operates in
New Zealand law. Moreover, it is further suggested that the only way in which a duty to
bargain in good faith, akin to that which applies in British Columbia, could be introduced
effectively into New Zealand is by statutory amendment. The alternatives are as uncertain
as they are unlikely to occur.
CHAPTER 4: THE GOOD FAITH DEBATE IN NEW ZEALAND

If one were to assume that a duty to bargain in good faith is largely absent from the law in New Zealand as it currently applies to employment and labour relations, what, then, would it cost to introduce such a duty? In particular, what would it ‘cost’ in terms of reduced efficiency and freedom; efficiency and freedom being the two primary objectives of the ECA? According to the Public Service, these costs would be significant, but is this view necessarily correct? Moreover, beyond issues of efficiency and freedom, what further arguments could be made for, or against, introducing this duty? Each of these issues will be addressed in turn.

4.1 Efficiency and the Duty To Bargain in Good Faith

Efficiency’s Pre-eminent Status Under the ECA

The primary objective of the ECA, and the permissive bargaining regime it introduced, is the promotion of “an efficient labour market”. According to the ECA’s supporters, the enactment of legislation emphasising this objective represented a significant improvement on the LRA. As noted, the NZBRT (amongst others) had argued that bargaining under the LRA was inherently inflexible and, as a result, inhibited the efficiency of the labour market. According to Brook, an economist and policy analyst for the NZBRT:

An increasing weight of evidence bears witness to the failure of this kind of system. This failure is most often described in terms of the inflexibility it generates across all aspects of employment relationships - inflexibility in labour costs, conditions of employment, work practices, rules and regulations (including taxation), training and mobility within and between firms. ... The overall effect is

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536 ECA, Long Title.
537 Supra note 45.
that barriers are erected to the fruitful and co-operative use of labour, at a high cost of unemployment and underemployment.  

The ECA was intended to remedy this inefficiency. Bill Birch, the Minister of Labour responsible for introducing the ECA, spoke of “efficiency” obtained through “improvements” in working arrangements. The NZEF similarly referred to employers and employees working together to achieve focused and effective agreements designed to meet the specific needs of particular work sites. Given the emphasis placed on efficiency by the ECA, it is important to consider how a duty to bargain in good faith would affect the present efficiency of the New Zealand labour market.

The Free Market Vision of “Conflict Free” Employment

A duty to bargain in good faith is essentially aimed at eliminating bad faith, and resulting conflict, from labour negotiations. Proponents of the free market would argue that this duty is unnecessary (and therefore inefficient) because, in their view, bad faith and conflict are not “natural” incidents of the employment relationship. As Dannin describes, prior to the enactment of the ECA, many of the Act’s supporters:

[P]ortrayed a coercion-free workplace; ... [contending] that the natural state of employment relations is a meeting of equals, intrinsically imbued with co-operation and fairness.

Brook, for example, argued that a free market would foster mutual, rather than conflicting, interests:

[T]he competitive pressure to which firms are subjected in labour markets (as well as in capital and output markets) will act to constrain the contractual options available to employers, and create pressures to develop employment relationships

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539 Supra note 42.
540 Knowles, supra note 43.
541 Dannin, supra note 33 at 462.
that not only commence with an expectation of mutual benefit, but maintain the mutuality of that benefit over time.\textsuperscript{542}

The NZBRT expressed a similar view:

It is important to recognise that with the abandonment of the conflict-based model of industrial relations in favour of a concept of free exchanges between employers and employees based on mutual interests, 'strikes' and 'lockouts' are likely to become obsolete notions ... \textsuperscript{543}

Not only have ECA supporters tended to dismiss employer/employee conflict as "unnatural", they have also argued that previous conflict and communication difficulties between employers and employees were due primarily to the interference of unions. According to the NZEF, "a union presence in the workplace has frequently hampered, rather than encouraged, the communication process",\textsuperscript{544} a view endorsed by Anne Knowles:

\begin{quote}
[I]t is the ... firmly held view of proponents of the [Employment Contracts] bill that ... divisions that have been created in the workplace by outside constraints imposed by current legislation will be removed, allowing the employer and employees at an enterprise to have full and open communication.\textsuperscript{545}
\end{quote}

Thus, ECA advocates heralded the new free market approach to bargaining as a means of eliminating this unnecessary and avoidable source of conflict. Indeed, according to many

\textsuperscript{542} Brook, supra n 538 at 141.
\textsuperscript{543} NZBRT, Submission to the Labour Select Committee on the Employment Contracts Bill (February, 1991) at 18-19.
\textsuperscript{545} A. Knowles, "Employment Contracts Bill: What's in it for the Workers?" (1991) Examiner (N.Z.), 24 April, 7. Comments of this nature reflect a philosophy which conflicts with the view held by many involved in organised labour. Employer advocates such as Knowles identify unions as "third parties" which are external to the employment relationship. Conversely, many unionists view unions and their members as one and the same (i.e., that a union is simply the collective embodiment of its members). See e.g., R. Freeman & J. Medoff, What Do Unions Do? (New York, Basic Books, 1984) at 8.
supporters of the legislation, the ECA has achieved this goal. Carrol and Tremewan argue that:

The most beneficial consequence of the [ECA] seems to be that managers are now obliged to talk directly with their staff, rather than conduct labour relations through distant agents, and they report that workers are responding positively.\(^{546}\)

Roger Kerr expressed a similar view in 1997, proclaiming the ECA had resulted in:

\[E\]normous changes in enterprise culture, in particular far greater trust and cooperation in workplaces, less disputation and more job security.\(^{547}\)

In the same manner, the NZEF has asserted that "improved workplace communication and flexibility [has] been the [ECA’s] most notable success" as "staff and management [are] now able to talk to each other in ways not possible under a confrontational system."\(^{548}\)
Even the previous National Government subscribed to the view that union elimination served to foster workplace harmony:

The weight of evidence received by the committee pointed to a distinct improvement in employer/employee relations under the Employment Contracts Act 1991, mainly because of the removal of third party involvement at the workplace where employees and management did not want it.\(^{549}\)

As has been noted in chapter one, however, the introduction of the ECA (together with its emphasis on direct bargaining between employer(s) and employee(s)) did not eradicate conflict. In particular, employer dictation increased. How then, did the freemarketers explain this inconsistency? They did so by labelling such dictation and conflict as

\(^{546}\) Carroll & Tremewan, supra note 6 at 187.

\(^{547}\) R. Kerr, "Obstacles to Employment and Productivity Growth in New Zealand’s Labour Market" (1997) Address delivered at the 11th Annual Industrial Relations Conference, New Zealand Institute of International Research.

\(^{548}\) NZEF, "Communications Improved by Contracts Act" (1992) The Press (N.Z.), December 17, 3. See also NZEF, supra note 545 at 205.

\(^{549}\) The Majority Report, at 19.
"anomalous" behaviour that would be corrected by the market place. As one ECA supporter asserted:

The market will ultimately protect workers from being exploited by employers. Firms which fail to pay market rates - that is, based on what a worker is worth with regard to his or her skills and experience - will lose workers. 550

American law professor Richard Epstein, whose work had a major bearing on the content of the ECA, has also placed considerable stock in the self-policing ability of the market:

The employer who decides to act for bad reason or no reason at all ... faces very powerful adverse economic consequences. If co-workers perceive the dismissal as arbitrary, they will take fresh stock of their own prospects, for they can no longer be certain that their faithful performance will ensure their security and advancement. The uncertain prospects created by arbitrary employer behaviour is functionally indistinguishable from a reduction in wages unilaterally imposed by the employer. At the margin some workers will look elsewhere, and typically the best workers will have the greatest opportunities. 551

The protection apparently afforded to employees by the flexibility of the free market was a theme similarly adopted by Douglas Myers, a member of the NZBRT and Chief Executive of one of the largest companies in New Zealand, Lion Nathan. According to Myers, "by far the strongest protection for workers is the ability for them to compete freely for jobs and for firms to compete freely for their services." 552

In sum, then, advocates of the ECA promoted, and continue to promote, three fundamental views as regards labour bargaining. These are, respectively, that the "natural" state of the employment relationship does not involve bad faith, conflict and

551 R. Epstein, "In Defence of the Contract at Will" (1984) 51 U. Chi. L.Rev 947 at 968. Whilst New Zealand does not presently recognise employment at will, a number of the proponents of the present free market are lobbying for the introduction of this concept. See infra note 816.
552 D. Myers, "Where to Now in Labour Relations?", Speech Delivered to the Managing Change in Industrial Relations Conference (31 July, 1990) at 8.
exploitation; that the conflict which occurred in the past was due to the interference of unions and a misconceived statutory framework; and that any conflict and dictation for which employers are responsible, is anomalous, and will be corrected by the market place.

If one were to accept these views, a duty to bargain in good faith would be superfluous. Mandatory good faith bargaining procedures and obligations would be unnecessary in a labour market based on mutual interests, good faith dealings, co-operation, the free and full exchange of information, labour mobility, and the absence of industrial conflict. But does such a market exist in New Zealand, and, more particularly, how accurate are the three views referred to?

The Continuation of Conflict Under the ECA

Any notion that employment under the ECA would be conflict free and universally co-operative was quickly dispelled by what occurred in the market place. As noted in chapter one, strikes and lockouts continue to arise, such that this particular manifestation of conflict can hardly be described as “anomalous”. Less overt forms of conflict such as absenteeism, reduced worker output, turnover, low morale and a reduction in trust


between employees and employers have all persisted since the advent of the ECA, and, according to a number of studies, have increased.\textsuperscript{555}

Moreover, since the enactment of the ECA, numerous industrial ‘battles’ have been fought by all manner of parties. As Kelsey describes:

Industrial disputes stretched across many sectors - factory workers, nurses, teachers, pulp and paper workers, shop employees, bus drivers. Both sides employed tactics that were reminiscent of the darkest days of New Zealand industrial relations, such as the 1912 Waihi strike and the 1951 waterfront lockout.\textsuperscript{556}

In the new adversarial environment, both sides employed tactics which CTU president Ken Douglas labelled ‘the start of American-like industrial terrorism here’. In an extended and acrimonious dispute at the CHH Kinleith mill, unions used scanners to intercept the cell-phone communications between company executives. In turn, the company hired private investigators and security firms to monitor union activities and protect their sites against sabotage. The New Zealand Dairy Company paid low-level officials to campaign against their own union. Alliance Textiles established an employer-subsidised incorporated society, called the Mosgiel Independent Thought Society, to represent workers’ interests as a rival to the union. Air New Zealand, NZ Rail and several hospitals recruited strike breakers from overseas.\textsuperscript{557}

The existence of widespread conflict and a lack of co-operation is also confirmed by a recent study conducted by Ian McAndrew.\textsuperscript{558} McAndrew’s research reveals that contract formation for the majority of New Zealand employees is now a process of employer dictation rather than negotiation and compromise, and that this is primarily because unions are not involved in the majority of negotiations.


\textsuperscript{556} Kelsey, \textit{Rolling Back the State}, at 107.

\textsuperscript{557} Kelsey, \textit{New Zealand Experiment}, at 185-186. Again, conduct of this nature would clearly evidence a breach of the duty to bargain in good faith in British Columbia. See supra notes 210-235.

\textsuperscript{558} McAndrew, supra note 29.
These findings were based on McAndrew’s review of more than 550 separate workplaces. He found that only 22 percent of employers engaged in a “negotiation model” of bargaining, \(^{559}\) whereas the vast majority of employers engaged in a process of contract formation that bore little resemblance to traditional bargaining behaviour. McAndrew summarised his findings as follows:

[O]nly by means of collective dealing with employers through a bargaining agent, and leading to the formation of collective contracts, are workers able in the current environment to compel employers to negotiate. Where this process is in place, workers are almost always in our sample represented by a union. These groups of employees have been relatively successful in resisting employer demands for concessions.

Beyond this unionised collective negotiations sector, other groups of employees ... are not effective in modifying employer positions in any way that resembles negotiation and that, consequently, concessions have been extracted from these workers at a significantly higher rate than is the case for workers in the unionised collective negotiations sector. \(^{560}\)

In short, based on McAndrew’s findings, employer dictation and non-co-operation in the formation (or renewal) of employment contracts is much more likely to occur when the contract is not a collective contract negotiated by a union bargaining agent. These findings are particularly significant, given recent estimates that as few as 20 percent of the New Zealand workforce are now covered by collective agreements negotiated by unions. \(^{561}\) Thus, it would appear that more than three quarters of New Zealand’s workforce experience employer dictation as the mode of contract formation. \(^{562}\)

\(^{559}\) Which McAndrew defines as a bargaining model that exhibits in its logistics and outcomes the sort of give and take conventionally associated with bargaining behaviour in the industrial relations arena. See supra note 29 at 126.

\(^{560}\) McAndrew, supra note 29 at 138.

\(^{561}\) Supra notes 68 and 83.

\(^{562}\) A finding which strongly suggests that the inequality of bargaining power which exists in Canada and the United States also exists in New Zealand. The only difference is that the labour legislation in North America expressly recognises that inequality, whereas the ECA does not.
McAndrew’s empirical research is consistent with other studies,\(^{563}\) and with considerable anecdotal evidence. Instances of employee powerlessness are frequently reported. As one New Zealand employee lamented:

> It’s all very well for a member of a major union to say “No, I won’t accept that, it’s wrong, unfair or unjust”, and to say that with some confidence, or to not even have to say it directly to the employer but through his agent. But now we’re in a situation where workers are without their strong union backing, and are face to face eyeballing the employer. Suddenly the balance of power is weighted very much in favour of the employer.\(^{564}\)

Similar scenarios are reported frequently in the news media, of which the following excerpt from The Press is an illustrative example:

> ... Another worker was hired as a trainee manager in a fastfood outlet. Two weeks later her employer presented her with a contract to sign within half an hour. “When I tried to negotiate, I was told to take it or leave it. He said he would hold pay owing until I did,” she said. Her punishment for being the only one of 15 workers who resisted the employer’s offer was to be sacked on the spot.\(^{565}\)

McAndrew’s findings are further supported by numerous union officials, including Rick Barker, an officer of the New Zealand Service Workers Federation. According to Barker, in many cases bargaining exists in name only:

> [E]mployers have learned ... they have the right to veto, the right to say no and, my God have they exercised it. Take this or leave it. And that’s the end of it in 99% of the cases.\(^{566}\)

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\(^{566}\) See Dannin, *supra* note 53 at 167.
The National Distribution Union expresses a similar view, describing bargaining among those employees who are not union members, in the following terms:

The bargaining process in these cases varies but generally takes the form of the employer preparing a contract, putting it to the staff and then persuading them to sign. It is rare for there to be any negotiation leading to the alteration of the employer-drafted contract. Existing workers find it hard to get overtime, access to additional hours (there is severe underemployment in the retail sector), and promotion if they refuse to sign. This is not a genuine negotiating process. It is a perversion of the term "negotiation".  

These reports ought not to come as any surprise to the present Government, for the previous National Government (the main partner in the coalition) was told by the Department of Labour, before the ECA was enacted, that 60 percent of the New Zealand workforce would be too weak to consummate agreements under the ECA.  That these concerns were cast to one side is a testimony to the lobbying power of those who sought the ECA’s introduction.

Criticism of bargaining under the ECA is not, however, grounded solely on the occurrence of widespread employer dictation. There also appears to be a lack of communication between employers and employees, despite the ECA’s emphasis on direct dealings.

According to the Majority Report:

[E]vidence received has also shown that some employers are using the removal of compulsory unionism as a way to tell employees less than before about their rights. Witnesses said that, especially in companies where the employer has actively encouraged staff to resign from a union, employers often impose contracts without negotiations. Sometimes these contracts contain scant information about employment conditions. Many witnesses, particularly from service and retail industries, said employers do not communicate with them about their contracts and frequently intimidate employees into signing contracts with the message that they will be dismissed if they do not.

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567 National Distribution Union, supra note 442 at 3.
568 Department of Labour, Ministerial Brief (1990) 4 October, at 4 and 43.
569 The Majority Report, at 19.
The trend towards reduced communication and co-operation was also noted by Oxenbridge in her case study of an Area Health Board’s negotiations with its nursing staff:

The union team requested that the [employer] provide them with financial information including projections of wage costs, breakdowns of total wage expenditure (into penal rates and ordinary hours), and information on the proportions of workers working ordinary and penal hours. However, the [employer] was reluctant to divulge such information. Consequently, union negotiators were unable to assess the validity of “ability to pay” arguments put forward by the board, and were also hampered in their efforts to develop a proposal which would not unfairly advantage one group of workers over another. 570

These various reports, both empirical and anecdotal, clearly contradict the “conflict free” and “co-operative” vision of employment propounded by those who lobbied for the ECA. Dannin, for one, expresses no surprise. In her view:

What the NZEF-[NZBRT] hoped to see was a system of workers and employers - without unions - free to engage in contracting at the lowest possible cost. ... The NZEF-[NZBRT] did not want discussion and workplace co-determination with equal partners. They wanted a law that would give them complete control and saw the rhetoric of labour-management co-operation as a benign-sounding way to explain their goals. 571

Dannin’s scepticism is not without foundation. Industry leaders such as Bruce Hancox, former Chief Executive of Brierly Investments Limited, have stated publicly that free market employment and labour relations is about vested, rather than mutual, interests:

Capital is not interested in a moral society, ethical rights and equal distribution of wealth, or income, or fairness. Capital is interested in a return. ... That’s criminal

570 Oxenbridge, supra note 122 at 25. As noted previously, employees have no legal right to request financial data, other than their own individual wage records. See the Minority Report, at 7; and supra note 438. C.f., the position in British Columbia, where information material to a bargain must be disclosed. See supra note 226.

571 Dannin, Working Free, at 55.
in every sort of moral sense ... I know all that. But everybody is doing it, and the competitors in this business are doing it, so we're doing it.\textsuperscript{572}

This comment provides at least one explanation for why McAndrew found employer dictation to be so widespread. Presumably not all managers are intent on dictating to their workforce, and driving down employee wages; but some are (or at least believe they are) forced to do so in order to compete with competitors who do. This “ratcheting” effect serves only to encourage widespread employer dictation and the destruction of employer-employee co-operation.

However, even if one were to assume that a “vision” of co-operation and conflict free employment was, in fact, genuinely held by at least some ECA advocates, one might suggest that such a vision was remarkably naive, given the nature of the bargaining that occurred under the ECA’s predecessor.\textsuperscript{573} Although union membership was compulsory in many instances under the LRA, and collective bargaining the norm, the centralised nature of that bargaining meant that most employers had little or no direct contact with union officials. This “isolation” was further exacerbated by the fact that many unions failed to secure a strong shop floor presence.\textsuperscript{574} Thus, a significant proportion of employers were free to conduct their workplaces unimpeded by direct union contact.\textsuperscript{575}

Employers would, for example, set wage rates unilaterally, a practice which was lawful provided employees were paid the award minimum or above.\textsuperscript{576} In the same manner,

\textsuperscript{572}“Bosses Law Exposed” (1991) \textit{M&\textsc{c} News} (N.Z.), at 7.

\textsuperscript{573} And given the experience in other labour law jurisdictions. The National Labor Relations Act in the United States, for example, is based on the view that certain “recognised” sources of strife and unrest exist in industrial relations. See 29 U.S.C.S. s. 151, Findings and Declaration of Policy (West Supp.) at 270.

\textsuperscript{574} This was primarily because proactive recruitment of members was not essential in a system of compulsory membership and blanket coverage.

\textsuperscript{575} McAndrew, supra note 30 at 183. Interestingly, this finding by McAndrew directly contradicts the NZEF’s assertion that union presence in the workplace was generally the cause of poor communication between employers and their employees.

\textsuperscript{576} Dannin, supra note 33 at 458; McAndrew & Hursthouse, supra note 45 at 119-120.
many employers acted unilaterally on issues such as safety, new technology and overtime. It is, then, little wonder that many employers continued in the same vein in the free market where even less constraints existed. As Dannin argued:

Logic should have suggested that the new law would not alter these attitudes or lead employers to embrace a world of joint partners in the enterprise.\textsuperscript{577}

McAndrew takes a similar view:

For these employers, the Employment Contracts Act was an invitation to do what they felt was necessary to reduce cost structures. With no prospect of having to deal with effective unions, and with little tolerance for doing so if unexpectedly faced with the prospect, these employers wrote ‘reasonable’ contracts, presented then individually or collectively to employees, and expected them to be signed.

... [T]hese employers were not experienced in negotiating with unions, and saw no value in it. Faced with no statutory obligation or real pressure to bargain in a conventional sense, they developed new contracts on the basis of their own impression not only of their own needs, but of employees’ needs, and of what was ‘fair’ and what was ‘realistic’ in the wake of the Employment Contracts Act. Having done so, they generally saw little room for further compromise, believing that they had already compromised their own interests by consideration of the other factors. In essence, they ‘internalised’ the negotiations, ‘seeing both sides’.\textsuperscript{578}

The dictation (and resulting lack of co-operation) that now occurs under the ECA is not, however, simply a continuation of the less than co-operative approach to management frequently taken by employers under the LRA. As a number of commentators have noted, the ECA has increased employer/employee tension. Kelly, for example, suggests that the ECA has created a system of employment and labour relations that is now more adversarial then ever. In his view, legalistic obsession with the contractual nexus has lead

\textsuperscript{577} Dannin, \textit{Working Free}, at 19.

\textsuperscript{578} McAndrew, \textit{supra} note 30 at 183-184.
to formalism and increasingly adversarial attitudes.\footnote{579} Walsh agrees, stating that there now exists in New Zealand:

>[A] growing sense of employer strength and (in some quarters) militancy, and a more conflictual and antagonistic approach to industrial relations rather than the idealised picture of harmonious co-operation sketched by [ECA] advocates.\footnote{580}

These views are endorsed by many in organised labour. According to Ken Douglas, president of the Council Trade Unions, the ECA has created a "revenge" mentality in the market place:

The Employment Contracts Act says you get what you can, when you can, how you can. If that is the game plan, we will play by those rules. We will take our cue from employers, and where there is economic and industrial leverage, we will use it. Let’s not hear the wails about the national interest. Under the Employment Contracts Act there is no such thing. Where the simple force of market power allows employers temporary industrial dominance, be warned. There is a revenge mentality building up, and we will see that as organisational capital, to draw on when we can.\footnote{581}

To some extent, this reaction is occurring already. As Harbridge has noted:

Industrial action, particularly in the public sector, is growing in New Zealand and will no doubt develop as unions (and their members) decide to resist further claims for concession bargaining and to make proactive claims for wage increases. The sting in the tail of the new breed of unions may well be more than most employers bargained on.\footnote{582}

In summary, it is suggested that the experience to date under the ECA serves to discredit the three fundamental views advocated by ECA supporters, to which reference was made


\footnote{581} Douglas, \textit{supra} note 112 at 203. See also Grills, \textit{supra} note 26 at 100.

\footnote{582} Harbridge & Crawford, \textit{supra} note 68 at 245.
previously. In the first place, it is naive at best, and dishonest at worst, to describe employment as a relationship based on complete co-operation and non-conflicting mutual interests. Whilst the objectives of employers and employees can, and do, overlap, this is not always so, as evidenced by the frequency with which conflict continues to occur between employers and employees in New Zealand. This conflict has not been eradicated by the free market, it has simply been left to be resolved by raw market power. The result is frequent and widespread employer dictation.

Secondly, unions cannot be blamed for much of this conflict and dictation, given its frequent occurrence in “union free” work sites and negotiations. And thirdly, not only has the ECA failed to counter this “anomalous” behaviour, if anything, such behaviour has been fostered, and exacerbated, by the present free market approach to bargaining. To call such widespread behaviour “anomalous” is to ignore reality.

Accordingly, assertions that a duty to bargain in good faith has no place in New Zealand because conflict does not, or should not, exist, ought to be treated with scepticism. In the current New Zealand system of employment and labour relations it can be argued with considerable persuasion that mechanisms such as a duty to bargain in good faith, which are aimed at the avoidance, and resolution, of conflict, would have an important and valuable role to play.

*The Efficiencies of Free Market Bargaining*

If one were to put to one side for the moment the existence of this conflict and dictation, one is still left with the issue of how efficient “free market” labour bargaining actually is. If, at the end of the day, a bargaining regime of this nature delivered labour market efficiency, productivity\(^{583}\) and general prosperity, then perhaps there would be less need for bargaining controls.

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\(^{583}\) “Productivity” is used here to mean output per employee.
Proponents of the ECA invariably argue that the current permissive model of bargaining has been responsible for enhanced labour market efficiency.\footnote{Supra notes 108-111.} According to the Public Service:

[W]here employers and employees are free to negotiate solutions which respond directly to the circumstances they face, those solutions are likely to facilitate the appropriate allocation of resources across the economy and the efficient use of those resources.\footnote{Supra note 181 at 219.}

In the same vein, the Public Service is critical of changing the current approach, remarking that “greater prescriptiveness over bargaining arrangements risks reducing flexibility and adaptability to changing circumstance.”\footnote{Supra note 183.} This assertion endorses the New Zealand Treasury's criticism of the bargaining regime that preceded the ECA. According to the Treasury's Government Management briefing in 1987, rising unemployment and low productivity at that time was a direct result of the highly regulated bargaining that occurred under the LRA.\footnote{See Kelsey, New Zealand Experiment, at 174.}

Undoubtedly, many employers have enjoyed the power of dictation since the ECA was introduced. From their perspective, at least, achieving changes to their labour arrangements has been extremely cost effective. Yet critics of the ECA have questioned whether this approach has actually led to enhanced productivity and efficiency. In the first place, a number of the studies which have credited bargaining under the ECA with enhancing productivity have been based on the “impressions” of managers, rather than empirical evidence.\footnote{For example, both Kerr and Knowles refer with approval to 1996 surveys which illustrate, at least in their view, that the ECA has resulted in “increased productivity, operational flexibility and greater training.” (See Kerr, supra note 66 at 96; Knowles, supra note 127 at 86). However, the surveys to which they refer (see The New Zealand Institute of Economic Research, Quarterly Survey of Business Opinion}
"ideological" rather than "analytical", and further, that many employers are confusing wage cuts with enhanced productivity. As Easton points out, while reducing labour costs may be considered important to an employer, "this is not the same thing as [improving] productivity." Kelsey concurs, noting that:

[M]ore people working for lower labor costs does not mean productivity has increased; it merely shows income transfers from labor to capital.

In this respect the ECA may, in fact, foster inefficiency by enabling managers to cut wages, rather than having to look to innovation and skill enhancement, as a means of increasing profitability. As Dannin notes:

The 1993 Labour Select Committee Minority Report found that some employers who were unable to reach agreement restructured so that there were fewer positions. They then offered the new positions to their workers on the condition that they accept the inferior terms or be laid off. The report concluded: "We do believe that the Employment Contracts Act provides a cop-out scenario for poor management in that it can disguise its own organisational deficiencies by artificially cutting labour inputs."

These views are borne out by cases studies such the one conducted by Oxenbridge:

The Act’s opponents maintain that the legislation leads to a short-term cost-cutting focus among employers, who fail to recognise the benefits of investing in long-term initiatives such as skills development, workplace design and work method reform, all of which were included in the [union’s] proposal for workplace reform. The board’s initial rejection of the proposal, and its reluctance to accept that the

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(1996) March, and J. Savage, “What do we Know about the Economic Impacts of the ECA?” (Wellington, NZ Institute of Economic Research, 1996)) were both based on the impressions of managers rather than any statistical or empirical evidence. See Easton, supra note 61 at 214.

Harbridge & Crawford, supra note 68 at 246.

Dannin, Working Free, at 168-169; Harbridge & Crawford, supra note 68 at 247; Rasmussen & Deeks, supra note 61 at 288.

Easton, supra note 61 at 215.

Kelsey, supra note 57 at 271.

Dannin, Working Free, at 169.
concept was relevant to contract negotiations, validates such criticisms of the Act. ... The Act’s implicit aim of reducing wage costs featured prominently in the board’s bargaining strategy, while longer-term initiatives were excluded from negotiations. 594

Pearson and Rose report a similar example:

Leaked Board minutes of a medium sized Auckland manufacturer reveal directors deciding, as a matter of policy, to use the [ECA] to reduce workers’ employment conditions. They estimate savings of several thousands of dollars, which will enhance company profitability. There is no suggestion of expansion, reinvestment or productivity-based bargaining. 595

Such reports are significant, for although wage reduction may enhance profitability in the short term, serious questions must arise as to whether cost cutting contributes to sustainable productivity. According to Dannin:

[I]t has not taken long to see that New Zealand employers’ long-term interests are suffering as skills decline and trained workers become a rarer commodity. Or, to put this into the sort of language preferred by the ECA’s proponents, micro-rationality is leading to macro-irrationality. 596

Easton is equally critical of short term cost cutting:

[W]e need to distinguish between short-term flexibility, such as that the ECA promotes, and long-term flexibility, which is about how a labor force increases its skills and ability to carry out a multitude of tasks. It is possible that long-term flexibility is undermined by short-term flexibility, which inhibits the worker from developing a loyalty to the firm ... while also discouraging the firm from developing ... skills in its workforce. ... [T]he ECA ... could undermine the development of long term productivity. 597

594 Oxenbridge, supra note 122 at 26.
596 Dannin, Working Free, at 292.
597 Easton, supra note 61 at 216.
Free market advocates respond by arguing that the market itself will punish short sighted behaviour of this kind, that only the truly innovative will prosper. Yet such assertions are problematic. They fly in the face of the continued desire of employers to relocate to jurisdictions offering cheaper labour.\(^{598}\) Indeed, New Zealand has been promoted as a destination for foreign employers, for this very reason.\(^ {599}\) Moreover, in a market place that operates on bargaining power there is ample opportunity at present for employers to counter the innovation of competitors by driving their own employees' wages even lower. Given the current climate of high unemployment, there is little prospect of this type of conduct ending in the foreseeable future.\(^ {600}\)

The extent to which employers are using the permissive bargaining model to enhance the efficiency of their individual employees, and their own bargaining processes and outcomes, is also debatable. In terms of the efficiency of individual employees, it is notable that many of the workplaces which have moved from a collective labour arrangement to individual contracts, have simply instituted numerous individual contracts which are identical save for wages rates.\(^ {601}\) Little if any tailoring of employment contracts has been sought. Similarly, research by Harbridge in 1994 indicated that only 16% of the contracts surveyed made any connection between pay and productivity.\(^ {602}\)

Additionally, Gilson and Wagar have questioned whether labour market productivity has been enhanced by the overall drive towards individual employment contracts:\(^ {603}\)


\(^{600}\) In stark contrast to the low wage strategy implemented by many New Zealand employers, a recent report commissioned in British Columbia recommended a high wage/high productivity approach as a means of enhancing the international competitiveness of the British Columbia workforce. See *Managing Change*, at 2-5 & 45.


\(^{602}\) Harbridge, *supra* note 102 at 18.

\(^{603}\) Telecom, for example, apparently has a policy to de-unionise its entire workforce and move all of its staff on to individual contracts. See Kelsey, *supra* note 57 at 267.
Far from finding new innovation and workplace flexibility, the pursuit of individual contracts in unionized organisations is typically found to be associated with simple cost-cutting exercises, defensive business strategies, workforce reduction, and a marked absence of any form of progressive decision-making. Most dramatic of all, however, despite intensive review of all available data, we cannot find a single statistically significant or reliable relationship between organizations pursing individual contracts and our exhaustive measures of firm performance.  

As regards employers seeking to tailor their own bargaining processes and outcomes to enhance their efficiency, McAndrew's research found no identifiable correlation between the level of pressure an employer was under to reduce costs and the employer's choice of bargaining process and contractual outcome (i.e., whether collective or individual in each case). According to McAndrew, the only factors which appeared to significantly affect these decisions were the size of, and union presence in, the particular workplace.

The final, and perhaps most conclusive, indicator that free market bargaining has not delivered the enhanced efficiency promised by ECA advocates, are the poor overall figures regarding New Zealand's recent productivity growth. According to the OECD, during the period 1992-1996 New Zealand achieved a productivity growth rate of just 1.5 percent per annum, a level which the OECD considers to be manifestly inadequate. Other estimates have been even lower. According to economist Brian Philpott, the average annual productivity increase between 1992 and 1996 was just 0.7 per cent. Moreover, it appears that productivity actually fell by 1.6 percent in the 1995/1996 financial year.

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604 Gilson & Wagar, supra note 80 at 230-231.
605 McAndrew, supra note 29 at 128; See also I. McAndrew, “The Structure of Bargaining Under the Employment Contracts Act” (1992) 17:3 N.Z.J.Ind.Rel. 259.
606 McAndrew, supra note 29 at 135 and 139.
609 Bill Birch, Pre-Election Economic and Fiscal Update (1996) at 49.
Nor have poor efficiency returns been limited to the private sector. As Kelsey has noted:

Low morale and high turnover contributed to deprofessionalization in some state sector agencies staffed by an increasingly deskilled and casualised workforce. The institutional memory of central government had been jeopardised. A PSA pilot audit of public service staff in 1996 confirmed workers’ concerns that qualities of professionalism, loyalty, innovation, and commitment to public-well-being were being subordinated to the goals of efficiency and managerialism. Meanwhile, politicians had distanced themselves from responsibility for the operation and inadequacies of the state sector.\textsuperscript{610}

These less than impressive findings accord with Easton’s conclusions as regards the ECA and productivity:

If the Employment Contracts Act had worked in the way it proponents claim, there should have been substantial and ongoing productivity gains. Such gains have not occurred. ... [N]o statistical evidence exists for substantial gains in productivity above the trend of previous years following the introduction of the ECA. ... [T]he primary gains to employers from the ECA have been lower pay and greater freedom to manage, not higher output per worker.\textsuperscript{611}

Many advocates of economic reforms have tended to hypothesize certain benefits and then assume that these benefits have been necessarily realised after the reforms were implemented. They then selectively use anecdotes and statistics to buttress the case. Systematic empirical investigation ... often suggests otherwise. This pattern has been true among advocates of the ECA. On the basis of the empirical evidence and systematic analysis, it is very difficult to reach strong conclusions about the beneficial effects of the Employment Contracts Act. In particular, the poor productivity growth rules out the likelihood that the ECA was a major contributor to the macroeconomic expansion of the mid-1990s. However, the Act does seem to have contributed to the poor real wage growth and the failure of many workers to obtain a share in any increase in the prosperity of the 1990s.\textsuperscript{612}

Rasmussen agrees, noting that:
The economic impacts of the Act have been less than clear cut. Changes in real wages, labor, productivity, and levels of employment and unemployment obviously have some relationship to the ECA. However, how large (or small) cannot be determined with any great confidence ... We have looked at the productivity data and observed that the anticipated productivity benefits of the Act have not been forthcoming.\footnote{Rasmussen & Deeks, supra note 61 at 295.}

Unfortunately for New Zealand, the future (in terms of labour market productivity) does not appear to be any more promising. According to the June 1997 consensus forecasts of the New Zealand Institute of Economic Research,\footnote{Which averages out the predictions of fourteen separate forecasters.} New Zealand’s economy will grow at a long term rate of under 3 percent per annum, which will be based primarily on an increased use of labour and capital, but not on any significant increase in labour productivity.\footnote{Easton, supra note 61 at 213.} These views are supported by the Reserve Bank of New Zealand, which has predicted a trend in productivity growth of no more than 1.25 percent per annum.\footnote{D. Brash, “The New Inflation Target and New Zealanders’ Expectations About Inflation and Growth” (1997) Address to the Canterbury Chamber of Commerce, 23 January.}

Given the forgoing, claims that free market bargaining under the ECA has contributed to enhanced efficiency and productivity, and will continue to do so, are ill-founded. Rather, the only enduring “achievements” of the bargaining regime instituted by the ECA appear to be the enhancement of employer control, and the reduction of wage costs - neither of which have produced any quantifiable increases in the efficiency of the labour market.
Distributive Efficiency\textsuperscript{617}

The rhetoric of free market advocates often refers to the “good of all”: of the ECA delivering benefits to both employers and employees. Indeed this was how the ECA was sold to the New Zealand public by the National Party both before and after it was elected to power in 1990:

By introducing voluntary unionism and changing bargaining procedures [the ECA] will increase productivity, enhance employment and encourage the sharing of benefits that flow from increased output.\textsuperscript{618}

The new bargaining environment will provide exciting opportunities to bargain directly around efficient business operations, leading to substantial productivity gains. It is vital for the future of New Zealand that the opportunity for productivity gains is taken up by employers and employees, and that those businesses share the benefits of those gains through higher wages for all New Zealanders.\textsuperscript{619}

It is also how the ECA continues to be packaged and promoted by its supporters. According to Kerr:

The Employment Contracts Act has seen a fundamental shift in the nature of industrial relations in New Zealand, and one that benefits the majority of employers and employees.\textsuperscript{620}

\textsuperscript{617} The term “distributive efficiency” is used here to describe the distribution of income and wealth among New Zealanders. See for discussion C. Blyth, “The Economist’s Perspective of Economic Liberalisation” in A. Bollard & R. Buckle eds., Economic Liberalisation in New Zealand (Wellington, Port Nicholson Press, 1987) 3.

\textsuperscript{618} National Party, Election Manifesto (1990) at 27. [Emphasis added].

\textsuperscript{619} Address by W. Birch to the New Zealand Parliament, “Introduction of the Employment Contracts Bill” in Hansard, Parliamentary Debates of New Zealand (1990) 19 December, 482. [Emphasis added]. See also the address to Parliament by the Minister of Commerce, Philip Burdon, delivered on the eve of the ECA’s enactment, which included the following excerpt: “The Bill is designed to ensure that New Zealand has an industrial system that will allow workers to enjoy genuine increases in living standards.” See Hansard, Parliamentary Debates of New Zealand (1990) 19 December, 484-485.

\textsuperscript{620} Kerr, supra note 66 at 98. [Emphasis added].
These same supporters berate state intervention and regulation as being harmful to employees. As Kelsey describes:

Treasury wanted government expenditure constrained through a comprehensive reappraisal of existing institutions and policies, especially health, education and social welfare. Inefficiencies, it said, worked against the poor and unemployed by depriving them of the benefits of economic recovery, and lack of incentives prevented people from achieving dignity, security and participation in society.621

The key for both employers and employees, according to Treasury, was a free market approach to employment and labour relations:

Unless the regulatory framework is flexible and permissive enough to allow adaptation to changing conditions, the consequences will be felt in continuing high levels of unemployment, lost opportunities for young people to gain skills, continued slow growth in productivity, and poor economic performance.622

If Treasury is to be believed, the free market introduced by the ECA represented a panacea for the ills of both employers and employees. However, as Deeks has noted, the ability of the free market to equitably distribute wealth has been touted but not substantiated. According to Deeks, there has been little attention paid to:

[T]he ability of the deregulated market to deliver both economic performance and an equitable society. Questions of market regulation or deregulation were not argued in relation to outcomes, that is, in relation to the demonstrable efficiency or inefficiency of the market as a creator of wealth and a regulator of goods and services. Rather they were argued in relation to beliefs, to ideology. The market was given moral authority; it was a prior “good” rather than good as a consequence of what it could and did deliver.623

621 Kelsey, Rolling Back the State, at 83.
Easton concurs, having noted that:

Allegations that policies which make the rich richer will also benefit the poor have been more a matter of wishful thinking by the rich than the conclusions of any rigorous analysis.\(^{624}\)

The concerns expressed by Deeks and Easton have surfaced in the form of employer attacks on the wage of those employees with little bargaining power. As noted in chapter one, while many employees in the primary labour market have received significant pay increases, others have suffered pay cuts or nil increases. In many industries penal rates and over-time allowances have been abolished completely, and base rates have been cut or have remained static. Moreover, it is not only “corporate” employers who have reduced the earnings of their employees. As Kelsey notes:

Perhaps the most poignant case saw the Presbyterian, Methodist and Salvation Army social service institutions offer their workers a flat rate, 10 percent wage increase, in return for abolishing weekend rates and other allowances - at the same time as the Council of Christian Social Services was condemning the inhumanity of the government’s welfare cutbacks. While the agencies argued that the changes were cost neutral, the unions claimed that the employers would save 13 percent on wages. A hospital domestic worker on $451 before tax for a five day week, including weekends, would now receive $382 gross. The union was prepared to negotiate the abolition of penal rates, but it wanted them phased out. The workers went on hunger strike in support of their position. Their union predicted that some of its members ‘would be forced to seek charitable assistance from the very agencies for which they worked’.\(^{625}\)

Ironically, freemarket proponents such as Kerr plead employer poverty as the justification for wage cuts of this kind:

If employers are some how exploiting employees, this implies that a little more could costlessly be squeezed out of employers for the benefit of employees. But,

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\(^{625}\) Kelsey, *New Zealand Experiment*, at 183. [Footnotes omitted].
in a competitive economy, no monopolists enjoy lasting economic rents with pockets waiting to be emptied. There is no more to be squeezed out. What Kerr fails to address is the consolidation that is taking place in the existing bifurcated labour market. Some employees are, in fact, securing a larger piece of the pie, while others simply get left behind. This divergence is frequently about the ability to demand, rather than the ability to pay, and at present, many employees have no ability at all in this regard.

A case in point is Telecom. Sold by the New Zealand Government in 1990 to Bell Atlantic and Ameritech for $4.25 billion, this company enjoyed an increase in profits from $257 million in 1990 to $716 million in the year to March 1996. Yet during that same period, Telecom dismissed half its workforce through redundancies. Moreover, the staff who remained received average salary increases of just 5 percent over that period (contrasted with a net increase in company earnings of 114 percent). Quite clearly then, the pockets of Telecom were far from empty, and yet very little of its prosperity trickled down to its employees.

Tranzrail (formerly New Zealand Rail) presents a similar scenario. Sold in 1993 for $400 million; its revenue per employee increased by 14 percent over the period 1993-1995, yet its personnel costs fell over 11 percent during the same period. In effect, Tranzrail’s

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626 Kerr, supra note 66 at 99.
627 That is not to say that introducing a duty to bargain in good faith would eliminate this divergence. Disparities of income also exist in North America. See e.g., J. Overmyer, “Why the Future is for the Few” (1998) Toronto Star, 31 May; L. Wright, “No Big Gains For Labour. Stats Show Record Corporate Profits Not Trickling Down” (1998) Toronto Star, 1 April, E1. However, what the duty can do is moderate divergence by taking the primary focus of employers away from short term wage cutting, and by focusing employers and employees on a collaborative high wage/high productivity strategy. See infra notes 669-673.
628 Kelsey, New Zealand Experiment, at 183.
629 Kelsey, supra note 57 at 267. During the period 1990 to 1995, Telecom’s staffing levels decreased from over 16,000 to 8,600.
630 Kelsey, supra note 57 at 270.
employees bore the cost of restructuring, while the resulting benefits were enjoyed by the company's shareholders.\textsuperscript{631}

These examples are not anomalies; they reflect the approach taken by numerous employers in New Zealand. Even on Kerr's own estimates (which he delivered in a speech in 1993), the ECA had been responsible for a 17 percent increase in productivity, and yet wages had risen by only 8 percent.\textsuperscript{632} Whilst both of these estimates have since been discredited, the significant feature of Kerr's statement is that even he was prepared to acknowledge the discrepancy between the alleged gains achieved, and the distribution of those gains to employees. Such an acknowledgement from an ardent supporter of the ECA lends significant credence to Kelsey's argument that:

\begin{quote}
Talk of short-term pain for long term gain has meant pain for the poor to achieve gain for the rich.\textsuperscript{633}
\end{quote}

Many critics of the free market are not surprised that the ECA has failed to live up to its billing as regards distributive efficiency. According to Easton, many of the gains made by employers since the ECA was enacted, have, in fact, been achieved at the direct expense of their staff, a finding borne out by the stagnation of the average real wage rate since 1991.\textsuperscript{634} Moreover, as Kelsey argues, the assumption that the pursuit of an internationally competitive market economy and the retrenchment of the welfare state would ultimately benefit all New Zealanders is inherently problematic. In her view:

\begin{quote}
Freemarketers invariably argue that without profits, companies cease to exist, and along with liquidation go jobs. Although this is clearly true, the same can not be said of the need to secure increasingly substantial profits at the expense of employee wage rates. In the case of Telecom and Tranzrail, considerable increases in profitability have resulted in little by way of corresponding gains to employees.
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\textsuperscript{632} Kerr, supra note 110 at 3.

\textsuperscript{633} Kelsey, \textit{Rolling Back the State}, at 11.

\textsuperscript{634} According to Easton, the total rise in real wage levels over the past seven years has been in the order of two percent. See Easton, \textit{Supra} note 61 at 210.
Underpinning [this assumption] was the *unspoken reality* that an export-led recovery by a competitive New Zealand economy depended on continuing depressed wage rates and conditions, and a constant pool of unemployed. Those with greatest access to resources and a superior position on the playing field of economic and social life would prosper and accumulate power. Those with least skills and bargaining power, while waiting for the promised benefits to trickle down, would remain marginal and exploited, abandoned by a streamlined state that has washed its hands of the responsibility for their welfare.  

Free market advocates claim this type of discriminating affect is necessary in the short term, but that ultimately everyone (including all employees) will benefit from the progress achieved by the free market, particularly through job creation. Indeed, as noted in chapter one, Roger Kerr and others have been quick to attribute to the ECA alleged employment growth and a reduction in the numbers of unemployed.

In terms of employment growth, Kerr suggests that the ECA has been responsible for a 17% gain in employment over the period 1991 - 1996. Knowles concurs, arguing that 220,000 new jobs have been created by the ECA. And yet, such claims are misleading. In the first place, total job growth has been well below the natural increase in the labour force, hence, no overall gains have been achieved. Secondly, by 1994 only half of the job losses incurred since the 1980s had been recovered. Thirdly, many of the jobs that have been created since 1991 have been part-time, low paid and of uncertain tenure. And finally, job creation has done little to reduce the number of New Zealanders on benefits. As the Minister for Social Welfare recently pointed out:

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635 Kelsey, *Rolling Back the State*, at 28. [Emphasis added].
636 *Supra* note 116.
637 Kerr, *supra* note 66 at 96.
638 Knowles, *supra* note 127 at 87.
639 Kelsey, *Rolling Back the State*, at 336-337. Kelsey notes that New Zealand’s population during the early 1990s was growing at 12 percent per year.
In the year ended June 1996, our strong economy saw 62,000 more people employed, but only 5,000 fewer on unemployment benefits and an extra 7,000 on other benefits.\textsuperscript{641}

An assertion that is made hand in hand with claims of job growth, is that the ECA has been responsible for a decline in unemployment. Once again Kerr is quick to point out that the official level of unemployment has declined from 11 percent in 1992 to 6 percent in 1996.\textsuperscript{642} Yet Kerr fails to address a number of significant issues. First, unemployment in New Zealand in 1986 was just 4 percent. It cannot, then, be said that the ECA has improved upon, or even matched, the employment generation of previous systems of labour relations. Secondly, Kerr ignores the fact that unemployment is predicted to rise.\textsuperscript{643} Thirdly, the notion that unemployment has declined contradicts the statistic mentioned previously, namely that job growth is at a level which is less than the natural expansion of the labour force. Where, then, are the new jobs which have apparently been filled by the unemployed?

The answer to this inconsistency, is one of definition. Something Kerr fails to mention is that the definition of "unemployed" has been altered by the Government on several occasions since 1990, and on a number of those occasions the scope of the term has been reduced.\textsuperscript{644} For example, the 1991 Census excluded from the labour force those who were not available to commence employment during the week prior to the census date.\textsuperscript{645} Moreover, at present, people working one hour or more a week are defined as


\textsuperscript{642} Kerr, supra note 66 at 96.

\textsuperscript{643} According to the New Zealand Institute of Economic Research, unemployment in New Zealand will reach 7% during 1998. See New Zealand Institute of Economic Research, Economic Update 4 (September, 1997).

\textsuperscript{644} Hence the explanation for why the level of "unemployed" can be reducing, even although the rate of job growth is insufficient to meet an expanding workforce.

Yet these are just two of the methods which have been used to manipulate New Zealand’s unemployment figures:

The number of people unemployed continued to rise under National - although the figures remained subject to manipulation by changing eligibility criteria, introducing work and training schemes, reclassifying benefits, or altering the way the statistics were compiled. For example, in December 1991, the number of officially unemployed remained almost static for the first time in years at 172,700. But the total number of *jobless* - including those not immediately available for work or not seen as trying hard enough to find it - continued to rise to 270,000 or 15.7 percent of the workforce.

The disparity between those who are “unemployed” and those who are “jobless” remains. By June 1995 official unemployment had fallen to 6.3 percent of the workforce, yet the official “jobless” figure stood at 9.7 percent. Both statistics serve to challenge the questionable notion that increasing employer power and profits will necessarily lead to new jobs. As Dannin argues:

> Treasury believed that if wages could be lowered more people would be hired. It thought that an employer would hire two workers if it could get them for the price of one rather than simply lowering the pay of the worker and adding the difference to its profits. However, it does not necessarily follow that being able to pay a worker less for the same output means that the wages not spent will be used to increase the number of jobs rather than to increase profits.

Kelsey agrees. In her view unemployment and poverty have now become structural features of New Zealand life:

> Liberal reformers might talk of a high employment, high productivity, high income economy. But international competitiveness *requires* low wages and minimal

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646 Kelsey, *supra* note 57 at 271.
648 Kelsey, *New Zealand Experiment*, at 261.
conditions, a 'natural' rate of unemployment, and rich and poor, educated and unskilled, competing for the available jobs within the private sector market-place. As John Roberts observed early in the piece: 'Relatively low wages and unemployment are as inevitable in a ‘performance’ economy as capital gains and generous personal pension deals.\(^{650}\)

Some might say that it is not the role of the free market to effect distribution; that each individual must be self-reliant and achieve their own gains.\(^{651}\) Indeed, the current Minister of Finance, Bill Birch, was reported in March 1995 as having said that income disparities “are widening and they will widen much more. That doesn’t worry me.”\(^{652}\) While Bill Birch is obviously entitled to his own opinion, this statement directly contradicts the rhetoric upon which the ECA was sold to the New Zealand public; namely that the ECA would enhance distributive efficiency by delivering economic benefits to all. If that is not to happen, many employees in New Zealand have been deliberately misled.

The Efficiency Implications of a Duty to Bargain in Good Faith

As the preceding analysis illustrates, the system of bargaining introduced by the ECA has largely failed to eliminate conflict, foster co-operation, increase labour market productivity and distribute wealth. The question then becomes whether introducing a duty to bargain in good faith would make any difference.

Some have said that the imposition of this duty in Canada creates inefficiency. Palmer, for example, argues that the duty distracts parties from the central purpose of working out an agreement and instead encourages them to build up a case for litigation.\(^{653}\) In making this assertion, Palmer referred to the views of Cox, an American academic:

\(^{650}\) Kelsey, *Rolling Back the State*, at 108-109. [Emphasis added].

\(^{651}\) See the discussion by Kelsey, *Rolling Back the State*, at 16-23.

\(^{652}\) New Zealand Herald (1995) 16 March. This statement contrasts markedly with Birch’s claims at the time he introduced the ECA. See supra note 619.

Hammering out a labour agreement requires all the negotiators’ skill and attention. To divert them from the main task by putting a value on building up or defeating an unfair labour practice case diminishes the likelihood that the negotiations will be successful.\footnote{A. Cox, “The Duty to Bargain in Good Faith” (1958) 71 Harvard L.R. 1401 at 1440.}

Critics of labour regulation also argue that mandatory obligations create inefficient barriers to employment. This argument would presumably be made in relation to imposing a duty to bargain in good faith, just as it has been made in respect of the requirement for just cause in dismissals:

The most potent form of protection for employees dissatisfied with their employers is the opportunity to gain alternative employment. ... Any moves to impose statutory restrictions must be judged in terms of their impact on the willingness to take on new staff. Restrictions on job termination inevitably raise employment barriers, particularly to the most marginal workers. Any increased job security for some comes at the expense of reduced job security for others - as always, there is no ‘free lunch’.\footnote{NZBRT, Employment Contracts Bill: Supplementary Submission to the Labour Select Committee on the Options Paper 3 (March 1991) at 3-4. See also Kerr, supra note 66 at 100.}

However, it is suggested that neither of these criticisms are substantial. In terms of the concerns expressed by Palmer, the BC Board has stated that it will not allow itself to be used as a substitute for the negotiating table.\footnote{See e.g., Noranda at 160-161.} The same approach could readily be taken in New Zealand. Moreover, in the current climate of falling dues and increasing workloads (for unions) and increasing competition (for employers), one ought seriously to question the idea that parties would willingly seek to incur the expense of litigation, a view born out by the absence of recent litigation over the duty in British Columbia.

In terms of the second criticism, the extent to which the duty to bargain in good faith would restrict the negotiating tactics of employers (and hence add to their costs and unwillingness to employ) would likely be significantly exceeded by the efficiency gains a duty of this nature can deliver. These gains can be divided into four categories; the
rationalisation of the bargaining process; the avoidance of disputes; the enhancement of collaboration; and the enhancement of distributive efficiency.

Efficiency Gains in the Bargaining Process

There are any number of ways in which a duty to bargain in good faith can enhance the efficiency of the bargaining process. In the first place, there would no longer be a need for any parties to strike or lockout simply to compel their counterparts to approach the bargaining table. Moreover, the requirement for full and frank disclosure would enable parties to distinguish “present reality from past rhetoric,” thereby ensuring that each party clearly understood the other’s position. This in turn would reduce the likelihood of uninformed disputes. As one Canadian Labour Board has pointed out:

As a general matter of policy, if parties are to engage in economic conflict their differences ought to be real and well-defined. It is patently silly to have a trade union ‘in the dark’ with respect to the fairness of an employer’s offer because it has insufficient information to appreciate fully the offer’s significance to those in the bargaining unit.

Additionally, the requirement to consider and offer counterproposals enhances the prospect of accommodation, which can, in turn, reduce the number of issues that remain in dispute between the parties. Again, according to the same Canadian Labour Board:

[R]ational discussion is likely to minimise the number of problems the parties are unable to resolve without the use of economic weapons thereby focusing the parties’ attention in the eleventh hour on the ‘true’ differences between them.

\[657\] Something which presently occurs in New Zealand. See supra note 553.


\[660\] Ibid. at 113.
These views accord with common sense. Not only is rational discussion likely to be productive, a lack of dialogue can have the opposite effect, namely the fostering of entrenchment and mistrust. As Oxenbridge noted in her case study, for example, the unwillingness of an employer to disclose the financial rationale for its proposal not only slowed negotiations down, it created conflict and animosity.661

The value of a duty to bargain in good faith in terms of enhancing the efficiency of the bargaining process was illustrated well in *Canadian Industries Ltd*.662 In that case the Ontario Board censured an employer’s refusal to disclose the basis for its interpretation of anti-inflation guidelines. The Board held that had the employer been more willing to discuss the basis for its views, the parties might have discovered at an early stage that the employer’s understanding was wrong, and an impasse could have been avoided.

The decision in *Med Lab Workers* represents a further case in point.663 The employer wanted a single collective employment contract covering all clinical services staff. The plaintiff union and its members (who made up a proportion of the clinical services staff) sought a separate contract covering their specialist positions. Over a number of years the employer attempted to bypass the union and negotiate directly with its members, and to discredit the standing of the union. Litigation resulted. The case was initially heard in 1994 by the Employment Court which found in favour of the union. The employer appealed and when the case finally reached the Court of Appeal in 1996, Justice Hardie Boys was moved to note:

> On the hearing of this appeal it very quickly became apparent that a quite minor, and unnecessary, dispute had got out of hand. It had grown out of all proportion, and had driven the parties into entrenched positions from which the public interest, and their own, demanded that they extricate themselves. The manner in which the Employment Court’s judgment was expressed could only have exacerbated the

661 Oxenbridge, *supra* note 122.
situation. This Court therefore invited the parties to accept mediation of their dispute, intimating that it would none the less give judgment on the legal issues raised at an appropriate time in the light of the progress of mediation. Happily the invitation was accepted. Since then this Court has been informed by counsel that mediation has made some progress.⁶⁶⁴

One wonders why it required the expenditure of considerable legal fees and the pertinent comments of a Court of Appeal judge before the parties sought the assistance of a mediator. By the time the case reached the doors of the Court of Appeal much of the damage in terms of animosity between the parties and the creation of entrenched positions had already occurred. A duty of good faith bargaining could be used in New Zealand, as it is in British Columbia, to minimise this type of occurrence by mandating timely discussion and (if necessary) mediation. The latter is particularly important, for as the experience in British Columbia has shown, settlement becomes “more difficult and unlikely the longer a dispute continues.”⁶⁶⁵

The Avoidance of Disputes

The potential efficiency gains to be achieved from a duty to bargain in good faith are not, however, limited to negotiation process itself. This duty can also lead to substantive efficiencies in the form of settlements and the associated avoidance of economic sanctions. As the BC Board has noted:

Negotiation nourished by full ... discussion stands a better chance of bringing forth the fruit of collective bargaining than negotiation based on ignorance and deception.⁶⁶⁶

⁶⁶⁴ Ibid. at 9.
⁶⁶⁵ Yarrow Lodge, at 34.
Increasing the rate of agreed settlement and reducing the occurrence of economic sanctions would clearly assist the efficiency of the New Zealand labour market. Strikes and lockouts can result in significant costs including loss of workdays and productivity, the undermining of client goodwill and the loss of employee trust and motivation. And the reality is that many of these costs extend well beyond the tenure of a particular dispute. As Deeks describes:

Historical conflicts can become part of an organisation's culture. Most organisations, then, have to recognise that their current labour relations climate is, for good or ill, partially conditioned by the attitudes and stereotypes, values and traditions inherited from the past. 667

The public and all parties involved in employment and labour relations system have an interest in avoiding these costs. Even proponents of the free market would acknowledge the value of avoiding strikes and lockouts caused by factors other than the proper functioning of the market. For example, where a strike or lockout is caused by a lack of understanding or the conveyance of inaccurate information, the stoppage cannot be said to be an informed action nor an appropriate reflection of market forces. Imposing a duty to bargain in good faith could assist in reducing the incidence of all work stoppages, including the ill-informed, and, as a result, have significant benefits in terms of market productivity and efficiency.

Nor would dispute avoidance be restricted to the initial negotiation of employment contracts. As the 1968 Woods Report on Labour Relations in Canada noted:

Collective bargaining works more effectively and yields more satisfying results when both sides to the negotiations act in good faith. This applies both to the negotiation of an agreement and to its administration. Where one party does not act in good faith, the disease is usually contagious. A sign of bad faith by one side is likely to make the other suspicious, and to weaken the possibilities for

667 Deeks & Boxall, supra note 5 at 233.
meaningful accommodations both before and during the life of the collective agreement.\textsuperscript{668}

\textit{Collaboration and Innovation}

The third efficiency gain which can be achieved through a duty to bargain in good faith, is the enhancement of collaboration and innovation. A number of the commentators who have criticised the short term cost cutting promoted by the ECA, have argued that sustainable productivity can best be achieved by co-operation and collaboration between employers and employees. According to Douglas:

\begin{quote}
\textit{Industrially, the challenge is to engage the knowledge, experience and commitment of workers in improving the quality of production and the responsiveness of production systems to changing technological and market threats and opportunities.}\textsuperscript{669}
\end{quote}

Free market proponents tend to agree with these comments,\textsuperscript{670} although many believe such co-operation and commitment will occur as a natural result of free market bargaining. As noted, however, in many cases in New Zealand this has not occurred. Rather, numerous employment relationships in New Zealand are notable for employers dictating to their employees, a practice which serves to foster antagonism and a ‘revenge’ mentality, rather than co-operation and collaboration. Imposing a duty of good faith bargaining could reverse this trend by encouraging parties to work together and listen to each other in the course of contract formation and operation.\textsuperscript{671}

\begin{footnotesize}
\begin{enumerate}
\item Douglas, supra note 112 at 204. For similar statements in Canada, see e.g., A. Verm & J. Weiler, Understanding Change in Canadian Industrial Relations: Firm-Level Choices and Responses (Kingston, IRC Press, 1994); A. Verm & J. Weiler, “Restructuring in Industrial Relations and the Role for Public Policy” in Bruce, B., ed., Work, Unemployment and Justice (Montreal, CIAJ, 1994).
\item See e.g., Carroll & Tremewan, supra note 6 at 186.
\item The OECD has stressed that New Zealand must focus on skill enhancement and training if satisfactory levels of employment growth and productivity are to be achieved. See Boxall, supra note 68 at 32. Fostering collaboration and co-operation through good faith dealings would assist in achieving this focus. Notably, skill enhancement and collaboration are strategies also recommended by the recent labour relations review in British Columbia. See Managing Change, at 2-5 & 45.
\end{enumerate}
\end{footnotesize}
Significantly, a strategic and co-operative approach of this nature would also recognise that employers and employees have vested interests in employment (rather than simply denying the existence of these interests, as many free market advocates do). As Douglas notes:

A strategic response recognises that employers and unions may pursue their own interests, but with a common interest defined by the need to develop a flexible, innovative and efficient industrial system.  

*Distributive Efficiency*

The fourth and final efficiency gain that will be mentioned, is that of distributive efficiency. Because a duty to bargain in good faith emphasises sustainable innovation through co-operation, the duty may also enhance the distributive efficiency of bargaining by shifting the current focus of many New Zealand employers away from wage cuts. In other words, if gains in productivity can be made through co-operation and collaboration, employers are less likely to focus on reducing wages as the primary means of increasing profits. Having said that, it is conceded that securing this change in approach may be far from easy, particularly given the success that many employers have had to date in reducing wage costs under the ECA.  

*The Precedent For Seeking Efficiency through a Duty to Bargain in Good Faith*

On one view, the duty to bargain in good faith is a dispute resolution mechanism. It is intended to facilitate settlements and minimise strikes and lockouts. In doing so, it promotes efficiency in terms of both labour relations procedures and outcomes.

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672 Douglas, *supra* note 112 at 207.

673 Indeed, it will be suggested in chapter five that in order for a duty to bargain in good faith to be effective, there will need to occur a change in ideology among many New Zealand employers and shareholders. See *infra* notes 765-767.
Notably, there precedent exists in the ECA for the imposition of this very type of mechanism. Whereas the ECA does not contain or mandate any dispute resolution procedures for bargaining disputes, it does contain mandatory procedures for the resolution of personal grievances and disputes of right.\(^{674}\) Where these types of disputes arise, the specified procedures must be followed, and the use of economic sanctions as a means of resolving those disputes is prohibited. The Government has sought to justify this restriction on the basis of efficiency. In its response to the ILO investigation, the Government stated:

> Strikes are unlawful in relation to personal grievances and disputes because there are adequate procedures for resolving them through the Employment Tribunal to which all employees have access.\(^{675}\)

There is no reason in principle for not also applying a dispute resolution mechanism to bargaining disputes. Indeed, in 1990, Government advisors suggested the ECA ought to contain a mechanism of this nature, in the form of mediation.\(^{676}\) According to the advisors in question, not to include this mechanism in the ECA:

> [R]uns the risk that the State has no capacity (short of some form of one-off legislative intervention) to influence bargaining behaviour, and particularly disruptive bargaining behaviour. On the other hand, the establishment of some institutional presence signals publicly that the State has some interest in constraining excessive bargaining behaviours and promoting industrial harmony.\(^{677}\)

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\(^{674}\) ECA, ss. 32 and 44. The procedures detailed in the First and Second schedules to the ECA apply by default unless an employment contract contains alternative procedures which are not inconsistent with the requirements of the ECA. See ECA, s. 32(2).


\(^{677}\) *Ibid.* at 4. It must be noted, however, that enacting a duty to bargain in good faith does not eliminate the possibility of legislative intervention in labour relations. Indeed, such intervention occurs on occasion in Canada. By way of recent example, in late 1997 the Federal Government legislated the return to work of over 40,000 striking postal workers. (See E. Stewart, “Mail Legislation Zips Through” (1997) Toronto Star, 3 December, A1). In June of this year the British Columbia Government legislated the resolution of negotiations between teachers and school trustees by enacting the Public Education Collective Agreement Act 1998 - Bill 39. (See K. Bolan, “Minister’s Move to Impose Teachers’ Deal Draws Fire” (1998) The
Unfortunately this recommendation was rejected. Given the continuation of conflict under the ECA, this matter ought to be revisited. Imposing a duty to bargain in good faith (together with an associated mandatory mediation procedure) would provide a mechanism through which the State could promote industrial harmony and efficiency. And, at the very least, a development of this nature could not be said to be inconsistent with the dispute resolution procedures already contained in the ECA.

4.2 Freedom and the Duty to Bargain in Good Faith

The Importance of Freedom in the ECA

Freedom is the second primary principle of the ECA. According to its Long Title, the ECA is an Act:

- to promote an efficient labour market and, in particular, -
  (a) To provide for freedom of association:
  (b) To allow employees to determine who should represent their interests in relation to employment issues:
  (c) To enable each employee to choose either-
      (i) To negotiate an individual employment contract with his or her employer; or
      (ii) To be bound by a collective employment contract to which his or her employer is a party:
  (d) To enable each employer to choose -
      (i) To negotiate an individual employment contract with any employee:
      (ii) To negotiate or to elect to be bound by a collective employment contract that binds 2 or more employees.
  (e) To establish that the question of whether employment contracts are individual or collective or both is itself a matter for negotiation by the parties themselves.

Vancouver Sun, 26 June, A3). Nor are enactments of this kind simply a recent occurrence. For example, between 1987 and 1993, back to work legislation was enacted on 13 occasions in the Canadian public sector. (See G. Swimmer & M. Thompson eds., Public Sector Bargaining in Canada (Kingston, IRC Press, 1995) at 436). The point is, however, that without a dispute resolution mechanism, legislative intervention is the only avenue for state intervention.
Free choice is central to these objectives. In the same manner, section 18(1) provides:

Negotiations for an employment contract may, subject to this Act, include negotiations on any matter, including all or any of the following matters:
(a) The question of whether employment contracts are to be individual or collective:
(b) The number and mix of employment contracts to be entered into by any employer.

Consistent with maintaining free choice, the ECA leaves the method and process of bargaining entirely up to the parties. As noted in chapter one, no provision is made for conciliation, arbitration or compulsory mediation and, generally speaking, parties in negotiations for a collective contract are free to use economic sanctions at any time. 678

Given this context, it is necessary to consider how imposing a duty to bargain in good faith might impact on the free of choice of New Zealand employers and employees.

The Duty to Bargain in Good Faith and Its Impact on Freedom

Some would say that a duty to bargain in good faith restricts the substantive (as well as the procedural) freedom of employers and employees. According to Palmer, the duty compels agreement because tribunals have, on occasion, associated a lack of agreement with a lack of good faith. He seeks to sustain this view by reference to Labour Board decisions in the United States in which the opinion has been expressed that good faith negotiations ought necessarily to result in agreement. 679 Because of this alleged 'compulsion' to agree, Palmer asserts that:

The concept of 'good faith' would seem to be incompatible with the freedom of the individual company or union to enter, or to refuse to enter into contractual relationships on terms of their own choice. 680

678 For discussion on the limited restrictions on the use of strikes and lockouts, see supra note 38.
679 Palmer, supra note 653 at 415.
680 Palmer, supra note 653 at 417.
However, on the basis of the decisions of the BC Board, one might question the current validity of this criticism. As noted, compliance with the duty has not been interpreted as requiring parties to agree or to make concessions.\textsuperscript{681} Furthermore, a significant distinction can be drawn between the duty as it applies in the United States, how it applies in Canada, and how it would presumably apply in New Zealand. In the United States it has been held that whilst employers can justifiably and unilaterally refuse to discuss permissive topics, employers must settle certain mandatory topics.

This differentiation between “mandatory” and “permissive” bargaining topics has not been replicated in Canada.\textsuperscript{682} The identification of bargaining topics is for the parties to determine. Canadian employers cannot, then, unilaterally reject an issue from the bargaining agenda, but nor can they be compelled to negotiate a resolution on a particular issue. The same would be true in New Zealand. At present, the range of topics to be addressed in negotiations is itself a matter for negotiation.\textsuperscript{683} It is extremely unlikely that this freedom would be altered by the imposition of a duty to bargain in good faith.

Although Palmer’s claim of substantive compulsion would be of questionable application in the New Zealand context, there is more validity in the claim that the duty to bargain in good faith would restrict the procedural freedom of employers, employees and their representatives. A negotiating party could not, for example, refuse to negotiate or refuse to explain their proposals, or refuse to consider alternatives or counter-proposals, as they can now.

Yet such restrictions must be placed in context. Although the duty would carry with it a number of procedural obligations, it would not undermine the relative positions of the parties. For example, in Canada the duty has not been used to redress imbalances of

\textsuperscript{681} See supra notes 241-242.

\textsuperscript{682} See e.g., Pulp & Paper Industrial Relations Bureau, 77 C.L.L.C. 16,109 (B.C.L.R.B.).

\textsuperscript{683} ECA, s. 18.
bargaining power between employers and unions.\textsuperscript{684} As the Ontario Labour Board has noted, the existence of the duty is not to result in:

\begin{quote}
[P]arties abandoning the bargaining table for the Board simply because the bargaining process is not working out in their favour.\textsuperscript{685}
\end{quote}

This is a view endorsed in British Columbia, where the BC Board has acknowledged that “[c]ollective bargaining is not a process carried on in accordance with Marquess of Queensbury rules.”\textsuperscript{686}

Moreover, a duty to bargain in good faith would not prevent either party effecting a strike or a lockout or exercising other negotiating tactics, including appealing for public support through picketing or advertising campaigns.\textsuperscript{687} While there would be some restrictions on when strikes or lockouts could lawfully be effected,\textsuperscript{688} these restrictions would apply to both employers and employees and would not, then, alter their relative bargaining power. In sum, the duty to bargain in good faith would have only limited affect on the freedom of employers and employees.

Nonetheless, free market advocates could well argue that any restriction at all would be inconsistent with the free choice that is central to the ECA. But would it? Before undue emphasis is placed on this claim, it is important to assess what “freedom” under the ECA realistically means.

\textsuperscript{684} See e.g., \textit{United Steelworkers of America} v. \textit{Radio Shack}, 80 C.L.L.C. 16,003 (O.L.R.B.).

\textsuperscript{685} \textit{The Citizen}, [1979] 2 Can.L.R.B.R. 251 (Ont.) at 266.

\textsuperscript{686} \textit{Noranda}, at 160.

\textsuperscript{687} See e.g., \textit{The Ottawa Newspaper Guild, Loc. 205 \\& Ors and Journal Publishing Co. of Ottawa Ltd}, [1977] 2 Canadian L.R.B.R. 183 at 195. Although note that picketing in Canada can only occur in relation to a legal strike. See e.g., BC Code s. 65(3). Similar restrictions apply in New Zealand. See ECA, ss. 61-63.

\textsuperscript{688} The BC Code, for example, prohibits strikes or lockouts until after the parties have bargained collectively in accordance with the Code. See \textit{supra} notes 250-251.
How 'Free' is the Free Market?

The notion of a free market under the ECA is imperfect, for a number of reasons. In the first place, those who lobbied for the ECA also sought a system of enforceable rights based on contract. That system now exists, and relies on the support of the State to enforce contract and property rights. Whilst it is not suggested that a labour market could operate without enforcement mechanisms, it is, nevertheless, important to recognise this qualification. As Bakan argues:

It is simply nonsensical to reject regulation and state ownership on the ground that they involve state ‘intervention’ when their alleged opposite, the ‘free market’ is itself made possible only through operation of an elaborate state apparatus. Deregulation of a particular area of social or economic activity means not that the state has pulled out of that area but only that legislative restrictions on the exercise of state enforced property and contract rights are lifted. After deregulation, laws, courts, police and the penal system continue to create, enforce, and protect contract and property rights.

Secondly, the notion of a “free” market is also imperfect to the extent that state regulation provides New Zealand employers with a unilateral right to incorporate, and thus collectively contract for labour, whereas employees have no reciprocal right to collective employment contracts, a point noted by Dannin:

[F]ree market advocates never suggested that employers be freed by exposing them to the full rigors of the market place without the special protection offered corporations and their shareholders.

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689 See e.g., Brook, supra note 538 at x.

690 J. Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto, University of Toronto Press, 1997) at 150.

691 Dannin, “We Can’t Overcome” at 51. Indeed, the many common law judges now appear to be reasserting the importance of separate corporate personality. See for example, the recent retrenchment of the grounds on which the corporate veil will be pierced. See Lord Wedderburn, Labour Law and Freedom: Further Essays in Labour Law (London, Lawrence & Wishart, 1995) at 83-84.
Thirdly, the notion of a truly “free” market becomes less convincing when one considers the comments of the New Zealand Government regarding the purpose of the ECA. Prior to the enactment of this legislation, concerns were expressed that a free market would provide employees with excessive bargaining leverage in the event the New Zealand economy took an upturn.⁶⁹² In response, the Prime Minister at the time, Jim Bolger, was reported to have said that if more buoyant times arrived he would alter the ECA.⁶⁹³ On the basis of such a response one might question whether the free market was intended to be ‘free’ for both employers and employees, a suspicion further fuelled by comments made by the Government in response to the ILO investigation:

The Government submits that the Act is an appropriate mechanism in the new environment since it gives businesses the freedom they need to adopt flexible work practices in order to compete effectively in international and domestic markets.⁶⁹⁴

Indeed, one could question whether the ECA would have been introduced at all had the New Zealand economy been more buoyant in the 1980s and early 1990s. As Harbridge has noted:

The existence of an unemployment rate in excess of 10 percent is a powerful bargaining weapon and there is pretty widespread agreement that the bargaining imbalance of the Employment Contracts Act would never have been implemented in strong economic times, and if unemployment had not been so high.⁶⁹⁵

Comments such as these hint at the fact that many supporters of the ECA are not proponents of the “free market” in the pure sense. Many employers lobbied strongly for the ECA, because they saw it as a means to an end in a particular economic climate. If the

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⁶⁹³ Barber, ibid.


⁶⁹⁵ Harbridge, supra note 89 at 70.
bargaining strength of employees were now to become disproportionate to their own, undoubtedly many of those same employers would lobby for state imposed restrictions on wages and conditions; arguing that such restrictions were necessary in order to maintain the international competitiveness of New Zealand businesses (and hence “necessary” for the good of “all”). As Grills so aptly puts it, many who presently sing the praises of the free market to any who will listen, would, over night, become “born again Government interventionists”.

Fourthly, and lastly, the ECA itself fails to enact a truly “free” labour market. As noted, in several instances the Act prohibits the use of a party’s economic strength. The requirement to follow the prescribed, or equivalent, dispute resolution procedures for personal grievances and disputes of right are the clearest example of this prohibition. A further, and perhaps more significant, example is the prohibition on employees striking to secure multi-employer contracts. According to the Government, this restriction was required in order to:

[Protect the freedom of choice of employers as well as employees in the negotiation structure.]

This explanation is entirely unconvincing. The restriction does nothing to protect the freedom of employees. Indeed, it has quite the opposite effect by limiting their negotiating strategies. Moreover, the irony of this explanation is that the Government is prepared to assume employees are able to choose their preferred form of contract despite the existence of employer bargaining power in a deregulated labour market, while at the same time arguing that employers in the same market place need legislative protection in order to exercise their free choice regarding their desired form of contract. In many instances the exact opposite is true.

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696 Grills, supra note 26 at 100.
697 ECA, s. 62.
698 The Government’s Reply, supra note 155 at 227.
One suspects the true motivation for this restriction is efficiency rather than freedom. As noted in chapter one, the previous National Government expressed concern with the inflexibility of the national and industry awards formed under the ECA’s predecessor. The prohibition on striking for multi-employer contracts appears to be aimed at reducing the number of these arrangements, and, to this extent at least, the ECA has been extremely successful. Whatever the true motivation for this restriction, the prohibition on striking for multi-employer contracts represents disproportionate treatment of employers and employees and serves to further undermine the notion of a truly “free” labour market.

Does Freedom for One Mean Freedom For All?

The free market introduced by the ECA is the result of liberalism. As noted, this movement identifies the individual as paramount. Liberalism has also sought to re-interpret the concept of “freedom”. As Kelsey notes:

*Freedom* no longer meant liberation from enforced economic, racial or social inequality. Instead, it had the meaning of ‘freedom of the individual to achieve objectives free of constraining conditions.’ ... All this would *empower* individuals

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699 *Supra* notes 63-66. It is interesting to note the approach taken on this issue in British Columbia. The current policy of the BC Board is that the bargaining rights of trade unions are limited to the particular unit in respect of which they have been certified. (See e.g., *Northwood Pulp & Timber Ltd and CEP, Loc. 603 (Re)*, 95 C.L.L.C. 220-001 (B.C.). For earlier authority to the contrary, see e.g., *Famous Players Inc (IRC No. C213/89, affirmed (1990), 5 C.L.R.B.R. (2d) 107)*). As a result, pushing to impasse an insistence on industry or national bargaining has been held to be contrary to the duty to bargain in good faith. (See e.g., *Masonry Contractors Ontario and LIUNA Loc. 183 (Re) (1996), 33 C.L.R.B.R. (2d) 288 (Ont.))*). There are, however, a number of instances in British Columbia where bargaining takes place at an industry level. In the British Columbia construction industry for example, bargaining is required to take place on a multi-employer and multi-trade trade basis between representatives of the construction industry (the BC Construction Labour Relations Association) and a trade union bargaining council. (See BC Code ss. 55.1-55.26, as amended by the Labour Relations Code Amendment Act, 1998 (S.B.C. 1998, c.33)). Similarly, industry bargaining has occurred in the British Columbia seafood processing industry, the British Columbia film industry and the solid wood sector of the British Columbia forest industry. (See *Managing Change*, at 39-41). Some sectors of the British Columbia Public Sector have also centralised their bargaining functions. (See e.g. *Public Sector Employers Act* (R.S.B.C. 1996, c.384, ss. 10-14); *Education Labour Relations Act* (R.S.B.C. 1996, c. 382, ss. 4-8 in particular)). Two of the primary reasons for parties engaging in this form of bargaining appear to be a desire to achieve efficiencies and to solve industry wide problems. (See *Managing Change*, at 41-42).
to take control of their lives as free and equal actors on the level playing field of life.

*Liberation* was defined by Treasury to mean ‘the promotion of the dignity of people through direction of their own lives.’ There is no room for putting altruism ahead of self-interest, compassion ahead of efficiency, or mutual obligations and collective identity ahead of individual benefit. Nor was there any doubt about the intrinsic superiority of the marketplace.\textsuperscript{700}

This concept of *individualised* freedom is referred to regularly by ECA proponents. According to Brook, for example, the free market emphasises:

\[T\]he liberty of individual workers to use their labour as they see fit, and in particular to enter contracts with employers or unions that will be of mutual benefit - in essence, a freedom to co-operate. In this sense, individual freedom serves as a basis both for the protection of individuals and for social cohesion.\textsuperscript{701}

The Government that enacted the ECA employed similar rhetoric:

The exercise of the right to choose other representatives is indicative of the degree of responsibility employees now have for their own bargaining. The Act, for the first time in New Zealand, gives workers the opportunity to be actively involved in collective bargaining.\textsuperscript{702}

One would prefer to assume these views are believed by those who expressed them, for as Geare has commented:

The EC Act presumes an individual can negotiate on an equal footing with an employer. One must assume the drafters and supporters of the Act are strongly unitarist and believe all, or certainly the vast majority of employers will *always* operate in the best interests of everyone. If not, they demonstrate a callous disregard for the weaker members of society.\textsuperscript{703}

\textsuperscript{700} Kelsey, *Rolling Back the State*, at 78-79. Footnotes omitted.
\textsuperscript{701} Brook, *supra* note 538 at xii.
\textsuperscript{702} The Government’s Reply, *supra* note 155 at 221.
\textsuperscript{703} Geare, *supra* note 2 at 196. Emphasis original. Dannin expresses the view that many ECA supporters in fact believe in this philosophy. See Dannin, “We Can’t Overcome”, at 46 (note 215).
Yet the notion of individualised freedom is problematic. It ignores the risk frequently
associated with deregulation, namely that those most in need of protection become
vulnerable to the excesses of a stronger party. In such cases freedom exists in theory but
fails to materialise in reality. As Adams argues:

> Freedom of contract is clearly an important value but pursued to the extreme the
freedom of one party can become the subjugation of another.

In essence, to enjoy the ability to exercise freedom, a party requires sufficient power to
resist the excesses of another. In other words, freedom “requires a measure of social
equality.” The question then becomes whether the ECA, and the system of bargaining it
has introduced, permits employees to exercise fully the choices provided to them.

Proponents of the ECA would answer this question affirmatively. Anne Knowles stated
prior to the passage of the ECA, that “[t]he supporters of the legislation see the balance of
power at the workplace as being evened up rather than leaning in any one particular
direction.”

Kerr endorses this view:

> [T]he idea that there is any systematic inequality in bargaining power between
employers and employees is a basic fallacy in labour law which was rightly set

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705 Bakan, supra note 690 at 10.
706 See Knowles, supra note 546.
707 Kerr, supra note 479. Kerr’s assertion directly contradicts the accepted view in Canada and the United States that equality cannot be achieved in many employment relationships without bargaining controls. See supra note 353.
Baird, a consultant engaged by the NZBRT, has expressed a similar view, alleging that the notion of unequal bargaining power between employers and employees is a “hoary myth”. 708

Brook has sought to substantiate these assertions. She argues that employers and employees have equal bargaining power because employees can rely on their savings and unemployment benefits while employers have to meet the costs and a lack of resources when employees leave. Yet Brook’s argument rests on a number of questionable assumptions. First, that employees are paid sufficiently well to save; second, that employees can afford to live while in between jobs; and third, that there exists alternative, and more favourable, employment options in the market place. For many employees, these assumptions are patently false.

In this regard, it is important to note that the ECA was introduced at a time of significant unemployment (ranging between 10.1 % and 9.9 % during 1991 to 1993), 709 and that levels of unemployment continue to be high. 710 Moreover, significant restrictions have been imposed on the unemployment benefit. Four in particular are of considerable importance. The first is that the rate of the unemployment benefit has been cut significantly in recent times. 711 Secondly, any person who voluntarily leaves a job must wait out a 13 week “stand-down” period before they can claim the benefit. 712 Thirdly, as noted previously, an employee on strike is unable to claim the benefit. 713 Thus, striking rather than resigning places an employee in no better position as regards state support.

708 Baird, supra note 478 at v-vii.
709 See Dannin, “We Can’t Overcome” at 90-91.
710 The present figures on unemployment range in the vicinity of 6 percent, although the official estimate of the number of “jobless” employees is between 9 and 10 percent. See supra note 648.
711 See supra note 93.
712 Rasmussen & Deeks, supra note 61 at 281. Prior to April 1997, the stand-down period was twice as long, but was reduced because the Government considered too many employees were lodging unmeritorious grievance claims in order to obtain immediate access to the unemployment benefit.
713 See supra note 428.
Finally, any applicant who succeeds in claiming the unemployment benefit will have that benefit stopped if they refuse an offer of “suitable” employment. “Suitable employment” is defined as employment determined by the Employment Service as suitable for a particular person to undertake, and the benchmark (in terms of salary) is the minimum wage.\textsuperscript{714} The Government heralded these requirements as “positive initiatives” aimed at encouraging people off the benefit system and into work.\textsuperscript{715} In reality these restrictions have provided employers with considerable bargaining leverage and a source of cheap labour, both of which have materially undermined employee mobility in the labour market.

Brook further claims that “[c]ompetition” in the market place “precludes, rather than creates, the possibility of exploitation of one party by the other.”\textsuperscript{716} Her argument is essentially that the availability of alternative employment in a free market provides employees with options and an associated freedom from exploitation.\textsuperscript{717} Kerr subscribes to the same view:

The underlying view is that employees are a disadvantaged group relative to employers and thus need extra rights and protections. The source of this inherent disadvantage of employees is unclear - except to strict Marxists. In a mobile society and open economy, there are few monopolies or monopsonies outside the public sector. Employers have to compete for labour, large employers are highly sensitive to their reputation as employers, and it is usually easy for an employee to quit a job.\textsuperscript{718}

\textsuperscript{714} Mazengarbs, at N/905 and N/921. For a discussion on “suitable work” see Re Fehling [1997] NZFLR 857.

\textsuperscript{715} According to Jenny Shipley, the Minister of Social Welfare at the time many of these initiatives were introduced, benefits were too high compared to wages and thus needed to be reduced in order to “encourage” people to “compete for work opportunities”. See P. Herbert, “Stripping Away Worker’s Protection” (1991) The Dominion (N.Z.), 20 February, 14.

\textsuperscript{716} Brook, supra note 538 at 16.

\textsuperscript{717} As noted, freemarket advocates have relied on the same argument to support their claim that employer-employee conflict can be resolved by the marketplace. See supra notes 550-552.

\textsuperscript{718} Kerr, supra note 66 at 99.
Hide has similarly expressed confidence in the bargaining power that employees purportedly derive from the market place:

The idea that capitalists as employers exploit workers has been around for a long time. It has wafted around snooty circles as well as shop floors and has been absorbed through a sort of intellectual osmosis by academics, editorial writers, news reporters and others too lazy to think things through for themselves. ... In a free market employers are thought to have the upper hand because they do the employing. The free market thus allows them to use their “bargaining strength” to drive down wages and so increase profits “unfairly”.

... The theory blows up once you realise that the competition in the labour market is not between workers and employers. It is instead between employers for workers. ... Employers thus must compete for workers. ... The need to outbid other employers puts a floor to the wage that must be paid.719

The notion that bargaining power can derive from the availability of options is not without logic, but, for many employees it is a notion that has failed to materialise under the ECA. High levels of unemployment and cuts to unemployment benefits have created undeniable barriers to employee mobility. Thus, despite Kerr’s somewhat patronising assertion that it is “easy” to “quit” one’s job, many employees are unable to leave a job in reaction to deteriorating terms and conditions for fear of not security alternative employment. Moreover, for low skilled employees in particular, there is no guarantee that alternative work, if secured, will be on any more favourable terms.

In terms of Hide’s assertions, what he fails to acknowledge is that the ratcheting affect of the free market has sent the “floor” to which he refers into a downward spiral.720 In reality the true competition is between employees (both employed and unemployed) for scarce jobs, and not between employers for scarce labour. Competition is, then, far from a saviour of New Zealand employees’ freedom.

720 See supra note 572.
Other free market advocates claim that individuals must be responsible for their own bargaining power, rather than relying on the state. Hutt, for example, argues that the:

[R]emedy for the individual’s “bargaining weakness” is to raise the value of his work. His “bargaining power” depends (a) on his having scarce and valuable powers, which simply means that he can provide goods and services which consumers need, and (b) on his effective right to use those powers.\textsuperscript{721}

Similar views have been expressed by employers in New Zealand. The free market, it was said, would “ease the shedding of workers from one dying enterprise, and encourage them to reskill and relocate in a new growth industry.”\textsuperscript{722} Once again, however, these views fail to reflect the reality facing many New Zealand employees. For those without resources, higher education and ‘reskilling’ are privileges available only to others. As a result, for these employees, the free market has meant the erosion rather than the enhancement of their income, freedom, and employment prospects.

If employees were indeed on an equal footing with employers, and freedom for one meant freedom for all, one would expect to see genuine negotiations and the genuine exercise of employee choice. In terms of genuine negotiations, ECA proponents point to settled contracts as evidence of meaningful bargaining. According to one Employers’ Association advocate:

Companies have been able to make new arrangements with respect to hours which have been \textit{acceptable} to workers as well as useful to employers.\textsuperscript{723}


\textsuperscript{722} Kelsey, \textit{Rolling Back the State}, at 99.

\textsuperscript{723} Carroll & Tremewan, \textit{supra} note 6 at 187. [Emphasis added]. This particular quotation was referring to the “agreed” elimination of contractual penal and overtime rates of wages in New Zealand workplaces. \textit{C.f.}, the position in British Columbia, where these entitlements are rendered compulsory by statute. See \textit{supra} note 106.
This statement assumes a bargained outcome, rather than one imposed by employer dictation. As noted by McAndrew, Barker, and Dannin (among others), for most employees in New Zealand, this is simply not reality.

In terms of the genuine exercise of employee choice, it is also material to note that large numbers of employees lack the power to elect an effective bargaining agent.\textsuperscript{724} As Grills notes, this “freedom” is rendered meaningless in many cases by the ability of employers’ to veto negotiations:

\begin{quote}
The right to union membership does not mean the same thing as the right to have your union representative recognised in the sense of being dealt with fairly or in good faith.\textsuperscript{725}
\end{quote}

This point has been developed further by Boyd, who concludes that the effect of the Court of Appeal’s decisions in the \textit{Ivamy} and \textit{Med Lab Workers} appeals has been to downgrade the freedom of association allegedly guaranteed by the ECA, to a freedom of assembly.\textsuperscript{726} However, for some employees, even “assembly” is beyond their range of options. With the decline in union resources, and the refusal of some employers to allow union access to worksites, increasing numbers of low skilled and low paid employees are losing the option of union membership.\textsuperscript{727} Others are simply giving up on unions, for as Grills points out, what is the point in paying dues to a union that can be lawfully ignored?\textsuperscript{728}

\textsuperscript{724} Dannin, \textit{Working Free}, at 46.
\textsuperscript{725} Grills, \textit{supra} note 26 at 91.
\textsuperscript{727} \textit{C.f.}, Kerr, who asserts that declining union membership is a result of employees voluntarily deciding not to join unions. See Kerr, \textit{supra} note 66 at 96.
\textsuperscript{728} Grills, \textit{supra} note 26 at 99. See also E. Dannin, “Co-operation, Conflict, or Coercion: Using Empirical Evidence to Assess Labour-Management Co-operation” (1998) 19:3 Mich.J.Int’l.L. 837. Notably, many of the employees who are no longer represented by unions simply cannot afford alternative forms of representation a situation not aided by the fact that individuals cannot deduct from their taxes the expense of a bargaining representative, a privilege limited to corporate employers alone. See Dannin, \textit{Working Free}, at 299.
In sum, the talk of a “level playing field” and freedom for all is a fiction for many employees. As commentators in the field of critical legal studies have argued, apparently neutral laws can have very discriminatory affects. This is one such case. So much so, in fact, that Dannin refers to the notion of employee freedom under the ECA as “striking” in “its dishonesty”. Given this context, how can it be said that employees have, as Brook asserts, the “liberty to do as they see fit”? Under the ECA, freedom for one is most certainly not freedom for all.

4.3 The Remaining Debate

In New Zealand the debate on the introduction of a duty to bargain in good faith into the ECA focuses on the issues of efficiency and freedom. This is not surprising, given the emphasis placed on these two concepts by the ECA. However, there are a number of other arguments that ought to be considered in respect of this issue.

In the first place, critics of market interventionism could argue that a duty of this nature would create an uncertain and unenforceable standard. This has been a traditional objection to the development of a common law duty to bargain in good faith. According to Sealy:

[V]irtually all significant developments of the law are driven by commercial considerations, and where certainty and predictability have traditionally been regarded as more important than a ‘just’ outcome to be determined on an ex post facto basis by an exercise of judicial discretion.

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729 M. Minow, Making All The Difference: Inclusion, Exclusion and American Law (Ithica, Cornell University Press, 1990); R. Monks & N. Minow, Power and Accountability (New York, Harper Business, 1990). C.f., Roger Kerr, who argues that New Zealand must continue to apply the same rules to employers and employees, for, in his opinion, to enact different rules would be “deeply mistaken and counterproductive”. See Kerr, supra note 66 at 98.

730 Dannin, Working Free, at 48.

731 An argument which, itself, relates to the issue of efficiency.

Many ECA advocates would agree with these sentiments. Kerr, for example, asserts that the implied obligation to bargain in good faith developed by the Employment Court is unduly vague, and “leaves employers and unions uncertain as to how far they can go in negotiations.” Yet Sealy’s and Kerr’s assertions hint of extremism. As Carter and Furmston argue:

There is simply no reason to regard a concept of good faith as amounting to a licence to judges to do whatever they consider ‘fair’ in the context of a particular dispute.

This more balanced view is, in fact, supported by the experience in British Columbia. The BC Board has not inquired into the fairness of a party’s position when determining whether a party has failed to bargain in good faith. Rather, the focus has been on enforcing compliance with settled requirements and obligations.

Moreover, whilst the term ‘good faith’ might appear nebulous, there will be “guide posts by which to travel”. As the experience in British Columbia illustrates, jurisprudence and statements of policy can provide clear guidance as to what “good faith” requires. Defining good faith in this fashion in New Zealand would be no more difficult than the tasks common law courts frequently face when interpreting standards such as “best endeavours” and “reasonable care”. What is more, any initial uncertainty could be reduced by the inclusion of specific guidelines in the enacting statutory provision.

A second and related potential criticism is that a duty of good faith could result in bargaining becoming excessively legalised. Whilst this will obviously depend on the

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733 Kerr, supra note 66 at 100.
734 Carter & Furmston, supra note 509 at 5.
736 Whilst there will inevitably be litigation associated with defining and enforcing the duty, if the experience in British Columbia is any guide, that litigation will become less and less frequent as the duty becomes an accepted norm in employment and labour relations. Indeed, a statutory duty could prove considerably more certain than the implied term presently applied by the Employment Court.
manner in which the duty is interpreted, this has not been the experience in British 
Columbia. Although the BC Board has been prepared to develop guidelines through 
jurisprudence, a pragmatic rather than overly legalistic approach has been taken; an 
approach which accords with the practice throughout Canada:

Canadian jurisprudence and policy expression on the duty to bargain in good faith 
and make every reasonable effort to conclude a collective agreement has been a 
rapidly expanding body of literature. The Board has been cautious in contributing 
to this delicate subject of human behaviour. This is one area where board rules 
frequently spawn countermoves requiring the creation of more rules. We seek to 
minimise this fencing in of the free collective bargaining range.737

A similar approach would likely be taken in New Zealand, given the experience of the 
judges and adjudicators employed by the Employment Court and the Employment 
Tribunal.

A further argument that employers are likely to raise is that a duty of good faith would 
compel the disclosure of sensitive information, something which may be damaging in an 
increasingly competitive environment. In response, however, it must be noted that the 
duty as applied in British Columbia covers only information directly relevant to the bargain 
in question. Moreover, one can argue that the deliberate with-holding of such information 
is hardly conducive to a relationship that is intended to operate on the basis of trust and 
confidence. Non-disclosure of this nature in the formation of an employment contract can 
rightly be viewed as a breach of that trust and confidence, and tantamount to 
misrepresentation. As the BC Board noted in Noranda:

It is a long-established principle of American labour law that a party commits an 
unfair labour practice if it withholds information relevant to collective bargaining 
without reasonable grounds. ... That principle does fit comfortably within the 
language of s. 6 (now section 11). One would hardly say that an employer who 
deliberately withheld factual data which the union needed to intelligently appraise a

proposal on the bargaining table was making "every reasonable effort to conclude a collective agreement." 738

It is also important to note that disclosure subject to reasonable terms can be compatible with a duty of good faith. 739 In instances of particular sensitivity, then, an employer could insist on limited disclosure subject to enforceable undertakings as to confidentiality. 740

Employers might additionally argue that enforcement of the duty would be too slow and would compel mediators to breach confidence. In terms of the former concern, delay could be significantly reduced by the availability of interim relief (such as interim injunctions). In any event, the delay associated with enforcing this duty could hardly be any greater than the time required for Med Lab Workers to reach the Court of Appeal. 741

As for the second concern, this point arises because the duty in British Columbia continues during mediation. 742 Notably, however, the general position in British Columbia is that statements made to a mediator in the course of mediation are inadmissible in subsequent unfair labour practice claims and grievance arbitrations. 743 As was noted in Yarrow Lodge:

The adjudication of [the duty to bargain in good faith] has ... never involved the evidence of mediators, or the parties' communications during mediation. The basis of the rule is fundamental: settlement discussions, in order to be effective, must be given the widest possible scope in order to encourage and allow the parties to

738 Noranda, at 162.
740 Having noted the possibility of disclosure on terms, it should be stated that employers ought not to presume that disclosed information would necessarily be misused by employees or their representatives. Misuse would deter future disclosure and would undermine the relationship of trust and confidence between employer and employee, something which is obviously not in an employee's own interests.
741 A period well in excess of a year. See supra notes 663-664.
742 Supra note 203.
743 Subject, of course, to both parties consenting to the admission into evidence of statements of this nature.
make the compromises necessary to achieve settlement, without fear that such
discussions will prejudice their legal position.\textsuperscript{744}

ECA proponents may also argue that making good faith bargaining compulsory is unlikely
to enhance the prospects of settlement, because parties who genuinely wish to settle will
deal with each other in good faith in any event, and those who do not wish to settle, will
not, irrespective of whether a duty of good faith exists. To coin a familiar adage, you can
only lead horses to water, you cannot make them drink. Those who express this view
might wish to consider the transformation a party can undertake in the course of a
bargaining dispute. The pressure of bargaining can override any pre-existing commitment
to co-operation. It is in these times that parties could benefit most from a requirement to
persist with bargaining in good faith. While some will inevitably resist the requirements of
good faith, effective sanctions would serve to persuade many to participate in bargaining
in a meaningful way. Once participating in this fashion, even the most embittered may be
surprised at the potential effectiveness of a good faith approach.

A further, but not unrelated, potential criticism is that making good faith bargaining
compulsory would constitute legal paternalism, which has no place in a free market. A
response to this claim is that very few disputes are entirely self contained in terms of their
affect and cost. All bargaining disputes that result in litigation drain the resources of
society. In addition, most strikes and lockouts detrimentally affect a range of people, not
just the parties directly involved.\textsuperscript{745} Achieving the settlement of bargaining disputes in a
manner which minimises costs to society is a socially desirable objective. Making good
faith bargaining compulsory would be consistent with this objective.

\textsuperscript{744} Yarrow Lodge, at 37. See also BC Code, s. 146(3); Overwaitea Food Group (B.C.L.R.B. No. 278/96)
(B.C.); D. Brown & D. Beatty, Canadian Labour Arbitrations (Ontario, Canada Law Book Company,
1998) at para. 3.4342. That is not to say, however, that an applicant in an unfair labour practice claim
cannot contrast a counterpart’s position prior to mediation with its position thereafter, as evidence of
intransigence supporting a claim of bad faith bargaining.

\textsuperscript{745} For example, a dispute between a supplier of raw materials and a manufacturer can impact on
wholesalers, retailers, customers, various employees, and relatedly, the welfare of their families and
communities.
Finally, critics of the duty might claim that mandating good faith bargaining will not make any difference to the outcome of bargaining - which, they may argue, depends on the relative power of the parties rather than the process followed. This criticism will be addressed in detail in chapter five. Suffice it to say at this point, however, that the process used can directly impact on the power of a party. Bad faith bargaining can be effective in undermining a collective of employees, thus reducing their ability to secure their objectives. Moreover, while a duty to bargain in good faith will not provide a panacea for all employment conflict, it will, at least, provide some check on the wide spread dictation and mistrust that presently exists in many New Zealand workplaces.

4.4 Conclusion: The Good Faith Debate

It would be naive to suggest that the imposition of a duty to bargain in good faith would avoid all conflict in labour bargaining, and hence provide the one solution for maximising efficiency. The Canadian postal workers, the Vancouver garbage collectors and Fletcher Challenge (Canada) Limited can all attest to that. All have been involved in lengthy industrial disputes in the last twelve months despite the existence of the duty in Canada. There is no reason to suggest that the position in New Zealand would be any different. However, the point is that contrary to the views expressed by the Public Service, a duty to bargain in good faith can actually assist market efficiency.

Critics will argue that a duty to bargain in good faith is ill-conceived and inefficient: that a properly functioning market does not need mechanisms designed to facilitate settlement. Unfortunately, the idealised vision of conflict free employment propounded by those who express these views has not materialised under the ECA. For many employees, conflict and dictation continue to arise, which serves only to undermine collaboration and efficiency.

It is also important to highlight the hypocrisy inherent in criticism of this kind. Free market advocates argue that employment is based on co-operation, the frank disclosure of
information, and discussion rather than dictation. A duty of good faith is entirely consistent with this vision. Why then do free market advocates oppose the duty? One suspects because a statutory duty would be enforceable by employees, whereas, at present, the "vision" of co-operation and collaboration spoken of by ECA advocates operates in most cases at the complete discretion of employers, a discretion many are choosing not to exercise.

Freedom is also a central objective of the ECA. Yet on the basis of the above, any assertion that the ECA guarantees true freedom for all parties involved in employment and labour relations in New Zealand is illusory. Moreover, the legislation itself is inconsistent as regards this objective. Imposing a duty to bargain in good faith would not, then, be a blight on an otherwise truly free market.

The limited degree to which freedom would be impinged upon by such a duty must also be noted. Contrary to what the Public Service in New Zealand might consider, the duty is largely procedural. The negotiating arsenals of employers and employees would remain, subject only to limited requirements and obligations. It is true that a party could no longer refuse to negotiate but one could question the role such a tactic ought to play in formalising a relationship intended to operate on trust and confidence.

It is also important to note that a duty to bargain in good faith would, in fact, enhance one aspect of freedom under the ECA. The freedom of employees to bargain through a representative. For many, this freedom is non-existent, and will remain so while employers retain a lawful power of veto as regards negotiations. A duty to bargain in good faith would compel employers not only to recognise bargaining agents, but also to engage with them.

Admittedly, this may not change the ultimate outcome of bargaining. It may not turn a struggling business around, or result in more favourable terms of employment, or enhance productivity. But it might. Genuine bargaining might surprise even the most entrenched
critic. Moreover, even if true recognition of a bargaining agent results in none of these benefits, it will still be of value, at least to those employees who presently have their bargaining elections ignored.

Beyond issues of freedom and efficiency, there are arguments which can be made both for, and against, the introduction of this duty. It is suggested that the former are considerably more persuasive than the later. Ultimately, however, critics of this development will remain, primarily because employment and relations is about vested interests, and the different parties involved will no doubt assess the duty to bargain in good faith in terms of its impact on their own objectives.

Those employers and employees who wish to achieve substantive efficiency and freedom, and who are no longer satisfied with the rhetoric which currently pervades New Zealand employment and labour relations, ought to support the introduction of a duty to bargain in good faith. For without this duty, many free market advocates will continue to give little more than lip service to the vision of co-operation, fairness and good faith which they, themselves, have advocated.
CHAPTER 5: THE SPECIFICS

It is relatively straightforward to speak of a duty to bargain in good faith at a conceptual level. It is more difficult to describe how the duty should operate in practice in order for it to be effective in a specific context. It would be unwise, for example, to suggest that the duty as it applies in British Columbia could be incorporated in identical form into New Zealand. There are differences in culture, legal processes and legislation that would make this both impossible and undesirable. Whilst the approach in British Columbia has been used to provide a frame of reference for this thesis, it will be suggested that before this particular conceptualisation of the duty could be adopted effectively, it would require modification.

In particular, consideration must be given to six issues. First, should the duty apply to bargaining for both individual and collective employment contracts? Secondly, if the duty is to apply to individual negotiations, how can the legislature ensure that it is complied with? Thirdly, in the context of individual bargaining should a distinction be drawn between selection processes and bargaining? Fourthly, should arbitration be available as a remedy? Fifthly, what features must be addressed in the enforcement mechanisms generally to ensure the duty operates effectively? And lastly, what should the legislative amendment look like, both in terms of the enacting section and those provisions that provide a supporting role?

5.1 The Individual - Collective Divide

The statutory duty to bargain in good faith in British Columbia is confined to collective bargaining; it has no application to individual employees and employers who enter into contracts of service. The question then becomes whether a similar restriction ought to apply in New Zealand. It is suggested, for the following reasons, that it should not.
In the first place, the primary purpose of the duty to bargain in good faith in British Columbia is to support collective bargaining. If the duty were restricted to collective bargaining in New Zealand, the duty would have the very opposite effect. It would further encourage employers to insist on individual bargaining, for this would enable them to avoid the duty and its corresponding obligations.

This difficulty is averted in British Columbia by the use of the certification procedure. Provided a union is able to obtain certification, collective bargaining follows automatically. There is no indication that a certification procedure is being considered for introduction into the ECA, presumably because it would be inconsistent with the freedom of each employee to determine whether or not to be represented in negotiations. The nature of bargaining (whether collective or individual) is likely, then, to remain a matter for negotiation. As long as this continues to be the case, restricting the duty to collective bargaining will serve only to undermine collective action.

The second difficulty with limiting the scope of the duty to collective bargaining is the likely creation of a "chilling" effect. At present there is ample evidence of intransigence by employers as regards contract negotiation, particularly in the secondary labour market. This would only worsen in a regime that restricted obligations of good faith to collective bargaining. Employers that might have entertained at least initial discussions with a union to examine the possibility of a collective outcome would likely refuse to do so, lest they be held to have committed to collective bargaining and the associated obligations of good faith. ⁷⁴⁶

Restricting the duty to collective bargaining is also unlikely to be viewed with enthusiasm by those employers who lack the bargaining power of some of their peers and competitors.

⁷⁴⁶ One way to overcome this affect would be to provide in the ECA that the duty of good faith applies as soon as one party to the proposed negotiations gives notice that it wishes to negotiate a collective contract. Employers, however, are likely to argue that such a mechanism would over-ride their ability to choose the form of bargaining. A more straightforward way of addressing this issue, and one that still preserves this choice, is simply to apply the duty to all negotiations.
In circumstances where employers are unable to resist their employees’ demands for a collective contract, those employers would suffer the “double blow” of also having to bargain in good faith. Employers in this position would presumably complain of unfairness; that they were being subjected to restrictions and costs not also borne by their competitors.

Limiting the duty to collective bargaining would also lessen the scope of its benefits to a portion of the labour market. As noted, estimates regarding the extent of the workforce now employed on collective contracts vary widely, from as low as 22 per cent, to as high as 50 per cent. Even on the most favourable estimates, the duty would have no application to at least half of New Zealand employees. This statistic is even more significant when one considers that the employees most vulnerable to employer dictation are those employed on individual contracts who work in the secondary labour market. These are the employees with potentially the most to gain from the duty, and thus the most to lose if they were to be excluded from its scope.747

It is also important to recognise the lack of viable alternatives that currently exists for individuals who wish to challenge employer dictation. Individual employees cannot legally strike in support of contractual demands - this mechanism is restricted to collective bargaining. They have then, no economic avenue for countering dictation. Moreover, as noted, section 57 has proven to be less than adequate in addressing complaints of individual employees. Given this void of alternatives, a duty of good faith has much to offer in the context of individual bargaining.

Employers looking to restrict the scope of this duty may also look to arguments of practicability to aid their cause. Telecom, for example, employs in excess of 8000 employees. It might well argue that a duty that compelled it to bargain individually with each employee would simply be unworkable; that it would not have the resources to

747 “Potentially”, because an issue must arise as to whether protection might exist in theory but not in reality, an issue that will be addressed later in this chapter.
undertake such a task. Yet, such an argument conflicts with a fundamental assumption of the ECA. The legislation assumes that each individual employee has the choice of whether or not to negotiate individually. According to the Act, each of those Telecom staff could approach their employer and request to discuss their terms of employment. Obviously in reality, this does not occur. Telecom has the power and legally condoned right to simply ignore such requests. And, as Joris de Bres, the Central Operations Manager of the Public Service Association, described in relation to another employer, most employees are simply too afraid to adopt this approach:

Yes, we would bargain on one [individual contract] until we got it right. Then we would go on to the next one. That was really an attempt to persuade the employer that they either saw us seven hundred times or they saw us once. What we couldn’t find was a person willing to do that. And I think what you’ve got there is an element of fear. ... We couldn’t find one person who wanted to be at the front.748

In short, employers benefit from employee fear and their own ability (both legally and economically) to ignore individual requests for bargaining. Yet why should employers be heard to say that they should not have to negotiate individually, when the legislation assumes this can occur at present? Imposing an obligation to bargain would merely be giving substance to what all employees’ are purportedly already entitled to do.

The “Telecom” type of concern could also be addressed on a practical level. If bargaining individually with all its employees would be too costly for an employer, there is always the option of a collective contract, which would clearly require less bargaining resources. In other words, employers can factor the potential cost of numerous individual negotiations into their decision as to which form of contract they would prefer. At present, many employers need not concern themselves with these costs because they enjoy a power of veto over the form of the contract entered into, and the manner in which it is entered into.

748 Interview of de Bres by Dannin, recorded in Dannin, Working Free, at 244.
In terms of the scope of the duty, it is also material that the suggestions for legislative amendment proffered in recent times by the New Zealand Labour Party and by the Council of Trade Unions have called for the application of good faith to both collective and individual bargaining. Even the Public Service suggested in its advice to the coalition talks that if the duty were introduced, it could be defined to apply to all contracts. Such a concept is not, then, entirely radical in nature, but already enjoys a degree of support, albeit not from some of the freemarketers who support the ECA.

Finally, before the duty to bargain in good faith is limited to collective bargaining, one should question why such a restriction is appropriate. This dichotomy would not, for example, accord with the Employment Court's implied obligation of good faith bargaining, which is grounded in an implied obligation that exists in every employment relationship. If the duty at common law applies to all employment, why should the ECA draw a distinction between collective and individual arrangements?

One might also ask why this distinction occurs in British Columbia and the rest of Canada. The most logical explanation is that the duty was introduced in response to unrest in unionised workplaces. While this rationale makes sense in terms of avoiding large scale social disruption, it is less relevant to the vulnerability of employees and the promotion of trust and confidence in every employment relationship.

In sum, it is suggested that no good reason exists for restricting the duty to bargain in good faith to collective bargaining. On the contrary, there are a number of compelling policy arguments for extending the duty to all employment negotiations in New Zealand.

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750 One might surmise this suggestion was proffered so as to avoid a situation where there would be an incentive for employees to request collective, rather than individual, contracts.

751 See e.g., NZEF, supra note 545.
5.2 Enforcement and Relevance in an Individual Setting

At present, the ECA purports to provide every employee with the right to choose the nature of his or her employment contract, the options being collective or individual, or a combination of both. However, as discussed in chapter four, for many employees this right exists only in theory. In reality they lack the industrial leverage and financial resources to exercise that choice. The result in many cases is employer dictation. Why then would a duty to bargain in good faith be any different? That is to say, if the duty cannot be enforced or relied upon in any meaningful way, how will it be of any value?

The second issue that arises in the individual setting is relevance. Some will, no doubt, argue that those without bargaining power will be no better off with the duty than without, that their take home pay depends not on the bargaining process, but on their substantive bargaining power, or their lack of it, as the case may be.

In terms of enforcement, it is important to note at the outset that difficulties associated with application should not be confused with a lack of need for protection. By way of example, courts in the past have not been deterred from awarding damages in meritorious claims just because calculation is difficult. The same should be said of a duty of good faith. Difficulty in enforcement is not a valid reason for saying that there is no need for the duty in the first place.

That said, the difficulty of enforcement must still be addressed. Studies in Canada have shown that statutory rights tend not to be complied with in the setting of individual employment. The experience in New Zealand is not dissimilar, with a number of commentators having noted the frequency with which employers over-ride the employment entitlements of employees engaged in marginalised and secondary work.


As the Working Women’s Resource Centre submitted to the Select Committee sitting in respect of the ECA:

[W]omen tend to be employed in small businesses on a part-time or casual basis, and are often low paid. Frequently women are sole employees, and are forced into a confrontational situation with their (frequently male) employer when considering conditions of employment. This leads to women often accepting a contract without negotiation, or not receiving a contract at all and being too intimidated to ask for one.\(^{754}\)

This vulnerability is heightened by the nature of the New Zealand labour market, and in particular the number of small and isolated work sites that exist.\(^{755}\) Given this context, it will not be easy to ensure that the duty to bargain in good faith is effective in the context of negotiations for individual employment contracts. Yet there are steps which could be taken to foster compliance. The first relates to the treatment of unions under the ECA. As noted in chapter one, unions have tended to abandon small workplaces.\(^{756}\) This has not been an aspiration of the union movement; rather a reflection of economy reality. In an era where the number of negotiations has increased considerably and where union membership (and dues) are falling, unions have found it economically impossible to offer representation to individual workers in isolated work places.

If the duty to bargain in good faith is to operate effectively, this trend must be reversed. There must be a source of representation that is realistically available to individual employees - not simply a form of representation that exists in theory but which is beyond the financial means of those who need it most.\(^{757}\) The legislature can do a number of things to promote this development. In the first place, the employer’s power of veto over union access to the workplace for the purposes of recruitment must be removed. Unions will seldom get through the door if employers retain the unilateral right to refuse access.

\(^{754}\) The *Majority Report*, at 87.

\(^{755}\) See *supra* note 57.

\(^{756}\) *Supra* note 80.

\(^{757}\) The services touted by many lawyers and consultants can be placed in this category.
Concerns of union abuse can be dealt with by the imposition of a standard of reasonableness (in terms of the time, frequency and duration of access), akin to that which the Court of Appeal has applied to section 14 of the ECA.758

Secondly, the reasonable negotiating expenses of employees should be tax deductible. Corporate employers enjoy that benefit, why should it not also be provided to employees? And finally, negotiating representatives ought to be able to commence an action in their own name alleging a failure to bargain in good faith, rather than individual employees having to assume the role of plaintiff, as is generally the case under section 57.

The second step to enhancing compliance in an individual setting is that of refocusing the objectives of unions. Some suggest that unions have forgotten what it is that they are fighting for; that they themselves have bought into the “free market” ideology. Sayers suggests that the strategic objectives of the Council of Trade Unions (such as participating in Total Quality Management, skills matrixing and the like) may be excluding the employees that need union support the most, namely those in marginal and secondary jobs.759 International commentators, such as Mahnkopf, agree, arguing that unions have exacerbated polarisation by ignoring peripheralised sectors of the workforce.760

Mahnkopf’s views are supported by McAndrew’s research in New Zealand:

Our research confirms the reports of others that the unionised segment of the New Zealand labour market is, to a considerable extent, protecting permanent, full-time jobs against erosion by contracting, employment of short term staff, redundancy or compromise of the traditional work shift. Employees in the unrepresented sector have been less able to block or slow the moves to such more flexible arrangements at the demand of their employers. As other commentators have recently remarked, unions are emerging in the labour market sponsored by the Employment Contracts Act as vehicles for the representation of “better off” workers, the elite of the

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758 See Foodstuffs, supra note 398.
759 Sayers, supra note 79 at 220.
labour market, as they cement in place and then enhance the gaps in job quality, wages and conditions that separate them from workers in the non-union, and essentially smaller-business segment of the market.\textsuperscript{761}

Unions must address these concerns. As Maxine Gay argues:

Clearly, new approaches are necessary that reflect the range of circumstances within which workers find themselves. The union movement, as the voice of working people, needs to return to the principles of mutual solidarity and support. It needs to reach out to marginal sectors of the workforce, to unemployed workers and other beneficiaries, to build alliances with others suffering under the structural adjustment program. In short, a desperate need exists for tactical and strategic innovation that moves beyond corporatist unionism and is based in active struggle against the continuing weakening of working class power.\textsuperscript{762}

Kelsey agrees. In her view unions:

[M]ust stake out a clear role, establish a mandate for that role from their membership, and work in collaboration with others to create an environment where people believe there really are alternatives. ... [This] means revitalising, in a radically different way from the past, the political role of unions in the struggle to deliver human dignity, employment security, and living social wage, which is the right of paid workers and those unpaid workers on whom they and the society depend.\textsuperscript{763}

The third step towards securing an effective duty in an individual context is that of ensuring effective enforcement. In this regard, the Government will need to commit resources. The expansion of the roles of labour inspectors to investigate breaches and to effect prosecutions might be a step in the right direction.\textsuperscript{764} But the answer lies primarily

\textsuperscript{761} McAndrew, supra note 29 at 139. (1995)

\textsuperscript{762} Gay & MacLean, supra note 73 at 64.


\textsuperscript{764} Such an approach is not without precedent in New Zealand. The enforcement of awards under the Industrial Relations Act 1971 fell within the jurisdiction of labour inspectors. See Geare, supra note 9, at 63-64. Increasing the resources of labour inspectors was also a submission made by a number of parties to the Select Committee which sat to consider the effects of the ECA on the labour market. See Kelsey, New Zealand Experiment, at 194. One suspects, however, that such an approach is unlikely to be endorsed by
in pro-actively promoting the duty rather than enforcing it after breach. Ensuring adequate funding for skilled mediators is essential. There must be a source of advice and expertise available to assist parties work through contracting disputes as they arise. This approach is far more likely to succeed than looking to litigate bad faith after the event.

The fourth, and related, step to ensuring compliance in an individual setting is education. Employers and employees must be persuaded of the benefits of bargaining in good faith. Only then will the duty become the expectation and not the exception. The law will need to initiate this evolution, but the duty will only work effectively if it is then embraced as common practice.

This need for a change in approach ties into the second issue, namely the relevance of good faith bargaining to individual negotiations. Put bluntly, if compliance with the duty will not effect the substantive outcome, what is its value? Such a view would tend to be expressed by the party wielding the power, rather than the party being dictated to. The aggrieved party may well argue that being listened to and having one's views genuinely considered is beneficial, in and of itself. Moreover, how can those who wield the power in employment relationships assert that this duty will make no substantive difference, without first applying it? Who knows what an employer and an employee might gain from a truly co-operative approach to bargaining. Perhaps nothing, but it cannot be correct to say that this will always be the case.

One would also hope that a co-operative approach to bargaining would shift the emphasis away from minimising employee income. If it does not, then there may well be cause for concern, for as John Collinge, former president of the National Party warned in 1992:

> We cannot risk being two nations, employed and unemployed. We cannot expect those with no jobs and no hope to embrace a society which has failed them.\(^{765}\)

the present Government, given the current emphasis placed on "user pays" and reduced Government spending.

\(^{765}\) *New Zealand Herald* (1992) 8 August.
Critics of the duty might also seek to undermine its relevance by arguing that it could be simply averted by the use of contractors, rather than employees. Such tactics might be expected given the ideology that presently pervades at least some New Zealand workplaces. As Anderson and Walsh have noted:

The Employment Contracts Act has created or reinforced an attitude among some employers that is overtly hostile to unions. It has also spawned an industry of consultants who encourage such attitudes and openly promote union busting policies.  

The potential for employers with this attitude to use contractors, and thereby evade the duty of good faith, can be answered in two ways. First, with the developments at common law regarding the recognition of good faith bargaining, employers may find themselves owing similar duties to contractors. But more importantly, if this claim were to represent the permanent mindset of employers, then the duty is unlikely to be effective. Effectiveness depends greatly on legitimacy. To be effective, both employers and employees must view the duty as beneficial and unexceptional, as is the case in British Columbia. If employers, in particular, fail to view the duty in this manner, the fostering of co-operation and good faith will be that much more difficult.

5.3 Selection versus Bargaining

Consideration would need to be given to the extent to which a duty of good faith would impact upon the recruitment of individual employees, both in terms of the obligations of

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766 Anderson & Walsh, *supra* note 726 at 171-172.

767 If good faith bargaining continued to elude employees in isolated and marginalised workplaces, then alternative strategies would need to be considered. In Canada, consideration has been given to alternative forms of representation and support for those working in isolated workplaces where the coverage of collective bargaining (with its associated duty of good faith) does not reach. These alternatives have included calls for sectoral or industry bargaining; unions funding litigation against employers who fail to pay minimum standards and generating publicity of that litigation; and lobbying for adequate statutory minimum working conditions and effective state funded enforcement mechanisms. See Hickling, *supra* note 252.
employers and those of applicants. Would an employer, for example, be obliged to negotiate to impasse with every applicant that applies for a position of employment? If so, such a requirement could expose employers to unprecedented costs and obligations. However, it is suggested that the duty could appropriately be limited to those employees who are actually offered employment. Arguably this approach would accord with a common sense view, for until an offer is made, bargaining has not commenced.

A related issue is whether a duty to bargain in good faith would oblige a job applicant to make full disclosure of all information that a prospective employer would view as relevant to the appointment, whether favourable or not. If the duty were to oblige such disclosure, it would signal a dramatic departure from the current common law position, which derives from the House of Lord's decision in Bell v. Lever Bros. According to Lord Atkin's judgment in that case, a "master and man negotiating for an agreement of service are as unfettered as in any other negotiation."

In essence, according to Lord Atkin, job applicants owe no duty of disclosure, a principle that accords with the traditional common law view that there is generally no duty to disclose material facts before a contract is made. Lord Atkin's dictum continues to represent the law, with limited exceptions, and for good reason. This principle is grounded on a number of persuasive policy considerations including the notion that employees ought not to be permanently labelled by reference to prior mistakes or

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769 Ibid. at 227-228.
771 The exceptions which have developed are limited in number and scope, and include an obligation that applicants for fiduciary positions must make full disclosure of all information material to their applications (Courtright v. Canadian Pacific Limited (1983), 5 D.L.R. (4th) 488, affirmed (1985), 18 D.L.R. (4th) 639 (Ont.C.A.)); and an obligation on all applicants to disclose impairments that are likely to materially affect their ability to perform the job for which they have applied (see e.g., Coquitlam Public Library Board and Canadian Union of Public Employees, Local 561 [1997] B.C.C.A.A.A. No. 337 (Unreported, Award No. X-81/97); affirmed, Coquitlam Public Library Board and Canadian Union of Public Employees, Local 561 (1998), B.C.L.R.B. No. B153/9 (April 9, 1998)).
misconduct; that a civilised society values rehabilitation and the avoidance of double punishment,\(^{772}\) and that the law should not impose a duty when employers are capable themselves of making enquiries.\(^{773}\)

It is suggested that a duty to bargain in good faith, appropriately applied, need not undermine Lord Atkin's dictum. In essence, a distinction can properly be drawn between the duty of good faith, and the duty of \textit{utmost} good faith.\(^{774}\) The later applies in negotiations such as those concerned with the formation of fiduciary relationships where there exists a duty to effect full disclosure of all material information.\(^{775}\) In contrast, the duty of good faith permits an applicant to act self-interestedly, but not in bad faith. Thus, to lie about past misconduct in the face of a direct question would constitute a breach of the duty; not to disclose that misconduct when not asked about it and in circumstances where the exceptions to the rule in \textit{Bell v. Lever Bros} do not apply, would not.\(^{776}\) Hence, a statutory duty which requires an employee and an employer to bargain in good faith, and the common law rule propounded by Lord Atkin, need not conflict.

\section*{5.4 Arbitration As a Remedy}

An issue that will inevitably arise in the good faith debate, is whether the duty should encompass an arbitration procedure, whereby terms of employment can be imposed on a

\(^{772}\) "Double punishment" in this context means being dismissed for misconduct and then being prevented from securing further employment by virtue of a duty to disclose that misconduct unasked, in subsequent job interviews.

\(^{773}\) For fuller discussion of these policy considerations, see G. Davenport, "To Speak or Not to Speak. What if there is no Question?" (1998) 6:2 Can.Lab. & Emp.L.J. 184.

\(^{774}\) For discussion on this distinction, see P. Finn, "The Fiduciary Principle", in \textit{Equity, Fiduciaries and Trust}, T. Youdan ed., (Toronto, Carswell, 1989) at 4-14.


\(^{776}\) This approach accords with the existing rulings of the Employment Court to the effect that the contract of employment is not a contract of the utmost good faith importing obligations of disclosure. See \textit{e.g.}, \textit{King v. Strait Shipping} [1996] BCL 466 (E.C.).
party without its consent. As noted, the BC Code provides for arbitration in relation to first collective agreements, and in extreme cases of bad faith bargaining.

Interestingly, in 1990 when a duty to bargain in good faith would have been enacted into New Zealand law, but for a change in Government, the duty was linked to arbitration. Under the 1990 Labour Relations Amendment Act the Arbitration Commission was to have had the power to impose final offer arbitration where at least two years had passed since the expiry of the previous award (or since negotiations had started if there was no previous award) and where it could be established that any party had not been negotiating in good faith.

However, despite this precedent, it is difficult to envisage arbitration ever being introduced into the ECA without there first being substantive modification to the philosophy and objectives of the Act. There are two principal reasons for saying this. First, an arbitration procedure would run counter to the fundamental premise of the ECA, namely that the parties themselves ought to determine the outcome of negotiations (including the form and content of the contract entered into).

Having said that, it is somewhat ironic to conceive of the ECA expressly permitting a third party arbitrator to dictate the form and content of an employment contract, when, in practice, the ECA permits many employers to now make exactly this type of unilateral decision through the exercise of their bargaining power. Yet many of those same employers would undoubtedly complain if a process ending in arbitration resulted in a third party exercising this same unilateral power.

The second difficulty as regards introducing arbitration is one of logistics. In the absence of controls provided by a certification procedure or blanket coverage, an arbitration

777 The Labour Relations Amendment Act 1990, legislation which never received the assent of the Governor General.
778 Ibid. s. 149C(1)(d).
procedure under the ECA could be unwieldy in the extreme. For example, given that any two employees can seek a collective contract with an employer, it is conceivable that a large number of arbitrated contracts could apply in one workplace. Rationalising this process through the use of certification procedures or blanket coverage is likely to be opposed on the basis that this would alter the “neutrality” of the ECA by promoting collective bargaining over individual, and that it would contravene the “freedom” of all employees to elect how they wish to engage in bargaining.\(^{779}\)

Despite the fact that the present “neutrality” of the ECA actually promotes individual bargaining, and that the “freedom” referred to is unexercised by many employees, these potential inconsistencies are likely to present significant hurdles to any move to introduce arbitration into the ECA.

Given these difficulties, the Government is unlikely to introduce arbitration (first contract or otherwise), even if a duty to bargain in good faith were enacted. Apparently, neither would the Labour Party (presently the main party in opposition to the Coalition Government).\(^{780}\) Even putting to one side the “inconsistencies” that arbitration would create in the ECA, it seems that the notion of arbitration is too closely associated with the perceived “evils” that many now ascribe to the previous system of national awards and blanket coverage.\(^{781}\) Nor would a return to arbitration necessarily receive the support of those involved in the union movement, many of whom perceived arbitration as “labour’s leg iron”.\(^{782}\)

\(^{779}\) Simply imposing an arbitrary minimum number of applicants as a pre-requisite to an arbitration is unlikely to solve this logistical problem. Those most in need of the protection that can be afforded by arbitration (or the threat of arbitration) namely those in isolated worksites, are unlikely to achieve the required numerical threshold. Moreover, the setting of a threshold would not alleviate the potential for large employers to be faced with numerous arbitrations.

\(^{780}\) Clark, supra note 749 at 159; Anderson & Walsh, Supra note 726 at 171. The only party in recent times to have advocated a return to compulsory arbitration was the New Zealand First party, and this “vision” has apparently been short-lived. See Hughes, supra note 168 at 169.

\(^{781}\) Such as inflexibility and inefficiency. See supra note 45.

\(^{782}\) A reference to the use of arbitration by employers and the Government to rein in large wage demands. See Harbridge, supra note 68 at 241.
5.5 Enforcement Generally

If arbitration is not to be available, how then is the duty to be enforced? It is suggested that the key is promotion, rather than enforcement. If the duty is breached, there will need to be appropriate sanctions, but the duty will fail to be effective if parties are repeatedly seeking enforcement through the courts. The focus of the duty ought to be on mediation during the negotiation process, whereby efforts can be made to prevent or circumvent bad faith conduct at source. This approach appears to have worked well in British Columbia, where the overwhelming majority of claims involving allegations of bad faith bargaining are voluntarily settled.

In cases where “promotion” proves insufficient, and these will inevitably arise, there will need to be mechanisms for obtaining swift and effective remedies. Parties must be able to apply for interim injunctions, rather than having to incur the lengthy delays associated with substantive hearings before obtaining any relief. As was illustrated in *Med Lab Workers*, drawn out litigation will do little to eradicate bad faith conduct. The body charged with the ultimate enforcement of the duty will also need to be empowered to award remedies of the kind available in British Columbia, including costs, damages (in extreme cases), cease and desist orders and compliance orders.

The need for swift remedial action highlights the present funding crisis facing the Employment Court (the body with jurisdiction to grant interim injunctions) and the Employment Tribunal (which would likely have jurisdiction over substantive claims for compliance). As the Chief Judge has pointed out, inadequate resourcing of the Court is currently placing its interim injunction jurisdiction in jeopardy:

The vacancy created by the late Judge Castle’s death two years ago has not been filled. There is no sign of any movement toward filling the more recent further vacancy caused by Judge Finnigan’s premature retirement. ... The consequences of this inaction can only be appalling. A court of six judges will soon be one of four.
... This leaves four judges for the whole country ... to deal with the entire first instance employment jurisdiction previously vested in the High and District Courts - potentially upwards of 450 cases annually, each capable of lasting from anywhere between half a day and several weeks. The problem stems not just from the number of cases, but also from the threat to the Court's established ability to react flexibly and in a timely manner where necessary to accommodate exigent emergencies in the workplace, yet provide the parties with a full opportunity to be heard. If it is prevented from providing this service by a lack of resources, the best interests of employers and employees alike will suffer.  

The position is little better in respect of the Employment Tribunal. As noted, the number of claims being filed in the Tribunal is increasing every year. From 2,332 in 1992, to 3,592 in 1995 to 5,144 in 1996. Despite this increasing workload, the Tribunal remains underfunded, so much so that it has recently had to curtail its practice of sitting in venues outside the five main cities. The result has been delays of up to a year or more in the hearing of substantive claims.

This state of affairs will require resolution if the duty to bargain in good faith is ever to operate effectively. If parties are unable to seek timely interim relief from the Court and substantive hearings before the Tribunal, filing claims alleging a breach of the duty may in fact be viewed by a stronger party as a way to stall negotiations and to deplete the financial resources of an opposing party. In essence, if the duty is not supported by an effective enforcement jurisdiction, it may itself encourage bad faith conduct.

5.6 A Suggested Amendment

How then should the legislative amendment look? The effectiveness of the duty will depend as much on the supporting provisions that serve to encourage good faith conduct

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783 Goddard, supra note 478 at 104. See also Goddard, supra note 463 at 5-6.


as it will on the core enacting provision. In terms of the core provision, the following is suggested:

**Obligation to Bargain in Good Faith:**

1. Where any employee, employer or bargaining representative initiates bargaining for a new employment contract, a replacement contract, or a variation to an existing collective contract, the parties (or proposed parties) to that contract shall bargain in good faith and make every reasonable effort to conclude a contract, or variation, as the case may be.
2. The duty to bargain in good faith and make every reasonable effort to conclude a contract or variation, includes, but is not limited to:
   - Meeting with the other party to the negotiations at reasonable times;
   - Each party outlining its proposals and the issues it considers to be in dispute.
   - Each party providing the other with such information as is reasonably necessary for the other party to evaluate and understand the first party's proposals.
   - Listening to, considering, and responding to counter-proposals until such time as an agreement or a genuine impasse is reached.
   - Not engaging in conduct that undermines the authority of the union or the bargaining agent (as the case may be) to represent employees or employers, or which interferes with the relationship between the union (or the bargaining agent) and the employees or employers it represents.
   - Attending and participating in any mediation hearing initiated by the Employment Tribunal.
   - Not employing replacement employees or contractors, or directing existing staff against their will, to perform the work normally performed by employees who are lawfully striking or locked out.
   - Not engaging in any conduct intended to delay, frustrate or undermine bargaining.
   - Not insisting on, or taking to impasse, proposals which are unlawful or contrary to this Act.
3. The duty to bargain in good faith shall not oblige any party to reach agreement.
4. No party shall be able to effect a strike or a lockout until they have bargained in good faith in accordance with this section.

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786 This proposal derives some of its content from the draft section included in the New Zealand Council of Trade Union's Workplace Relations Bill (see supra note 749) and from the provisions on good faith bargaining contained in the Labour Relations Amendment Act 1990 (s. 149D, in particular).

787 As the ECA is presently drafted, this would include taking to impasse the issue of whether a collective contract is to cover more than one employer.
It is important that this core provision cover not only negotiations for new and replacement contracts, but also negotiations for variations to existing arrangements. At present this is a significant void in the ECA. Not only is there currently no procedure for negotiating the resolution of disputes arising over “new matters”; nor can parties seek to resist or implement change through economic sanctions - for strikes and lockouts are prohibited. Thus, the proposed amendment would constitute a significant improvement on the present position, for as Dannin argues, the ECA fails:

[T]o comprehend employment as an ongoing relationship with a continuing need for representation and negotiation once a contract [is] signed.\(^{788}\)

In order to be effective, this enacting section would need to be supplemented with other provisions. For example, there would need to be a section detailing what it means to “initiate bargaining”.\(^{789}\) There would also need to be a section providing that any party to actual or proposed negotiations could apply to the Employment Tribunal for mediation assistance, in which case the Tribunal, in its discretion, could initiate a mandatory mediation session.

Section 18 of the ECA, which provides that negotiations for an employment contract can include negotiations on any matter, should be retained. This would avoid the creation of any artificial distinction between mandatory and permissive bargaining topics.\(^{790}\) Parties would thus be required to consider and respond to all genuine matters brought to the bargaining table. In addition, section 14 of the ECA, which guarantees workplace access to bargaining representatives for the purpose of discussing negotiations with those they represent, should be expanded to permit a right of access for the purposes of recruitment.

\(^{788}\) Dannin, *Working Free*, at 224.

\(^{789}\) This could be achieved by the giving of a prescribed period of written notice.

\(^{790}\) A distinction that operates in the United States but which is not replicated in Canada.
The provisions regarding union membership and authorisation should also be addressed. The provisions prohibiting undue influence should be expanded to expressly encompass both joining a union and authorising it to act on one's behalf. Moreover, membership ought to be viewed as prima facie evidence of a union's authority to represent an individual in contract negotiations. This approach would preserve the right of an employee to opt out of the representative relationship, but at the same time would eradicate the present situation whereby employers can frustrate bargaining through imposing onerous evidential requirements as pre-requisites to bargaining. 791

Similarly, the ECA ought to provide that once an employee has joined a union and permitted that union to commence negotiations without signalling a desire not to be represented, that employee should not be permitted to revoke his or her bargaining authority for a specified period (say 90 days). This would mean that employers would have nothing to gain by seeking to fragment the employee-representative relationship (through direct communications, for example). This would, in turn, encourage employers to concentrate on achieving a resolution through bargaining rather than through the disruption of employee collectives. 792

The core section would also need to be interconnected with the existing remedial provisions in the ECA. The interim injunction jurisdiction of the Employment Court would need to be expanded to cover the duty, thus permitting parties to seek an interim enforcement order. Moreover, as noted, the primary substantive enforcement mechanism should appropriately be a compliance order from the Employment Tribunal. 793

791 See for example, the bad faith tactics utilised by the Department of Social Welfare. See supra notes 124-125.
792 This amendment would also provide stability to the bargaining process which is, at present, sorely lacking from the ECA. See Dannin, Working Free, at 273.
793 This would accord with the present position, which is that any party alleging a breach of a provisions in Part II of the ECA (the part that deals with bargaining) may seek a compliance order from the Employment Tribunal. See ECA, s.55.
Clearly there will be a requirement for judicial interpretation of key concepts. It is impossible for a statutory provision to deal with all possible eventualities, nor is an attempt at exhaustive coverage necessarily desirable in an evolving field such as employment law. Yet in this respect, the Employment Court is not entirely without precedent. It terms of what it means to bargain in a genuine fashion with an open mind, some guidance could be derived from the Court’s exiting interpretation of “consultation” obligations. The Court has had cause to consider what it means to consult, in cases where such an obligation is owed by an employer by virtue of either an express term in an employment contract or the implied term as to trust and confidence.\textsuperscript{794} Materially, for present purposes, the Court has been willing to “flesh out” this obligation with concrete requirements, which have included:\textsuperscript{795}

- entering consultation with an open mind as to alternatives;
- providing the parties with whom consultation is occurring sufficient information to enable them to evaluate any suggestions made;
- providing those parties with a reasonable opportunity to provide a response or feedback;
- listening to responses made, and not making a decision until genuine consideration has been given to those responses.
- making a genuine effort to accommodate the views of those consulted.

Similarly, the Court of Appeal has provided guidance as to what it means to “consult”:

If a party having the power to make a decision after consultation holds meetings with the parties that it is required to consult, provides those parties with relevant information and with such further information as they request, enters the meeting with an open mind, takes due notice of what is being said, and waits until they have had their say before making a decision, then the decision is properly described as having been made after consultation.\textsuperscript{796}

\textsuperscript{794} For enunciation of this term, see supra note 449.


\textsuperscript{796} Wellington International Airport v. Air New Zealand [1993] NZLR 671 (C.A.) at 684.
Whilst 'bargaining' and 'consulting' are clearly not identical processes, (bargaining does not, for example, permit one party alone to determine the outcome), as Anderson has suggested, this jurisprudence could, nevertheless, be used as a basis for developing guidelines on what it means to bargain in good faith. Certainly both processes share a number of common traits including the need for a open mind, clear communication and the consideration of alternatives. If a duty to bargain in good faith were to be enacted, it would be unfortunate if the Courts did not look to take advantage of this existing and helpful jurisprudence.

797 Anderson, supra note 141 at 127.
CHAPTER 6: CONCLUSIONS

Employment is critically important to employers, employees and society as a whole. In terms of employees, as the Supreme Court of Canada stated in *Reference Re Public Service Employee Relations Act (Alta.)*:

Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.\(^{798}\)

Moreover, as Dannin describes:

> We are all desperately dependent on work. Our own jobs - or lack of them - give us our status, our world-views, our friends, our enemies, our opportunities, and our children’s opportunities - or lack of them.\(^{799}\)

By the same token, employers can not pursue their visions and objectives without labour. Most work does not perform itself. And society not only relies on employment for the provision of essential good and services, employment also lies at the heart of modern day economic exchange.

It is, then, not surprising that employment regulation causes such heated debate. The existence, and extent, of regulation directly impacts on the objectives of both employees and employers. Employees seek to maximise job security, job satisfaction, and income. Employers seek to maximise profitability and efficiency. These objectives can, and do, over-lap. Yet, frequently, they do not, and tensions result. How those tensions are resolved essentially depends on how a particular system of employment and labour relations allocates, and moderates, bargaining power.

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As was discussed in chapter one, New Zealand has moved from one extreme to the other. From 97 years of state regulated conciliation and arbitration to a system premised almost entirely on the free market. From a system that promoted comparative wage justice, to one in which success depends solely on market power. As one would expect from such a dramatic change in approach, views on the success of the new regime have been as polarised as the regimes themselves. Freemarket proponents speak of enhanced employer-employee co-operation, shared visions, increased productivity, sustainable growth and widespread prosperity. Critics allege dictation, oppression, negative and short sighted cost cutting, and resulting poverty. There is, perhaps, some truth in both camps.

That the criticism of the ECA carried some weight was evident by the election manifestos of a number of the New Zealand political parties leading up to the 1996 election. The New Zealand First Party, among others, pledged to introduce into the ECA a duty to bargain in good faith. A Coalition Government was duly formed, comprising, in part, New Zealand First. However, the promised reform has not been forthcoming. Indeed, it now appears more likely that further neo-liberalist driven reforms will be effected, in particular, the abolishment of the separate labour law jurisdiction and the resulting immersion of labour law into the common law of contract.

One of the reasons the debate over a duty of good faith has lost momentum is that it has, to date, been engaged at the level of abstract and rhetoric. The advice given to the coalition talks by the Public Service is a case in point. Yet, both critics and advocates of the proposal have been guilty of speaking of concepts rather than concrete examples. It is then, little wonder that the current Minister of Labour appears to have succeeded in marginalising this debate.

It is suggested that this issue is too significant to be cast aside so readily. There is far more at stake than simply a political party honouring its manifesto. The debate over the duty to bargain in good faith strikes at the heart of the neo-liberal vision underlying the
ECA. Freemarketers talk of co-operation, trust and confidence, yet, for many employees in New Zealand, what transpires bares little resemblance to this vision.

An assessment of whether a duty to bargain in good faith could contribute positively to New Zealand employment and labour relations cannot occur in any meaningful way in the abstract. Without a concrete example of the duty to work from, assessing its potential relevance and impact, and contrasting it with what we already have, is virtually impossible. This thesis has sought to provide an example, by drawing on the approach taken to this duty in British Columbia. This approach is not submitted as the only possible option, but rather one in respect of which there is much to commend.

An analysis of the approach taken in British Columbia, reveals that the duty is essentially procedural, and is now an accepted, enduring and valuable aspect of British Columbia labour relations.

Critics of the duty in New Zealand have claimed, and will no doubt continue to claim, that a duty of this nature is not necessary; that the laws in New Zealand already promote good faith bargaining in the labour market. Contrasting the key provisions in the ECA and the current common law position in New Zealand, with the position in British Columbia, reveals just how tenuous these claims are.

There is no reference whatsoever in the ECA to a duty to bargain, let alone a duty to bargain in good faith. Bargaining under the ECA can mean nothing more than an employer directing its workforce to sign a collective document, and locking them out until they do. And yet the ECA is not notable simply for its failure to enact a duty to bargain in good faith. It goes one step further, by providing parties with ample scope for engaging in bad faith conduct. Dictation, intransigence, tactics aimed at fragmenting collectives, the engagement of alternative labour, and the ability to effect economic sanctions without having even approached the bargaining table are all tactics which are permitted by the ECA and which have been condoned by the New Zealand courts.
Nor are there viable alternatives upon which an enforceable and meaningful obligation to bargain in good faith can be grounded. Although the Employment Court has developed an implied obligation to bargain in good faith, and common law courts generally have begun to shed their traditional resistance to the concept of good faith, such developments are as uncertain as they have been ineffectual. The implied duty has never be utilised by the New Zealand Employment Court to sanction conduct which would otherwise not have fallen foul of the ECA. Nor is there any realistic prospect of this occurring; the Court has its hands full with existing cases and ensuring its own survival.

For the same reason, the seeds of development in the common law generally are unlikely to have any significant impact in New Zealand employment and labour relations, at least in the foreseeable future. It is, then, a fallacy to say that the existing law in New Zealand serves to promote good faith bargaining in any meaningful or substantive way, or that such a duty could be introduced effectively by means other than legislative amendment.

Proponents of the free market have also argued that a statutory duty to bargain in good faith would be prohibitively costly in terms of reduced efficiency and freedom; a claim of considerable importance given the primacy accorded to efficiency and freedom by the ECA. It is submitted that such assertions are erroneous. The free market bargaining that presently occurs under the ECA is far from efficient in resolving conflict, nor does it provide all parties with exercisable freedoms. It is one thing to have free choice in theory; it is quite another to have the bargaining power to exercise it.

Moreover, in terms of distributive efficiency, the model of bargaining enacted by the ECA presents a far from optimum model. While there can be little doubt that certain sectors of the New Zealand labour market have reaped the benefits of the free market (including numerous multi-national employers, those skilled employees in the primary labour market and various shareholders); this prosperity has been achieved at considerable cost. More New Zealanders than ever now live below the poverty line and many in the secondary
labour market face a future of little, if any, promise. The neo-liberal ethic of individual self-interest provides little solace to those without the resources to up-skill and insulate themselves from the vagrancies of the "level" playing field created by the ECA.

A duty to bargain in good faith could enhance co-operation, efficiency and freedom, in a number of respects. Acrimonious disputes clearly cause inefficiencies, as do strikes and lockouts. The duty to bargain in good faith has been utilised in British Columbia to reduce these inefficiencies. Moreover, a truly co-operative approach to bargaining may shift the focus of employers away from cutting labour costs as the primary means for enhancing profitability. The duty can also provide substance to the freedom of employees to participate in genuine negotiations, rather than simply a freedom to assemble, as exists now.

Analysing the duty in terms of freedom and efficiency is fundamental to the good faith debate. When the debate is framed in these terms it becomes much more difficult for opponents of the duty to marginalise the calls for reform. Focusing on efficiency and freedom also serves to highlight the hypocrisy inherent in many of the current objections to this duty. The ECA was sold to the New Zealand public on the basis that the employment relationship was based on co-operation. A duty to bargain in good faith is entirely consistent with that view. Why, then, do freemarketers oppose the duty? One might surmise this is because many employers fear losing the power to dictate to their employees, a power that is sourced in the ECA and the free market it has established.

And what of the other concerns regarding the duty; that it is too onerous, too uncertain, and biased? The approach taken in British Columbia addresses each of these issues. The duty is not onerous, it is essentially procedural in nature. Although the duty can result in the imposition of terms (through first contract arbitration and the remedial provisions), these aspects of the duty need not necessarily be replicated in New Zealand. In terms of uncertainty, considered legislative amendment would, in fact, remove much of the uncertainty that presently surrounds the implied obligation developed by the Employment
Court. To the extent that gaps remain, the task of providing judicial guidance would fall to Employment Tribunal adjudicators and the courts, and would be no more difficult than the task which common law courts have already undertaken in defining similar standards such as “reasonableness”. Commercial parties appear able to cope with notions of this kind; there is no reason to suggest that employers and employees will be any less able to do so.

In terms of alleged bias, the duty applies to both employers and employees. To the extent that this duty restricts the use of economic sanctions, it does so for both parties, and thus leaves their relative bargaining options unaltered. Nor will the duty provide a “crutch” for otherwise weak unions; unions themselves will be required to justify and explain their demands, and those looking to the duty as a means of achieving what they lack the power to achieve at the bargaining table, will be disappointed. Indeed, the duty will be considerably more neutral in effect than the ECA; which purports to deliver freedom of choice to all parties, yet does so in a context that prevents many from exercising that freedom.

It is, however, conceded that the duty to bargain in good faith, as it applies in British Columbia, could not be introduced into the ECA without modification. In particular, care would need to be taken to address the disparate and isolated worksites in which many New Zealand employees work. Approximately twenty five percent of all New Zealand employees work in work sites of five or less employees.\(^{800}\) Given this context, the duty to bargain in good faith will never be meaningful unless it is supported by effective and timely remedies. This in turn, will require a funding commitment from the New Zealand Government. Even more importantly, however, compliance with the duty must become common place, and uncontroversial, as it now is in British Columbia. Only then can the resources of the Employment Tribunal be used to foster, rather than enforce, good faith.

\(^{800}\) Kelsey, New Zealand Experiment, at 192. See also supra note 57.
Some will say that a duty to bargain in good faith does not go far enough; that it will be insufficient to address the failings and inequities perpetuated by free market bargaining (particularly in terms of the present distribution of wealth). Anderson argues that employees must be permitted to strike for multi-employer contracts, and that the ECA should adopt a preference towards collective rather than individual bargaining. Grills has called for the reinstitution of tri-partite conferences between employers, the Government and organised labour. Boxall advocates an appropriate minimum wage, and increased emphasis on training and education. According to Douglas, the key lies in collaboration and bargaining at an industry level. Others have suggested a return to compulsory arbitration.

It is readily acknowledged that introducing a duty to bargain in good faith is not the only way in which to address concerns regarding a lack of meaningful bargaining under the ECA, but perhaps it is more realistic than many alternatives. The ECA will not be repealed nor substantially altered; at least not without a dramatic change in Government. Even then, the existence and power of the neo-liberal lobbyists who occupy strategic positions within industry, the Government and its supporting Departments, may make repeal difficult. As Rasmussen has noted:

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803 Boxall, supra note 127 at 162. See also Anderson & Walsh, supra note 726 at 165; Mulgan, supra note 753.

804 Boxall, supra note 68 at 32.

805 Douglas, supra note 112 at 202-203; Anderson & Walsh, supra note 726 at 171.

806 Dannin, “We Can’t Overcome”, at 154. See also the references to New Zealand First’s policy as regards arbitration by Hughes (see Hughes, supra note 168 at 169) and Boyd (see S. Boyd, “Let Government Intervene in Industrial Disputes - NZ First” (1996) The Evening Post (N.Z.), 17 September, 8).
In the last decade in New Zealand, notwithstanding the different party complexions of government, the influence of business on economic and social policy has been immense. Nowhere has this been more marked than in the industrial relations system where the growth in business influence in national policy making on employment and labour market matters has been mirrored by a growth in employer power in the workplace. Thus, while it is likely that the present Coalition Government will collapse in 1999, we see no evidence at present that a change in government will bring into place a radically different employment relations regime for the new millennium.\(^\text{807}\)

Given this context, working within the legislation to give greater substance to bargaining is, perhaps, a more realistic starting point. If the duty then fails to deliver a change in ideology and resulting co-operation, good faith, and enhanced distributive efficiency, then further regulation, and alternative initiatives (such as those noted above and in Canada),\(^\text{808}\) may well be necessary.

The task that confronts those who would seek the enactment of a duty of good faith will be far from easy. In the first place the present Government is unlikely to be responsive, despite the promises of the New Zealand First Party. The National Government is by far the dominant partner in the coalition,\(^\text{809}\) and has a history of attacking those who fail to completely embrace the free market vision.\(^\text{810}\) Moreover, even if the Coalition were to reform, the very nature of a Coalition Government (with its emphasis on compromise) makes significant reform difficult to achieve.\(^\text{811}\)

Additionally, small employers will likely object to “interfering” regulation, and demand to be left alone to run their businesses.\(^\text{812}\) Similarly, many larger employers will likely resist

\(^\text{807}\) Rasmussen & Deeks, supra note 61 at 296.
\(^\text{808}\) See supra notes 767 & 801-806.
\(^\text{809}\) By way of example, the New Zealand First party does not have a Minister of Labour, or an Associate Minister of Labour in the Government. These positions are filled by National Party members of Parliament. See Hughes, supra note 168 at 175.
\(^\text{810}\) See Kelsey, Rolling Back the State, at 301-302.
\(^\text{811}\) Grills, supra note 26 at 101.
\(^\text{812}\) Boxall, supra note 127 at 156-157; McAndrew & Hursthouse, supra note 45.
any amendment that they perceive as threatening their autonomy and profitability.\textsuperscript{813} The NZBRT, the NZEF, and other employer lobby groups will no doubt also turn their considerable resources against such a proposal. Enhanced bargaining regulation runs directly counter to a number of their current objectives, which include the abolishment of the minimum wage, the Employment Court, and the existing requirements for procedural fairness in dismissals.\textsuperscript{814} According to Steve Marshall, the chief executive officer of the NZEF, the ECA has not gone far enough:

\begin{quote}
Maybe the Employment Contracts Act is not an end in itself, but a process; a link between the prescriptive labour legislation of the past, and a future where labour contracts are subject to the same legal principles as other contracts. The changes in practices and attitudes being wrought by the Employment Contracts Act are important in themselves, but if the employment relationship lost its mystique and rhetoric, other matters could assume their correct prominence.\textsuperscript{815}
\end{quote}

In essence, this is a euphemistic way of describing employment at will, and the eradication of the current employment law jurisdiction.\textsuperscript{816} It is disquieting to think that the NZEF’s attack on the Employment Court and its specialist jurisdiction may, in fact, be successful. As Kelsey argues, this attack is, in essence, motivated by a desire to abolish all institutional opposition, judicial or otherwise, to neo-liberal ideology.\textsuperscript{817}

\begin{footnotes}
\footnotetext{813}{Boxall, supra note 127 at 156-157.}
\footnotetext{814}{Kerr, supra note 66; Sloan, supra note 440. See also M. Story, “Lawyer: Change Will Make Sackings Easier” (1998) Sunday Star Times (N.Z.), 17 May, D10.}
\footnotetext{816}{See e.g., Kerr’s call for employment at will. See Kerr, supra note 479. It is, perhaps, ironic that at the same time the NZBRT and others lobby for employment at will, there are commentators in jurisdictions where this approach is the norm, who are calling for the introduction of dismissal for cause. See e.g., K. Sheehan, “Has Employment at Will Outlived its Usefulness? A Comparison of U.S. and New Zealand Employment Law” (1997) 28 Cal.West.Int.L.J. 323.}
\footnotetext{817}{According to Kelsey, a primary motive behind the NZBRT’s attack on the Employment Court is to extend neo-liberal hegemony from the bureaucracy, the Government and the private sector to the judiciary. See J. Kelsey, “Mad Max and the Future of the ECA” (1997) Labour Notes, March, 6. See also Rasmussen, supra note 61 at 292.}
\end{footnotes}
There is, however, cause for optimism. Bargaining under the ECA is failing to deliver social or economic equality. Nor is it resulting in the co-operative and efficient labour market that New Zealanders were promised. As more people realise these deficiencies, questions will be asked. The key is to engage in the debate at a substantive level rather than with rhetoric. If the ECA is supposed to have delivered enhanced co-operation, where is it? If co-operation exists, why are so many claims being filed in the Employment Court and the Employment Tribunal? Why is it that employer lobby groups wish to see the abolishment of the specialist jurisdiction? Why do strikes and lockouts continue to occur with regularity? Why did so many employers utilise partial lockouts, and why do employers continue to push the envelop on section 12 as far as possible?818 And why is it that some unions can barely restrain their enthusiasm for “putting the boot in” if, and when, market conditions permit them to do so? All these questions serve to challenge the questionable vision of co-operation advocated by ECA supporters.

And in terms of efficiency, where are the benefits for the secondary labour market? Why have the expanding profits of multi-national employers not been replicated in equivalent wage increases? Why do so many New Zealanders live in poverty while others receive unprecedented wage increases? And what would the costs be of regulating the present free labour market to the extent necessary to ensure a more equitable distribution of wealth among New Zealanders?

These issues must be addressed in substance, so that the New Zealand public can consider whether the ECA in its present form is indeed the appropriate way to regulate labour bargaining. Yet, if this is to happen, New Zealanders must demand substantive answers from their politicians and Department officials, rather than accepting the freemarket rhetoric which currently pervades Government releases. Those who call for explanation and change are not “special pleaders” as Epstein might suggest.819 They are concerned

818 As Dannin notes, “in reading through court cases, one is struck by how much creative energy has been employed in trying to restructure the ECA into a system of full employer hegemony rather than treating workers as equal partners in the workplace.” Dannin, Working Free, at 312.
819 Epstein, supra note 478 at 26.
New Zealanders who deserve, and must demand, answers. In the end it comes down to those in a democratic society determining how their society should operate. As Rick Barker suggests:

[I]t comes down to what we want as a society. Do we want a society that has a great spread of incomes so you have very poor and very wealthy, or do we want a society which treats everybody with some respect and dignity. And if we want to treat everybody with some dignity, then I think the state has to intervene on behalf of those who are less powerful and the most open to exploitation, the most vulnerable in society.  

Nor is the solution solely about economics. It is as much about humanity, social justice, exercisable freedom and access to opportunity. These concerns have been largely marginalised in the neo-liberal focus on the individual, for as Byrne so aptly puts it:

What is lost by coming under the influence of this dragon is the flesh and blood of people whose values and aspirations are reduced to the periodic printing of a paycheck.

One could now, in New Zealand, appropriately extend this metaphor to those who cannot even secure pay cheques, and who must, as a result, satisfy themselves with ever reducing benefit payments. Bargaining under the ECA in its present form has not delivered the promised utopia. It is time to ask why and to demand changes.

That said, few would advocate a return to the previous extreme where union membership was compulsory, strikes and lockouts were illegal and where the State essentially controlled labour relations. Even unions have acknowledged that the present system

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820 "Interview with Rick Barker", National Secretary, Service Workers Federation of Aotearoa, noted in Dannin, Working Free, at 311-312.
822 Many opponents of the ECA have said that a return to the system under the LRA would be inadvisable. See e.g., Clark, supra note 749; Anderson & Walsh, supra note 726 at 175-176; Foulkes, supra note 802 at 192; Grills, supra note 26 at 100.
carries with it a number of benefits, and, in truth, there is often little to commend replacing one extreme with another, as the ECA itself illustrates. The way forward, at least initially, may best be achieved through the introduction of a statutory duty to bargain in good faith. This would serve to foster moderation and industrial harmony, and, perhaps even more importantly, would encourage an approach to bargaining that reflects the fundamental nature of the employment relationship; one that is based on trust, confidence and good faith. Only when a duty of this nature is enacted, will the rhetoric and the reality of bargaining in the New Zealand labour market coincide.

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823 Including compelling unions to become more service orientated, more responsive to member needs and more focused on establishing a workplace presence.
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APPENDIX ONE

CLAIMS INVOLVING ALLEGATIONS THAT A PARTY HAS FAILED TO
BARGAIN IN GOOD FAITH, AS A PERCENTAGE OF ALL UNFAIR LABOUR
PRACTICE CLAIMS (ULPC'S) DISPOSED OF: TOGETHER WITH OUTCOMES

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NOTES
A = 75% OF ALL CLAIMS INVOLVING ALLEGATIONS OF BAD FAITH BARGAINING WERE VOLUNTARILY SETTLED.
B = 14.8% OF ALL CLAIMS INVOLVING ALLEGATIONS OF BAD FAITH BARGAINING WERE DISMISSED.
C = 7.4% OF ALL CLAIMS INVOLVING ALLEGATIONS OF BAD FAITH BARGAINING WERE UPHELD.
D = 2.8% OF ALL CLAIMS INVOLVING ALLEGATIONS OF BAD FAITH BARGAINING WERE EITHER WITHDRAWN AT AN EARLY STAGE (14), RESULTED IN CONSENT ORDERS (6) OR RESULTED IN DECLARATIONS (1).
APPENDIX TWO

CLAIMS INVOLVING ALLEGATIONS THAT A PARTY HAS FAILED TO BARGAIN IN GOOD FAITH, AS A PERCENTAGE OF ALL UNFAIR LABOUR PRACTICE CLAIMS (ULPC'S) DISPOSED OF

CLAIMS OF BAD FAITH v TOTAL CLAIMS

NUMBER OF CLAIMS

YEAR

TOTAL CLAIMS DISPOSED OF

CLAIMS OF BAD FAITH

245
APPENDIX THREE

OUTCOMES OF CLAIMS OF BAD FAITH (1978-1997)

- CLAIMS VOLUNTARILY SETTLED
- CLAIMS DISMISSED
- CLAIMS UPHELD
- OTHER

577
APPENDIX FOUR

APPLICATIONS UNDER THE FIRST AGREEMENT PROCEDURE (1993-1997)

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OUTCOME OF APPLICATIONS

- □ AGREEMENTS IMPOSED THROUGH ARBITRATION
- ■ APPLICATIONS VOLUNTARILY SETTLED
- □ APPLICATIONS WITHDRAWN
- □ UNION DE-CERTIFIED
- ■ PARTIES PERMITTED TO STRIKE