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Department of Labour
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**THE EFFECT OF THE
EMPLOYMENT RELATIONS ACT 2000
ON COLLECTIVE BARGAINING**

July 2009

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SUMMARY

Research aim and method

This research aimed to examine whether the Employment Relations Act has had any significant effect on the coverage and content of collective bargaining. It has been undertaken to inform employment relations policy work in the Department of Labour.

A mixed methods approach including a survey, focus groups, face to face interviews and analysis of administrative data was used. Information was collected from employers, employees, unions and employment relations professionals (academics, lawyers, mediators and professional advocates). Limitations of the research methods used are discussed on page 64.

Findings

Unionisation

While union membership has increased under the Act, union density (the proportion of union members in the total employed labour force) has been static at around 17 percent. Union membership remains concentrated in the public sector, and amongst a few historically strongly unionised industries (manufacturing, and transport and storage) in the private sector.

Working in a strongly unionised environment has a significant influence on an employee's decisions to join a union, thus patterns of union membership tend to be perpetuated. Employees also join unions because of their belief in a collective approach providing strength in numbers, and selective benefits (for example, free representation in case of grievance).

Employees not in unions considered membership would not offer them sufficient benefits. A combination of factors contributed to this: terms and conditions were considered to be largely the same for unionised and non-unionised employees, there have been improvements in statutory minimum terms and conditions, work places now provide more support to resolve issues, and employees have better access to information and confidence in knowing their employment rights.

Union representatives agreed that many of these factors are present, but also considered that workers do not have access to information about unions and/or opportunities to join a union, and that the 'opt in' rather than 'opt out' provisions of the Act work against unionisation. In addition, unions do not have the resources necessary to organise effectively in a largely enterprise-based (single employer-single union) bargaining environment.

Collective bargaining

The proportion of employed people covered by collective agreements has been in decline or static since 2001. The reasons for this relate to voluntary unionism, and the fact that most collective bargaining is carried out at the enterprise level (and as such it is more difficult for unions to organise workers) – both factors reflect the impact of the Employment Contracts Act 1991. Collective coverage is now around 15 percent of the total employed labour force. Coverage is – as it has long been – uneven, with a much greater proportion of the public sector covered by collective agreements. The ratio of

public to private sector coverage has increased over the last eight years: from 3.3:1 in 2000 to 5.7:1 in 2008.

Some union representatives in the qualitative research no longer considered 'pass on' of collective conditions as the most significant barrier to the growth of collective bargaining (as they had soon after the Act was passed). The primary barrier now is the sheer number of workers not covered by a collective agreement either through choice or because they do not have access to a collective agreement in their workplace. The number of unionised workers has exceeded the number of workers covered by collective agreements since 2003. Currently about 40,000 union members appear not to have access to a collective agreement in their workplace.

A majority of businesses across all industry groups do not have any employees on collective agreements. Large employers are more likely to have a higher proportion of unionised staff. The survey research found that employers with experience of unions and collective bargaining had a more positive attitude towards unions and collective bargaining than employers without this experience.

Employees who were part of a collective considered that the benefits were workplace employment policies being applied evenly, better agreements than they would have got had they negotiated as individuals, and being able to rely on experienced negotiators.

Non-unionised employees – who may not have been familiar with collective agreements – believed that a collective agreement made it less likely that good performance would be recognised. These employees also associated collective bargaining with the possibility of going on strike over matters that did not concern them.

In general, the provisions of the Act relating to collective bargaining (the good faith principle, bargaining process agreements, union access rights and employment relations education leave) provided a framework for negotiations that was broadly acceptable to both employers and unions. Within this framework, the process and outcome of bargaining was dependent on the individuals and circumstances particular to each case. Overall, the Act – through the good faith concept – was considered to have had a minor positive effect on the style of collective bargaining.

Multi Employer Collective Agreements (MECAs)

Unions seek MECAs because it is considered workers have greater bargaining power under a multi employer collective agreement. It is also a means of addressing the resourcing challenges of enterprise based bargaining.

Although union representatives suggested that there were advantages for employers in greater co-operation within sectors, private sector employers (in general) in the qualitative research did not see MECAs as advantageous. Some unionised employees also had reservations about MECAs due to the time negotiations took, the acrimony involved, and the possibility of losing some terms and conditions they previously had in order to accommodate additional employers in the collective.

Multi employer collective agreements (MECAs) currently cover less than 30 percent of collectivised workers. Since 2001 this figure has ranged between 22 and 33 percent. MECAs are found primarily in the public sector, particularly in education and health. The qualitative research suggested unions have had some success in negotiating quasi MECAs in which very similar terms and conditions are negotiated in separate collective agreements; however the number of such collectives is unknown.

Multi Union Collective Agreements (MUCAs)

The proportion of collectivised employees covered by MUCAs – currently around 16 percent - has varied little for over ten years. Union representatives showed limited enthusiasm for them in general, but the experience of MUCAs for both employers and union representatives in the qualitative research was positive.

Disputes

Employers and union representatives regarded the principles of dispute resolution under the Act positively. The effectiveness of mediation was widely considered to depend on the skills and experience of the mediator involved. Views were mixed on the impact of mediation on collective bargaining outcomes.

Since the Act, few of the cases heard by the Employment Relations Authority (and even fewer in the Employment Court) have related to collective bargaining issues. It is not known to what extent this reflects better dispute resolution at lower levels (between the parties concerned or in mediation) or an unwillingness to engage with these agencies.

Employers' and union representatives' views of their experience with the Employment Relations Authority varied. Those with the most experience of the Authority were more critical of the process and outcomes, and criticised the consistency of decisions made by the Authority. The cost and length of time it took to get a decision and the quality of the Court's decisions were criticised.

Content of collective agreements

There was little evidence of change in the content of collective agreements that could be attributed to the Act (ie, achieved through collective bargaining rather than through changes to statutory minima). Bargaining has continued to focus on wages, hours worked and redundancy provisions as has historically been the case. The most notable change is the increase in the proportion of collectivised workers getting more than four weeks annual leave (subsequent to the Holidays Act 2003 increasing the annual leave entitlement to four weeks from 1 April 2007). This proportion has grown from 8 percent in 2004 to 42 percent in 2008.

Costs & benefits of collective bargaining

Both the qualitative research undertaken and the international literature show that the costs and benefits of collective bargaining to employees and employers depend very much on the circumstances of each case, and that no general conclusive statements can be made. The qualitative research provided limited evidence of a 'partnership' approach manifesting itself during collective bargaining (it may of course be built outside of this time). Similarly the impact of the Act on productivity could not be observed in the research. Although there was some discussion about productivity during bargaining it seldom made an appearance in collective agreements, including MECAs.

Costs & benefits for employers

Employers of larger numbers of staff considered that there were cost efficiencies in negotiating one collective agreement, and employment relations benefits in terms of consistency of terms and conditions for employees, however, they did not see that collective bargaining provided further benefits, and few could see benefits in MECAs.

Costs & benefits for employees

Unionised employees perceived that they had better terms and conditions than their non-unionised peers. They also considered that they had had expert negotiation of the agreement on their behalf. In some cases of protracted and acrimonious bargaining (generally involving unions bargaining for a multi employer collective agreement) some employees perceived that the costs of union membership exceeded the benefits.

Employment relations & industrial action

Employment relations professionals considered that the Act had focused attention on the employment relationship compared to the award days, but noted that relationships were still largely individualised rather than collectivised.

Work stoppages and the percentage of all employees involved in work stoppages had been falling prior to 1991, and has continued to fall (albeit unevenly) during the Employment Contracts Act and under the Employment Relations Act.

Conclusion

Overall the effects of the Employment Relations Act on collective bargaining are chiefly observed in the recovery of collective bargaining in the public sector, and the continued decline (in general) in the private sector.

1. INTRODUCTION

This report presents the findings from Department of Labour (DoL) research on the effect of the Employment Relations Act 2000 (the Act) on collective bargaining. The research aimed to examine whether, after eight years, the Act has had any significant effect on the coverage and content of collective bargaining.

A key objective of the Act is 'to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.' Collective bargaining is one of the means by which the Act seeks to achieve this objective.

In examining the effects of the Act on collective bargaining, this report looks first at unionisation rates, the factors that underlie these rates, and influences on individuals' decisions about joining a union. Following this the growth of collective bargaining since the Act was passed is discussed. The report looks at where collective bargaining has grown and why, including multi employer and multi union collective bargaining. Exploring this subject further, the report examines the effects of key provisions of the Act that were intended to promote collective bargaining. The processes of bargaining are also examined, including looking at what issues are disputed, and how they are resolved. Finally the report looks at the perceived costs and benefits of collective bargaining for both employees and employers.

Research methods

The research involved qualitative and quantitative methods and analysis of administrative data. The DoL research team interviewed employer and union national bodies, union representatives and employers, employment lawyers and mediators. The qualitative work included focus groups with employees,¹ matched interviews of employers and union representatives from selected work sites, and four sector case studies in which employers, employees and union representatives were interviewed. The DoL surveyed employers, union representatives and employees from Auckland, Christchurch and Wellington about their perceptions of unionisation and collective bargaining. The research also involved analysis of DoL administrative databases of union membership and work stoppages and of Victoria University of Wellington's database of collective agreements. Appendix I provides more information about the research methods.

¹ In the survey and the qualitative research, almost all of the employees responding to the research came from (at least partially) unionised worksites. (In the two non-union focus groups, there was no stipulation made when recruiting respondents about whether or not there were any collective agreements in their workplaces. Therefore, some may have been from unionised workplaces even though they were not union members themselves, while others may have been from totally non-unionised workplaces.)

2. UNIONISATION

This section of the report looks at unionisation since the Act was passed. The promotion of collective bargaining requires that a critical mass of employees join unions. It could be expected that the Act would have a positive effect on unionisation because registered unions have the sole right to negotiate collective agreements. In addition, the Act improved union access to workplaces (including sites without current union members); and provided for employment relations education leave (which includes supporting union delegates in their role).

However, Boxall (writing in 2001) described a number of continuities in the Act from the Employment Contracts Act which might be expected to moderate changes. These continuities include voluntary unionism, a bargaining structure largely based around enterprises and workplaces, no return to compulsory arbitration, and personal grievance procedures being available to all employees. International studies of unionisation also suggest that the Act would not see a major increase in union membership. Lesch (2004) in his study of unionisation in OECD countries shows that the extension of collective agreements terms and conditions to non-union members, and legislation providing a substitute for union negotiated protection act against union membership. There is debate in the literature about the extent to which globalisation of economies and new industries have put unions under pressure (Scruggs & Lange 2002); regardless, the decline in union density is an international trend (Visser 2006).

To what extent have unions grown?

Table 1 below shows that union membership and union density (the proportion of union members in the employed labour force) decreased markedly with the Employment Contracts Act (which commenced in May 1991). Union membership began increasing under the Employment Relations Act and has generally continued to increase. However, union density – around 17 percent of the total employed labour force² - has not increased due to the steady increase in the total number of people employed since 2000.

The number of unions has changed over the last 20 years, as single enterprise unions have come (and gone), unions have merged and new unions have developed. In 2008 there were 168 registered unions with a total membership of 373,327.³ Nearly half (44 percent) of registered unions have less than 100 members – the median number of members per union is 132. The ten largest unions account for three quarters (76 percent) of the total union membership.

² Note that the total employed labour force describes those people who are working as self-employed and/or as a wage and salary earner, ie, it is larger than the number of people who could potentially join a union or be covered by a collective agreement.

³ Eighteen of the 168 unions did not provide an annual return to the Department of Labour in 2008, five of which voluntarily deregistered after 1 March 2008.

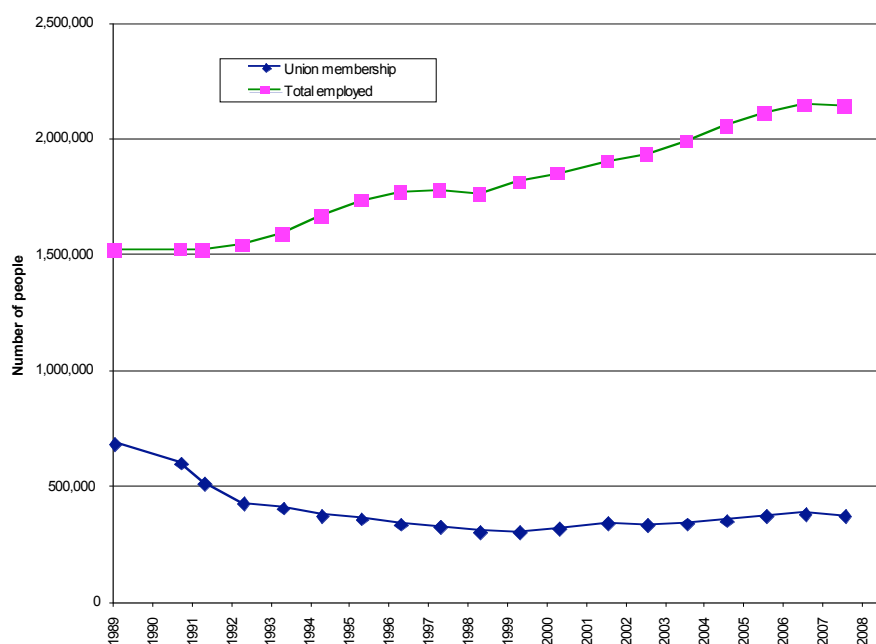
Table 1: Union membership 1989-2008

Date	Union membership	Number of unions	Total employed*	Union density	% change in union membership	% change in total employed
Sep-89	684,825	112	1,520,000	45%	n/a	n/a
May-91	603,118	80	1,521,700	40%	-11.9	0.1
Dec-91	514,325	66	1,518,800	34%	-14.7	-0.2
Dec-92	428,160	58	1,539,500	28%	-16.8	1.4
Dec-93	409,112	67	1,586,600	26%	-4.4	3.1
Dec-94	375,906	82	1,664,900	23%	-8.1	4.9
Dec-95	362,200	82	1,730,700	21%	-3.6	4.0
Dec-96	338,967	83	1,768,200	19%	-6.4	2.2
Dec-97	327,800	80	1,773,200	18%	-3.3	0.3
Dec-98	306,687	83	1,760,900	17%	-6.4	-0.7
Dec-99	302,405	82	1,810,300	17%	-1.4	2.8
Dec-00	318,519	134	1,848,100	17%	5.3	2.1
Mar-02	342,179	170	1,901,000	18%	7.4	2.9
Mar-03	334,044	181	1,928,700	17%	-2.4	1.5
Mar-04	340,413	179	1,988,000	17%	1.9	3.1
Mar-05	354,898	151	2,054,800	17%	4.3	3.4
Mar-06	366,985	178	2,107,900	17%	3.4	2.6
Mar-07	376,763	169	2,144,200	18%	2.7	1.7
Mar-08	373,327	168	2,138,900	17%	-0.9	-0.2

Sources: union membership figures 1989-2000 from May et al 2000 and 2002-2008 from DoL union membership statistics; total employed figures from Household Labour Force Survey data 1989-2007 from Statistics NZ 2008. *Total number of people employed describes those people who are working as self-employed and/or as a wage and salary earner, ie, it is larger than the number of people who could potentially join a union or be covered by a collective agreement.

The figure below shows the steady increase in the total number of people employed compared to the trend in union membership.

Figure A: Trends in union membership and total number of employed



Union membership remains concentrated in particular sectors, as shown in Table 2 below. There is a considerably greater degree of unionisation in the public sector, and amongst a few particular industries (manufacturing, and transport and storage) in the private sector. These are areas of traditional union strength and existed as such prior to the Act. Although annually there are minor changes, there has not been sufficient change or enduring growth to suggest these established patterns of union membership are changing significantly.

Table 2: Proportion of union members by industry

Industry	2005	2006	2007	2008
Agriculture, fishing, forestry	3%	5%	4%	3%
Mining and related services*	-	-	-	-
Manufacturing	25%	22%	26%	23%
Energy and utility services*	-	-	-	-
Construction and building services	2%	3%	4%	4%
Retail and wholesale trade, and restaurants and hotels	3%	4%	4%	3%
Transport, storage and communication	33%	37%	35%	30%
Financial, insurance and business services	5%	4%	3%	4%
Public and community services **	33%	36%	37%	38%

Sources: DoL union membership data; Statistics NZ Household Labour Force Survey

* Mining and related services and energy and utility services are included in the total Household Labour Force Survey figures but are not listed as separate categories; therefore these figures are not included.** Combines the ANZSIC categories of government administration and defence, health and community services, education, cultural and recreation services, and personal and other services.

It is not possible to closely analyse individual union growth year on year as the potential membership must be known in order to comment meaningfully on the extent to which unions are succeeding in increasing membership. Also, there is a lack of detailed union membership data over time (the flow) which would permit deeper analysis of union membership, for example, looking at the flow through of members and the length of union membership.

Factors that encourage or discourage union growth

Factors that encourage union growth

There is an extensive international literature looking at the factors involved in employees' decision-making about whether to join a union. Overall, the literature suggests that the key factors in whether people join a union are the presence of a union at the workplace and employees' belief that workers need strong trade unions to protect work conditions and wages (Schnabel & Wagner 2005).

In the DoL's survey of employees the largest single reason (selected from a range of options) by employees for joining a union was 'support if I had a problem at work.' This is similar to the findings of a survey of employees carried out for an earlier evaluation of the Employment Relations Act (Waldegrave 2003). Unionised employees also expressed stronger beliefs than their non-unionised peers that the union would protect their jobs, and secure better pay and conditions than individuals could negotiate.

In focus groups, unionised employees viewed the union as offering a means of more effective communication with the employer. Employees also felt there was strength in numbers, and improved health and safety protection. (Union members expressed these views even when they could not name the union to which they belonged.)

All groups interviewed in the qualitative research held similar views on factors that encouraged union growth. Workplace culture was considered a key factor in employees' decision-making. Thus new employees were considered more likely to join the union in a heavily unionised workplace, and the converse was also true.

Another factor suggested by respondents that encouraged union membership was the selective benefits unions offered members such as free representation for personal grievance cases, or bonuses (as the Public Service Association had negotiated for members only). The suggestion was also made (by an employer's representative but not by any employees) that - in relation to some unions - workers join the union because they believe it can contribute to the growth and success of the workplace.

A difficult employment relations environment at work was considered to encourage union membership, as was a political environment that favoured unionisation. Very active union organisers were also thought to have an influence on individuals' decision making.

Note that comparisons of international data show that union density has a very weak - or perhaps no - association with the employment rate or the unemployment rate (Aidt & Tzannatos 2002).

Factors that discourage union growth

All groups involved in the qualitative research suggested many more factors associated with the contemporary environment that discouraged rather than encouraged union growth - these factors are discussed below. In addition it was widely considered that unions had not recovered from the effects on membership of the Employment Contracts Act, and did not have the resources necessary to organise effectively.

The Employment Contracts Act saw a decline in overall union membership and an increase in the number of small and single enterprise unions (Barry & Walsh 2007). (The Departmental data on unions does not identify single enterprise unions, but as noted, in 2008 nearly half of unions had less than 100 members.) Consequently one effect of the Employment Contracts Act was the creation of a large number of small collective agreements, which are resource intensive to negotiate. Reflecting business demographics in New Zealand,⁴ the majority of collective agreements involve less than 50 employees as Table 3 below shows, and have done since the inception of the Employment Relations Act. It was commonly held by interviewees in the research that union organising efforts are thus concentrated in the areas where unions have a chance of building a critical mass that will help to perpetuate membership. However no empirical data relating to union organising activity was available.

⁴ Statistics NZ Business Operations Survey 2007 data shows that of the 35,000 businesses with more than 5 employees, three quarters (73 percent) have between 6 and 19 employees.

Table 3: Proportion of all collective agreements by settlement size

	Settlement size (number of people covered)				Number of agreements
	Under 50	50-99	100-499	500 or more	
2001	69%	12%	14%	5%	3,260
2005	70%	14%	13%	3%	2,593
2006	69%	14%	14%	3%	2,581
2007	69%	14%	14%	4%	2,512
2008	70%	14%	13%	3%	2,684

Source: Victoria University's Industrial Relations Centre collective agreement data series

Employers and employment relations professionals considered that a combination of factors meant joining unions was simply not sufficiently attractive to employees: terms and conditions were considered to be largely the same for unionised and non-unionised employees making employees question the value they derived from union fees. (The DoL survey found that a belief that the fees were too expensive was more likely to affect former union members' decision-making than people who had never been members.)

The improvement in statutory minimum terms and conditions gave conditions to all workers which might previously have been in collective agreements negotiated by unions. There was also a view that, given the improvements to terms and conditions, unions were unlikely to be able to deliver significant further improvements.

There was a suggestion from employers and employees that work places now provide more support to resolve issues. Where people might once have complained to a union, they now take the problem to human resources staff or a manager. A high employment rate also meant employers made an effort to keep their employees content, making union growth less likely.

Unions were seen by some employers and employment relations professionals as suited to workers engaged in occupations where everyone did very similar or strongly collegial work, for example, nursing and teaching, or were engaged in process work. Unionism was considered not to suit employees in work based on 'individual skill and knowledge' such as the information technology sector.

Another view expressed in the qualitative research was that younger workers had better access to information and confidence in knowing their employment rights compared to previous generations: this was considered to discourage union growth. Linked to this and to unions' lack of resources, the presence of a generation of employees with no experience of unionism was also considered a factor in modest union growth since the Act.

The disproportionately low union membership of younger workers is noted in the literature internationally. A number of (not mutually exclusive) theories are suggested, some of which have better support from empirical evidence than others. Haynes' (2005) analysis of these theories using two large scale surveys in New Zealand concluded that the location of younger workers in workplaces with low union presence is a major cause of lower union membership among younger workers (however the study did not exclude deficiencies in union organizing also playing a role).

It was commonly observed by all groups in the qualitative research that people in casual work did not have a long term perspective on their employment and therefore did not see union membership as relevant. Union representatives saw that this group of people lacked the opportunity to be represented by a union due to the prevalence of enterprise level bargaining. Union involvement only during collective bargaining was also considered to limit opportunities for union growth.

Employees' reasons for not joining a union

The DoL survey showed that the single most commonly cited reason for not being a union member – by both people who have never joined a union and those who were formerly members of a union - is that they are 'satisfied with (their) job and therefore see no reason to join a union.' This reflects the overarching view emerging from the qualitative research with employees and is also the perspective of employers and employment relations professionals.

Focus groups found most non-union members would only join a union if they saw significant benefits in doing so. Employees did not see the value in unions essentially because they felt they had good conditions that could not be bettered through being in a union. The qualitative research also found that more skilled people considered unions irrelevant as they felt they could negotiate for themselves. Some people did not want a third party in the employment relationship. These people viewed unions as more suited to those in unskilled and process work, or in workplaces with poor employment practices.

Some non-unionised employees considered that bringing the union into the employment relationship was divisive, with long term poor effects on the relationship. It was also suggested that union membership could create difficulties between staff. It was felt that management structures and human resources staff could resolve minor difficulties. Further it was felt that people have more information about their rights, and are more empowered to communicate with employers themselves. There was also more statutory protection of minimum terms and conditions, and Occupational Health and Safety regulations with respect to health and safety issues.

Although non-union members did not see the point in belonging to a union, they did provide a few examples of collective action in workplaces. For example, one group of employees collectively discussed their individual employment agreements with their employer, and another company used a committee of employees to review their equipment and keep management updated on what needed replacing.

We all get together on each site and have one big (meeting) for the whole area. It's just an open forum really. Anyone can put in their gripes or complaints. Management will have their say. It's quite a good forum really... and there's often a lot of changes come from them.

Non-union member employee

The literature suggests that – in some situations - the presence of 'non-union voice mechanisms', as described above, may dissuade workers from paying for the additional support offered by a union (Fiorito 2001, Bryson and Freeman 2005, Bryson 2006.)

Union views

Union representatives agreed that many of the reasons described above for not joining a union existed, but also considered that there were issues with access to information

about unions and opportunities to join a union: much of the organisation must be done at the enterprise level which is resource intensive for unions, and this difficulty is exacerbated by the relative frequency with which people change jobs. Union representatives also considered that the provisions of the Act requiring that employees opt in rather than out of joining a union added a barrier to people joining unions.

The relative extent to which these issues contribute to limiting union membership is difficult to assess. There is no analysis available of the effect of unions' resources on their ability to organise. In the DoL survey, 18 percent of employees who had never been in a union gave lack of knowledge about unions or how to join as a reason for non-membership. Employers of non-unionised staff in the qualitative research stated that they had either never been approached by a union organiser or that their staff weren't interested. Where unions sought access it would appear to have operated smoothly. (Access rights are discussed further on page 36.)

Ending union membership & duration of membership

The literature on the subject of former union members (which is minimal) suggests that ceasing to be a union member relates not so much to changes in attitudes to unions but largely to structural factors. For people who remain in employment (that is, discounting those who retire, become unemployed or self employed), the major reason for ceasing to be a union member relates to people changing jobs and there being no union in the worksite they had joined (Visser 2002, Goslinga & Sverke 2003).

The DoL survey differentiated between people who had never been union members and former union members, but neither the survey nor the qualitative research looked specifically at people's reasons for leaving a union. However, the survey did show that former union members were more likely than people who had never been union members not to be in a union because their current job was not covered by a collective agreement and/or because they believed that the fees are too expensive.

In the qualitative research, former union members referred to prior poor experience of unions relating to representation of workers, and overly aggressive union action. While in the case study research, insufficient benefit in return for union fees was cited by some former union members and those contemplating resigning their membership.

The literature on why people remain in unions and the duration of membership is also limited, however, Vaona's (2006) study of union data from the Veneto (Italy) region estimated the median duration of union membership at approximately six years, a similar result to that obtained by Visser (2002) for Dutch workers (five years). Women, flexible workers, foreign workers and those working in cities tended to show less attachment to union membership than other workers. Workers with a smaller probability of joining unions also had a higher probability of leaving them once being a member.

Are there areas where unions should logically be involved but are not?

In the qualitative research, union representatives, employers and employment relations professionals reported that there were areas where unions could potentially have made gains but have not made them to any great extent.⁵ The service sector was the most commonly cited example from respondents who commented on areas which one might

⁵ In this context, the growth of Unite union was noted by respondents (they have increased membership – particularly with workers in the restaurants and accommodation sectors – from 646 in 2004 to 4,321 in 2008). However, commentators expected that sustaining membership in these sectors would be difficult.

expect to be more highly unionised. This sector was characterised by respondents as containing a high proportion of low paid, young and vulnerable workers, with (real or perceived) issues for workers associated with the terms and conditions. Respondents considered that the sector was not effectively unionised because there was a low rate of union density in the private sector overall, and unions did not have the critical mass to provide the organising resources. Further, the characteristics of much of the workforce (young, high turnover, casualised) made it very difficult to organise.

Difficulties with organising workers in the sector were not always associated with the limited resources of unions. A public sector employer provided the following example of a joint employer-union attempt to unionise a predominantly young, part time work force.

We worked with the (union) which represent all people who work in (this area), to get all these people who work part-time up to 30 hours a week to get them to join the union. It was the best thing for us (as the employer) to do. We co-operated with the union to specifically target each individual and to give (staff) a circular (that said) over the next two years if you join the union you'll get an increase in pay of three percent in the first year and two percent in the second year together with a medical insurance subsidy ... We did a big campaign, assisted the managers to work with the union to get this thing to every single person...and we got about eight people out of 300 (to join the union).

Employer

3. COLLECTIVE BARGAINING

This section of the report looks at whether collective bargaining has grown under the Act and the factors which promote or discourage it.

Under the Act, if there is an existing collective agreement in a workplace, new employees who already belong to a union that is party to the agreement will automatically be covered by the agreement. If when an employee begins work they do not belong to a union that is party to the collective agreement, the employer must tell them the agreement exists. The employee then has 30 days to decide whether or not to join the union and be covered by the agreement. During the 30 days they are covered by an individual agreement on the same terms as the collective one. If after 30 days they decide not to join the union, they can then vary their agreement. If they do not negotiate a new agreement, they continue to be covered by an individual agreement on the same terms as the collective agreement.

One of the consequences of these provisions is that only employees in a union party to a collective agreement are in law covered by that agreement. In practice, the coverage of a collective agreement may extend further than just those union members through the extension of terms and conditions of the collective to other employees.

To what extent has collective bargaining increased?

Table 4 below shows that the number of employees currently covered by collective agreements is less than the number when the Act was passed. Additionally, the proportion of employed people covered by collective agreements has been in decline or static since the year following the introduction of the Act. Table 4 also shows that from 2003 onwards the coverage of collective agreements has been less than total union membership. Presumably, this is because there is no applicable collective agreement for some union members.

Table 4: Collective agreement coverage 2000-2008

Year (June)	Number of collective agreements	Total employee coverage by collective agreements	Total union membership	Total number of people employed*	Proportion of people employed covered by collective agreements
1996	No data	403,000	338,967	1,747,300	23%
1997	No data	416,000	327,800	1,758,900	24%
1998	No data	418,700	306,687	1,741,500	24%
1999	No data	421,400	302,405	1,764,600	24%
2000	3,877	420,600	318,519	1,782,300	24%
2001	3,260	391,400	319,660	1,840,300	21%
2002	3,465	399,100	342,179	1,896,400	21%
2003	2,477	329,300	334,044	1,931,800	17%
2004	2,353	297,800	340,413	1,992,100	15%
2005	2,593	300,700	354,898	2,052,600	15%
2006	2,581	321,900	366,985	2,115,500	15%
2007	2,512	309,900	376,763	2,148,100	14%
2008	2,684	331,800	373,327	2,163,800	15%

Sources: Union membership data from May et al 2001 and DoL; collective agreement data from Lafferty & Kiely 2008;⁶ people employed data from Statistics NZ Household Labour Force Survey.

*Total number of people employed describes those people who are working as self-employed and/or as a wage and salary earner, ie, it is larger than the number of people who could potentially join a union or be covered by a collective agreement.

Public/private sector differences

Collective agreement data analysed by Victoria University of Wellington's Industrial Relations Centre shows that since the Act a much greater proportion of the public sector has been covered by collective agreements – largely due to the recovery in collective bargaining in the public sector since the Act, which has not been matched in the private sector.

Table 5: Private and public sector collective bargaining density

Year (March)	Density* (%)		Ratio public/private sector
	Public sector	Private sector	
1990	97	48	2.0
1995	59	21	2.8
2000	69	21	3.3
2005	61	9	6.8
2006	68	9	7.5
2007	61	9	6.8
2008	59	10	5.7

Source: Victoria University of Wellington's Industrial Relations Centre data

*Density calculated using statistics NZ Quarterly Employment Survey data to estimate total employment by public and private sector.

⁶ Agreements received by Victoria University's Industrial relations centre are submitted on a voluntary basis, however the IRC considers that, although incomplete, their database covers the overwhelming majority of employees covered by collective agreements.

Looking more closely at the private sector, Table 6 below shows the proportion of employees covered by a collective agreement by industry in 2007. Between a quarter and a third of all business in manufacturing, health and community services, mining and quarrying, transport and storage, and construction have between 50-100 percent of employees covered by a collective agreement. In the remaining sectors, between a tenth to a fifth (approximately) of businesses have between 50-100 percent of employees covered by a collective agreement. Over 80 percent of businesses in the finance and insurance, and property and business services sectors have no employees covered by collective agreements.

Table 6: Collective employment agreements in the private sector by industry (2007)

Industry	Number of businesses	Proportion of employees covered by a collective agreement					
		Zero %	10% or less	50% or less	90% or less	90 to 100%	Unknown
Percentage of all businesses							
Agriculture, forestry and fishing	3,060	73	0	2	2	14	9
Mining and quarrying	96	67	3	8	6	15	2
Manufacturing	5,349	60	3	8	8	17	5
Electricity, gas and water supply	18	65	17	6	6	6	6
Construction	3,609	66	2	4	2	18	8
Wholesale trade	3,081	74	3	3	1	12	8
Retail trade	5,772	69	2	2	1	19	7
Accommodation, cafes and restaurants	3,360	64	3	0	4	13	16
Transport and storage	1,530	67	3	6	6	16	1
Communication services	132	69	5	2	2	18	4
Finance and insurance	573	84	1	4	2	6	2
Property and business services	5,118	82	2	1	1	10	4
Education	606	74	4	1	0	13	8
Health and community services	2,097	64	2	12	6	13	3
Cultural and recreational services	597	62	5	2	5	22	5
Overall	35,004	69	2	4	3	15	7

Source: Statistics NZ Business Operations Survey

As might be expected from the discussion on factors encouraging union membership, the number of employees in the business has some effect on the proportion of employees covered by collective agreements. Table 7 below shows that larger employers are likely to have a greater proportion of employees covered by a collective agreement.

Table 7: Collective employment agreements in the private sector by number of employees (2007)

Business size	Number of businesses	Proportion of employees covered by a collective agreement					
		Zero %	10% or less	50% or less	90% or less	90 to 100%	Unknown
Percentage of all businesses							
6-19 employees	25,608	71	1	3	2	16	8
20-49 employees	6,216	70	3	4	4	15	5
50-99 employees	1,719	65	7	10	6	10	3
100+ employees	1,458	49	12	16	13	7	3

Source: Statistics NZ Business Operations Survey

What factors influence the growth of collective bargaining?

In the qualitative research, there was a general consensus that there had been limited growth in collective bargaining under the Act. Amongst employees, employers and union representatives there was a widely held view that the Employment Contracts Act had had a significant negative impact on union membership and on the prevalence of collective bargaining, and that while there have been some increases, the Act had done only a little to reverse this trend.

In the beginning (after the Employment Relations Act) collective bargaining got up and going in places where it hadn't been done before or had fallen by the wayside but it depends entirely on union penetration and once they'd reached the limits of that it plateaued and that's how it'll stay.

Employment relations professional

There was a consensus of opinion amongst different groups interviewed about the barriers to collective bargaining. The overarching barrier was considered to be the voluntary nature of unionism – as employees with a choice about an individual or a collective agreement must make a choice about joining a union. Secondly, as discussed, most collective bargaining is at the enterprise level – requiring unions to organise at individual worksites. Respondents felt that unions do not have the resources required to organise effectively in much of the private sector, and therefore cannot get the mandate they need to initiate collective bargaining.

Employer views

The qualitative research showed that whether employers actually welcomed collective bargaining depended on their circumstances: employers of a large number of employees with a high proportion of unionised staff regarded collective bargaining as efficient – although the process of bargaining could be costly (this is discussed further on page 49.) The DoL's employer survey found that employers with experience of unions and collective bargaining had a more positive attitude towards unions and collective bargaining than employers without this experience.

This finding is supported by earlier work carried out in New Zealand by Foster et al (2006).⁷ Foster's study found that small to medium organisations did not show much interest in collective bargaining and concluded that employers' attitudes did not bode well for the growth of collective bargaining. It was noted that employers may be convinced to enter into collective bargaining if they can be shown there is some benefit to their organisation.

The qualitative research also showed that there was a clear contrast in perceptions of collective agreements between employers who had these agreements and those who did not. Those who currently had collective agreements thought that these worked well and had at worst a neutral impact on their business. Those who did not have collective agreements, on the other hand, could see no significant gain from being party to one at their workplace and often thought that it would cause problems.

In the qualitative research some union representatives interviewed considered that employers actively resist unionisation and hence collective bargaining. There was no evidence of employer resistance to collective bargaining in the qualitative research from

⁷ Findings based on a 20 percent response rate to postal survey of employers with 10 or more employees in Taranaki, Manawatu-Wanganui and Hawke's Bay regions listed in the *Universal Business Directory*.

employers or employees (although there were several examples of employers resisting multi employer collective bargaining - this is discussed on page 23). Similarly, in the DoL's survey only a very small percentage of non-union members gave as a reason for not joining that they were 'afraid of reprisals from management.' Further, a number of employers expressed a preference for collective bargaining (this is discussed further on page 48).

Union views

As stated, union representatives also considered that key factors inhibiting the growth of collective bargaining were unionisation rates and access to collective agreements in workplaces. There has been a change in union views since the earlier evaluation of the Act (Waldegrave 2003) in which 'almost all unions reported that the extension of collective terms and conditions to those on individual arrangements was the most significant barrier to greater growth of unions and collective coverage.' Some union representatives interviewed did not now consider 'pass on' as the major issue hampering the increase of collective bargaining:⁸

There are 200,000 work sites where there's no collective agreements, so there's no pass-on ... pass-on is not the issue there. The issue is there is simply no effective bargaining.

Union representative

Employee views - union members

The qualitative research with employees found that that their knowledge about collective bargaining varied, with some taking a great deal of interest and attending all union meetings while others were less involved. Union members saw one of the key benefits of being part of the collective was the option to rely on experienced negotiators who could point out areas that might be problematic.

Union members regarded strength in numbers as an important benefit of union membership in terms of collective bargaining, and generally felt that collective pressure helped them to negotiate better agreements than they would have got had they negotiated as individuals. Some felt that being part of a collective agreement had helped them keep hold of specific benefits that had been lost in other workplaces. Collective agreements also helped union members feel that workplace policies were being applied evenly across their worksite.

However, union members felt that the specific gains negotiated as part of a collective agreement were passed on to non-union colleagues and this was a source of irritation. While passing on was a disincentive to be part of the collective, it was not an argument against it as collective bargaining was seen to have delivered specific gains that would not have occurred if negotiations had taken place on an individual basis.

Employee views - non union members

The qualitative research also provided information about non-union employees' views of having a collective employment agreement. The research did not explore how much information these employees had been given about the collective agreement that would

⁸ Note that while the 2004 amendment to the Act made it a breach of good faith to pass on collectively negotiated terms and introduced a bargaining fee, union representatives considered this had made little difference to the extent or impact of pass on.

have been applicable to them – or if there was such an applicable collective. However their responses indicate that they were not familiar with collective agreements. Non-unionised employees generally thought that there would be little benefit for them in having a collective agreement. Most did not know a great deal about the content of actual agreements, but seemed to assume that collective agreements were simple documents outlining basic pay and conditions. Non-unionised employees expected that collective agreements would not be flexible enough to be effective in workplaces where people had a wide range of different roles (a description that most believed applied to their workplaces). They could often see the advantages of collective bargaining for certain people, but not people like them.

Some non-union employees thought that collective agreements made it less likely that good performance would be recognised. These people considered that their own performance was above average or at least above the 'lowest common denominator' that they thought a collective agreement would be based on, thus these respondents believed that they would be worse off under collective rather than individual agreements. For some non-union employees these views were based on a desire to be seen as an individual rather than as part of a collective. However, some non-union employees could see merits in collective bargaining where managers were not prompt to reward good performance.

Non-union members often associated collective bargaining with the possibility of going on strike. Some non-union members felt that past strikes had been unnecessarily disruptive and had not been of great benefit to the union members involved. These respondents considered that belonging to a union might result in being obliged to strike because of a dispute that had nothing to do with them. Again, non-union respondents generally did not see particular benefits for themselves in collective action but thought that there could be considerable costs. As noted, though, there was evidence of limited informal collective action amongst some non-unionised employees such as collectively negotiating revisions to their employment agreements.

Multi employer and multi union collective agreements

Multi employer collective agreements

Under the Act, unions are able to bargain for single or multi-employer collective agreements (MECAs). Before collective bargaining begins a secret ballot must be held of members of the union who are employed by each employer that would potentially be involved in an MECA. At each site, a majority of votes in favour of a multi-employer agreement are required to give the union a mandate to seek a MECA.

There have been several notable Employment Court cases involving unions initiating MECAs or citing employers into existing MECAs. The Employment Court has concluded that the Act does not require the parties to conclude a multi-employer collective agreement. Rather, section 33 makes it one aspect of the duty of good faith that a union and an employer bargaining for a collective agreement should conclude such an agreement unless there is a genuine reason, based on reasonable grounds, not to. Thus the requirement to conclude a collective agreement may include a multi-employer collective agreement, but it may equally include a single employer collective agreement or one of the other varieties of collective agreements that the Act allows (Towner 2007).

MECAs currently cover less than 30 percent of collectivised workers. Since 2001 this figure has slowly increased from 22 percent (2001) to 33 percent (2006) but declined slightly in 2007 to 28 percent and 26 percent in 2008.

Table 8: Proportion of workers covered by type of agreement 1996-2008

Year (June)	Multi employer			Single employer		IEA (%)**	Number of workers covered
	Multi union (%)	Single union (%)	No union (%)*	Multi union (%)	Single union (%)		
1996	3	16	4	16	58	3	403,000
1997	3	15	4	17	58	3	416,000
1998	4	15	3	15	60	3	418,700
1999	3	15	4	15	59	4	421,400
2000	3	15	3	15	60	4	420,600
2001	3	19	2	14	57	5	391,400
2002	5	19	0	16	55	5	399,100
2003	4	22	0	15	56	3	329,300
2004	4	25	0	16	55	0	297,800
2005	5	25	0	15	56	0	300,700
2006	4	29	0	14	53	0	321,900
2007	1	27	0	16	56	0	309,900
2008	1	25	0	15	59	0	331,800

Source: Lafferty & Kiely 2008

*Data for 1996-2001 included a multi employer – no union category.

** Proportion of employees who are not union members but who have negotiated collectively.

Note that this results in a number of individual agreements, not a collective agreement.

To further illustrate the comparatively large number of single employer single union agreements, Table 9 below shows the *number* of collective agreements by type over 2001-2006.

Table 9: Number of agreements by type 2001-2006*

Year (June)	Multi employer		Single employer	
	Multi union	Single union	Multi union	Single union
2001	4	7	103	580
2002	13	45	396	2756
2003	12	41	345	2020
2004	11	52	325	1992
2005	11	58	327	2199
2006	11	66	322	2206

Source: Victoria University of Wellington's Industrial Relations Centre

* The total number of agreements in this table may deviate slightly from the total number in other tables due to missing or unreported data for the variable being shown.

Multi employer collective agreements are found primarily in the public sector, particularly in education and health. In 2008, core government employees accounted for 46 percent of all employees covered by MECAs. Only nine percent of private sector employees covered by collective agreements were covered by multi employer agreements.

However unions have had some success in negotiating quasi MECAs. For example, the Service and Food Workers Union did not attain a multi employer collective agreement for hospital cleaners but the agreements with individual contracting companies employing the cleaners are as similar as possible. In the banking sector, the union is

organising on an industry wide basis rather than pursuing agreements on an industry wide basis. It cannot be assessed from this research how extensive such arrangements are; this would require close analysis of collective agreements within industry groups.

Why have MECAs?

Working towards MECAs is the policy of the Council of Trade Unions (NZCTU 2007) – although not all unions pursue MECAs. MECAs are not necessarily easy to establish: they require unions to ballot members and potentially involve having to negotiate with all employers; therefore situations involving numerous employers are likely to be very resource intensive. (This can be overcome by the employers agreeing on an employer representative for bargaining purposes. An example of this is the Medical Association taking on the role of employer when the Nurses Organisation initiated a MECA for members employed in primary health care.)

In the qualitative research, union representatives said they sought MECAs because workers had much greater bargaining power under a MECA than under a single employer collective agreement.

In a MECA there is power. [For example] I go to a coffee shop every morning and staff there change every day ... Offering them collective bargaining in an enterprise-based regime is impossible even if they wanted it, whereas if there was a multi-employer restaurants and cafes collective agreement, they would walk into that workplace and have access to a collective agreement and a union.

Union representative

It was also a means of addressing the resourcing challenges of enterprise based bargaining.

Our strategic direction is to try and consolidate these collectives because what we need is industry wide bargaining and basically awards by another name because we have recognised you can't organise site by site.

Union representative

Union representatives also suggested that there were advantages for employers in greater co-operation within sectors

Under a MECA you can actually facilitate proper skills recognition and upgrading on training and agree ... what the requisite skills are ... I think there's definitely big economic advantages in employers in this country ... collaborating.

Union representative

The qualitative research showed unions worked to establish MECAs by concentrating on increasing membership at individual sites, and once each of these sites was unionised putting them together into a multi-employer agreement. Some union representatives reported that they had found even the most basic of MECAs difficult to establish. These included trying to put together multi-plant or multi-store agreements when all the plants and/or stores were part of the same company.

... as [employers] perceive it, it's in their economic interests not to consolidate bargaining with each other, they fight us every step of the way over multi-employer agreements even in very closely related companies. Look at [x company] and the [x company division] where each of the companies involved were 100 percent owned by the same parent. It wasn't like they were

competing with each other but they were determined not to set something up which would allow workers to be unified nationally.

Union representative

An employer who was part of a multi-site operation explained that being able to respond to local conditions was essential to their business and a multi employer collective agreement would not work for them.

The business is changing for us ... we couldn't afford to be tied in to other (subsidiary) companies let alone the competition. ... to tie us to a quite different business in another place was wrong for us – and the potential for (the multi employer collective) to grow larger – (it was) all wrong for us.

Employer

Employment relations professionals and employer representatives in the qualitative research considered that concluding MECAs was the only hope for unions to increase collective agreement coverage. It was also suggested that this sometimes led unions to put an ill advised amount of effort into trying to negotiate new MECAs or extend existing ones. There was information in the qualitative research that supported this view with several cases of unions initiating MECAs or citing employers to join existing MECAs that were resisted by employers and did not appear to be understood by employees. In all such cases the bargaining was protracted, acrimonious and expensive - and did not result in new or extended MECAs.

Employment relations professionals and employers saw that MECAs were a means of unions addressing issues of critical mass (having one rather than a number of agreements to negotiate). As is discussed below, no advantage for employers emerged from the qualitative research other than minimising the number of agreements to negotiate.

Employer representatives considered that MECAs might in some circumstances be attractive to employers: where the efficiency of not having to separately negotiate agreements outweighed the disadvantages such as sharing business information with competitors, loss of control of the business, or paying higher wages. Employer representatives considered that if there were these advantages then employers would be involved in MECAs. In general though, private sector employers in the qualitative research did not see MECAs as advantageous. Employers were likely to see MECAs as bringing an increase in union power without any particular benefits to the employer, but possibly some significant disadvantages as described above.

The research included one case study involving an existing MECA. This predated the Act and was considered to work well because the employers involved complemented rather than competed with another within the industry sector. However when the union cited a number of other employers into the existing MECA, the previously trouble free bargaining deteriorated, and the collective agreement took months to settle. Due to the resistance of the employers cited into the existing MECA, industry training provisions – a key aspect of negotiations - were abandoned in order to settle the agreement.

The union have been pushing for a number of rounds now to open up the whole thing about industry training ... I would have said we could have worked this all through ...we said we would look at ... trying to get more uptake of industry training within the industry. ... We went down the track and not [all the employers] wanted to be involved... It fell flat; it didn't go anywhere

unfortunately... [The union] held on to it pretty much until the end but it fell by the wayside in order to get the agreement signed off. ... The training claim was one of [the union's] main core claims right up until the end and then in order to get a percentage deal ... they had to say well look we will put that aside.

Employer party to the original MECA

Multi employer collective agreements were seen by respondents in the qualitative research as largely a public sector phenomenon because it was Government policy to have centralised bargaining in the state sector.

Employees' views

MECAs give unionised employees the same terms and conditions if they change employers (within the group of employers party to the MECA). It is not known to what extent this offers an advantage to those employees. The qualitative research included case studies where a MECA was initiated and one where an existing MECA was extended. In these cases the extent of the information that unionised employees had is unknown. However, these employees could not see that a MECA would bring them particular benefits, were worried about the delays in negotiations they associated with the multi employer aspect of the bargaining, and did not want to be obliged to strike over issues that essentially did not concern them such as an employer other than their own not agreeing to a particular provision. In relation to this last point, some employees felt that the multi employer collective bargaining might result in them receiving poorer terms and conditions than they otherwise would have.

Multi union collective agreements

Data from the VUW collective agreement database shows that at June 2008, 17 percent of collectivised workers were covered by multi union agreements but almost all of these were single employer multi union agreements. The proportion of collectivised workers covered by single employer MUCAs has remained roughly static since 1996 at 16 percent of workers. Only one percent of collectivised workers are covered by multi employer multi union agreements – the lowest proportion (and smallest number) of such collectivised workers for many years (Lafferty & Kiely 2008).

There was limited experience of MUCAs amongst the qualitative research participants. Union representatives interviewed did not generally express enthusiasm for MUCAs, considering that they did not deliver major benefits or were only appropriate in certain specialised circumstances. Many of the union representatives' who expressed a view considered that in most organisations, employees covered by one union often had very different roles from those who were members of a different union, which made constructing a multi union collective agreement difficult. Union representatives interviewed generally preferred informal co-operation between unions operating in the same workplace. Rather than in a multi union collective where the unions would negotiate together, the general practice was for unions operating in the same workplace to work separately but keep each other informed. There was, though, also a union view that MUCAs ensured unions did not - inadvertently or otherwise - undermine each other during collective bargaining.

If it's another union in the industry and we're bargaining together, it makes much more sense because there's no possibility of us undermining each other if

we're at the table at the same time arguing, advocating for the same members, for the whole group of members, it's much more advantageous for us.

Union representative

Employer representatives in the qualitative research also felt that MUCAs did not offer unions many advantages in the contemporary environment. Contrary to union representatives' views, employer representatives considered this was because unions now worked across occupational boundaries, with most bargaining at the enterprise level. There is no data available on the occupation of unions' members, but it was suggested by respondents that many unions now work across occupational boundaries.

Employers' perceptions of whether a MUCA would offer employers benefits differed. One employer, without multi union bargaining experience, felt that having multiple unions involved might create problems with the strongest union forcing their claims through. Others though saw that a multi union collective agreement might offer some efficiency advantages by replacing two or more agreements with one, and contributing to a consistent approach to all employees (this is discussed further on page 49).

Employers who had experience of multi union bargaining saw the possibility that a particular union's approach could be modified by having other unions involved in negotiations.

We also thought it would be useful to temper the bad behaviour of the biggest union by bringing in the more professional approach of the (x and y unions) into the process of bargaining in the one forum. As it transpired, we couldn't get the unions convinced.

Employer

An employer involved in a long standing MUCA involving several unions felt that the MUCA encouraged co-operation.

You really haven't got the issue around having say three individual negotiations with three [unions] and the jungle drums beating in the background saying 'oh we got this or we got that'. ...you haven't got that issue because it's all transparent... So that's a real positive. I think the other positive for this type of [negotiation] is that it does create the environment to be collaborative... Because you may have ... [a union] who thinks strongly about [an issue] but then you have [another union] who may think another way, that may soften [the first union's] approach. ... It may allow for movement.

Employer

Effect of the Act on multi employer and multi union collective agreements

The qualitative research found a general view (across employers, employment relations professionals and union representatives) that while the Act had made MECAs more possible, it had not made them easier to conclude. This was because while they could be initiated, and industrial action could be taken in pursuit of such, there was no onus to conclude a multi employer collective agreement. Union representatives considered that the legislative support for MECAs was weak and did not recognise structural changes to the economy that have seen a greater casualisation of the workforce.

While the Act does not treat single employer, single union, multi employer or multi union collective agreements differently, in practice MUCAs may be easier to negotiate than MECAs as they require employer(s) gaining agreement from the unions concerned

(ie, were likely to involve only a small number of parties). However, this type of agreement was not generally considered by unions to offer any particular advantages to workers.

4. EFFECT OF PARTICULAR PROVISIONS OF THE ACT ON COLLECTIVE BARGAINING

This section of the report discusses the effects of the concept of good faith in the Act and key provisions of the Act intended to promote good faith bargaining.

Good faith

Background

Under the original Employment Relations Act 2000, good faith was the central concept of the employment relationship. The 2002 review of the Act found that, for a variety of reasons, a high standard of good faith behaviour was not always visible. In the Employment Relations Amendment Act (No.2) 2004 (which came into force on 1 December 2004) a key amendment area centered on the definition of good faith and the requirements that this imposed upon parties. Good faith became a key principle for the whole Act, with employment relationships built on 'good faith in all aspects.'

The Amendment sought to specifically identify what good faith required, to rectify the problem of undermining tactics in relation to collective bargaining (for example, in relation to 'passing on' conditions, or an employer taking any action to persuade an employee not to be involved in a collective agreement.) The duty of good faith also now required the parties to conclude a collective agreement (unless there was a genuine reason, 'based on reasonable grounds' for not reaching an agreement - one party not wanting to be involved in a collective would not be a genuine reason.) The Amendment also introduced an obligation to continue bargaining, penalties for failure to comply with the duty of good faith, and mechanisms for facilitating bargaining. In extreme circumstances the Employment Relations Authority was given the power to determine a collective agreement.

Good faith in collective bargaining

In the qualitative research people from across sectors and all parties to employment relationships viewed the good faith concept positively because it provided a framework for constructive negotiations. Good faith bargaining relationships were becoming the norm, and this was considered to have enhanced trust generally, laying the foundation for good ongoing relationships. Most respondents considered that this was an achievement of the Act, however the view was also expressed that good faith behaviour was part of the broader concept of good management and had been developing prior to the Act.

The good faith requirement was seen to affect both parties to the employment relationship equally. In more acrimonious employment relationships, it was considered by employers that the good faith concept may be used more 'as a weapon' than a tool for creating positive relationships. (Breaches of good faith are discussed on page 41.) Nonetheless the overall effect of the concept was a framework for negotiations in which both parties were obliged to be constructive in their approach and credible about their claims.

Some participants in the research approved of the concept of good faith not being closely defined. Others had difficulty with the lack of specificity: there was a view that it caused confusion about how to act during negotiations, particularly with respect to

employers communicating with employees (discussed below). For some union representatives as well, the lack of a close definition of good faith meant they could not 'pin down' employers' acting in bad faith.

*Our view is that good faith is often extremely vague and often very unenforceable. So a really common area of dispute with us... is around communications with staff and we are of the view very clearly that all of the (particular employers we deal with) use communications to undermine the collective bargaining process and undermine the union. But they do it in such a way that you **can't** necessarily pin it down and the good faith obligations fall down there.*

Union representative

The health sector has its own Code of Good Faith, formalised by unions and employers. This consensus document was developed by District Health Boards New Zealand and the CTU and is a Schedule in the Employment Relations Act. The Code contains guidelines supporting collective bargaining including requiring the employer parties to support bargaining for a multi employer collective agreement. However, this Code too was considered by both union representatives and employers in the qualitative research to have had little impact - possibly because of the number of parties involved in the bargaining in the case studied.

... you had days if not weeks of bargaining in which the private contractors would effectively not sit in the same room or chose to create the circumstances so that they[could] claim they didn't have to sit in the same room as [their clients]. ... there is a good faith obligation between the employer representatives and union representatives. But there is also a good faith obligation between employers, [there was] very little of that you know, these are largely cut throat competitive bottom line businesses with very little common interest except making some money.

Union representative

Comments about the impact of good faith were confined to the effect on the process of bargaining. Respondents could not cite any difference made by good faith to the outcome of bargaining.

Bargaining process agreements

A bargaining process agreement (BPA) establishes the parameters for the collective bargaining process. For example, what topics will be included in the collective bargaining and what procedures will be followed if the parties cannot reach agreement. BPAs are intended to promote orderly collective bargaining, but it is not necessary to resolve a BPA prior to collective bargaining.

There is no data available on how many collective agreements are preceded by a BPA, nor how many BPAs are left unresolved with the parties proceeding to collective bargaining. The view of employment relations professionals involved in the qualitative research was that most parties involved in collective bargaining have a BPA. All employers and union representatives in the qualitative research had experience of BPAs.

A BPA was considered by respondents in the qualitative research to carry some weight as the Act said the parties should use their best endeavours to reach a BPA. Union representatives and employers were aware that if they went to mediation or the

Employment Relations Authority during collective bargaining, they would be asked to conclude a BPA.

In situations where there was a history of straightforward collective bargaining, the BPA was also straightforward, perhaps only involving signing last year's agreement.

The research provided several examples of issues emerging when bargaining was initiated that made negotiating the BPA time consuming and expensive. These examples involved employers' rights to communicate with employees during bargaining, and unions initiating a MECA unwanted by employers. These situations were characterised - in comparison with other cases in the research - by particularly complex, historically difficult, or new relationships between parties.

In multi employer or multi union situations, a BPA must be signed by all of the parties involved. The qualitative research showed that this did not in itself present problems, as the state of relationships involved was the critical indicator of the ease of negotiating the BPA and the subsequent collective agreement.

Where BPA negotiations were drawn out, pressure to reach agreement came from union members keen to see the collective agreement resolved and from the limited resources of the parties involved. This pressure meant that some issues up for discussion in collective bargaining might be put aside, with the risk that they might not be included in collective bargaining.

We weren't (in the bargaining process agreement) able to reach an agreement with employers on (a particular point). The tyranny of the bargaining process agreement then becomes well you haven't addressed it therefore clearly you didn't intend it. No, we haven't addressed it because we (omitted) it to get over that hurdle.

Union representative

In another case in the qualitative research, the union representative described the employer refusing to proceed until the union had agreed to the BPA.

Even if a BPA was concluded after protracted negotiation, it was not necessarily abided by, leaving the impression that negotiating the agreement had been a waste of time. Doubt was also cast on the usefulness of a BPA in situations where collective bargaining went smoothly. However participants in the research agreed that it was difficult to predict where BPAs would most be needed. Most employers saw having a BPA as good practice, and one employment relations professional who had negotiated a new collective agreement thought they were a major advantage of the Act. The flexibility provided by the Act - being able to proceed to collective bargaining without a BPA - was considered useful by both employers and unions in the qualitative research.

Overall those employers and union representatives who had relatively straightforward collective bargaining experiences looked favourably on BPAs for providing a framework for bargaining, and considered that they contributed to a constructive bargaining environment. Employers and union representatives who were in acrimonious situations found BPAs less valuable. Employment relations professionals had a generally positive view of BPAs but noted that their usefulness depended on how they were drafted and used - whether they were developed in the spirit of the Act to make the collective bargaining process constructive or not. In general, the drafting and use of BPAs was considered to have improved over time.

Communication rights

Under the Act, unions and employers must not undermine the bargaining or the authority of the other in the bargaining. The duty of good faith requires that a union and an employer must not bargain about terms and conditions of employment with persons whom the representative or advocate are acting for - unless the union and employer agree otherwise.

Communication between parties about terms and conditions of employment, in particular, employers communicating with employees, was the subject of some discussion in the qualitative research. Union representatives considered this section of the Act to be vital to the integrity of the bargaining process.

Fundamentally the nature of collective bargaining is that there are two parties to it. There is the union and there is the employer, staff who belong to the union choose to belong to the union, choose to make the union their bargaining agent and choose for the union to do the bargaining. So if the employer finds ways of communicating directly with employees in effect they are undermining the choice of those employees to be represented somewhere through their union and that bargaining process.

Union representative

Unions considered that this provision in the Act prevented the 'worst excesses' of employers directly negotiating with unionised employees during bargaining, but did not entirely prevent employers 'subverting' the Act (for example, leaving information addressed to managers 'lying around'). In addition, if unions did not have to address employers' communications to employees, their resources were conserved.

A range of employers involved in the qualitative research had no issues with a restricted ability to communicate with employees at this time. These employers included those with a heavily unionised workforce and those with a small proportion of unionised employees. However there were also employers who had strong views about being able to communicate with employees. This was because they wanted to correct any misrepresentation of their (the employer's) views, because their employees asked them to communicate with them, and because non-unionised employees may miss out on information.

... the union (were) telling us what our employees (were) saying the issues are, but we'd like to get it straight from the horse's mouth.' So we held nationwide sessions with all employees and the union ... said that that was stepping into the gray zone in terms of good faith. It was prior to the initiation of bargaining but pretty close to, and they said 'look, we're the mouthpiece for your employees, how dare you speak to them directly'. And we said 'look, we're a prudent employer, ..., we want a direct relationship with our people and we don't think that you've got it right. So we got the (union) version and the version from our people. They aligned up pretty closely but there were differences. There was value we saw in the process of going directly to our people and, of course, if we only rely on the union version then our individual employees who are not union members kind of miss out on their opportunity to have their say, and obviously they actually outnumber the union employees.

Employer

Having a BPA was found useful in this respect by some employers and unions who agreed in the BPA what would be communicated to employees. This gave reassurance to both parties.

We state that there is to be no information releases to anybody unless agreed by both parties... at the end of each meeting we'll say 'what's our communication process here? What are we communicating?' And then we'll decide as a collective group to say 'this is what will be communicated and to who'. It's just more about making sure that from both parties that the information that we share is correct, number one; number two, that it's information that is not going to derail negotiations.

Union representative

A notable case in the Employment Court involving the Christchurch City Council and the Southern Local Government Officers Union which centred on an employer's right to communicate with its employees during bargaining for a collective agreement had not necessarily resolved issues for either unions or employers. Some employers considered there was uncertainty about what they could say and who they could say it to, leading them to say nothing at all to employers during bargaining. This was felt to be damaging to employer-staff relationships.

Certain restrictions on communication during bargaining apply to all parties involved, ie, to union communication with members, between employers in a multi employer collective agreement and between unions in a multi union collective agreement. Although most comment was received from union representatives about employers communicating inappropriately with employees during bargaining, other communication issues were also raised in the qualitative research. Employees in two of the industry cases studied were dissatisfied with the communication from their respective unions. Some employees were frustrated by inconsistent messages from union representatives in relation to what they could expect from the negotiations, others felt the union had not always delivered reliable information.

I was disgruntled with what I was told by union people. They kept on changing things. They were making promises they couldn't keep.

Employee

The employer will say this, (the union) will say that and probably the truth is somewhere in the middle. That is probably being a bit generalistic but you know I have seen some of the stuff that has come out over the years from (the union) and I just think that (it) is bullshit.

Employee

Essentially the more information the better from any party really You get a bit sceptical (of) the ... marketing spin of (the union) 'we need to aim at this level so we will scare everyone and (the employer) can't say their piece.'

Employee

Some of these complaints may reflect on the skills of delegates rather than or as well as deliberate miscommunication. A number of employment relations professionals in the qualitative research commented on the need for training for union delegates and organisers and employers (managers).

If you looked at the (x case) ... the union couldn't sell it to members because some were advantaged and some were disadvantaged by it and the collective

only goes so far... plus it required a lot of explanation to employees and the delegates were not up to it.

Employment relations professional

Disclosure

Information disclosure is a core requirement of the duty to bargain in good faith under the Employment Relations Act. Employers and unions must provide on request information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.

There was general agreement in the qualitative research that information disclosure between parties was not a major issue in single employer collective bargaining. In the earlier evaluation of the Act, some unions operating in the private sector reported either anticipating or getting an unco-operative response from employers (Waldegrave 2003). In the current research, unions reported getting information willingly from employers – if they requested it. Some employers had always provided such information; others had become more open.

Some employers noted that the unions they dealt with had never asked for information. These employers considered this to be because such information would not 'support the union case.' The union perspective was that such information may be provided by employers at regular intervals and not just during bargaining. Several union representatives did not ask for specific information from employers as they felt it added little to the negotiations.

Employers with a non-unionised workforce thought that unions would misuse information rights. Employers' concerns may have been exacerbated because the only statutory remedy for the disclosure of confidential information is a compliance order - penalties cannot be sought. However, in the experience of employers who did disclose information, unions acted responsibly.

In multi employer collective bargaining, disclosure could be problematic because it meant disclosing business information to other employers.

Within that multi employer collective agreement arrangement there are employers sitting alongside each other for the purpose of negotiating. ..., there is no way we are going to open our books to the (union) with (our competitor) next door to us.

Employer

Although in such circumstances there is provision for an independent reviewer to examine the information, this would extend the negotiations and the resources required.

*(The union) could put it to an independent body but at the end of the day they are going to have to put the time into it to trawl through the information and they are stretched for resources. They haven't said that to us but we know they are... I would **suggest** that even if they forced an employer the employer would be kicking and **screaming** all the way and challenging it and that would slow the whole process down anyway... In the mean time the whole multi employer collective agreement is put on hold while this is all happening...*

Employer

Access rights

Under the Act, union representatives may enter workplaces for 'purposes related to the employment of its members; or for purposes related to the union's business; or both.' This includes, for example, providing employees (including non-union employees) with information about the union, to attempt to recruit employees to join a union, and to monitor compliance with a collective agreement or with employment legislation. In exercising their access rights, union representatives are required to enter workplaces at reasonable times and not to compromise reasonable health, safety and security conditions.

The qualitative research showed that the access rights provisions were generally working well for employers (including those with non-unionised employees) and union representatives.

Unions considered access rights a critical aspect of the Act in terms of being able to recruit as it was very difficult to organise out of work hours. This was particularly important in situations of high employee turnover.

Access rights were exercised selectively by unions. In highly unionised workplaces, the Act was seen by union representatives as having little effect. There was though less need for these unions to organise as union members on site effectively did this.

The whole issue with [access rights] is that our industry ... has been unionised for so long that there is an acceptance of right of entry of union officials or union people around the places.

Union representative

Access was more complicated in situations where the employer did not own the worksite but it was not prevented.

Employees felt union access had worked well, and that their employers were co-operative. Employers were on the whole comfortable with how union representatives used access rights. For most employers difficulties arose only occasionally and were isolated incidents, such as the manner of a particular union representative. There was a more general problem for an employer of retail staff. From the employer's perspective union access to their employees would ideally be carried out over several visits to minimise impact on the business. This approach would not necessarily suit the union, which had limited resources.

Employers of non-unionised staff had either never been approached by union representatives or their employees had expressed no interest when union representatives made contact.

Employment Relations Education Leave

Under the Act employees who are union members can take paid leave to undertake approved courses in employment relations education (ERE) if their union allocates ERE leave to them. This provision is aimed at increasing understanding of employment relations, especially the duty of good faith. ERE leave can only be used for education of a type that is approved by the Minister of Labour.

The ERE Contestable Fund provides grants to support the development and delivery of ERE initiatives and courses that will help make workplaces safer and more productive.

The courses should be linked to the objectives of the Employment Relations Act or the Health and Safety in Employment Act or both.

Applications can be made by a registered union, a union organisation, an employer, employers' organisation, or any other provider recognised under the Education Act or by NZQA. If an organisation is not eligible, it can work with an eligible organisation which can apply for the funding and take overall accountability for course delivery.

Data from the Employment Relations Education Ministerial Advisory Committee, presented below in Table 10, shows that the number of participants in ERE courses has decreased in the last few years. The reasons for this are unknown. Health and safety representative training continues to have a high level of participation. Although there is no dataset available showing which unions apply for leave from employers for union members, the applications for ERE course funding suggest that the larger unions predominate.

Table 10: Number of participants in ERE Courses, 2002-2007

Year	ERE Leave participants	Health & Safety representative participants	Total number of participants
2002	11,083	-	11,083
2003	12,269	1,411	13,680
2004	9,288	10,838	20,126
2005	10,295	9,458	19,753
2006	8,113	8,518	16,631
2007	8,330	5,924	14,254

Source: Employment Relations Education Ministerial Advisory Committee

An earlier evaluation of the short term effects of the Act found (through representative survey data) that there appeared to be relatively low use of ERE leave, though it was used most frequently at larger and more highly collectivised sites. Several unions reported then that administration and staff replacement issues prevented them using more of their ERE leave entitlement (Waldegrave et al 2003). These issues were not cited in current research. The qualitative research found that ERE leave was of more importance to unions than employers. The leave enabled unions to train delegates, this was particularly important where union's resources were limited and where workplaces had high turnover. In these situations unions relied on delegates for organising. These union representatives considered ERE leave critical to being able to extend collective bargaining, as unionised employees were eligible for the leave irrespective of whether there was a collective agreement in place.

... you (don't) have to have a collective agreement to qualify for paid education leave. So that's meant where we're struggling to get a collective agreement in a green fields site, we can still get workers off the job for training and education.

We use that a lot because our union ... depends hugely on having well educated delegates in the workplace and so all our delegates get put through basic delegate training which involves two levels and trains them in your rights at work and then how to deal with problems in the workplace.

Union representative

Although regarded as an important right, ERE leave was less critical to unions in industries that were heavily unionised.

Employees interviewed as part of the qualitative research made minimal comment. ERE leave was considered to build good links with unions but there was no comment on the extent to which the leave contributes improved understanding of employment relations and good faith.

Employers generally considered ERE leave was used appropriately and did not cause significant disruption. There were though examples of employer dissatisfaction. One employer felt the amount of time taken by an employee on ERE leave had been disruptive and was a benefit to the union but a cost to the business. Another employer had reason to believe an employee had in fact spent three weeks on paid ERE leave participating with the union in collective bargaining negotiations with another employer in the same industry.

Some union representatives considered that ERE leave was of benefit to employers as well as the union because it helped to ensure that key union members had skills that could help the business as a whole. There was also an employer view that it was useful for employees to know their legal rights and how to exercise them appropriately – which was one of the intentions of this provision of the Act.

Often people act from their perception of what their rights are rather than what they actually are and they need advice. Union officials can drive up issues, but the more important role they play is to counsel their members on an individual and collective basis about what the law requires and what their rights actually are and how to engage in proper discussions about those issues. The more people are educated and trained on that the better. In fact, we have offered to unions to jointly participate in training, but they don't like that idea.

Employer

Data from the Employment Relations Education Ministerial Advisory Committee shows that there have latterly been more co-operative union-employer employee education ventures (EREMAC 2008).

Whether ERE leave actually has the desired effect is unknown. Employees in the qualitative research had little to say about ERE leave, being only vaguely aware of delegates attending such courses, or feeling that it improved connections with the union. A qualitative evaluation carried out early in 2008 looking at the impact of ERE leave found that a number of participant, course and workplace factors must be present before the desired outcomes will be achieved (Nunns 2008).

5. EFFECT OF THE ACT ON THE COLLECTIVE BARGAINING PROCESS

The style of bargaining

In the qualitative research, respondents were asked to comment on any effects of the Act on the process of collective bargaining. Discussion of this topic was largely with employment relations professionals and employers – union representatives and employees made few comments.

Many respondents considered that negotiations over time have become less confrontational and more constructive. Respondents who had been through multiple updates of the same collective agreement reported that the first negotiation had been much more difficult than subsequent agreements. They considered that both parties had learnt from the first round and did not want to repeat that experience, and that the most difficult issues had been sorted out on the first round and there was subsequently less controversial ground to cover.

Several respondents commented that unions now seemed more prepared to use what was often described as a partnership approach⁹ but meant in practice that people were simply more civil, for example, that they had been prepared on occasion to confront colleagues who were ill mannered or unreasonable.

There were also union representatives and employers in the research who rejected the idea that there had been any real change in the tone of collective bargaining. Negotiations remained very much a confrontation between employers and the unions as representatives of the employees. While the tone might generally be civil and there were fewer confrontations, a great deal of brinkmanship remained in negotiations.

A number of contributors to the research commented on the significance individuals had on negotiations, and how much depended on the attitudes, skills and knowledge of the people involved. The influence individuals had was acknowledged in people's suggestions for improving support for collective bargaining: embedding structural and strategic relationships so that bargaining does not rely so heavily on the people in the management and union representatives' role, developing specialist collective bargaining mediators, having more training for managers in collective bargaining, and having more training support available.

Some employers felt that a major change to the style of bargaining had been introduced with the Employment Contracts Act when managers began bargaining directly with unions, and a more sophisticated management style began to evolve. This view was also put forward in McAndrew's (2003) summary of collective bargaining experiences of employers and union representatives. McAndrew found that the state sector had recognised in the Employment Contracts Act era that an adversarial tone was dysfunctional for government departments and employees. This work was added to in

⁹ McAndrew (2006) describes union-employer partnership as including 'a collaborative approach to bargaining; wide union and employee consultation practices; a focus on extracting mutual gains from negotiations; a preference for consensus over conflict; and, mutual investment in protecting relationships. Partnership, nonetheless, respects the existence of a diversity of interests in the workplace, recognizes the potential for legitimate conflict there, but promotes restraint and protection of the relationship in the management of conflict.'

McAndrew's 2006 study of employer-union workplace partnerships, which concluded that - with exceptions - most movement towards the adoption of partnership behaviours and attitudes has occurred in New Zealand over the past 15 years, with some acceleration since 2000.

Similarly it was felt that some – but not all – unions had changed their approach and were now more business-like. These unions saw the importance of ongoing relationships with employers rather than 'turning up once every three years to ask for five percent.' There was a view expressed by some participants that union negotiating style had changed. This was attributed by some respondents to the 'old guard' having left, with newer people being more flexible but attributed by other respondents to the union movement making a strategic decision to change their approach. In addition, good faith was seen to have tempered union negotiating style as unions were more accountable to their members, had to be more transparent with their members, and behave in good faith with employers during bargaining.

Some unions were excluded from this view. These unions were characterised as driven by ideology, with no attempt to understand the business environment, and not necessarily responsive to their members' needs. Some employment relations professionals considered that there was a place for a blunt approach from unions, and that such an approach could exist within a generally constructive relationship: collective bargaining is, after all, a mechanism for getting agreement between two parties whose interests are not entirely the same.

The view was also expressed that union attempts to bargain MECAs had encouraged a return to positional bargaining¹⁰

... you see much more positional playing in collective bargaining, you see much more ambit bargaining, you see much more conflictual bargaining ... as soon as you start to put employers together in multi-employer collective bargaining, you will ... have all of that behaviour, and the reason is that employers fundamentally have different interests, and to try and suggest that they should bargain together on the same level of interest will tend to get them to bargain towards the lowest common denominator.

Employment relations professional

Duration of negotiations

The length of time taken for actual collective bargaining negotiations was not specifically explored in the research, although some respondents commented on it. One employer mentioned that negotiations were over within three hours and had been for some years due to the openness of the dialogue between employer and union; other negotiations were considerably more protracted. Clearly a number of factors contribute to how long bargaining takes, such as the number of issues up for discussion, the state of the relationship between the parties and between the personalities involved and their respective attitudes, skills and knowledge. It is difficult then to assess any effect of the Act on the time spent in collective bargaining. The Act encourages openness between the parties which may facilitate agreement; but the majority of collective agreements are single employer single union agreements, and unions could be assumed to be under some pressure to negotiate as quickly as possible.

¹⁰ Positional bargaining is a negotiation strategy that involves holding on to a fixed position, and arguing for it alone, irrespective of any underlying interests.

Issues in dispute in negotiations

In the qualitative research, collective bargaining disputes (defined as issues that went to mediation and/or to the Employment Relations Authority or the Employment Court) were associated with two issues: unions initiating or expanding MECAs and alleged breaches of good faith.

The qualitative research included several examples of unions initiating new MECAs or attempting to expand an existing MECA. In all of these cases, employers resisted the change to their previous bargaining structure. (Union and employer views on MECAs have been presented on page 23.) One of the disputes reached the point of a work stoppage. In these cases, new MECAs were not established but the existing MECA was extended.

In the qualitative research, the most frequently cited breach of good faith related to employers communicating with employees during bargaining. (This issue has been described above on page 33.) While this was an ongoing difficulty in some industries, it had not recently escalated beyond the parties concerned.

Employers also had complaints in relation to good faith. One employer's advocate described a union refusing to begin bargaining.

Right now I'm facing an issue with a union - we initiated bargaining back in October (2007) - they still won't come to the bargaining table. They won't tell us who their members are etcetera. In the meantime, the employer's gone ahead and made some wage adjustments for the people who he knows are not in the union and wants to deal with the rest of his employees but can't; they can't get the union to come to the table.

Employer's advocate

Despite the level of complaint over perceived breaches of good faith (by both unions and employers), few of the respondents involved in the qualitative research had taken a case to the Employment Relations Authority.

Reasons for not pursuing perceived breaches of good faith were not fully explored in the research but appeared to involve pressure from union members to settle agreements as quickly as possible, a lack of clarity around what constituted a breach, and perceptions that there were no real penalties for breaches (although Section 4A of the Employment Relations Amendment Act 2004 includes specific financial penalties for breaches of good faith in particular situations). Employment relations professionals considered that the mechanisms in place to deal with breaches of good faith, namely the Employment Relations Authority, worked best when there was a very clearly defined dispute. It was widely acknowledged that rulings from the Authority may be ignored by either party to a dispute.

The dispute resolution process

Under the Act, parties are encouraged to settle collective bargaining disputes themselves at the lowest possible level. If disputes cannot be settled mediation is intended to be the primary means of settling disputes. If mediation is unsuccessful, the parties may have their dispute decided by the Employment Relations Authority. If still unsatisfied, parties may appeal to the Employment Court. Mediation is not compulsory for parties in dispute, but the Employment Relations Authority may refer parties to mediation.

The Mediation Service

In the qualitative research employers and union representatives regarded the principles of dispute resolution under the Act positively, ie, that problems should be resolved at the lowest possible levels and that quickly available independent mediation was provided free of charge. In general, interviewees regarded the Mediation Service positively.

Data showing how many collective bargaining negotiations the Mediation Service is involved in was not available at the time of writing this report, however, participants in the research considered that the number is not large. Some of the cases, though, are of considerable size or significance, for example, collective bargaining negotiations in the health sector. Most of the employers and union representatives interviewed had had experience of the mediation service at some time.

For some respondents in the qualitative research, going to mediation early in the bargaining process was a constructive step, taken in recognition that it was clear after a day's bargaining whether mediation would be needed to facilitate the process. However, other employers saw going to mediation as indicative of a breakdown in relationships with the union.

Although it is not the role of mediators to tell parties what to do, it was evident in the qualitative research that parties in collective bargaining disputes expected the mediator to be able to move the process along if the parties themselves failed to do so.¹¹ The inability of mediators to make direction was welcomed by some because parties would not be told what to do by a third party, however others considered it made the process less effective.

[Mediation was] wishy washy because there's nothing binding. It was a person flitting between rooms. No substance. We ended up with lawyers moving it along. Maybe it was the personality of the mediator, and it wasn't easy to mediate because we were very determined. Also dealing with representatives of three companies in the same group not wanting a bar of what the union wanted – three quite different positions. Mediation served a purpose because eventually the union agreed we could negotiate for more than a multi employer/multi union agreement. It was a step in the process.

Employer

The effectiveness of mediation was widely considered to depend on the skills and experience of the mediator involved. Some respondents considered collective bargaining required particular skills but views differed on whether collective bargaining mediation should be encouraged as a specialised area for mediators. It was noted that parties could be selective about the mediator they wanted for collective bargaining disputes as mediators came from different backgrounds and had built up knowledge of particular industries and this made them sought after to mediate in those areas. In one of the case studies two mediators were involved because parties could not agree on a single mediator.

¹¹ Parties in dispute can agree to ask the mediator to make a final and binding decision over any issue they cannot agree upon. That decision is enforceable in the Employment Relations Authority and Employment Court. Parties in dispute can also ask a mediator to sign any settlement they reach and that settlement too is enforceable by the Employment Relations Authority and the Employment Court.

Respondents' views were mixed on the impact of mediation on collective bargaining outcomes as clearly it is not possible to judge what might have happened had the mediator not been involved. One employer who eventually got the outcome they were looking for after mediation questioned whether this reflected the amount of time the bargaining was taking (for example, it had exceeded the unions resources prompting them to abandon the multi employer collective bargaining) rather than the value added to the process by mediation. Mediation was generally regarded by respondents as cost effective, depending on the amount of time it took. It was also seen to be useful as a threat, as going to mediation would prolong the bargaining process.

Some participants in the research saw a role for mediation after collective bargaining had been settled. Issues may be left over from bargaining which could be resolved outside of the collective agreement; mediators could also work with parties to improve or repair relationships where the bargaining had been fraught or relationships had been historically difficult.

Commenting on the service generally, a number of respondents noted that the mediation service was under increasing pressure, with longer waits for mediators.

The Employment Relations Authority

Parties can also take unresolved disputes to the Employment Relations Authority, generally once mediation has been exhausted as an option. The 2004 Amendment to the ERA introduced a new mechanism to assist bargaining to continue to progress towards an agreement. This mechanism was intended to address the small number of cases where there were serious difficulties relating to problems occurring within the bargaining (for example, a sustained breach of good faith), or possible effects on the community (for example, a proposed strike or lockout which would substantially affect the public interest). In these situations, one party could request the Employment Relations Authority to become involved as a third-party and 'facilitate' the parties' bargaining. The Authority's facilitation role was limited to encouraging but not compelling settlement, so that the parties would continue bargaining themselves. The Authority would only recommend a conclusion, which was not binding, and the parties still retained the freedom to accept, or not, the conclusion reached (Walker 2007).

In the qualitative research employers and union representatives generally found the process and outcomes of their experience with the Employment Relations Authority to be acceptable. However amongst those respondents with more experience of the Employment Relations Authority, there was more criticism of the process and outcomes. Both employers and union representatives in this group criticised the consistency of decisions made by the Authority. One employer considered that the dispute process had become more litigious under the Act, because of the complexity of the legislation and its subsequent amendment in 2004. Unions were particularly critical, finding the process overly complicated and costly and the decisions of poor quality – even when they were in favour of the union concerned. Employment relations professionals considered that the fundamental difficulty with the Employment Relations Authority process was that it could be ignored. The Authority was considered to work well where the parties (the employer in particular) had a degree of pressure to follow the Authority's direction, for example, as a publicly owned company might.

Table 11 below shows that only a small number of collective bargaining related cases are heard by the Employment Relations Authority each year. Since the Act the number of such cases has not greatly changed.

Table 11: Collective bargaining related cases heard by the Employment Relations Authority

Year	Number of collective bargaining related cases heard by the ERA*	Total number of ERA cases
2001	11	479
2002	7	800
2003	9	847
2004	8	937
2005	14	1039
2006	10	877
2007	14	861

*The cases counted and referred to include those where bargaining was either a substantive issue or a major issue within a jurisdiction or practice and procedure case.

Employers and union representatives in the qualitative research had no experience with the Authority’s facilitation option but it was found wanting by employment relations professionals because of the inconsistent decisions to let cases go to facilitation and the fact that recommendations were non-binding.

... [the] employer had filed for facilitation, the union wanted mediation and asked for a date but the employer said they would wait for facilitation. ..., it was let through on shallow grounds, because [there was an ongoing] work to rule. If you look at the history of facilitation, it hasn't been altogether successful in resolving issues. My view is the adjudicator let this [request for facilitation] through too early. There needs to be more consideration about whether mediation has gone far enough. In the facilitation process – [a dispute] goes to facilitation, the facilitator hears the case and makes a recommendation [which is] non binding. ... [the] way to settle is at the table.

Employment relations professional

The entire dispute process from mediation to the Employment Court was comprehensively criticised by another employment relations professional:

The [dispute] process is to go to mediation and the Employment Relations Authority, and get a decision. If you want to appeal, is it de novo or part? Go to preliminary hearings to work out which bit. If one party objects, then 9 months and \$10,000 down the track, you have [an Employment Court] hearing where anybody can say what they like with no relationship to the Employment Relations Authority decision - the Employment Court can come up with something completely different.

Employment relations professional

The Employment Court

The Employment Court hears and determines cases relating to employment disputes, particularly challenges to determinations of the Employment Relations Authority, and questions of interpretation of law (and has first-instance jurisdiction over matters such as strikes and lockouts).

In the qualitative research comments on experiences with the Employment Court in collective bargaining disputes were almost wholly confined to union representatives and employment relations professionals. Their observations were entirely negative. The cost and length of time it took to get a decision and the quality of the Court’s decisions were criticised.

[The Employment Court] is losing its relevance, becoming very pedantic about detail and procedure. Also there is inconsistency amongst judges for the first time; they hear so few cases that what they get are turned into major cases, they are obsessed with procedure. Decisions are unnecessarily long and verbose. Traditionally people had a high regard for the Labour Court because they came out with good practical answers. Nobody can afford to go [to the Employment Court], the costs are huge.

Employment relations professional

One union representative felt the Court was disinclined towards collective bargaining.

When you look at its decisions which could have gone either way in almost every novel case it's gone ... against unions and collective bargaining.

Union representative

Table 12 below shows that the Employment Court has heard few cases related to collective bargaining since the Act.

Table 12: Collective bargaining related cases heard in the Employment Court

Year	Number of bargaining related cases	Total number of cases
2001	2	226
2002	5	216
2003	4	196
2004	4	148
2005	4	155
2006	3	141
2007	5	172

Source: Department of Labour

The content of collective agreements

The Employment Contracts Act era saw the erosion of conditions in collective agreements, for example, the removal of penalty rates from 24 hour a day operations. Reviewing this subject in 2004, May et al noted that there had been some restoration of entitlements lost under the Employment Contracts Act but only in particularly strongly unionised areas and not to the levels which applied prior to the Employment Contracts Act.

In the qualitative research respondents were asked whether they had observed changes over time in the content of collective agreements. There was a widespread view – encompassing all groups of respondents – that there had been very little change in the content of collective agreements. Negotiations concentrated on wages and hours now as they had historically. Where there had been changes these were not thought to be related to the Act – except insofar that the provisions were legislated for in the Act, such as ERE leave and union access to work sites. Changes in the content of collective agreements over time were considered more likely to have been driven by changing business needs, for example, losing overtime provisions in favour of total remuneration packages, or legislated changes such as increases to the minimum wage and to annual leave.

Other changes observed by employment relations professionals were the use of working parties to address complex issues such as recruitment and retention of staff, or drug and alcohol testing. It was also noted by respondents that some issues are covered in employment policies rather than collective agreements. Observing the changes over

time to conditions in collective agreements in Table 13 below, it can be seen that the Act has not, overall, brought about marked changes in conditions: the most notable change appears to be the increase in the proportion of collectivised workers getting over four weeks of annual leave, subsequent to the Holidays Act 2003 increasing the annual leave entitlement to four weeks from 1 April 2007.

Table 13: Conditions in collective agreements 2001-2008

Sample of conditions in agreements	2001	2002	2003	2004	2005	2006	2007	2008
	<i>Proportion of collectivised workers covered</i>							
An employer contribution to superannuation	n/a	21%	27%	29%	28%	27%	27%	31%
Some provision for call back payments	50%	49%	54%	59%	59%	60%	58%	57%
Some provision for stand by payments	30%	28%	35%	40%	41%	44%	40%	38%
Ordinary weekly hours of work = 40	61%	63%	63%	59%	60%	61%	60%	59%
Ordinary weekly hours not stated	22%	21%	18%	22%	22%	26%	25%	27%
Ordinary days of work = Mon-Fri	38%	37%	39%	42%	43%	37%	41%	42%
Clock hours specified (requisite for overtime payments)	45%	45%	48%	50%	50%	54%	55%	53%
Overtime premiums provided	70%	66%	65%	68%	69%	70%	69%	67%
No stated payment for work on a statutory holiday	20%	22%	27%	25%	16%	n/a	n/a	n/a
Provision for a paid day in lieu for working on a statutory holiday	76%	74%	73%	75%	74%	n/a	n/a	n/a
Provision for a fourth week of annual leave	90%	90%	92%	95%	95%	95%	95%	96%
Provision for between four and five weeks or more of annual leave (agreements since July 2003)	n/a	n/a	n/a	8%	17%	31%	42%	42%
Long service leave entitlement	69%	66%	63%	64%	69%	61%	60%	64%

Source: Victoria University of Wellington's Industrial Relations Centre data.

Term of agreements

In Table 12 below, data on the term of collective agreements from VUW's Industrial Relations Centre shows that over half of all collectivised employees are now covered by agreements with terms of two years or longer. Fewer than 10 percent of collectivised workers are covered by agreements of less than a year. The proportion of workers covered by agreements of between 25-36 months had a dramatic increase in 2005, which was sustained for several years but is now decreasing. Agreements with a term of over 36 months duration are not permitted under the Act and there have been no workers covered by agreements of more than 36 months since 2003.

Table 14: Term of collective agreements 1996-2008 – proportion of collectivised workers covered

Year (June)	<12 months	12 months	13-18 months	19-23 months	24 months	25-35 months	36 months	>36 months	Coverage
<i>Percentage of collectivised employees</i>									
1996	6	29	10	10	26	13	4	2	377,500
1997	5	30	19	6	23	12	4	1	390,600
1998	4	30	17	7	27	11	4	0	390,200
1999	3	27	13	5	31	17	3	1	391,700
2000	4	29	8	7	29	12	4	7	388,400
2001	12	24	8	6	26	8	7	9	361,000
2002	12	23	9	18	23	6	6	3	369,100
2003	2	23	7	29	23	6	7	3	318,900
2004	3	23	7	16	24	7	20	0	296,700
2005	3	20	8	8	26	22	12	0	299,600
2006	2	19	8	13	23	20	14	0	321,900
2007	6	18	9	11	23	20	13	0	309,900
2008	3	18	11	14	24	19	12	0	331,800

Source: Lafferty 2008

Respondents in the qualitative research made few comments on the benefits or otherwise of agreements of various durations. Because a longer term inhibited the ability of unions to take industrial action, having a longer term was considered by one employment professional as indicative of a greater degree of trust between the two parties. Table 15 shows that the majority of agreements had a duration of either 12 or 24 months, with only a small proportion of agreements having a duration of longer than 24 months.

Table 15: Term of collective agreements 2002-2006 - proportion of agreements

Year	<12 months	12 months	13-18 months	19-23 months	24 months	25-35 months	36 months	>36 months	Total*
<i>Percentage of total agreements</i>									
									n
2002	5	43	9	5	27	4	5	2	3069
2003	4	38	9	6	31	4	6	2	2418
2004	3	39	8	6	32	5	6	0	2373
2005	3	37	8	5	33	6	7	0	2595
2006	4	34	9	5	33	6	8	0	2581

Source: Victoria University of Wellington's Industrial Relations Centre data

* The total number of agreements in this table may deviate slightly from the total number in other tables due to missing or unreported data for the variable being shown.

6. PERCEIVED COSTS AND BENEFITS OF COLLECTIVE BARGAINING

This section looks at the costs and benefits of collective bargaining as perceived by participants in the qualitative research and respondents to the DoL's survey.

Looking at the actual costs and benefits was beyond the scope of this research project. In addition, the literature suggested that such an analysis was likely to be inconclusive. A World Bank study of the extensive international literature on the link between labour standards and economic performance found that no general conclusions about the *net* costs or benefits of unions could be reached (Aidt and Tzannatos 2002). The study did, though, find robust evidence relating to the wage mark-up: union members and other workers covered by collective agreements in industrial as well as in developing countries do, on average, get higher wages than their non-unionized (or uncovered) counterparts. The union impact on aspects of economic performance other than wages was less clear. It would appear that voluntary job turnover is lower and job tenure longer in unionized firms. Fringe benefits were more commonly found among unionized workers than among non-unionized ones. Overall, Aidt and Tzannatos concluded that the extent to which particular costs prevail or particular benefits materialize depends on the economic environment in which unions and employers operate, as well as the way in which collective bargaining is organised.

Costs and benefits for employees

Analysis of the collective agreements database maintained by VUW's Industrial Relations Centre shows there has been steady improvement in wages for most collectivised workers over the past decade, but draws no conclusions, noting this has been achieved in the context of steady economic growth, low unemployment and skills shortages (Lafferty 2008).

The DoL's survey of employees showed that union members had much stronger beliefs than non-union members that unions protect job security and secure better pay and working conditions than individual employees could get. Union members also believed - more than non-union members - that union membership is a good investment.

In the qualitative research the costs and benefits of collective bargaining to employees depended on the circumstances of each case. Unionised employees considered that they had received benefits through collective bargaining, namely better terms and conditions, including access to industry training and improved health and safety. It was not possible, though, to assess the extent to which these benefits were actually derived from union membership. Unionised employees also perceived that they had had expert negotiation of the agreement on their behalf, and - in highly unionised sectors - felt that they were part of a team (a significant social benefit).

In some cases of protracted and acrimonious bargaining (generally involving unions initiating or extending a MECA, employees in the qualitative research perceived that the costs of union membership had exceeded any benefits. Notably, employees involved in such situations were not been able to cite the potential benefits of a MECA and could not recall or had never known why the union(s) wanted a multi employer collective agreement nor why employers did not.

Benefits for employees perceived by employers and employment relations professionals

In the qualitative research employers and employment relations professionals noted the fundamental benefit of unionisation was that employees gained more power by acting together. More prosaically, union members would get free representation from the union should they have a work related grievance. A further benefit noted by some employers was that collective bargaining gave employees a choice between an individual or a collective agreement.

Some employers believed union members received very little benefit from union membership fees, and were disadvantaged by having to be in a union to have a collective agreement. Employees wishing to have a collective agreement at the enterprise level had to join a union or set up their own union¹² and meet the administrative requirements. This was considered by some employers to be an unnecessary burden to employees though an employment relations professional saw advantages for both parties.

Why not establish a union for your factory workers – you fund administration and something towards legal advice and they select several representatives to get one agreement for everyone As the employer its your problem to negotiate with the representatives but it's their problem to deal with all the workers.

Employment relations professional

No employees who had formed a union at the enterprise level were involved in the research, but, as noted, there were examples in the qualitative research of informal collective action amongst some non-unionised employees, including collectively negotiating revisions to their employment agreements. There is, though, no data on the extent to which this occurs or the comparative costs and benefits it has for employees or employers.

Some employment relations professionals considered there had been limited benefits from bargaining under the Act compared to what was available prior to the Act, citing increasing income disparity in New Zealand as evidence that the Act was not achieving its objective of addressing the inherent inequality of bargaining power in employment relationships.

Costs and benefits for employers

As noted previously, the DoL survey found that the greater the percentage of employees covered by collective agreements, the more favourable employers' perceptions were that collectivised workplaces are better for businesses. This association was stronger for those employers who directly negotiate with unions compared to those who do not.

An earlier New Zealand study similarly found that employers not engaged in collective bargaining were far more likely to perceive that it could contribute nothing of value to either the firm or its employees. Virtually all such employers in the study perceived adverse effects from collective bargaining on productivity, the exercise of managerial discretion, work organization, and workforce conflict. In contrast, significant minorities of employers engaged in collective bargaining saw it contributing in those areas (Foster 2006).

¹² Under the Act any group of employees numbering 15 or more may incorporate and register a union, provided the union abides by stipulated rules.

In the qualitative research employers, employer representatives and employment relations professionals considered that the extent to which collective bargaining was a cost or benefit to employers depended on the circumstances. For larger employers who were willingly involved in collective bargaining it offered efficiencies – a collective agreement provided a common set of basic rules, provided simplicity, consistency and equity – contributing to harmonious employment relations. With a collective in place an employer could plan knowing the cost structure of labour, it also gave coherence and enabled strategic planning in a way that was not possible with individual employment agreements. It was noted that these benefits applied to larger employers. For employers of a small number of staff (three or four people) there was felt to be no discernible advantage in collective bargaining.

Union representatives considered that collective bargaining brought efficiency and consistency to negotiations with employees. Union representatives also saw advantages to employers in industry wide bargaining or MECAs. If there were industry standard terms and conditions for employees, employers did not have to compete locally on wages and conditions. MECAs also provided a vehicle for industry skills training – although it was acknowledged by one union representative that this was not widely used, and this research supports that view.

In terms of costs, employers found collective bargaining could be time consuming, distracting and damaging to employment relations. Also, under the Act, individual enterprises had to cover the costs of bargaining. These costs included the compliance costs of going through the bargaining process, the opportunity costs of being involved, and the costs of any industrial action. One of the benefits of multi employer and/or a multi union collective agreement for an employer was that these costs were spread amongst employers.

The cost of having some employees on one or more collective agreements and some on individual employment agreements was noted. It was complex and time consuming explaining the options to new employees and the variations created additional work for human resources and payroll staff. Notably, the DoL survey found that the number of hours employers spent on human resources work had no association with their view of unions.

In relation to individual employment agreements, a distinction was made by respondents in the qualitative research between employees who could be under a collective agreement but chose not to be union members and other employees whose work was outside of any collective agreements.

Some people are on true individual agreements – their jobs are outside of collective terms. This is not high maintenance once they are in the job – there is a performance review process established. Then there are the people who could be under a collective agreement – that's quite labour intensive, you can't just pass on the terms of the collective. You have to talk with them, negotiate, tell them they can get independent advice. The human resources manager in that part of the business would spend quite a bit of time going through the process.

Employer

Where a number of employees in a business could be under a collective but chose not to be union members, it was generally acknowledged that employers did not literally individually negotiate with these employees. In these cases, individual employment

agreements were likely to be very similar, possibly with a few employees negotiating particular terms and conditions.

Having employees on individual employment agreements had costs in addition to time taken negotiating and producing the agreement. Essential clauses may be overlooked, with the potential to cause expensive difficulties for the employer later. Although no employers of very few staff were included in the qualitative research, employer representatives considered that such employers were unlikely to seek professional advice on individual employment agreements and were consequently more likely to experience such problems.

Effects of the Act on productivity and employment relations

Productivity

It is inherent in the Act that there is a positive relationship between the quality of the employment relationship and productivity and performance. However the sheer volume of literature on the effects of collective bargaining on productivity, profitability and national economies suggests that the relationship is complex. Metcalf (2002) studied the effects of unionisation on productivity/profit/wages in six countries (the United States of America, Canada, the United Kingdom, Germany, Japan and Australia) notes the impossibility of using theory to predict any union effect on productivity because unions can both enhance and detract from the productivity performance of the workplace or firm. Further, testing for links between union presence and productivity is difficult. Many studies reviewed by Metcalf had limitations including a neglect of the role of management, lack of a theory of union behaviour and insufficient attention to the heterogeneity of unions and the measure of productivity.

Similarly, in Aidt's and Tzannatos' (2002) wider study, the least robust results in terms of being able to link labour standards with economic costs and benefits, related to productivity, training, and pay systems. The impact of unions on productivity levels (in terms of both labour productivity and total factor productivity) could not be determined from the empirical evidence.

In the DoL's survey, union organisers expressed a strong belief that unions and unionisation assist businesses. Union organisers were more likely than employers to consider that where employees were unionised, productivity was increased, employees were more highly motivated at work, businesses had greater success retaining staff, and that the cost of employment dispute resolution and human resources was reduced. Employers, however, were indifferent as to whether union organisers cared about the businesses and whether unionisation was related to productivity.

The qualitative research provided limited evidence of a 'partnership' approach to productivity. In one heavily unionised workplace, the unions involved were entrusted by the employer with more information on how the company works than was common, and the unions were expected to provide constructive feedback on how productivity could be improved. There was, though, no data on the extent to which this had been done.

An employment relations professional who worked in the private sector could not think of any such examples of engagement by unions on productivity issues.

(The employer sits there and tries to) engage in discussion around productivity and it's like (the union says)' that's your problem, not ours. You own the plant,

you own the equipment, it's up to you, it's not our job. We can tell you where things are going wrong but why should we'. So the legislation talks about good faith and about partnerships and working together, but that's not been my experience of life on the ground.

Employment relations professional

While a partnership approach may be expected to manifest itself during collective bargaining, it may of course be built outside of this time.¹³ Discussing partnership approaches, a respondent noted that a poor experience of collective bargaining could harm what had been a good relationship between the parties, but a good experience of collective bargaining would improve the relationship.

Similarly, employment relations professionals pointed out that efforts to increase productivity occurred outside of as well as within collective bargaining. Increasing productivity was considered to be a 'two way street,' where gains could be made by changes to management as well as by employees, and that both management and unions needed to shift their thinking.

Reflecting on the effect of the Act on productivity and productivity provisions in collective bargaining, employers and union representatives interviewed had similar views – there was some talk about productivity during bargaining but it seldom made an appearance in collective agreements. There was a notable lack of comment on productivity issues by both employers and union representatives in the case studies.

Several reasons were put forward as to why this might be: people did not know how to take such discussions forward; during bargaining questions around productivity got put aside for further discussion but this discussion failed to happen before the next bargaining round.

You have the first meeting, it's all a bit hard; have the second meeting, it's all a bit hard; they get busy, nothing happens, the contract runs its course and then you have, 'oh but last year you promised to get together and talk through the parts [relating to productivity]. Nobody got together, it never happened, so this year we want some [discussion on productivity].' So I find that there's a willingness to talk about it, but I think people don't know how to convert it to an action, and that may be part of the problem.

Employment relations professional

Some union representatives specifically wanted to develop engagement around productivity issues. There was also a wider union view that productivity issues would be easier to address if bargaining was industry wide rather than at the enterprise level – although this was not reflected in the sector case studies involving MECAs. Employment relations professionals considered that unions may have difficulty in selling productivity related provision to members. This was because some members may be disadvantaged by such provisions and because some delegates were not sufficiently skilled and experienced to explain the issues.

Both union representatives and employers agreed that the impact of the Act on productivity could not be observed.

¹³ Details of partnerships to boost productivity can be seen in the work of, for example, the Centre for High Performance Work (a joint venture between the Dairy Workers Union and the Engineering, Printing and Manufacturing Union aiming to increase productivity and business growth by integrating workers' knowledge into production decisions).

Employment relations climate of a workplace

The employment relations climate within workplaces was not a focus of this research but is briefly discussed here to prior to reviewing the level of industrial action since 2000. The Act's objective is to build productive employment relationships through the promotion of mutual trust and confidence. The 2003 evaluation of the Act found that most workplaces had been largely unaffected by the Act and that there was little in the Act to compel them to make changes. The evaluation further noted that where good workplace relationships existed they had not necessarily been achieved through the Act, but rather through employers' recognition that having good relationships with their employees has a positive effect for business. A small number of workplaces had made changes specifically because of the Act (that is, to meet its objectives). These tended to be larger workplaces that were more easily accessed by unions, had a history of collective agreements in the workplace, and had an established union presence - many of these were public sector workplaces (Waldegrave 2003).

In the qualitative research, respondents provided very little comment on workplace relationships under the Act, with the exception of some employers commenting on the negative effect on employee relations caused by restrictions on communicating during bargaining. Employment relations professionals considered that the Act had focused attention on the employment relationship compared to the award days, but noted that relationships were still largely individualised rather than collectivised. There was a general implication in the qualitative research that workplace relations were generally positive with no differences evident between unionised and non-unionised employees, or types of workplace.

Industrial action

Under the Act participation in a strike or a lockout is unlawful if it occurs while a collective agreement binding on the employees participating in the strike or lockout is in force. The strike or lockout must also relate to the bargaining for a new collective agreement. A strike or lockout cannot occur during bargaining until the parties have been negotiating for a new collective agreement for at least 40 days. As was the case under the Employment Contracts Act, a strike or lockout cannot relate to a personal grievance, a contractual dispute, a freedom of association issue, or take place in an essential service unless certain notice requirements are met (Simpson Grierson 2008).

Most work stoppages over the last five years have centred on wage disputes, as shown in Table 16 below.

Table 16: Reasons for work stoppages 2003-2007

Reason	2003	2004	2005	2006	2007
Dispute arising from negotiation of coverage of employment agreement	5	6	15	11	10
Dispute over wage provisions of employment agreement	18	26	41	29	16
Dispute over hours of work provisions of employment agreement	4	5	5	6	3
Dispute over overtime/shift provisions of employment agreement	3	5	5	9	3
Disputes over various causes*	9	12	5	12	17
Other	3	4	5	12	5
Number of stoppages**	28	34	53	42	29

Source: Statistics NZ

* Includes disputes over: whether parties have acted in good faith; health or safety issues; leave provisions; interpretation and application of employment agreement provisions and redundancy; and provisions of employment agreements.

** As respondents may give more than one cause for their stoppage, total figures do not sum to the stated total.

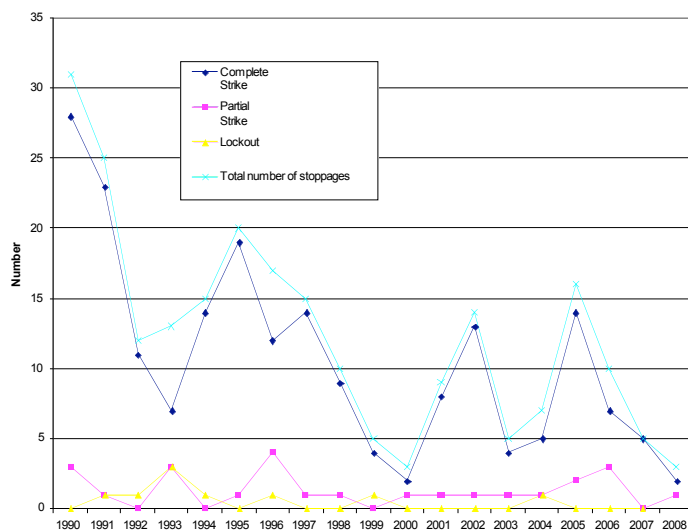
Work stoppages and the percentage of all employees involved in work stoppages had been falling prior to 1991, and continued to fall (unevenly) during the Employment Contracts Act and under the ERA, as shown in Table 17 and Figure B below.

Table 17: Work stoppages June quarter 1990-2008

	Number of stoppages				Percentage of all employees involved	Percentage of all person-days of work lost	Average Person-days Lost per Employee Involved	Estimated Loss in Wages and Salaries \$(000) 2006 \$s
	Complete Strike	Partial Strike	Lockout	Total number of stoppages				
Jun-90	28	3	-	31	1.50%	3.26%	9.30	50,188
Jun-91	23	1	1	25	2.83%	1.07%	1.64	10,667
Jun-92	11	-	1	12	0.07%	0.11%	7.08	994
Jun-93	7	3	3	13	0.87%	0.15%	0.77	1,751
Jun-94	14	-	1	15	0.47%	0.27%	2.56	3,236
Jun-95	19	1	-	20	0.49%	0.26%	2.28	2,906
Jun-96	12	4	1	17	0.53%	0.23%	1.94	2,967
Jun-97	14	1	-	15	0.19%	0.08%	1.82	975
Jun-98	9	1	-	10	0.68%	0.10%	0.65	1,601
Jun-99	4	-	1	5	0.01%	0.01%	2.90	138
Jun-00	2	1	-	3	0.07%	0.06%	4.17	1,553
Jun-01	8	1	-	9	0.12%	0.02%	0.64	240
Jun-02	13	1	-	14	0.07%	0.05%	3.16	610
Jun-03	4	1	-	5	0.00%	0.00%	0.00	0
Jun-04	5	1	1	7	0.13%	0.01%	0.43	202
Jun-05	14	2	-	16	0.23%	0.11%	2.2	1,450
Jun-06	7	3	-	10	0.12%	0.06%	2.0	1,581
Jun-07	5	-	-	5	0.02%	0.01%	1.5	83
Jun-08	2	-	1	3		Data not available		

Source: Statistics NZ

Figure B: Work stoppages 1990-2008



7. DISCUSSION & CONCLUSION

Under the Act only union members may be covered by a collective agreement. Therefore increasing the coverage of collective bargaining requires increased union membership across industry sectors. Since the Act was passed in 2000, union membership has increased but has not grown outside of the traditionally strong areas of the public sector, and (in the private sector) in manufacturing, and the transport and storage industries. As the number of people employed has also increased since the Act, union density has been static over the last eight years at around 17 percent of the total employed labour force.

The research has found, in line with international research, that there are multiple factors associated with individuals' decisions about joining a union. Workplace influences, however, have a very strong effect. Although the Act offers employees the choice of joining a union, because of the strong influence of workplace culture on union membership and the prevalence of single enterprise bargaining, the research suggests that established patterns of union membership will not change significantly.

Since the Act was passed, both the absolute number and the proportion of all people employed covered by collective agreements has declined. This decline has been uneven across sectors, with the ratio of public to private sector coverage increasing over the last eight years. In the private sector, a majority of businesses across all industry groups have no employees on collective agreements - although larger businesses are more likely to have employees covered by collectives. Since 2003 the number of unionised workers has exceeded the number of workers covered by collective agreements: currently around 40,000 union members appear not to have access to a collective agreement in their workplace. Union representatives interviewed no longer considered the 'passing on' of collectively bargained conditions as the major barrier to increasing collective bargaining, rather the issue now is the sheer number of worksites without unionised employees or collective agreements.

Single employer-single union agreements have remained the prevalent form of collective agreement. The proportion of workers covered by single employer collectives has remained at approximately three quarters of all collectivised workers over the last eight years, requiring about 2,500 agreements to be negotiated by unions with single employers.

One of the union responses to this environment of low union density in the private sector and the prevalence of single enterprise bargaining has been to pursue multi employer bargaining. Although resource intensive to pursue, unions consider that workers have greater bargaining power under multi employer rather than single employer collectives. MECAs also address some of unions' resourcing issues associated with the numerous small collectives that must currently be negotiated. The proportion of collectivised workers covered by MECAs has grown from 18 to 26 percent over the last eight years. However, MECAs exist largely in the public sector with nearly half of the core government collectivised workforce covered by a multi employer agreement but only nine percent of collectivised workers in the private sector.

The research suggests that although there may in some circumstances be bargaining efficiencies for employers from MECAs, in general employers do not want to be party to MECAs due, at least in part, to their desire to control conditions for their businesses locally. Notably, some (private sector) employees in this research were not necessarily

convinced of the benefits of MECAs either, as they were concerned about drawn out and acrimonious bargaining associated with multi employer negotiations and with losing conditions to accommodate additional employers. In addition to employer resistance, and resourcing constraints for unions, the Act does not prefer MECAs above other forms of collective agreements, thus the research provides no indications that the coverage of MECAs will increase. Therefore, unless union membership were to change dramatically, collective agreement coverage is unlikely to increase markedly either.

One of the ways in which the Act facilitates collective bargaining is through provisions requiring employers to bargain in good faith. This includes the obligation to conclude a collective agreement if a union initiates one. The research has shown that this provision has not been sufficient to increase collective bargaining. It is difficult to quantify other impacts of the good faith provisions. The research has shown, though, that both unions and employers consider that the Act has contributed, through the good faith concept, to the development of a more constructive style of bargaining. Evolving management and union approaches to employment relations were also held to be a factor in this progression. Individuals' attitudes, knowledge and skills were considered to be the critical factors determining the type of bargaining experience people had. Overall the Act was thought to have had a positive effect on the process of bargaining but not the outcome.

The research found no evidence that the content of collective agreements has changed under the Act. Both analysis of the conditions in collective agreements over time and the view of all groups of respondents in the research indicated that there had been very little change in the content of collective agreements - negotiations are concentrated on wages and hours now as they have been historically. Nor have there been marked improvements in conditions for collectivised workers under the Act, other than those brought about by changes to statutory minima.

In the research, collective bargaining disputes were associated by respondents with two issues: unions initiating or expanding MECAs and alleged breaches of good faith. Although the experience of research respondents with the Mediation Service and the Employment Relations Authority was mixed, and observations of the Employment Court entirely negative, respondents regarded the principles of dispute resolution under the Act positively. Since the Act, few of the employment relations disputes dealt with by the Mediation Service, the Employment Relations Authority or the Employment Court have been about collective bargaining. It is not known whether the small number of collective bargaining disputes in the Employment Relations Authority and the Employment Court reflect a smooth bargaining process or a reluctance to engage with dispute resolution bodies, however the qualitative research suggests the former. Work stoppages, which were decreasing prior to the Act, have continued (somewhat unevenly over the years) to decrease.

Internationally, the literature suggests that the impact of unions on productivity levels cannot be determined from the empirical evidence. The qualitative research provided limited evidence of a 'partnership' approach to productivity. Union organisers were more likely than employers to consider that where employees were unionised, productivity was increased. Both union representatives and employers agreed that the impact of the Act on productivity could not be observed (although efforts to increase productivity occurred outside of as well as within collective bargaining).

The research did not look at the economic costs and benefits of collective bargaining however the literature suggests that any such attempt would be inconclusive. Although

the cost benefit of having a collectivised workforce has not been shown, the research found a positive association between employers' perceptions that collectivised workplaces are better for businesses and the proportion of employees covered by a collective. The corollary of this finding is that employers with no experience of a collectivised workforce hold negative views about collective bargaining despite their lack of experience with it. In the qualitative research employers, employer representatives and employment relations professionals had a common view of the costs or benefits of collective bargaining to employers: the extent to which it was a cost or benefit depended on the employers' circumstances; for larger employers who were willingly involved in collective bargaining it offered efficiencies that outweighed the costs involved.

Overall the effects of the Act on collective bargaining are observed in the recovery of collective bargaining in the public sector, and the continued decline (in general) in the private sector. The research offers no indications that these patterns will change.

Further research

A number of gaps in knowledge have been identified in this report. There is a need for more comprehensive union and union membership data: this would also contribute to a better understanding of potential union membership.

More comprehensive analysis of the databases of collective agreements held by the DoL and Victoria University could be carried out to address some of the questions that were not explored in this research, for example:

- providing some detail about those union members not covered by collective agreements
- exploring how extensive quasi multi employer collective agreements are (where conditions in single employer collectives are aligned as much as possible within industries)
- looking at the impacts for employees and employers associated with multi employer collective agreements and with single enterprise unions.

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9. APPENDIX: DATA COLLECTION METHODS

A mixed methods approach as described below was used to collect data from employers, employees, unions and employment relations professionals (academics, lawyers, mediators and professional advocates).

Overview of the literature

An overview of the literature on factors affecting unionisation and collective bargaining was prepared at the beginning of the research project. The overview included work published in the last 10 years from the OECD countries. Information from this has been used in the interpretation of results from the other components of the research.

Existing data

The research drew on datasets maintained by Statistics NZ, the Department of Labour and Victoria University of Wellington, as detailed below.

Household Labour Force Survey from Statistics NZ

The Household Labour Force Survey (begun in October 1985) gives a portrayal of New Zealand's labour force and provides official un/employment statistics. The target population is the civilian, usually resident, non-institutionalised population aged 15 years and over. The representative sample contains about 15,000 private households and 30,000 individuals. Each quarter, one-eighth of the households in the sample are rotated out and replaced by a new set of households - the overlap between two adjacent quarters can be as high as seven-eighths. This overlap improves the reliability of quarterly estimates of change.

Business Operations Survey from Statistics NZ

The Business Operations Survey focuses on measures of business performance and a range of practices which may have an impact on performance. About 7,000 businesses (in the private sector) are surveyed annually in order to get a representative selection of New Zealand businesses and to get a broad coverage of the economy. Businesses in the in-scope industries for more than one year with rolling mean employment greater than six are included in the survey population.

Union membership data from the Department of Labour

The Department of Labour administers annual union membership returns. Each year, every union must advise the Registrar of Unions of the number of members it has as at 1 March that year.

Collective agreement database from the Industrial Relations Centre, Victoria University of Wellington

Since 1984 the Industrial Relations Centre has requested copies of employment contracts/ agreements from unions and employers. When agreements expire the Industrial Relations Centre requests copies of the renegotiated agreement. Agreements that have expired three years prior and have not been replaced are removed from the database. Agreements are obtained on a voluntary basis however the Industrial Relations Centre is confident that the sample covers the overwhelming majority of employees covered by collective agreements.

Survey of employers and employees

A survey was carried out directly by the Department of Labour of employers and employees located in Auckland, Wellington and Christchurch. These locations were selected in order to include both the North and South Islands of New Zealand as well as urban and rural areas. The survey included industries from the following categories: Manufacturing, Wholesale Trade, Retail Trade, Financial and Insurance, Education and Health and Community Services (ANZSIC categories C, F, G, K, N and O). It was not possible to include all industries due to financial and logistical constraints. All businesses in the specified geographical areas and involved in these industries that were listed on the Department of Labour's collective agreement database were included in the sample.

Employers were invited to participate in the survey and if they agreed their employees were also invited to answer the questionnaire. The questionnaire was available in both online and paper format and the participants could choose the most convenient way to answer it.

The employee questionnaire included questions about union membership, attitudes towards their employer, reasons for and against joining a trade union, and perceived benefits of collective agreements. The employer questionnaire included questions about business demographics, relationships with unions, and unions' contribution (including collective bargaining) to business performance and employment relations.

The survey included 3,930 employees of which 2,083 (53 percent) were union members employed at 156 businesses (out of 341 employers who were invited to participate in the survey). The majority of the employees were women (57.1 percent) with the average age calculated to be 43.3 years. About two thirds (68.7 percent) of the employees identified themselves as Pakeha, 7.7 percent Maori, 9.1 percent Pacific, 7.7 percent Asians, and 3.5 percent other ethnicity. On average the employees worked 39.2 hours per week.

Analysis of employers' responses focused on the impact of unions on their business. Analysis of employees' responses focused on the comparison of unionised versus non-unionised employees. Hence, it was not necessary to undertake a representative sample of employees but only to ensure that in each workplace the respondents would include both unionised and non-unionised employees. This was achieved by randomly sampling employees within the workplaces. SPSS was used for the statistical analysis.

Qualitative research

The qualitative research consisted of four components:

1. key informant interviews with employers and business representatives (4), union representatives (2), academics (3), employment lawyers (3), professional advocates, representatives of the Employment Relations Authority and mediation service (7), Department of Labour staff (2)
2. separate focus groups with employees and employers
3. matched interviews with union representatives, employers and employees
4. case studies involving employers, employees and union representatives.

Note that in the two non-union focus groups, there was no stipulation made to respondents about whether or not their workplaces were unionised. Therefore, some may have been from unionised workplaces even though they were not union members themselves, while others will have been from non-unionised workplaces. In the case

studies, all respondents were from unionised workplaces whether or not they themselves were union members.

Key informant interviews

These interviews were largely conducted by DoL staff with involvement from UMR Ltd. Some of these interviews served primarily as background and scoping for the project, and have not been reported on directly; however, they contributed to the design of the project and the interpretation of the results.

Focus groups

UMR conducted four focus groups with:

- union members
- blue collar non-union members
- white collar non-union members
- human resources managers for medium to large companies.

The first three had six to eight respondents. The human resources managers group had five respondents. All groups lasted ninety minutes to two hours.

Matched interviews

UMR also carried out matched interviews of union representatives, employers, and employees associated with the same enterprises or sectors. This approach was taken to gather the perspective of all these groups for specific sectors and types of organisations. Interviews included the following industry sectors: accommodation, retail, cafes and restaurants, health, manufacturing, information technology, and the public sector (including local government).

There were instances of sectors and companies where more than one union operates. In most of these cases, UMR spoke to the union with the largest number of members in that particular sector or spoke to the other union involved in another interview.

Case studies

The purpose of the case studies was to explore how collective bargaining worked in four selected sectors. The sectors were selected because they were expected to provide different perspectives on collective bargaining, and because they had not been included in the main part of the research. A key difference between the four groups was in their experiences of multi-party agreements:

- one company had a multi-union collective agreement
- one industry have a longstanding multi-employer collective agreement which was extended recently to cover other companies
- one sector experienced a failed attempt to put together a multi-union collective agreement
- in one industry, each company had their own single employer collective agreements.

Each case study was intended to consist of:

- one interview with an employer from the sector
- one focus group (of four to six people) with employees from the same company as the employer

- one interview with unions involved in the sector.

The specific issues covered in each case study were:

- experiences of collective bargaining with the company or organisation
- experiences of the tone, style and content of collective agreements involving the company or organisation
- the perceived impact of the Act and of specific aspects of the Act on collective bargaining.

As in earlier stages of the research, many respondents struggled to associate particular changes to collective bargaining with the Act. A key reason for this was that many respondents were not involved in the sector or at least with the specific company or union prior to the Act's introduction in 2000. This was addressed by respondents being asked to discuss the impact of specific changes associated with the Act, such as increased rights of access for unions and good faith principles.

Overall, the qualitative research included the largest private sector unions and two of the largest public sector unions. Seven of the ten largest unions were included. The unions involved covered 60 percent of all union members, and 74 percent of union members.

Limitations of the research methods used

This research was directed at assessing the effects of the Employment Relations Act 2000 on the coverage and content of collective bargaining. To do this it has focused (not exclusively) on people with experience of collective bargaining. Hence in the survey and the qualitative research, almost all of the employees responding to the research came from (at least partially) unionised work sites. (In the two non-union focus groups, there was no stipulation made when recruiting respondents about whether or not there were any collective agreements in their work sites. Therefore, some may have been from unionised workplaces even though they were not members themselves, while others may have been from non-unionised work sites.) It should be noted that non-union employees from non-unionised work sites may have expressed different perspectives.

Further to this point, employees surveyed by the Department were contacted through their employers, that is, employers allowed researchers to conduct the survey with their employees. This was done in order to match employer and employee responses. It is possible that a survey of employees only carried out without contacting the employees through a work place would have elicited different responses.

It should also be noted that as there is no database of individual employment agreements, it was not possible within the resources available to compare the conditions provided by collective agreements with the individual employment agreements at comparable worksites without any collective agreements.