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We Can't Overcome? A Case Study of Freedom of Contract and Labor Law Reform

Ellen J. Dannin†

Labor leaders in the United States frequently suggest that unions would prefer no legislative protection to the current system mandated by the National Labor Relations Act. With the passage of its Employment Contracts Act (ECA) in 1991, New Zealand offers a glimpse into how industrial relations proceed when under labor legislation which provides no procedural supports for union recognition and collective action. The intent of the ECA was to bring basic free market principles to New Zealand's collective bargaining system. Under the terms of the ECA, employees are free to negotiate directly with their employers all terms and conditions of employment. Employees may also authorize a bargaining representative for any length of time. Unions have no status under the Act except as agents based on an employee's specific authorization.

Despite its recent passage and relative lack of information regarding union membership and employment conditions under the ECA, some lessons are already apparent. First, the ECA disproportionately empowered the stronger bargaining group, typically, but not always, the employer. Un-
ions have suffered heavy membership losses under the ECA. This fact, however, developed as much from the pre-ECA bargaining environment as it did from the conditions imposed under the ECA. Prior to the ECA, many unions were too safely entrenched within a collective bargaining system in which they did not have to develop strong relations with members or possess bargaining skills to retain recognition. Unions which were most aggressive in preparing for the ECA have fared better under the ECA relatively speaking. The second lesson culled from the ECA was that the ability of employees to change bargaining representatives at any time leads to great instability in industrial relations. Although unions must not be so entrenched as to provide no incentive to hone representational skills, successful bargaining requires some level of stability. The article concludes with a brief suggestion for an American collective bargaining system in which unions would be subject to periodic recertification. This plan might strike a better balance for both effective union representation and equal power between labor and management at the bargaining table.

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The world with no laws, no morals, no government, no ethics, no anything to hold the fabric of humanity together but an abiding faith in the sanctity of contracts. The world that proclaimed ultimate freedom for its inhabitants and employed ultimate slavery.

... [C]ontract-breaking, the one sin on a world where there was no other sin, the only crime on the world where even murder was not considered a crime, unless it involved breaking one's signed word on a contract.¹

... The claim that everything in corporate life and law is contract at some deep structural level has outlived its usefulness. The idea never worked all that well as it was.²

I believe that the highest goal of legal scholarship should be sophisticated investigation into the reality of people's lives as an underpinning for the evaluation of legal rules. Empirical study has the potential to illuminate the workings of the legal system, to reveal its shortcomings, problems, successes, and illusions, in a way that no amount of library research or subtle thinking can match.³

For about a decade now, from at least 1984, AFL-CIO President Lane Kirkland and other labor leaders have condemned the NLRB and the NLRA

1. JAYCE CARR, RABELAISIAN REPRISE 2, 3 (1988).
as the key causes of labor's decline in the United States. Kirkland has said he would prefer "no law" to current labor law and that he prefers "the law of the jungle" over the current system because the law places too many restrictions on what unions can do to assist each other. "The law forces us, our unions, to work on products that are manufactured by law-breaking employers, employers that are in violation of the law in fact and in spirit. . . . [It] forbids us to show solidarity and direct union support," he declared.5

On June 8, 1993, at the sixth constitutional convention of the Amalgamated Clothing and Textile Workers Union in Las Vegas, Nevada, Kirkland demanded labor law reform to eliminate employer involvement in selecting union representation. Kirkland contended that "a worker's decision on whether or not to join a union is none of the employer's damn business."6 William H. Wynn, President of the United Food and Commercial Workers Union, complained about the quality of justice labor was receiving from the Reagan appointees to the NLRB and contended that labor would seek justice "in the streets if necessary."7 Richard Trumka, President of the United Mine Workers of America, described the NLRB as "clinically dead."8 Trumka criticized labor law:

I say abolish the Act. Abolish the affirmative protections of labor that it promises but does not deliver as well as the secondary boycott provisions that hamstring labor at every turn. Deregulate. Labor lawyers will then go to juries and not to the gulag of section 7 rights—the Reagan NLRB. Unions will no longer foster the false expectations attendant to the use of the Board processes and will be compelled to make more fundamental appeals to workers. These appeals will inevitably have social and political dimensions beyond the workplace. That is the price we pay, as a society, for perverting the dream of the progressives and abandoning the rule of law in labor relations.

I have a profound faith in the judiciary and jury system as it exists at common law. It has been the enduring bulwark against biased decision-making by "experts."9

4. The percentage of the organized workforce has declined for years—now to as low as 11.5% for the private workforce. See Richard B. Freeman & Joel Rogers, Who Speaks for Us? Employee Representation in a Nonunion Labor Market, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 13, 13 (Bruce Kaufman & Morris Kleiner eds., 1993).


These criticisms sound as if American unions would now be engaging in vigorous organizing activity but for the restrictions labor laws place on them. However, the sort of legislative reform labor leaders advocate is not designed to promote more active organizing but, rather, to provide outcomes which would be more favorable to unions. Reforming American labor laws has been a topic of conversation and speculation for years. Until recently, the prospect for even the most minor legislative changes seemed quite remote. Now, however, labor law reform has moved forward on the agenda. Clinton has established the Commission on the Future of Worker-Management Relations, headed by former Labor Secretary John Dunlop (the Dunlop Commission) to investigate and make recommendations for change. The Dunlop Commission issued its final report on January 9, 1995. As of the end of 1993, at least fifteen bills had been introduced in Congress to reform the National Labor Relations Act.

These proposals and studies are a consequence of longstanding unhappiness with the way the current system has been operating. Some scholars believe employer/union power has swung out of balance because of the current application and inadequate enforcement of labor law. Some propose moving to a system based on individual contracting. Others promote labor reform "based on direct governmental intervention guaranteeing individual rights to employees and substantive protections to unions under labor law . . . that are designed to alter the power imbalance between employees and employers." Suggestions have ranged from major legislative supports for unions to more subtle legislative or regulatory tinkering to a focus

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10. See Much Labor Law Reform Debate Expected in 1994, 144 Lab. Rel. Rep. (BNA) 495, 496 (1993). Of course, some optimistic predictions of the importance the Clinton administration would give to labor already have been proven wrong. In a speech given in May 1993, Charles Morris predicted a rapid turn-around in Board philosophy, since Clinton had the opportunity to fill four vacancies on the NLRB and appoint a new General Counsel in his first year. Professor Emeritus Charles J. Morris, Speech at the California State Bar's Spring Labor and Employment Law Seminar (May 21, 1993 and May 28, 1993), in 102 Daily Lab. Rep. (BNA), May 28, 1993, at D27. Of course, only one year later it was possible to see that this was an opportunity foregone.


15. Id. at 525-26, discussing the views of Critical Legal Studies theorists. Crain herself argues that American labor's problems are rooted in patriarchal conceptions of power and advocates fundamental change based on feminist conceptions of power which would empower workers and revitalize labor unions. For a full discussion of her views, see Marion Crain, Feminism, Labor and Power, 65 S. CAL. L. REV. 1819 (1992).

on failures intrinsic to unions themselves that legislative action cannot ameliorate.\(^\text{18}\)

Implicit in all these suggestions is the question or assumption concerning a connection between union success and law. However, it is not necessarily easy to determine what that connection is. Kirkland and other labor leaders view law as the enemy at the same time they turn to law for their salvation.\(^\text{19}\) The difficulty in addressing such a complex social problem is that the social sciences do not have effective methods for answering the question with scientific certainty—the social sciences do not have experiments, complete with control groups and replicability. The best we have been able to do is to look at the data on union decline and try to find the appropriate insight into the problem.

Now, however, New Zealand has made itself into an "experiment" which provides useful insights into the impact of law on unions. From 1894 to 1991, New Zealand labor law was one of the most protective of unions and unionization in the world. In 1991, it abruptly changed course and enacted the 1991 Employment Contracts Act \([\text{ECA}\)]\(^\text{2}\), a law founded on "free market" principles. "The industrial relations system produced by the ECA is entirely voluntarist. The ECA is devoid of procedural arrangements with respect to union recognition and bargaining arrangements."\(^\text{20}\) The ECA is as close to the "law of the jungle," which Mr. Kirkland says would be preferable to the NLRB, as it is possible to get.\(^\text{21}\)

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17. Professor Charles Morris recommends administrative changes, such as greater use of the Board's rulemaking power, reorganizing its election procedures, greater use of its injunctive power, reorganizing its Division of Administrative Law Judges, and greater use of discovery. Charles J. Morris, Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board, 23 Stetson L. Rev. 101, 109 (1993). I have proposed improving NLRB investigations by moving away from rigid time targets of less than a month to complete investigations as the major measure of NLRB agent performance; using the NLRB's § 11 investigative subpoena power; and taking a less bureaucratic approach to seeking remedies so that the remedy more effectively accomplishes the Board's purposes. Ellen J. Dannin, Labor Law Reform—Is There a Baby in the Bathwater?, 44 Lab. L.J. 626 (1993); see also Thomas A. Kochan et al., The Transformation of American Industrial Relations (1994).

18. Julius G. Getman, Ruminations on Union Organizing in the Private Sector, 53 U. Chi. L. Rev. 45, 46 (1986). The view Getman expresses has been given less attention and discussion. He attributes union organizing failures to unions which "have been complacent, have lost their sense of mission, have assigned incompetent people to organizing, and have failed to adopt innovative organizing tactics in response to changing conditions." Id. at 46.


21. New Zealanders have often looked with horror upon the American system as the worst that could possibly happen. The extreme nature of the legislation's impact on unions moved at least some New Zealanders at last to stop comparing the ECA with United States labor laws, finding Chile a more apt exemplar.

Auckland University labour expert Nigel Haworth says even Chile's General Augusto Pinochet couldn't reduce labour relations to the level of individual contracts.
The enactment of the ECA is a story of high drama, as it is legislation that slashed union density from 63% in 1989 to 43% in 1993, transforming a highly protective industrial relations system to one founded on the principles of freedom of contract and unrestrained market forces. The ECA was enacted in the face of popular opposition; 500,000 of a population of 3.1 million—nearly 1/6 of its inhabitants—demonstrated against it. The ECA has transformed New Zealand society. Several unions have disappeared, unable to withstand the harshness of life under the ECA. Newspapers carry advertisements for jobs at no pay which are answered by hundreds of job seekers, hoping that eventually the employer will take them on or hoping to gain experience so a paying job can be found. Although it is a food exporting country, food banks now are a common resource for many newly impoverished New Zealanders. At Christmas 1993, three church officials announced that they did not consider it a sin to steal to feed one’s family, the need was so dire. In 1994, the International Labor Organization (ILO) issued an interim and investigatory report finding that the ECA violated various of its conventions. On the other hand, some segments of New Zealand society and even some unions have prospered under the legislation. In addition, some of those who supported the ECA have actually suffered from its enactment. In short, the ECA’s impact is highly complex.

Despite its drama, this story might be of only local interest, except for the fact that the ECA has already spread to other countries and appears poised to spread much further. New Zealand was only the first country to enact these changes. The State of Victoria, Australia has already enacted similar legislation. Alberta, Canada and the Netherlands are considering passing their own ECAs. On March 13, 1994, the [London] Observer expressed confidence that New Zealand’s laws would or should be imported to other countries. The standard bearer of these changes, Roger Douglas, has been touring the world recently to spread the message. His book promoting those changes, UNFINISHED BUSINESS, has been at the top of the best seller list in Canada. The Premier of Alberta, Canada has ordered his cabinet ministers to read Douglas’ book.

If these events have escaped the notice of most of the public, they have not escaped the notice of powerful groups such as the International Mone-

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Chile apparently moved from a system that emphasised centralised bargaining to one of contracts, but Chilean unionists thwarted it by resolving to forge hundreds of separate contracts at once. Employers backed out, realising they couldn’t field enough bargaining teams. One wonders how New Zealand can succeed where Chile, with its penchant for torture and dropping unionists out of helicopters, could not.


Even though casual study demonstrates that the Employment Contracts Act 1991 bears no resemblance to the NLRA, some New Zealanders, quite inaccurately, persist in holding up the American system as the model of horrors. Peter Boxall, for example, calls the ECA the New Zealand Wagner Act. Harbridge & McCaw, supra note 20, at 5.

tary Fund (IMF) and the Organisation for Economic Cooperation and Development (OECD). Both have been putting out reports speaking of the changes in New Zealand in glowing terms. They cite improvements in New Zealand’s rate of inflation, measures of productivity, and increased employer flexibility. They leave out essential parts of the ECA’s impact, however. There is more than these influential groups are telling, and this article tells the rest of the story. Americans cannot dismiss the importance or relevance of the developments in New Zealand labor law.

There are, of course, major differences between the United States and New Zealand. Chief among these are New Zealand’s remote location and its small population of approximately three million people. New Zealand’s small size, however, means that change can occur rapidly there and becomes visible much more quickly than in the United States. New Zealand thus provides an intriguing view of the relation between labor law reform and union organizing success. In this article, I look at the recent legislative changes and their impact upon a small sample of New Zealand unions. The period of examination extends from the year before the introduction of the ECA to approximately two to three years thereafter. The main focus of this examination is a comparison of the status of New Zealand unions before and after the enactment of the new legislation, with detailed attention to select New Zealand unions’ responses as representative examples.

The past in New Zealand is certainly not without prologue, however. The American reader certainly cannot appreciate the significance of the ECA without a sketch of New Zealand’s past legislation. After a brief survey of labor history, this article focuses on ways in which unions did or did not prepare themselves for legislative changes as they appeared increasingly likely. The simplicity of drafting the ECA, the speed with which it was introduced—in December 1990, two months after the National Party’s election victory—and became effective—May 15, 1991—may make American legislators envious; however, all this took place in a manner which calls into question whether New Zealand may continue to be called a democracy.

So clear was it that the ECA would be enacted, and so radical were its provisions, that unions began to feel its impact in collective bargaining well before its effective date. This article examines the manner in which unions dealt with bargaining during this period and the way that they acted to oppose the legislation. Once the ECA was enacted, unions had both bargaining successes and failures as they developed varied ways to respond to the new bargaining environment. Some unions’ response was to fold; most suffered serious membership losses and struggled constantly. On the other hand, many unions devised creative ways to continue to represent their members. This article reviews the positive and negative ways in which the ECA affected workers, employers, unions and New Zealand society as a whole.
Finally, the process which New Zealand has undergone is used to reflect on the nature of unions and on law reform issues in the United States. Among the conclusions that can be drawn from the New Zealand experience is that the interactions between law and union strength is more complex than current discussions in the United States would suggest. Furthermore, this account leads to the conclusion that the measure of union success needs to be rethought. Finally, the story of New Zealand unions suggests that union interactions may play an important role in helping the union movement as a whole retain vibrancy and the ability to adjust to changing circumstances.

I

THE PAST: A SKETCH OF NEW ZEALAND LABOR LAW TO 1991

New Zealand has an unusually long history of legalized collective bargaining. At the end of the nineteenth century, New Zealand became the first country to legalize collective bargaining when it enacted the “Industrial Conciliation and Arbitration Act, 1894,” popularly referred to as the IC & A Act. The IC & A Act’s basic framework was retained in numerous subsequent revisions for throughout most of the next century. The last of these was the Labour Relations Act 1987 (LRA), which was replaced by the ECA in 1991.

Stated in the broadest terms, New Zealand labor law was very constricted and controlling. As Alan Geare describes the various labor laws from 1894:

There was a desire to foster unions as unions were seen as the best protection for workers. While collective bargaining was seen as desirable if peaceful solutions could be reached, the state provided conciliators to chair the bargaining sessions. Strikes and lockouts were illegal and, if negotiation failed, arbitration was provided to achieve a settlement. . . . [S]ome issues were deemed non-negotiable as they were deemed management prerogatives.

The IC & A Act required employer and worker unions to register with the government to secure the protections and benefits of the Act. Registration gave unions representation of all persons falling within the occupations described by the union. For example, a union which registered to represent all

25. Ian McAndrew, From Regulation to Deregulation in New Zealand Labour Relations: New Models of Bargaining Under the Employment Contracts Act 1991 1, 2 (1993) (on file with author). One who is familiar with the American system of labor relations will find in the following description many features which are both familiar and unfamiliar, although the American system of legal collective bargaining developed two generations later.
clerical workers would then represent all persons performing work of that description across workplaces throughout the geographic area provided for in the registration, whether nationwide or limited to a region of the country. This widespread coverage was a consequence of the “blanket clause,” first introduced in 1937, which bound all unions and employers engaged in the covered industry. Registration gave a workers’ union the right to negotiate the terms of an award (the basic document covering workers) with the designated representatives of the corresponding employers. Under some legislative regimes the collective document was actually the product of interest arbitration. Others, including the LRA, allowed arbitrated awards as agreements, but made them difficult to achieve, given the legislation’s requirements. Employers were required to allow union members paid time to attend two union meetings a year of no more than two hours each. Finally, unions had a legal right of access to the workplace.

New Zealand law created unions of employers which operated much like a multi-employer bargaining association in the United States. The New Zealand Employers Federation (NZEF) was an umbrella organization which, “in the name of a real or paper affiliate,” negotiated national awards

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27. Cf. LRA 1987 §§ 3-7, 132-34. Registration has been the key element of the New Zealand labor relations system from 1894. Unions can choose whether to register and come under the relevant legislation. Those who chose not to register—there have always been some—suffer certain disadvantages. They can only negotiate contracts binding the parties to them and with no life beyond their expiration. They have no access to the industrial courts. The parties shoulder the costs of negotiation, rather than the government. They also are subject to the danger of predation by other unions. See Nigel Hiworth, Unions in Crisis: Deregulation and Reform of the New Zealand Union Movement, in Organized Labor in the Asia-Pacific Region: A Comparative Study of Trade Unionism in Nine Countries 282, 283 (Stephen Frenkel ed., 1993); N. Woods, Industrial Relations Legislation in the Private Sector, in Labour and Industrial Relations in New Zealand 81, 98, 101 (J. Howells et al. eds., 1974).

The system described also existed and currently exists in much of Australia. Of the systems, one Australian analyst states: “Many organisations of workers, in both countries, were thus recognised through registration under legislation which otherwise could not have survived on the basis of performance in the field.” Steve O’Neill, Labour Market Deregulation: The New Zealand Experience 4 (1993 Parliamentary Res. Service Background paper Number 5).


29. Cf. LRA § 147.

The goal of the LRA was to force unions and employers to become more self-reliant, more viable organizations. It attempted to do this by forcing very small unions to amalgamate so that no union could be smaller than 1000 members, LRA § 6(2); by providing means for opting out of the award system into individual enterprise agreements, LRA §§ 132, 134-135; and by increasing the scope of topics which could be negotiated, §§ 132, 170. These topics are touched on in more detail throughout this section of the article.

30. LRA § 57. These were popularly referred to as “stopwork meetings.”

31. LRA § 196. Such a right of access could give unions powerful assistance in maintaining and establishing their representational status.
with the national office of a union.\textsuperscript{32} Thus, almost all collective bargaining in New Zealand from 1894 to early 1991 took place on a multi-employer basis, even though many negotiations affected far fewer employees than can be found in even single employer negotiations in the United States. In 1987, there were 383 awards in existence,\textsuperscript{33} and approximately 200 unions.\textsuperscript{34} This system also meant that the average workplace had several applicable awards, reflecting the presence of different occupational groups within the workplace.\textsuperscript{35}

This multi-employer bargaining system had several direct effects. First, awards usually prescribed only minimum terms.\textsuperscript{36} It was not unusual or illegal for an employer simply to decide to pay above-award rates.\textsuperscript{37} Second, given New Zealand’s sparse population spread among a large number of small worksites,\textsuperscript{38} this system arguably made unionization possible. Certainly, it made it cheaper than would otherwise be the case. Negotiations on a workplace by workplace basis would often be impossible or, at least, very difficult.\textsuperscript{39} This, in turn, led to the existence of some very small unions.\textsuperscript{40} Third, having substantially uniform terms of employment across workplaces for each job classification largely took wages and working conditions out of competition and meant that employers were on a level playing field. Within the workplace, it meant that workers had little reason to be competitive with one another, for good or ill, depending on one’s view of

\textsuperscript{32} McAndrew, supra note 25, at 1. Awards had multiple tiers of pay rates, and at certain time periods it was possible to negotiate regional and site awards, see Haworth, supra note 27, at 295, an arrangement situation similar to tying local agreements to national agreements in the United States.

\textsuperscript{33} See Minister of Labour, 1 Industrial Relations: A Framework for Review 22 (1985) (on file with author).

\textsuperscript{34} O’Neill, supra note 27, at 4.

\textsuperscript{35} Id. This emphasis on occupations as the basis for organization, as opposed to the worksite as is the case in the United States, reflects different conditions and views prevalent at the time each country’s laws were enacted. Cf. Dorothy S. Cobble, Making Postindustrial Unionism Possible, in Restoring the Promise of American Labor Law 285, 286 (Sheldon Friedman et al. eds., 1994). As Cobble points out, the nature of work is changing, possibly making a worksite-based unionism less appropriate than in the past and perhaps returning us to a time in which an occupational basis may be prudent. Id.


\textsuperscript{38} Approximately 100,000 people—9% of the workforce—work at a job site with fewer than four employees. Richard Whatman et al., Labour Market Adjustment Under the Employment Contracts Act, 19 N.Z. J. Indus. Rel. 53, 54 n.2 (1994).

\textsuperscript{39} Dannin, supra note 23, at 43.

\textsuperscript{40} In 1973, 73.4% of unions had total memberships of no more than 1000 members; in 1983, 67.3% of unions had total memberships of no more than 1000 members. Haworth, supra note 27, at 284-85. The LRA required that unions have more than 1000 members. LRA § 6(2).
the value of competition. Unions also had little opportunity or need to com-
pete for members, since registration defined representation.41

The laws in effect from 1894 until 1991 had a negative aspect as well, which stemmed from the nature of the laws themselves. The purpose of these laws was not to empower but to control unions and prevent them from having the ability to achieve a level of power equal to that of other parts of society, in particular capital.42 Thus unions had little ambit for operation. This is best seen in the fact that, until 1987 and the enactment of the LRA, unions were limited in the subjects as to which they could bargain. Prior legislation limited collective bargaining to “industrial matters,” as opposed to political, social or management issues.43

In sum, New Zealand’s laws gave unions a high degree of protection from 1894 to 1991. Unions had no need to seek members or work for representative status. The simple act of registration created representative status and preserved it in virtual perpetuity. The law compelled union membership and payment of dues.44 Registration thus created a situation so stable that many workers were represented in unions which, by the 1980s, had been formed nearly a century earlier and were covered by documents of nearly the same vintage.45 As a consequence, the boundaries of those unions, the mix of persons and jobs represented, and the structure of the award might no longer be a good fit by the late twentieth century.

The system also experienced an innate tension.

Once enmeshed in the compulsory arbitration process, the majority of unions came to accept the legitimacy of the system and the bargaining status it conferred. Consequently, they defended a system that was patently an enduring contradiction in that it tied the unions into an economistic bargaining framework that undermined the political sophistication and independence of the union movement, decreed the organisational structure of union activity, determined the internal processes of union life, and determined many mem-

41. LRA § 7 provides that registration gives a union “[e]xclusive coverage of the workers covered by the union’s membership rule.”

In certain cases there was unintentional overlap in the unit description, resulting in disputes akin to § 10(k) jurisdictional disputes under the NLRA. See, e.g., infra text at notes 164-65.

Joel Rogers advocates moving to something very similar to this system in the United States and for many of the same reasons which made this form advantageous in New Zealand. See Joel Rogers, Reforming U.S. Labor Relations, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 15 (Sheldon Friedman et al. eds., 1994).

42. Haworth, supra note 27, at 283.


45. See Interview with Rick Barker, National Secretary, Service Workers Federation of Aotearoa, in Wellington, N.Z. (May 14, 1992) [hereinafter Barker].
bership attitudes toward the union, all in ways likely to undermine union movement, autonomy and innovation.\(^{46}\)

It is not surprising, given the longevity of the award system and its protections, that New Zealand unions of the 1980s tended to take a conservative view of how they should or could conduct collective bargaining. The LRA tried to promote change by allowing greater variety in the structure of collective bargaining to take place. For example, § 132(a) allowed unions to “cite out,” that is, to remove an employer from award coverage to engage in individual bargaining with that employer. This was a process similar to bargaining that might take place after an American employer left a multi-employer bargaining unit, except that the union had the sole power to make the decision whether to engage in individual bargaining or not.\(^{47}\) A study of citing out practices during the 1989/1990 wage round, two years after the law’s enactment, showed that very little citing out had occurred. Of 279 awards and 42 composite awards registered by approximately 100 unions covering approximately 70,000 employers, only 563 employers were cited out by 27 unions.\(^{48}\)

Two years after the enactment of a radical change is probably too early to gauge its ultimate impact. Some retrospective studies suggest that change in many terms of employment were being achieved.\(^{49}\) However, unions did resist change and certainly had rational reasons for not citing out many employers. First, unions felt a great deal of pressure, which was caused by the massive restructuring, privatization, and corporatization of public services occurring during this time. “In the changed economic environment . . . unions have had little bargaining strength.”\(^{50}\) Second, it was possible to achieve some of the positive effects of enterprise bargaining through other, less drastic means.\(^{51}\) Once an employer was cited out, it was virtually impossible to regain award coverage, because the law provided no mechanism to reverse the process, even if negotiations went badly. Given this, a sensible approach was to wait and see how others fared. Third, unions feared that citing out employers, particularly more powerful employers, was likely to lead to depressed wages under the award.\(^{52}\) Unions’ fears were not ill-founded. Thirty-six percent of employers cited out failed to

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46. Haworth, supra note 27, at 284.
47. In part this represented a more restricted role in terms of workplace bargaining akin to American local agreements, since under the LRA, any enterprise bargaining removed a worksite from coverage under the award. See generally New Zealand Amalgamated Engineering and Related Trades Industrial Union of Workers, Strategies for Change: Representing Workers in a New Environment 3 (1987) [hereinafter Strategies for Change].
49. Harbridge, supra note 36, at 77.
50. Id.
51. Composite awards were one popular way, since they allowed local variations no longer permitted under award bargaining. Haworth, supra note 27, at 295.
52. Harbridge & McCaw, supra note 37, at 180.
enter into any succeeding agreement. Fourth, unions were contending with massive unemployment among their members and the resulting drop in memberships. This left them with little time and resources to take on risky new approaches to bargaining. Finally, unions had philosophical grounds for not wanting to bargain on an individual basis. If a major union goal was to take wages out of competition, the best way to do this was through award negotiations.

On the other hand, the NZEF had long applied vigorous pressure to move away from the award system. To the extent unions dug in their heels and refused to cite out employers, unions either failed to resolve employer frustration or failed to defuse the employers' propaganda campaign against unions. The manner in which one would characterize this dynamic depends on which side one favored; however, no matter how it was characterized, the result was the same. The failure to remake the collective bargaining landscape after the enactment of the LRA led to the feeling that the current system and the legislative process had failed employers by providing no way for their needs to be met. Failure to achieve their goals through the LRA exacerbated their sense of grievance and created more forceful, and what was perceived by their members as more legitimate pressure, for radical change.

Furthermore, union entrenchment in the award system had a detrimental impact on unions. On the one hand, it left them with very little experience in bargaining on any other basis. On the other hand, in many ways, New Zealand collective bargaining lacked important aspects of true collective negotiations. Even though New Zealand had one of the most highly organized workforces in the world, at about 50%, unions were, in many

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53. Id. at 178.  
54. Harbridge, supra note 36, at 78.  
55. See Dannin, supra note 23, at 20-21. Murray French of the Wellington Employers Association observed:  

It was quite apparent those companies covered by awards simply got a mediocre result from a mediocre environment of negotiating. Those companies I represented that had been cited out of the award were able to in fact move ahead quite significantly with the support of the union representing them at that time. And I think it was a useful example of ownership of documents.

And let's get it straight. I don't see documents in fact determining peoples' thinking. I think the documents only reflect a culture of an organization. Obviously there needs to be a lot of work and communication and a foundation of support and trust in an organization which subsequently is reflected in written contracts.

Interview with Murray French, Manager of Industrial and Legal Services, Wellington Employers Association, in Wellington, N.Z. (May 14, 1992) [hereinafter French].  
56. See Dannin, supra note 23, at 10-11. In the 1990 amendments to the LRA, the Labour government permitted employers to initiate a ballot among workers to determine whether bargaining would be based on awards or enterprise agreements. O'NEILL, supra note 27, at 12.  
57. This insight was expressed by the Minister of Labour as support for the LRA. See Dannin, supra note 23, at 7.  
58. Estimates naturally vary; however, all show New Zealand with a high actual and comparative union density. In 1970, it had 46% membership; in 1980, 55% membership; and in 1988, 42% membership. Freeman & Rogers, supra note 4, at 16. In 1985, the New Zealand Department of Labour esti-
important ways, irrelevant. Some employers saw awards as advantageous because they kept unions farther from the workplace and thus less able to limit managerial prerogative.\textsuperscript{59}

More important, employers legally could, and often did, set virtually all terms and conditions of employment. In New Zealand, awards were legally minimum condition documents,\textsuperscript{60} so that employers did not violate the law by unilaterally providing better conditions. In fact, this was a common practice.\textsuperscript{61}

One of those who preferred award coverage said that his firm had an informal, house agreement which was determined by senior management. This was flexible because the firm had the discretion to adjust the above-award margins according to the success of the business. It did not have to negotiate with staff.\textsuperscript{62}

This reflected a common experience of employers. A study in early 1990 found that 85% of employers paid at least some above-award rates, and most set wages unilaterally.\textsuperscript{63} Only 15% of employers even discussed their above-award payments with either the union or employees concerned.\textsuperscript{64} In fact, the vast majority of employers acted unilaterally on important workplace issues, such as safety matters, overtime, and new technology, although some would give their employees information regarding these issues.\textsuperscript{65}

In other words, most New Zealand employers regularly engaged in actions which would have made them subject to breach of duty to bargain in good faith charges by the NLRB, and most unions had very little to do with

\footnotesize{59. See Peter Franks, Report on Employers' Views on Industrial Relations Reform 4, 6 (Jan. 1991) (on file with author); see also Ian McAndrew & Paul Hursthouse, Southern Employers on Enterprise Bargaining, 15 N.Z. J. INDUS. REL. 117, 126 (1990) \textit{(hereinafter McAndrew & Hursthouse I)}.}

\footnotesize{60. See The ECA 1991: Introduction, supra note 36, at 105. Thus, Cobble's statement that American managers are exceptional in their "penchant for unilateral control," see Cobble, supra note 35, at 292, should be expanded to include New Zealand managers.}

\footnotesize{61. Harbridge & McCaw, supra note 37, at 176.}

\footnotesize{62. Franks, supra note 59, at 6.}

\footnotesize{63. See McAndrew & Hursthouse I, supra note 59, at 119; accord Ian McAndrew & Paul Hursthouse, Reforming Labour Relations: What Southern Employers Say, 16 N.Z. J. INDUS. REL. 1, 5 (1991) \textit{(hereinafter McAndrew & Hursthouse II)}. Not all industries paid above-award rates. In retailing, an industry employing large numbers, award rates were very low—paying from $NZ23.67 [$2.17] to $NZ43.88 [$2.58] for workers under 16-1/2 years to $NZ26.93 [$4.09] to $NZ82.16 [$4.81] for those over 20 years. There, payment of above-award rates was quite uncommon, and underpayment was a significant problem. See Peter Brosnan, Labour Market Flexibility and the Quality of Work: A Case Study of the Retail Industry, 16 N.Z. J. INDUS. REL. 13, 23 (1991).}

\footnotesize{64. See McAndrew & Hursthouse II, supra note 63, at 5.}

\footnotesize{65. See id. at 6-7.}
determining their members' day-to-day conditions. Once this is known, New Zealand's consistently high union density figures seem less significant, because, whatever they mean, they do not mean that New Zealand unions were actively engaged in representing their members as to their terms and conditions of employment.

Paul Kimble of the now-defunct Distribution Workers Federation (a union that corresponded in some respects to a combination of the Teamsters Union and the Retail Clerks part of the United Food and Commercial Workers Union in the United States) described award bargaining as a sort of sport.

The industry traditionally, under the award structure, once every year with those companies we would have a big punch up and all be out. There would be a song and dance, and then everyone would go back to work and there would be a wage increase. It was all very "matey." It was all very boys' own stuff, and they were always pretty friendly. It was a bit like a rugby game, really. . . . Everyone seemed to enjoy this. It was something that was expected really, every couple of years. It was great to do—yelling and screaming and the cities would be cut off and there would be huge trucks and there would be a settlement in the end. It was sort of like a game to people in the industry.

How did one of the most highly organized countries have a system that, in important ways, did not have meaningful collective bargaining? There is a great deal of evidence that suggests New Zealand's system of collective bargaining may have been so efficient at protecting unions and unionization that it ultimately acted to their detriment. Unions had little need to communicate with their members, since the legislation not only delivered them permanently to the union but also mandated the

66. Of course, the American system gave employers unimpeded discretion as to the most important decisions affecting the workforce. The advantages of the American system were strikingly similar to New Zealand's during the pre-ECA period.

For management, the traditional model also had various advantages. It helped to ensure a stable, skilled workforce. It provided a system for resolving disputes, unquestioned control over key decisions and an efficient way of dealing with many employees simultaneously through their representatives.

Getman & Marshall, supra note 44, at 1807-08.

67. Interview with Paul Kimble, Organizer, Distribution Workers Federation, in Wellington, N.Z. (May 12, 1992) [hereinafter Kimble].

68. When a union registered under the LRA (or preceding acts) it was given exclusive coverage of all workers within that union's membership rule or job description. LRA § 7. When the union registered with the Registrar of Unions, it chose membership by job classification, making members of all persons fitting that geographic and occupational description to be members. Graeme Clarke described the sort of problem this could lead to.

Just to give you an example, in 1946, the Engineers Union registered its third amendment for the year with one comma missing from what had previously been registered. The effect of that missing comma was to create a total overlap with the coverage of the Coach Workers' Union, so historically, in 1946 as a result of that one error, they acquired dual coverage . . . .

payment of dues through compulsory unionism. As a result, union representatives made little effort to learn organizing or servicing skills.

A study of employers in the southern half of the South Island confirmed this picture. While unions represented the vast majority of the employers’ workers, unions were almost completely absent from the scene. In the months preceding the study, a third of employers had no contact with the principal union at all, while another third had dealt with the principal union only once or twice. Most employers were even unaware whether they had a shop floor delegate (steward). This lack of activism might have been forgiven if it resulted in good representation. However, New Zealand unions—even despite high unionization rates—did not do particularly well for their members. In January 1991, the Minister of Education issued a list of twenty-nine awards with a base pay rate lower than the unemployment benefit of $NZ223.22 [$131.70] per week for a married couple without children. Fifty percent of registered awards in the late 1980s provided a weekly adult pay rate of $NZ295 [$174.05] per week when the minimum wage was $NZ235 [$138.65] per week. A fair examination of the conduct of New Zealand unions leads to the conclusion that, after nearly a century of this legislative regime, unions either had actually lost or believed they had lost the ability to function without an extremely supportive legislative environment.

New Zealand unions, before the enactment of the ECA, bore a remarkable resemblance to certain aspects of American unions, although far weaker. Paul Weiler suggests it is possible to view American unionization as an activity of employees; however, now a union is more often perceived by the public as an entity external to employees, as “a large, bureaucratic organization whose full-term officials periodically negotiate a long-term contract behind closed doors with the employer, and then represent a fairly small number of employees who are aggrieved by the way management

69. The LRA provided that a union membership clause could be inserted in any award or agreement if agreed to by the employer and union or by ballot of the members held with every third award or agreement. LRA §§ 61-66. Where a union membership clause existed, employees who failed to join within fourteen days of being requested could be justifiably dismissed. LRA § 71.

70. See Owen Harvey, The Unions and the Government: The Rise and Fall of the Compact, in Controlling Interests: Business, the State and Society in New Zealand 59, 64 (John Deeks & Nick Perry eds., 1992); Barker, supra note 45. “The delegate structure in New Zealand has never been particularly strong, and people tended to view unions as the organizer that came in from outside.” Loader, supra note 43.

71. See McAndrew & Hursthouse I, supra note 59, at 119.

72. See id. This was repeated elsewhere, as in the retail industry. Janet Hector et al., Industrial Relations Bargaining in the Retail Non-food Sector: 1991-1992, 18 N.Z. J. INDUS. REL. 326, 337 (1993).

73. See McAndrew & Hursthouse I, supra note 59, at 119.


75. Harbridge, supra note 36, at 77.
administers the contract during its lifetime."76 Weiler also describes unions which pay little attention to the felt needs of those they represent.77 As a result, rather than being a collective of employees, American unions may often be seen as professional organizations similar to an employer's personnel department.78

The picture one has of the pre-ECA situation is one of stability, relatively high levels of unionization, and passive, well-protected unions. The law that affected unions in the more formal sense of statutes and judicial decisions appeared highly benevolent and "pro-union" or pro-organization. Such a limited approach to understanding the law as it affected and was affected by New Zealand unions, workers, and employers would leave most of the meaningful story of New Zealand labor law untold. In this "more encompassing cultural sense, namely, as webs of institutions and practices through which a society represents to itself its shared understandings of right and wrong,"79 legislative supports meant that unions did not suffer seriously from any mistakes they made. Indeed, their limited ambit of operation left them little room to make mistakes. On the other hand, this highly protective legislative scheme also meant that union staff did not have to sharpen organizational skills or even to possess any organizing skills.80

Unions, their members, and employers all had fared quite well economically for decades. The system within which they had fared well was the award system. It was very easy for unions to ascribe all things good to the award system, just as, when the economy began to deteriorate in the mid-1970s, it became easy for the NZEF and New Zealand Business Roundtable (NZBR)81 to attribute all things negative to the laws governing

76. Weiler, supra note 13, at 11-12.
77. Id. at 12.
78. Id.
80. Barker, supra note 45. Julius Getman noted a similar impact of law on American unions. He states that there is an assumption that Board regulation of elections works in favor of unions. "I have become convinced that the price, both legal and practical, which the unions have paid for the regulation of employer speech has far exceeded the possible benefits. My conclusion rests on two premises: first, that when the Board intervenes in an election on the union's behalf, the union rarely benefits; and second, that the current trend in the law to ignore legitimate and important union interests is due in part to a desire to preserve 'balance' in the face of what is perceived to be unusual administrative and judicial protection of unions." Getman, supra note 18, at 66.
81. The NZBR is of fairly recent origin. It was formed by Auckland industrialists in the mid-1970s as a forum for chief executives of the major corporations in New Zealand. By the late 1980s and in the period leading up to the campaign for the ECA, NZBR members were either chief executives of major corporations or state owned enterprises. Its membership in 1986 and 1989 demonstrated heavy representation by those in the finance sector (7 of 32 in 1986 and 12 of 38 in 1989), while manufacturing had far less representation (7 of 32 in 1986 and 4 of 38 in 1989). Together, NZBR member companies were worth $18 billion or 77% of the New Zealand sharemarket and 18% of GDP in the late 1980s. Prominent members included Doug Myers (a large shareholder in Lion Nathan), Ronald Trotter (chair of Fletcher Challenge), Alan Gibbs (chairperson of state owned enterprise Forestry Corporation and of Gibbs Security), and Lindsay Fergusson (board member of Magnum Corporation). See Jane Kelsey,
the workplace relationship. In fact, in many ways the legal system was often irrelevant to what actually occurred and to determining who benefitted from the system. Professor Margaret Wilson points out:

Whether the law is seen to be to your advantage or detriment will largely depend on your economic bargaining power. Thus for many years, although the law made strikes illegal, when unions struck, employers did not enforce their legal rights because it was not in their best interests to do so. Skilled labour was scarce and it was easy to pass on to the consumer any extra costs incurred.

... [I]t was a characteristic of our social system that most people expect improvement in their working conditions will be gained primarily through legislation, and not through industrial bargaining. Governments, not trade unions have been expected to deliver social justice.

What view did employers have of unions and their roles in the period just prior to the enactment of the ECA? Many employers were quite content with the system, since it delivered low-wage settlements. One-fourth of the employers believed unions did a good job for their members. Most of the rest had a predominantly, if mildly, negative view, more often based on the perception that the union did too little too timidly, rather than too much too aggressively. Close to one-third felt that unions simply did nothing. About a third of the employers perceived unions as not being responsive to their members, as do-nothing organizations of officials who seldom or never visited the jobsite, and as not sufficiently aggressive in representing their own members. Paradoxically, those employers who dealt with unions more frequently tended to have more positive evaluations of unions, even though their dealings necessarily involved strife in resolving disputes over award interpretation, discharges, or other conflicts.
Considering the absence of unions in the workplace and the employers’ role in determining employment conditions, it was hard for workers to feel much connection with their unions. The high levels of unionization achieved under this system were unquestionably achieved at a price. The full effect of this became devastatingly visible in the way unions responded in 1990 and 1991 when it became clear that fundamental legislative change was imminent. By at least 1989, it was hard to avoid the certainty that the National Party (National) would win the next election and that it intended to implement massive legislative change in the area of industrial relations. National also made no secret that it intended to implement the policies which had been forcefully advocated by the NZBR and the NZEF throughout the 1980s.\textsuperscript{88} On May 8, 1990, five months before the election, National issued a five-page flyer signed by W. F. (Bill) Birch, its spokesperson on industrial relations. The flyer’s first statement was that the deregulation which had occurred in other parts of the economy over the prior years had to be matched by a “consistent approach” in the labor market.\textsuperscript{89} Thus, it would have been hard to overlook the importance which National placed on labor law as a priority.

This was the state of New Zealand unions when the conservative National Party regained control of Parliament on October 27, 1990, after two terms out of power.\textsuperscript{90} Two months later, the National Party introduced the Employment Contracts Bill (ECB) on December 19, 1990, as part of a package of other social legislation. It was enacted and became effective May 15, 1991, as the ECA. Bargaining under the ECA is founded on free market principles\textsuperscript{91} so that the individual employee is free to bargain with the individual employer to set terms and conditions of employment.\textsuperscript{92} Em-

\textsuperscript{88} For a discussion and analysis of these proposals, see Dannin, supra note 23, at 1; see also SERVICE WORKERS FEDERATION OF AOTEAROA, THE EMPLOYMENT CONTRACTS BILL: SUBMISSIONS OF THE SERVICE WORKERS FEDERATION OF AOTEAROA 2 (n.d.) (on file with author).

\textsuperscript{89} NATIONAL PARTY, NEW CHOICES IN INDUSTRIAL RELATIONS 1 (May 8, 1990) (on file with author); see also 6 PARL. DEB. (HANSARD) 493 (Dec. 19, 1990). National also issued a one sheet, abridged version that same day also entitled “New Choices in Industrial Relations.” The document referred to in this article is the full length version.

\textsuperscript{90} A synopsis of recent New Zealand electoral politics will be helpful in understanding events discussed in this paper. New Zealand is a parliamentary democracy. It has had only two major parties during recent years, the Labour Party and the conservative National Party. In 1984, the Labour Party, a traditional union ally, gained power. It was reelected in 1987. During that term, New Zealand suffered severe economic reversals when its sharemarket crashed in 1987, an event from which, even six years later, it had not yet recovered. In October 1990, the National Party regained power and shortly thereafter introduced massive legislative changes, one of which was the ECA. See generally KELSEY, supra note 81.


\textsuperscript{92} That an employee can bargain on an equal basis with an employer is an idea that was rejected in the National Labor Relations Act. See 29 U.S.C.A. § 151 (West 1973 & Supp. 1994). “[D]ue to market imbalances and available alternatives, the relative power of negotiating parties often differs considerably with individual employees possessing relatively little power to influence the terms of negotiation.” Thomas A. Mahoney & Mary R. Watson, Evolving Modes of Work Force Governance: An
ployees are also free to designate anyone as a representative for whatever period of time that employee chooses and can do so either on a group or individual basis. Unions have no particular status under the ECA and cannot take any action unless authorized to do so by employees and unless the employer is satisfied with the form of authorization. Walter Grills observes: "The right to union membership does not mean the same thing as the right to have your union representative recognised in the sense of being dealt with fairly or in good faith."

National's approach was to be one of increasing "flexibility in the labour market" by a move to "liberalise the current structure . . . remove existing constraints . . . and bring true democracy to the workplace with a wide range of choices. Employers and employees will be free to decide for themselves how they wish to negotiate wages, conditions of employment and resolve disputes." If anyone found that this statement was not sufficiently clear in forecasting the nature of the ECA, National was at pains to spell out the specifics of the changes it would make.

We will:
1. Reintroduce voluntary unionism.
2. Encourage more flexible bargaining arrangements between employers and employees.
3. Allow employees to choose their own bargaining agents.
4. Give industrial agreements the status of binding contracts.
5. Give workers greater flexibility to decide who will represent them in dispute procedures.

Evaluation, in Employee Representation: Alternatives and Future Directions 135, 142-43 (Bruce Kaufman & Morris Kleiner eds., 1993). However, these arguments were irrelevant to the ECA's proponents who either denied or ignored them. For example, during parliamentary debates on the ECB, National MP Marie Hasler contended that the ECB was "an act of faith and confidence in the people of New Zealand." This referred to faith and confidence in their being able to function in a viable manner under the ECA.

Opposition members talk almost solely about employer abuse, knowing full well that the Employment Contracts Bill was not designed as an all-purpose elixir of justice. They talk unceasingly about the rights of employees, but scarcely a word has been said about employee responsibility. Opposition members talk a great deal about rights to a minimum income, but they are incredibly silent on the question of the source of that income. The Opposition has talked endlessly about protecting employees' rights against employer manipulation, but is, in fact, more interested in justifying its own unconvincing adherence to an increasingly irrelevant labour relations system.


93. The full provisions of the ECA are more complex than a simple free market system, but it is not necessary to understand them to comprehend the changes it created.

94. ECA §§ 10-12, 59(3); Walter Grills, The Impact of the Employment Contracts Act on Labour Law: Implications for Unions, 19 N.Z. J. Indus. Rel. 85, 89-90 (1994). By 1993, only 25% of collective employment contracts had the union as a party to the agreement. Id. at 89.

95. Grills, supra note 94, at 91.

96. National Party, supra note 89, at 1 (ellipses appear in the original). This regime bears some de facto resemblance to the employee representation plan system which predated the enactment of the NLRA. Cf. David Brody, Section 8(a)(2) and the Origins of the Wagner Act, in Restoring the Promise of American Labor Law 29, 34-37 (Sheldon Friedman et al. eds., 1994).
6. Introduce a minimum code of wages and conditions. National said that "flexible bargaining arrangements" meant introducing a system in which workers could negotiate "individual contracts, through workplace or enterprise agreements, to industry and national awards." National was equally specific when it came to its plans for unions and collective bargaining. National planned to "allow employers and employees to jointly choose their own bargaining arrangements; be they workplace, enterprise or industry arrangements" and to "allow employees to choose their own bargaining agents, be it a union or otherwise, to represent them in industrial negotiations.

If by chance the manifesto left anyone unclear as to what sort of regime could be expected under National, it ought at least to have put voters on notice to inquire further and not to have assumed the best. Despite this persuasive evidence to the contrary, some unions maintained that any change would be minimal and limited to tinkering, such as outlawing union security arrangements, referred to in New Zealand as compulsory unionism. So self-deluded were some in the union movement that on the very eve of massive and devastating change, some trade unionists actually opposed attempts by their co-unionists to prepare for life under a hostile legis-

98. Flexibility is a vague term that was often used in New Zealand without precision. It could mean any of several things: (1) "quantitative" flexibility to allow an employer to adjust the quantity of labor to fluctuating needs by unilaterally increasing hours or adding temporary workers; (2) "qualitative" flexibility which would allow employers to use their existing workforce to meet changes in needs; and (3) "labor cost" flexibility, changing the way workers were paid, to reinforce the other two types of flexibility. See Rose Ryan, Flexibility in New Zealand Workplaces: A Study of Northern Employers, 17 N.Z. J. Indus. Rel. 129, 131 (1992).
99. National Party, supra note 89, at 2. This system bears some similarity to that which was advocated by the head of the National Recovery Administration, General Hugh Johnson, and general counsel Donald Richberg that § 7(a) of the Wagner Act called for neutrality as to the form of labor organization. Brody, supra note 96, at 37.
National's use of the word "award" may actually have been misleading, since it could have suggested the traditional bargaining structure would continue. Some suggested that "flexibility has become a synonym for unfettered managerial prerogative." Hammond & Harbridge, supra note 91, at 28.
100. National Party, supra note 89, at 1.
101. See Loader, supra note 43. In fact, after the introduction of the ECA many commentators wrongly claimed that National had not informed anyone of the dimensions of the changes it planned.
Paul Kimble, then an official with the Distribution Workers Federation, expresses the view which was common at the time.
Clearly, we saw changes coming. The Bill was certainly a lot more extreme than what the party had indicated would be its industrialized policy. We realized that lots of things would be different. We obviously knew that we would be dealing with voluntary union membership. . . But we probably didn't know that the legislation would make the negotiation of contracts as difficult as it has done.
Kimble, supra note 67.
To be fair, National had in the past used radical rhetoric in its election campaigns, but then had behaved moderately once in office. Letter from Brian Easton, economist, to Ellen Dannin (Mar. 21, 1994) (on file with author). The specific responses of the unions included in this study are presented below.
lative regime.\textsuperscript{102} Even today, some still dream of a return to the pre-ECA days and continue to view the ideal legislative reform to be a return to the old award system, to compulsory interest arbitration, to government inspection and enforcement of agreements, and to registration. Such a return may no longer be possible without extreme dislocation.\textsuperscript{103} Furthermore, living under the ECA changed reality so that two years after its enactment even some in the union movement could admit there was no turning back.\textsuperscript{104}

II

UNION PREPARATIONS FOR CHANGE

The nature of unions in the period prior to the enactment of the ECA varied. Some were, as described above, highly entrenched within the old system and even dependent on it for their very existence. Others were experiencing fundamental change as new leadership emerged. These new leaders were attracted to more strategic ways of thinking and had taken steps to implement more effective tactics, including making greater use of their delegate [shop steward] structures and increasing the education level of their staff and members.\textsuperscript{105}

A. The Service Workers Federation of Aotearoa\textsuperscript{106}

Despite this climate of denial, some union leaders, beginning as early as 1987, knew that a radically changed labor relations climate was imminent and had the courage to prepare for the challenge that this would bring. One of the best examples of this was the Service Workers Federation of Aotearoa (SWF), which represents a broad range of mostly unskilled and part-time workers, including restaurant workers, custodians, nursing home workers, security staff, musicians, and the like.\textsuperscript{107} In late 1990, the SWF represented approximately 70,000 workers, of whom 70\% were women, as well as many Maori, Pacific islanders, and southeast Asians.\textsuperscript{108} Given the jobs its members performed and the high number of women and minorities

\textsuperscript{102} See Barker, supra note 45.

\textsuperscript{103} Haworth, supra note 27, at 290. There seemed little likelihood of this occurring, however.

\textsuperscript{104} See, e.g., Angela Foulkes, The Culture of Tripartism: Can European Models be Adapted for New Zealand Use?, 18 N.Z. J. INDUS. REL. 185, 185, 192 (1993).

\textsuperscript{105} Haworth, supra note 27, at 282.

\textsuperscript{106} The Maori word for New Zealand. It is loosely translated as "the land of the long white cloud."

\textsuperscript{107} See SERVICE WORKERS FEDERATION OF AOTEAROA, supra note 88, at 1. The SWF thus has a membership roughly equivalent to the workers represented by the Service Employees International Union and Hotel Employees and Restaurant Employees Union in the United States.

\textsuperscript{108} See id.
in its ranks, it should come as no surprise that SWF members were among the most poorly paid in New Zealand. Full-time wages among SWF members tended to be quite low, in the range of $NZ14,800 [$7992] to a high of $NZ18,500 [$9990] per year. Some believe that these sorts of workers are among the most difficult to organize; however, more recent work suggests this may not be true.

SWF National Secretary Rick Barker was not one of the union leaders who ignored the advent of drastic change. He thought that industrial legislation would be one of the National administration’s first actions, because when they brought in an anti-union law before, they privately admitted that they had been too slow in doing it in 1983. But had they done it much earlier, they would then have been able to hobble the unions more. And to have blunted the effect that the unions would be able to have on the election in 1984. . . . [T]hey thought that they had lost a chance. So I always anticipated from that they would do it first up, so it would have its maximum effect and maximum time to run. The full three years. So when the next election came they would have the union movement in the most vulnerable and depressed state it could be.

Barker thus urged massive change within the union on a number of fronts. First, he looked abroad for models of what could be expected and for successful strategies for dealing with these changes. Barker concluded that New Zealand’s industrial relations would grow to be like the more contentious American environment. Second, he promoted education pro-

109. This is certainly the pattern in the United States. See Marlene Kim, Overview: Losing Ground, Increasing Hate—Workers and Minorities Today, in Building on Diversity: The New Unionism vii, viii-ix (Lab. Res. Rev. No. 20, 1993). In addition, the presence of large numbers of women and minorities among its membership suggested difficulty in keeping these people organized. In the United States, women have had significantly lower unionization rates than males. See Dorothy Cobble, Introduction: Remaking Unions for the New Majority, in Women and Unions: Forging a Partnership 3, 6 (Dorothy Cobble ed., 1993); Marion Crain, Feminizing Unions: Challenging the Gendered Structure of Wage Labor, 89 Mich. L. Rev. 1155, 1157 (1991).


111. See Crain, supra note 109, at 1159-72 (giving an overview of American unions’ attitudes to organizing women workers). The AFL, for example, beginning in the late 19th century focussed on improving workers’ wages and feared that women would undercut men’s wages. In addition, it was committed to a patriarchal view of women as homemakers. Id. at 1160-61.

112. Linda Hill, More Than a Cuppa and a Scone, Labour Notes, Sept. 1992, at 11. A recent study found that this may no longer be true in the United States. Union Tactics Found Key Factor in Winning Organizing Elections, 232 Daily Lab. Rep. (BNA), Dec. 3, 1991, at A-7. That study found that the union win rate was 66% in elections in units in which minorities made up more than 75% of the unit; 59% in units in which women were the clear majority; and 56% when the average wage rate was under $5.00 an hour. Id.; see also Phil Comstock & Maier Fox, Employer Tactics and Labor Law Reform, in Restoring the Promise of American Labor Law 90, 94-96 (Sheldon Friedman et al. eds., 1994).

The “difficult to organize” label may have resulted from different styles of organizing among women-centered unions. See Crain, supra note 15, at 1870-85 (for a discussion and analysis of women-centered unions); Crain, supra note 109, at 1173-74 (1991) (studies cited therein). The label may also reflect stereotypical thinking on the part of some unions. See, e.g., Patrick Renshaw, American Labor and Consensus, 1935-1990, at 152, 152-68 (1991).

113. Barker, supra note 45.
grams for union officials, including importing American trade unionists to teach American organizing skills. In Barker’s view, the value of these exercises and preparations was to equip SWF organizers to operate competently in a collective bargaining environment which would be quite different from any they had ever experienced.114

I would like to say that the object was for us to have sufficient numbers of our people having an appreciation first hand of what the likely environment of this was to be. This was so they would be able to say, “Well, this is what people have survived, and they can do these things,” and to have enough personal reserves and confidence to tackle the future. That was what I saw the objective to be. We were not certain what we were facing at that point.115

Barker borrowed from the organizing model of unionism to set up committees within each worksite to organize the job.116 The union’s role would be one of supporting the committee by giving it needed information and assistance. Barker saw membership drives as most likely successful if they were conducted around bargaining so that worker involvement in bargaining would create close personal ties with the union. Finally, the union tailored communications with each group it represented through a newsletter targeted to the needs of each negotiation.

Another important part of the organizational changes the SWF implemented in the waning days of the LRA was the negotiation of new agreements which broke out of the pattern set by the awards structure established ninety years earlier.

When it [the award covering tearooms, restaurants, and fast-food outlets] was written in 1900, no one had ever heard of the fast food industry. In the particular chains, the type of place, the language and the structures in the award, so people in McDonalds would pick it up and would not see any reference to swing shifts; they would see no reference to all the phrases that were commonly used.

114. Id. When asked what he found most valuable in this exercise in comparative labor law, Barker replied:
The most useful thing I learned was the statistic of decertification. Seventy percent of all decertification ballots was because of the perception of lack of service. As I understand, that is the figures of both the UFCW and the Hospital/Hotel employees and the generally accepted figures are right around the 70% mark. I find it very clear if that’s the experience in America why people leave unions and it would be no different here. We don’t have any statistical base here about why people leave, so you have to build a system that ensures a good level of service to the membership.

Id.

115. Id.

116. For a discussion of practical aspects of the organizing model of unionism, see MIDWEST CENTER FOR LABOR RESEARCH, LET’S GET MOVING! ORGANIZING FOR THE ’90’s (1991). For a more theoretical discussion, see generally Crain, supra note 14. The organizing model is in contrast to the servicing model, in which the union acts as a body with expertise which provides problem-solving services to its members for a fee. The organizing model seeks to involve members in solutions in order to promote a higher degree of organization and success. MIDWEST CENTER FOR LABOR RESEARCH, Introduction, AN ORGANIZING MODEL OF UNIONISM 1, 2 (Lab. Res. Rev. No. 17, 1991).
And for people who were flipping hamburgers they were cooks. They were cooks engaged to reconstitute pre-cooked or pre-prepared foods. This was just a nonsense to them. It seemed that the document was irrelevant in terms of the sick leave. It was written in terms of full-time staff who worked regular shifts. And there was sort of an add-on to it to deal with the casual nature the industry had become. The whole document was written upon the basis of full-time code with occasional part-time code as an appendage to it, when in reality, the industry had become almost completely casual and to read one entitlement for sick leave for a casual, part-time worker was pretty hard to interpret. But all of those things were turned around so it became very clear. It was written from the perspective of an employee, the type of person who was engaged by McDonalds.117

The SWF began its efforts to update its awards in the early months of 1990, by breaking down its old Restaurants Award into four component agreements to cover different sorts of establishments. This exercise, in and of itself, was a harbinger of things to come. Only a year or two earlier, employers would have welcomed the union’s position. In 1990, however, the SWF found most employers were not interested in anything the union had to offer. They were all too well aware that significant change was likely soon and preferred to wait.118

The one exception to this was McDonald’s, which agreed in June 1990 to a contract which was drafted specifically for it. The agreement was drafted in plain language and had terms which were perceived as relevant to the company.119 The SWF used the process of negotiating and drafting the McDonald’s agreement to implement innovations it had decided were desirable. The most important of these was a greater level of direct member involvement in negotiations. Members were involved in the formulation of negotiation positions through in-store meetings and a national meeting attended by approximately thirty-six McDonald’s employees from all over the country.120

The SWF’s modifications included the somewhat more prosaic work of restructuring itself. A more unfriendly bargaining environment meant that the SWF would be hard-pressed to retain membership, particularly since it operated in industries which internationally have only 3% of the workforce organized (an extremely low level of unionization).121 Thus, it was inevitable the SWF would lose members once it lost the protection of the LRA. To survive this onslaught, it had to streamline the organization to operate with less income. It attacked the problem on several fronts. First, it removed redundant functions throughout the organization nationally and centralized many operations. Second, the SWF borrowed business tools in

117. Barker, supra note 45.
118. Id. supra note 45.
119. Id.
120. Id.
121. Id.
information collecting and analysis to improve its management functions. Third, the SWF tried to achieve a higher degree of specialization through its existing staff in order to offer a higher quality of service to existing members and to be more effective in organizing the unorganized. This meant forming divisions organized by the specialized areas the union represented. The new structure was thus much more focused on specific tasks and also encouraged members to identify more strongly with their respective divisions of the union than they had been able to when dealing with the more general organization.

B. The Engineering & Related Trades Union

The Service Workers Federation was not the only New Zealand union to anticipate and prepare for the ECA. The Engineering & Related Trades Union (Engineers Union), a union composed largely of automobile workers and metal trades workers, anticipated the need for change in the way they operated as early as 1987, as a response to two forces. First, the LRA opened up a range of issues for bargaining since it no longer restricted unions to bargaining only about industrial matters. The second force which prompted the Engineers to seek change was a serious downturn in the automobile and other manufacturing industries in New Zealand.

First, the Engineers began to change union structures. They found there was a direct correlation between satisfaction with the union and degree of unionization and member contact with their organizer. They thus developed a system of periodic visits which required the organizer to visit every worksite at least twice a year and, preferably, several times a year, as opposed to only appearing for negotiations or when problems arose.

In addition to increasing contact, the Engineers changed the role of organizers to place fresh emphasis on the delegate (steward) structure. Under the new system, which was borrowed from systems the Engineers observed abroad, the union depended on a pool of flexible organizers working together with a supportive delegate structure to meet the goal of

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122. Id. The Service Employees International Union engaged in similar reorganization efforts in 1990-1992 in order to develop methods to serve a more diverse workforce and membership. See Ruth Needleman, Space and Opportunities: Developing New Leaders to Meet Labor's Future, in BUILDING ON DIVERSITY: THE NEW UNIONISM 5, 13 (Lab. Res. Rev. No. 20, 1993). The New Zealand labor movement as a whole has moved to seeking leaders with needed skills, as opposed to previous experience in the occupation or industry. Haworth, supra note 27, at 301.

123. Barker, supra note 45.

124. See generally STRATEGIES FOR CHANGE, supra note 47.

125. Loader, supra note 43.

126. Id.

127. As part of their research, the Engineers also looked abroad at what they saw as anti-union countries, such as the United Kingdom and the United States, as well as at countries they wanted to emulate, at the unions in those countries, and the reasons they were successful. The Engineers did not confine themselves to what they would define as "the union point of view" but, rather, examined economic issues as well with a view to expanding their role. Loader, supra note 43.
building up the union in the workplace. Thus, in 1987, Engineering Union organizers had their primary duties defined as member recruitment, steward elections, servicing shop stewards, award enforcement, dispute handling and award campaign organization.\(^{128}\)

The Engineers began to recruit its staff from sources other than the workplace floor.

[The Engineers] went out and hired graduates, people from the Labour Department, who obviously had a leaning towards and sympathies towards the union movement. People like Rosalie Webster who was ex-Department of Labour and now the assistant secretary of that union; Peter Chrisp, also a national officer; and John McKelrie, all of those sorts of people, in fact, were nontraditional union employees. And they even got down to wearing blue suits and nice ties to make themselves more presentable and more acceptable to the employers that they were meeting with.\(^{129}\)

The Engineers also changed the role of site stewards. The union had always had workplace delegates, but at this time they began to boost their numbers and to make other fundamental changes in their roles. The primary change was to make the steward take on a more visible role with the membership so that the union would be seen to have a continuous presence. Union organizers were to give support to the steward, as needed, including legitimizing the steward’s authority. For example, organizers were instructed to involve their stewards during site visits. In addition, stewards were to play a larger role in grievance handling.\(^{130}\)

Historically [stewards] had been white male tradesmen, someone from the tool shop. In a plant of 300 people where we covered not only the tool shop and the maintenance areas but all the production workers that was proven to be absolutely ridiculous because the majority of members on site were production workers and quite often females and in many cases Polynesians. They deferred to the absolute seniority of the white male trades groups, and we felt that was particularly unproductive because we necessarily couldn’t get information through in the form that they actually wanted it. And it meant that we had a very biased view coming back from the delegate structure about what they wanted because they were still catering their stuff to the interest group.

\(^{128}\) STRATegies, supra note 47, at 20; Loader, supra note 43.

\(^{129}\) French, supra note 55.

\(^{130}\) STRATegies, supra note 47, at 26-27.
The union still has, in the wider public mind, an image of being a white male trade union, even though the majority of our members are unskilled workers. We started bringing in more and more delegates saying that any shop over 12 or any work place over 12 had to have a delegate. So we put the number right down. In a plant of 300, for example, we would have 4 or 5 delegates. So rather than just relying on one, we actually brought them in and that boosted the representation of the delegates and made that structure much more responsive to what the membership wanted.

In addition to changing interpersonal relations and support systems, the Engineers changed the written materials sent out to the membership. It concluded, first, that the reading level of its publications was inappropriate and, second, that the nature of the materials being supplied needed to be better targeted. The Engineers decided to use these written contacts to "put unionism on the job" and to offer different ways workers could become involved in their union. At its most basic level of contact, workers received union material which was general but tailored to their industry. To further increase involvement, job-site delegates were given detailed information about important issues facing workers and related resources they could hand out to the workers, such as a flyer, a pamphlet, or a sticker dealing with the issues.

To meet these goals, the Engineers changed their written communications so that it was, first, material that would actually be used and, second, material which would lead workers to see themselves as more integral to their union and as benefitting more from it. Their final goal was to build a membership that was better informed and more current on issues which affected them within and outside the workplace.

For example, when the government began restructuring delivery of medical services under the Accident Compensation Corporation (ACC), the

131. Loader, supra note 43.
132. Id. The first issue of the stewards' newsletter introduces its purpose as:

The industrial relations scene is undergoing major change. The manufacturing industries are changing, the new Labour Relations Act is now in force, the Engineers union is restructuring and improving the way it organises and the way it bargains for wages and conditions.

In the face of all this change shop stewards have often said they need more information, that they feel isolated, and that they need to know more about what goes on outside their workplace.

This newsletter is designed to help fill that gap. It will provide information and details about current union issues, and will tell you where to go to find more information yourselves. It is the first of three newsletters to be produced during 1988, and goes to 1,503 Engineers' Union shop stewards, New Zealand wide. Much of the information contained is specific to certain shop stewards, and much is of an advanced nature so if some of the issues are confusing, don't worry!

UNION UPDATE, Mar. 1988, at 1 (on file with author). The newsletter is divided into sections on: (1) bargaining, with short one-paragraph summaries as to each negotiation in progress and where to get more information; (2) workplace health and safety; (3) union health clinics services available throughout the country; (4) union membership fees; (5) training and education, including union education and work training; and (5) wage and time records, focusing on recovering unpaid wages. Id.
133. Loader, supra note 43.
union paper, *Metal*, contained articles and a small tear-out pamphlet on the changes.\(^{134}\) The delegates' kit had background information on the changes accompanied by attractive stickers saying "ACC Cuts Can't Heal," as well as a petition if the delegate was interested in seeking signatures, and other related materials that could be put to use.\(^{135}\)

The Engineers were strongly influenced by labor relations events in Australia during this time.\(^{136}\) This transformed the way the Engineers approached bargaining long before the ECB was introduced to focus negotiations on nontraditional issues of workplace productivity and worker skills.\(^{137}\) This increased attention to bargaining that focused on developing worker incentives and skills had a number of ramifications. First, these industry initiatives provided a framework for increasing productivity and the redesign of job skills needed for industry. As the Engineers came to address issues specific to individual industries, the changes led to a collective bargaining document which focused specifically on the industry, as opposed to the more generic occupational award.\(^{138}\)

We decided that we wanted to change from some of the more staid elements in trade unionism, to actually getting away from just bargaining about wage increases to looking at the whole picture about what productivity meant. A lot of it was forced on us by just the decline in manufacturing. In fact to survive as a union, we needed to have members, and those members needed

\(^{134}\) The February/March 1992 issue of *Metal* contains a number of articles that are all health related, as well as those which focus on the ACC cuts. These include the privatization of the public health system, *Public Health—A Terminal Disease?*, *Metal*, Feb.-Mar. 1992, at 2; ACC Submission, supra, at 3; *Health Hazards of Metals*, supra, at 4-5. The next issue contains a four-page tear-out pamphlet entitled "A Guide to Accident Compensation Changes." The last page has the slogan, "ACC Cuts Add Insult to Injury," and urges workers to call their union should they need help filling a claim. It then gives telephone numbers for all the union's offices. *Metal*, Apr.-May 1992, at 6.

\(^{135}\) Loader, supra note 43. The Engineers put out some very creative materials. One poster is in vibrant red and black. It has the legend "Protection" across the top and displays a pair of sunglasses, a packet of condoms, sunblock and a block saying, "Be Safe - Be Union."

\(^{136}\) *Id.* This Australian influence continued through the time of the ECA. In February 1991 an international conference on workplace reform, Workplace Australia, was held in Melbourne which was highly influential in New Zealand. See *New Zealand Engineering Union, Inc., Workplace Australia: The New Zealand Link* (June 1991) (on file with author). One year later the second conference was held in Rotorua, New Zealand September 27-30, 1992, with 670 delegates from 120 different institutions. *Workreform: The Newsletter for Workplace New Zealand* No. 2, at 1 (September 1992) (on file with author); Patricia Herbert, *Ripples of Change for the Workplace*, *The Dominion*, Nov. 3, 1992, at 6. The Communist Party, a group the MCWU was aligned with, opposed Workplace New Zealand as "Fordism taken to its logical conclusion of total control by the employer." Graeme Clarke, "Reform Secures Employer Control," *Labour Notes*, Sept. 1992, at 8; see also *Workplace New Zealand: Designing the Future*, *Metal*, Oct. 1992, at 5.

\(^{137}\) "O'NEILL, supra note 27, at 11. This approach had some unforeseen consequences. One of the Engineer's bargaining partners and one of the most important New Zealand companies, Fisher & Paykel, presented a submission against the Act to the Select Committee. In doing this, it was one of a very few employers to oppose the ECB. Loader, supra note 43. Fisher & Paykel took this position because they feared the ECB would destroy the beneficial bargaining relationship they had developed with the Engineers. See generally Fisher & Paykel, Submission to the Labour Select Committee (on file with author).

\(^{138}\) Loader, supra note 43. This focus on helping employers run their businesses more efficiently was a target of criticism by other unions, which saw the Engineers as collaborating with the enemy.
to be employed and if we were going to be a manufacturing union which is what we wanted to be, we had to ensure that manufacturing survived in New Zealand at a time when it was quite evident that it was going under. So we started looking at strategies for manufacturing and began promoting a much wider agenda.\textsuperscript{139}

Murray French of the Wellington Employers Association observed: "And that union very much was promoting a sympathy with employers on the basis that if employers were successful, their members would benefit."\textsuperscript{140}

By late 1989, when it became prudent to prepare for a change in government, the Engineers began to search for evidence as to the nature of those changes.

We looked far and wide, we combed through speeches of Bill Birch [then opposition National Party shadow Minister of Labour]. The National Party was very close-lipped about what exactly they were going to do. They made big statements about they were going to change industrial relations and they said that was going to be one of their major platforms coming into the election, but they just said they were going to change it and they didn't really say what. A lot of people thought that would just bring in voluntary unionism. . . . We could see that they were going to go far further than that and we wanted to know how far.\textsuperscript{141}

\textsuperscript{139} Id. This expression by a unionist should seem strange only to those who believe that there is "a causal connection between workers forming a union and productivity declining, as if workers were more interested in 'loafing' than in helping to maintain the source of their livelihood." EDMUND F. BYRNE, WORK, INC.: A PHILOSOPHICAL INQUIRY 139 (1990).

\textsuperscript{140} French, supra note 55.

\textsuperscript{141} Loader, supra note 43. As a matter of fact, there is some dispute as to whether or not the National Party had or had not spelled out its plans for the area of industrial relations prior to the election and thus whether or not it had a mandate for the actions it took. NZEI National Secretary, for example, differs with Loader's views and believes that National spelled out its plans.

They were very clear. Don't let anybody tell you that National Party did not spell out what it intended to do in the industrial relations area, because it was very unclear in a number of areas, but in the industrial relations area, it was absolutely clear.

Interview with Rosslyn Noonan, National Secretary, New Zealand Educational Institute, in Wellington, N.Z. (May 26, 1992) [hereinafter Noonan].

Robyn Haultain, then an attorney with the New Zealand Council of Trade Unions observed that during this period there was increasing pressure from employer groups, especially the Business Roundtable:

whose policies and ideas happened to coincide with people in Treasury about the need for employers to be able to operate outside the statutory regime imposed by the Labour Relations Act or to get changes to the legislation which gave employers the power basically to impose site bargaining. There was a lot of pressure coming on for site bargaining and for employers to be able to deal much more on a one by one basis with their workers. There was a commission of inquiry into industrial democracy established by the Labour government and all of the tenor of the employers submissions and the position that they took in relation to that commission of inquiry was to try and push unions out and focus exclusively on the individual. They argued really strongly that the only sort of industrial democracy that they were interested in participating in was industrial democracy which was totally workplace centered and they talked a lot about excluding third party involvement. They often described unions as third parties.

In New Zealand, during this period, the one group with the power to dominate governmental decisions was Treasury. Treasury’s advice had to be sought as to each matter with economic, financial or revenue implications. Both Labour and National governments made themselves dependent on what Treasury advised and allowed economic decisions to dominate over other factors in making political decisions. In addition, Treasury was able to operate without restrictions. Until 1988, it was not required to file an annual report, and, at a time when it imposed austerity on others, its budget increased from $NZ32.8 million [$19.4 million] in 1987 to $NZ119.2 million [$70.3 million] in 1989 to $NZ161.7 million [$95.4 million] in 1991.142

As we couldn’t get anything out of the Minister of Labour, we looked at who was advocating change and who the Minister would be listening to and who historically National governments had listened to. So we went through all the Treasury reports, went through all the [New Zealand Business] Roundtable statements and all the rest of it. At that time there was a very big campaign going on, individual choice, freedoms arguments and things like flexibility and all the rest of it.143

By its mid-year meeting in 1990, the Engineers Union was actively gathering information and had done a good job of preparing itself to deal with massive change. The report prepared for the July 2-6, 1990 meeting at Hastings, reflects these pre-elections concerns and preparations.144 The re-

142. KELSEY, supra note 81, at 64-67.

143. Loader, supra note 43. The Ministry of Finance played a very conservative role in New Zealand economic planning throughout the 1980s. Not only were the views of the NZBR and Treasury similar, throughout this period, they engaged in a symbiotic relationship. This relationship has been fostered by cross-fertilization through exchanges of personnel. For example, in 1986, the NZBR hired as its executive director Roger Kerr, a man who had been an assistant secretary in Treasury and the head of its think tank, Economics II. See Natusch, supra note 81. This increased opportunity for the infusion of Treasury’s views into the NZBR and more intimate ties to Treasury. See id. at 42. As Natusch points out, there have been numerous migrations of people with Treasury links to major corporations or other influential positions. This does not necessarily mean that in all cases they are zealots for New Right ideology in their new positions. Id. at 61-63. On the other hand, as former Labour Prime Minister David Lange put it: “This core of skill and commitment and philosophy, painstakingly built up, was calculatedly diffused in cores of advice throughout the commercial community, so when Treasury moves into consultancies it’s talking to itself, to some extent.” Id. at 63.

NZBR views also gained a toehold within government through the vehicle of the Treasury. Treasury had a major influence on government, including Labour, by promoting “a rigid ideological line based on a near-religious belief in the theories of Hayek, Friedman and other gurus of the so-called New Right, rather than impartially advising the government of the day on the financial implications of alternative policies.” See David McLoughlin, Don’t Write Off Ruth, NORTH & SOUTH 36, 36 (June 1992). NZBR economic views thus became closely akin to those of Treasury, the Reserve Bank, the Centre for Independent Studies, and Rogernomics in terms of the sources they rely on. See Natusch, supra note 81, at 43. As Natusch points out, these views place the NZBR in the same ideological orbit as the OECD, the IMF and the World Bank. Id. at 75. So close are the ties among and within these groups, that the business editor of the DOMINION characterized the NZBR as the “public relations branch of Treasury.” See id.; see also KELSEY, supra note 81, at 40-41, 64-67.

144. STRATEGIES FOR THE FUTURE: CONFIDENTIAL REPORT FOR THE BIENNIAL CONFERENCE, Hastings (2-6 July 1990) [hereinafter STRATEGIES FOR THE FUTURE].
port advocates "an ability to handle the radical change a National Government could impose upon us." The Engineers predicted that union recognition would have to be earned, rather than being a matter of registration; that National would remove controls on the labor market and give individuals the right to choose "how they wish wages and employment conditions to be negotiated and disputes resolved." The document then analyzed how each of the specific predicted changes—voluntary unionism, flexible bargaining arrangements, free choice of bargaining representatives, and the like—would function.

The bargaining reforms the Engineers formulated to help them deal with the new environment included (1) articulating bargaining reform priorities, including selecting structures and strategies that would protect workers' earnings and job security; (2) openness to a change in bargaining structures where that appeared appropriate to meet their priorities; (3) inclusion of affected workers in the assessment of the strategy to be pursued in bargaining; and (4) ensuring that the structure chosen be viable in terms of providing a reasonable level of union organization, number of workers covered, and worker commitment and self-reliance. The report included in its appendices a model collective bargaining contract, an innovation never before needed.

C. The New Zealand Educational Institute

Another union which engaged in massive reorganization well prior to the enactment of the 1991 legislation was the New Zealand Educational Institute (NZEI), a union of elementary school teachers and other elementary school workers. The NZEI found itself subject to massive deregulatory pressures directed towards restructuring New Zealand's public schools beginning in about 1989. These pressures forced the NZEI leadership to action, part of which involved developing a very clear picture as to the sorts of continuing change it could expect to see.

We were very clear that this is what was going to happen, and we had a good look at how the organization was operating and how it represented the interests of different groups of members, whether every group member genuinely could feel they had a voice in the union and a say on the matters that

145. Id. at Appendix 3, p.5.
146. Id. at Appendix 3, pp.5-7. Such a program would follow from the natural tendency of conservatives, in particular, "to tell workers that isolation from one another enhances their dignity as individual human beings." Byrne, supra note 139, at 132.
147. Strategies for the Future, supra note 144, at Appendix 3, pp.7-10.
148. See id. at 91-92.
149. Id. at Appendix 6.
150. Noonan, supra note 141; see Hugh Lauder et al., The Labour Market, Education Reform, and Economic Growth, 15 N.Z. J. INDUS. REL. 203 (1990), for a description of New Right theory in this area.
151. Noonan, supra note 141.
affected their lives and a very rigorous review of what was being provided and how it could be improved.

... [A]s part of the process, we completely reviewed what we called a recruitment and retention campaign. ... It was ... a systematic review of all aspects of the way the organization operated and where members came in contact with the organization and what the quality of their contact was and what could be done to improve that. And so we focussed as much on retaining existing members, because I think in a way, because we were a compulsory union, there was a fear that we would lose some members once it ceased to be compulsory. And so we focussed, not just on recruiting new members, but what was required to retain all of our existing members.\textsuperscript{152}

During this same period, the NZEI began efforts to ensure a more active involvement of Maori\textsuperscript{153} members in the union. Maori members had viewed the union as not reflecting their interests or concerns and had thus been largely inactive and uninvolved. The NZEI created a new structure “from the grass roots up,” called “Miro Maori,” Maori Thread.\textsuperscript{154} The NZEI’s publications currently reflect the importance of Maori culture and tradition within the union. All the union’s publications prominently address issues of concern to Maori and use Maori language. In addition, the union structures meetings to reflect and respect Maori tradition, including having welcomes from the local tangata whenua (people) when meetings are held.\textsuperscript{155} This led to an upsurge in the activity and participation by Maori members, which strengthened the organization’s ability to respond to members’ interests and needs. Rosslyn Noonan explained:

The beginnings of it go back to the mid-80s but the period of real development is from ’89. That’s when things started to develop on a significant scale. And similarly now, we have women’s networks as well, we have a woman’s officer. The position was established in late ’88. That is another identification of the extent to which targeting a membership group that needs support to become more involved and active and to be able to see that the union was actually affecting the interests and needs.\textsuperscript{156}

\begin{itemize}
  \item \textsuperscript{152} \textit{Id.} The term “compulsory union” as used by Noonan refers to legislative and collective bargaining supports akin to an American union security clause operating in conjunction with the National Labor Relations Act.
  \item \textsuperscript{153} The Maori, a Polynesian people, are the indigenous people of New Zealand. They are entitled, under the Treaty of Waitangi, to equal status and respect in New Zealand. Despite this, they have long been treated unequally and have experienced problems of prejudice as a minority group, now constituting less than 20% of the population. The inclusion of greater numbers of Maori or others previously excluded has occurred across unions in New Zealand. Haworth, \textit{supra} note 27, at 301, 303.
  \item \textsuperscript{154} Noonan, \textit{supra} note 141. The Service Employees International Union engaged in similar reorganization efforts in 1990-1992 in order to develop methods to serve a more diverse workforce and membership. \textit{See} Needleman, \textit{supra} note 122.
  \item \textsuperscript{155} These features can be seen in the union’s annual meeting reports, \textit{see} New Zealand Educational Institute, Report of Proceedings: Annual Meeting (1990); its newsletter \textit{Rourou} (Contribution); and even in posters which often reflect Maori themes in design and color (Copies of \textit{Rourou} and posters are on file with author).
  \item \textsuperscript{156} Noonan, \textit{supra} note 141. This targeting of women is similar to that of some unions in the United States, which “have noticed that unions’ historical neglect of so-called women’s issues has been
Indeed, the NZEI went into 1990 having experienced an enormous amount of stress, which had led it to restructure to become as efficient and representative as possible.

**D. The Clerical Workers Union - NZ**

In contrast to these more activist unions, many New Zealand unions, as well as the largest union umbrella organization, the Council of Trade Unions, chose to ignore the possibility of enormous legislative change, sought to stave it off by attempts to bolster the Labour Party, or took other ineffective action. One of the least successful in preparing to meet the ECA was the Clerical Workers Union - NZ. New Zealand's second largest union, with 40,000 members in 1985, within nine months of the enactment of the new legislation it was defunct. The primary reason for its inability to cope with this threat to its existence was rooted in an internal power struggle among the leaders of the constituent unions which had arisen following amalgamation. "Rather than divide up the functions and go off and do those things, there was a great deal of suspicion amongst each other and they did everything together almost . . . [D]ecision-making simply didn't occur within that union, which ultimately assisted in its demise . . . ."

Even with no internal struggle within its leadership, the Clerical Workers faced the same problem the SWF did in representing workers who were notoriously difficult to organize. Its typical member was at a worksite with only two clerical workers, which was one among thousands of small workplaces throughout the country. Thus, the union faced an enormous—perhaps impossible—task just to visit all its worksites. It thus had to rely to an inordinate degree on compulsory union membership and supportive legislation for its existence. This is not to say that clerical workers did not want to support their union or became members only as a result of compulsion. According to Clerical Workers organizer Maxine Gay:

\[\text{a barrier to organizing women . . . .}\] Crain, supra note 109, at 1180. On the whole, however, American unions have tended to neglect women and issues of concern to women. Id. at 1180-81.

157. The Council of Trade Unions was created in 1987 as an amalgamation of the Federation of Labour, a coalition of private sector unions, and the Combined State Unions, a coalition of public sector unions. Haworth, supra note 27, at 282.

158. See Payne, supra note 141.

159. See text infra at notes 182-86 for a discussion of efforts by the CTU to bolster the Labour Party.


162. See Crain, supra note 109, at 1182 n.168 (discussing scholarship which views clerical workers as especially difficult to organize).
Although in some sense I found members hid behind the legislation. People who did want to be union members found it difficult. They were largely women, largely nervous and anxious, so for them having legislation meant that, well, of course, I don’t want to be a law-breaker, Mr. Employer, so I am going to be a member. And this was really in small towns where nobody could police it anyway. So although the law was there, it was pretty well self-regulating. People retained their membership. 163

E. Manufacturing and Construction Workers Union

The Manufacturing and Construction Workers Union (MCWU) presents the greatest contrast to those already examined. The MCWU or Coachworkers (as this union is popularly called as a result of a name which once reflected its main constituency) represents workers in diverse industries and locations. This is a consequence of a series of amalgamations the MCWU underwent after the LRA 1987 mandated that all unions have a minimum of 1000 members. 164 By early 1991, the merger of 11 small organizations brought the MCWU to a membership of about 3,000, a decrease from its peak membership brought on by economic recession in its industries. All the MCWU’s constituent unions, apart from the Optical Technicians and Pulp and Paper Workers, are in the metal industry, an industry that is almost completely represented by the Engineers Union. The two unions have experienced ongoing jurisdictional disputes, which were the result of overlapping coverage in their registrations. This long running jurisdictional battle between the two has only been exacerbated by the ECA. 165

This historical conflict, as much as its radical ideological leanings, may have equipped the Coachworkers for survival under the ECA. According to its General Secretary, Graeme Clarke, its philosophy is based on a strong view of internal union democracy.

Our perspective on the role of unions is basically that a union should do what its members want, and that should be determined by the members

164. LRA § 6(2).
165. Clarke, supra note 68.

There was always a certain amount of competition because of historical anomalies and the process of registering rules. Just to give you an example, in 1946, the Engineers Union registered its third amendment for the year with one comma missing from what had previously been registered. The effect of that missing comma was to create a total overlap with the coverage of the Coach Workers’ Union, so historically, in 1946 as a result of that one error, they acquired dual coverage, so they could go into any shop that we represented and say: “Would you like to join us, because we have coverage here too.” And they used to do that.

A lot of our time was spent fighting the Engineers. We couldn’t go into their shop and say to a fitter, “Do you want to join us?” because we didn’t have coverage of fitters in our rules. But through this error and the registration process, they had coverage for all our work, and so we had a continual battle on our hands. We were competing for membership, but they weren’t.

1d.
in meetings. As a result of that, the members ought to have a meaningful control over the union. They must control its resources.\textsuperscript{166}

One expression of this is that the union pays its officers no more than the members are paid.\textsuperscript{167} This also had a beneficial effect on union finances, no small matter in surviving in a hostile situation.

Unlike those unions so far examined, the MCWU is and always has been a very small union. It has also achieved success in ways that are both like and unlike those employed by the Engineers and Service Workers Federation. Unlike the Engineers, in particular, the MCWU has taken a strongly confrontational stance towards management. It views itself as part of a "world-wide tradition of workers . . . prepared to take militant action when, as responsible unionists, we find that this is the only way in a right cause."\textsuperscript{168} The MCWU relies on democratic decisionmaking in meetings based on majority rule.\textsuperscript{169} No doubt this is more easily accomplished by a group which is small enough, as a whole, to fit into one convention hall.

In its dealings with its own members, the Coachworkers has employed the technique of making itself visibly relevant to the members.

[Un]like unions that are increasingly centralizing funding, and then respond to people's needs in accordance with a centrally determined policy, our funding is decentralized. We have about eight accounting centers, which means there are eight sets of meetings looking at expenditures, eight different areas that the people concerned can approach for resources to carry out this or that. Within each occupational group or industry group, they have autonomous control within the policy of the union as a whole over their own affairs. You can't elect a superior group that will dictate policy to any section.

And the union should be looking out for the interests of the members in the broadest terms. If that means that you put some of the union's funds into giving kids Hepatitis B injections, well, that's what you do. If it means that members' income is affected by State house rent increases, well, you try to organize a rent strike. If it affects the members in any way and people are interested in it, then the duty of the officers is to carry that out.\textsuperscript{170}

The best example of this was the MCWU loan fund. In about 1988, the union discovered that members were being exploited by loan sharks who charged 1000\% interest. The union created a loan fund that would loan up to $500 with an administration charge of $22, to be repaid at a rate of $29 per week. In 1991, the union loaned $147,000 to about 500 workers.

Now, to people who do not have that facility, when you go around the plant shelling out money to people when they need it, so they don't have to go and borrow it from people at high interest rates or don't even have to leave

\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Clarke, supra note 68.
the job to get it, all they have to do is ask the delegate—other people look at that and they say: “Why can’t our union do that for us?”

F. New Zealand Council of Trade Unions

In the 1980s, the New Zealand Council of Trade Unions (CTU) undertook to establish a creative approach that would enlarge its role in New Zealand society. In many ways, this strategy was tied closely to that of the Engineers. The CTU, too, was influenced by Australian and Northern European unions to create a scheme of expanding union concerns beyond wages and working conditions; centrally coordinating goals and integrated strategies designed to attack issues such as full employment, trade and labor policy, productivity, industrial democracy, and other social issues; participating as an equal member in tripartite bodies with government and capital; focusing on creating growth and wealth, as opposed to focusing solely on the equitable distribution of resources; pursuing these goals within and without the workplace; and creating educational and research services. This approach was not without controversy. In many ways unions’ views as to this approach were reflected in their critiques of the CTU’s performance with regard to the ECA.

A second issue for the CTU was an attempt to create a more rational union structure. In 1989, it proposed amalgamating the union movement into fourteen unions (112 existed at the time) which would have greater resources and a wider bargaining focus.

Despite its attempts to create a forward looking strategy, the CTU found itself in an untenable position during most of the 1984-1990 Labour

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171. Id. Clarke continued in the interview to explain the importance of issues such as the loan program in making the union attractive to members:

A third of the people that left the Engineers Union and joined us, would have done so because they wanted a union. Another third would have done so because the others did. One-third would have left simply to get a loan. So, doing what the members want, even if it’s offbeat and not really a traditional union activity is something that will persuade people that “Yeah, okay, we’ll join that organization, because it’s meeting a need that we have. We can’t meet it anywhere else.” People on lower pay, the ability to get a $500 loan to smooth out your income to meet the unexpected bills is a really incredible thing to have, and the cost of it is so low—$22 for $500.

Other unions, including the Engineers, were expanding services supplied to members. Such services included providing group discounts on medical and life insurance, setting up union medical centers with inexpensive medical services, and providing legal representation in areas other than just labor relations. French, supra note 55.

172. The CTU was formed in 1987 of a combination of the Federation of Labor, the coalition of private sector unions, the state sector unions, and some previously unaffiliated unions. Not all unions joined, however, for various reasons. See Harvey, supra note 70, at 64. In 1991, 65% of all New Zealand unions were affiliated to it. These unions represented 87% of all union members. Harbridge & Hince, supra note 160, at 358.

173. Haworth, supra note 27, at 293. Even after the ECA was enacted, the CTU continued to push its view as to the centrality of tripartism and of labor’s taking on an expanded role beyond simply wage policies. See, e.g., Foulkes, supra note 104, at 188-89.

174. Haworth, supra note 27, at 293.

175. Id. at 299-300.
Government. "The supply-side victory in the Labour caucus made the union perspective on economic policy irrelevant, even obstructive. It also disestablished the unions as the key client group of the Labour Party in power. Not only were union economic priorities not relevant but the channels of influence expected to open with a Labour victory were blocked."

Indeed, this faction sought to ensure that the Labour Party was not captured by labor. The CTU's formal and institutional alliance with Labour left it unable to criticize Labour when it privatized government agencies and deregulated industries. In turn, by failing to keep faith with its membership and by failing to promote their interests within their party, the CTU became estranged from its membership and allies and thus weakened. A large number of the public looked to the CTU for leadership and heard nothing. One trade unionist described this as "the CTU's 'gentle' approach" to the Labour government. It was a policy which caused many in the union movement great apprehension.

Unions largely did not turn against Labour but, rather, simply became demoralized and divided during the latter part of the 1980s. Some unionists questioned whether they could or should support the party that had spurned the very people who had put Labour into power in the snap election of 1984. Others endorsed Labour, because they felt there was no alternative party with a chance of winning the election. For example, in July 1988, Rex Jones, head of the Engineers Union was elected president of the Labour Party. Others, especially those close to the New Zealand Communist Party, accused the CTU of collaborating with Labour in its "Big Business" policies. Some unions found themselves split internally. The Building Trades Union opted to support Labour and tried to educate its members as to the consequences of electing a National government, but its members rebelled. "The meetings gave the union hierarchy a roasting for suggesting that members should cast their vote for Labour. The view that was expressed was that the Labour Government had let them down and anything would be better than another term or at least it couldn't be worse."

The October 1990 election exacerbated these tensions by bringing the necessity of choosing to the fore. In the months leading up to the election, the unpopular Labour government was blamed for all the country's ills, especially its disastrous economic condition. The irony was that the policies which had made Labour unpopular were precisely those which Na-
tional stood for. Thus, if voters elected National by voting to punish Labour, they were only choosing a party likely to implement the very policies they did not like. On the other hand, in the view of many, Labour did not deserve to be reelected or at least deserved to be punished or criticized. Unfortunately, the more unpopular Labour became, the less the CTU could criticize it, for fear this would only lend support to National. In the end, the CTU's fears of a National administration far outweighed its disappointments with Labour. Its only option appeared to be silence. The silence of the CTU destroyed its credibility. This paralysis continued to the eve of the election.

By the early 1990s it was clear "that the mood of the country was for a change and that any National government coming in was going to make quite sweeping changes to the industrial legislation."183 A May 1990 opinion poll had Labour holding only eight seats.184 In the opinion of former CTU counsel, Robyn Haultain:

[E]verybody at CTU knew at least three months out from the election that Labour was going to lose and probably more like six. [CTU President] Ken Douglas was very reluctant to admit that. He didn’t want to believe that, I don’t think. He was hopeful that Labour would get back in. There was quite a lot of internal discussion about whether we should start meeting with Bill Birch, from the National Party, and with people who we knew were going to be at the forefront of the charge as far as voluntary unionism and so on was concerned.

... [A]ll of the people who worked in the technical services division had a very strong opinion that we ought to be meeting with Birch and as many of other National Party people as we could. The writing was on the wall. The Nats were going to win and at the very least we were going to have voluntary unionism. Some of us thought that we were going to have a hell of a lot more which would turn out to be a hell of a lot less from the point of view of workers ....185

This meeting never occurred, a consequence of Ken Douglas’ personal dislike of the National Party.

... [Meeting with Bill Birch] was personally abhorrent to him and he didn’t want to go and meet with him. He didn’t want to do it. And he kept on thinking that workers would see the writing on the wall and realize that even though Labour had done the dirty on them in pretty horrendous ways that they would still be better off with a terrible Labour government then they were going to be with a National government which would be far more brutal for them in terms of their working lives. So he just hung on to the hope that they would vote Labour and Labour would get back in so that he would never have to talk to Bill Birch. He just didn’t want to do it.186

183. Gay, supra note 161.
184. Harbridge, supra note 36, at 69.
185. Haultain, supra note 141.
186. Id.
As a consequence, things remained relatively in status quo for the CTU until after the election. Finally, the CTU held a conference November 14 and 15, 1990, a month before the ECB was introduced, at which it approved major changes in its organizational and representational structure which centralized national control.\textsuperscript{187} It also endorsed a proposal to draw up charters of union and worker rights coupled with a campaign to promote public support for them.\textsuperscript{188} However, by then it was too little action taken too late.

This relative inaction continued through the introduction of the ECB on December 19, 1990. The CTU’s reaction to this legislation, legislation which gutted union bargaining power and represented the triumph of those the CTU opposed, was to promise to stick with the Growth Agreement it had reached with the Labour government on September 17, 1990.\textsuperscript{189} The Growth Agreement called for a 2\% ceiling on wage increases, unless justified by higher productivity. At the time, inflation was 5\%. The Growth Agreement had been a desperate attempt to mollify what the Labour government perceived to be employers’ desires to limit union demands and to convince opponents of the LRA that their goals could be achieved under existing legislation.\textsuperscript{190}

The Growth Agreement appeared to be a blatant publicity stunt. For example, in announcing that it would abide by the Growth Agreement, the CTU announced that it wanted to coordinate trade union response to economic problems but would be unable to under a decentralized labor relations system.\textsuperscript{191} Labour Minister Bill Birch dismissed the agreement and


\textsuperscript{188} Id.


\textsuperscript{190} See Roth, supra note 189, at 291. This agreement opened both parties to criticism from all sides. National called the deal a stunt. The New Labour Party charged the CTU with selling out workers. The NZEF called the agreement positive. Id. at 291-92. The agreement also set a November 1 domestic summit meeting to include government, labor and business and provided that government would cut interest. See Herbert Roth, \textit{Industrial Summary September - October 1990}, INDUS. L. BULL., Nov. 1990, at 88.

Several major unions, such as the Engineers Union and Harbour Workers Union, very quickly showed their support for the agreement by limiting their wage demands to the 2\% level in the Compact. See Roth, \textit{Industrial Summary, supra}, at 88. Indeed, the 2\% level became the benchmark for settlement in that period, despite the fact that the wage round had earlier been running closer to inflation at 4.5 to 5.5\%. See Brian Easton, \textit{Alternative Systems of Industrial Relations: The Impact of the Employment Contracts Bill 17} (Feb. 5, 1991) (on file with author). Although the unions kept their side of the Growth Agreement, interest rates did not fall. See Roth, \textit{Industrial Summary, supra}, at 96.

\textsuperscript{191} See Macfie, supra note 189, at 5. Even two years after the ECA’s enactment, the CTU used the Growth Agreement to suggest that the economic pain the country endured under the ECA would not have been necessary.

The most successful “tripartite” agreement was one that didn’t develop through formal structures, and one that didn’t even have formal employer participation in its development. The “Growth Agreement” of 1990 indicated what was possible without compulsion or centralisa-
the CTU's offer to work cooperatively to resolve the country's economic troubles. According to Birch, the Growth Agreement was "an irrelevant old-style accord promoting centralised wage fixing contrary to the new government's industrial policy . . . ."192

III

THE DRAFTING AND INTRODUCTION OF THE EMPLOYMENT
CONTRACTS BILL

On October 27, 1990, as expected, National won by a huge margin. Labour retained only twenty-eight of ninety-seven seats.193 Even had Labour not been in disarray, the economy was in desperate trouble with a high balance of payments deficit, the highest ratio of foreign debt in the OECD, interest rates on loans and mortgages stuck at between 12-14.5%, and predictions of 250,000 jobless, with no sign of improvement.194 Unemployment had tripled since 1985 when Rogernomics195 began to take effect.196 As of December 13, 1990, two months after the election, true unemployment figures would increase to between 15-20%, from levels closer to 10%
through 1990. In addition, although the average gross income of full-time workers had risen 6.2% over the prior year, after adjusting for inflation and increased taxes, this constituted a 1.5% decline in purchasing power. This meant many New Zealanders had experienced real suffering for months leading up to the elections.

During this period, New Zealand experienced a major reorientation in its perception of unemployment. The level of mass unemployment itself contributed to this hardening of opinion. However, a more significant contribution was the increased materialism experienced during the prosperous first years under Rogernomics. In the past, most New Zealanders would have supported a philosophy that said full employment was an important component of a functional democracy, because it removes servility and balances power. Through the two generations that grew up after the Great Depression, “full employment was a deliberate product of government decision. . . . Large amounts of public money were used to create employment on works schemes . . . .” In the 1990s, however, unemployment was no longer “the government’s top economic priority.” Society had come to view the rights of consumers and investors to maximum freedom of action as the paramount interest. At the same time, there was a change in vocabulary.

Freedom no longer meant liberation from enforced economic, racial or social inequality. Instead, it had the meaning of “freedom of the individual to achieve objectives free of constraining conditions.” . . . Accountability would be achieved through market efficiency measures of profit or contractual performance criteria. All this would empower individuals to take control of their lives as free and equal actors on the level playing field of life.

This change in priorities was made philosophically palatable as “the state executive and its economic advisors [became] convinced that a spontaneous recovery in employment would automatically follow disinflation.” These views quite quickly had become accepted by the hierarchy of the Labour Party during their two terms in the 1980s.

197. See Roth, supra note 187, at 98.
199. See generally essays collected in Pelly, ed., supra note 196.
201. See id. at 77.
202. KELSEY, supra note 81, at 79 (emphasis in original).
203. See Shirley, supra note 196, at 36.
204. By 1992, NZBR views would achieve such a level of acceptability that Helen Clark, the Deputy Leader of the Opposition, essentially had come to accept the NZBR assessment in a speech she gave in May 1992. “I have believed for some years, however, that the process of moving out of the fortress New Zealand economy required parallel policies to enable the labour market and industry to adapt to change.” Helen Clark, Address to the New Zealand Employers Federation 2 (May 13, 1992) (on file with author). This suggests that, as in the United States, New Right economic philosophies
When it became apparent they had miscalculated the impact these policies would have on the economy in general and unemployment in particular, the proponents of New Right economics shifted their explanation for the persistence of high levels of unemployment. National Finance Minister Ruth Richardson, a particularly influential member of National's caucus, blamed the existing industrial relations system for unemployment and argued that "deregulating" labor laws and moving to a free market system would reduce unemployment. Richardson read unemployment figures as evidence that a third of New Zealand households existed in a "welfare state," and that high levels of unemployment existed because “fewer people have done more work and labour productivity rose dramatically.” This presents a stark contrast to the view, often expressed by supporters of the ECB, that “only increased productivity achieved through capital accumulation” can raise workers wages.

Treasury took the position that inflated wages and the provision of financial support to those out of work encouraged people not to accept work that was available. In order to limit this choice, it was necessary to make work under any conditions the only viable alternative. Treasury explained

would come to be accepted into mainstream discourse and would drastically alter the agenda for years to come.

This process can, perhaps, best be seen in the spread of the use of the term “labour market” as the most appropriate way to talk about workers.

[A]s viewed through a secularized Calvinist lens, the poor are exploited because of their own limitations. In other words, blame the victims: if they are unemployed, this is because of their moral depravity; if they are employed, they are too busy laboring to tend to anything that requires the exercise of reasoning power. In either case, they are not citizens but natural resources that must be managed for the good of the nation. Labor, then, is the basis of property—not, however, for the ignorant laborer but for those smart enough to organize labor profitably. In this perspective, poverty is a problem only if the poor are idle, not if the workers are poor.

BYRNE, supra note 139, at 64-65 (footnote omitted).

205. It was no aberration that the NZBR should be party to such a miscalculation. Within New Zealand, during the period of the campaign for the ECA, the NZBR had achieved a reputation for injecting a higher quality of research and discussion into the public arena. Even its critics often laud the high quality of the NZBR’s research and analysis. Natusch in her thesis cites several instances of this. However, even a cursory reading of NZBR materials belies this. For example, in the submission it made to the Labour Select Committee on certain aspects of the ECA, the NZBR based its economic analysis, not on studies by economists, but on articles by attorneys. Cf. New Zealand Business Roundtable, Supplementary Submission to the Labour Select Committee on the Options Paper 4 (Mar. 1991). This corresponded to the sort of research, analysis and argumentation it had been advancing for years. See generally Dannin, supra note 23. Interestingly, Treasury, which also had a reputation for superior research, was guilty of making serious miscalculations. KELSEY, supra note 81, at 66.

Furthermore, the NZBR failed to consider the most important issue affecting unemployment worldwide: increased technology in decreasing the need for workers. BYRNE, supra note 139, at 55. Under the circumstances, to advocate punitive actions against the unemployed was inhumane and demonstrated a lack of attention to the complexity of the issues at hand.

206. See James, supra note 194, at 9.

207. Id. Productivity may have two meanings: product per unit of pay, or output per unit of work. Richardson's use suggests the latter.

that such a program would depress wages. It noted: “Changes in benefit policies, which improve incentives to work, may put downward pressure on real wages for low-skilled workers.” New Zealanders, unaccustomed to unemployment and suffering, were hard put to say that this evaluation of the problem and the solution were incorrect. Certainly, as unemployment grew so did pressure for change from Treasury and the NZBR, and so did the power of their message.

National’s desire to reform labor law as early as possible and its certain victory in the October elections, led to their August hiring of Paul Bell, a NZEF employee, to begin drafting new industrial relations legislation. Department of Labour personnel were also engaged in some aspects of this work prior to the election.

Bell’s work included consulting those whose input on the shape of the legislation was desired in order to resolve important aspects of the new legislation early on while others were occupied with winning the election. In a November 16, 1990 memorandum to W. F. Birch, Bell noted that certain matters “had been fully considered and accepted by industrial relations practitioners in my preliminary meetings prior to the formulation of the paper to you in August.” The group consulted was, however, quite limited. No one identified with the union movement was consulted.

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209. See, e.g., THE TREASURY, BRIEFING TO THE INCOMING GOVERNMENT, 1990, at 12 (Oct. 27, 1990). This viewpoint has a following in the United States as expressed in slogans such as “Workfare, not welfare.” It was notable that the program contained no consideration of the need to create jobs, given that increased productivity had lessened the need for workers. Cf. Byrne, supra note 139, at 53. The question must be asked, however, to what extent this coerced work differed from forced labor, particularly given the possibility there was no work available at even very low wages.

210. This may also have been a consequence of attitudes that it is the responsibility of the individual to find work and not of the government to provide work. Cf. Byrne, supra note 139, at 53. Certainly, it does not logically follow that being able to pay a worker less for the same output will increase the availability of jobs.

211. See Memorandum from Paul Bell to W. F. Birch, Minister of Labour 1 (Nov. 16, 1990) (on file with author) [hereinafter Memo from Paul Bell]; Letter from W. F. Birch, Minister of Labour to John Robertson, Chief Ombudsman 1, 2 (n.d.) (on file with the author); French, supra note 55; see also 12 PARL. DEB. (HANSARD) 2114 (Dec. 6-27, 1990) (Question No. 65).


213. See Memo from Paul Bell, supra note 211, at 1.


This refusal to consult widely on its decisions continued after the ECB to the 1991 Budget round. This secrecy has meant that many such decisions “have subsequently been reversed, or at least have proved to be extremely difficult and politically costly to implement . . . .” See Jonathan Boston & Paul
This anti-democratic method of operation can be attributed to several sources. First, many who supported the ECA felt a near-religious, “true-believer” fervor; when one has the word from on high, consultation is unnecessary and even blasphemous. Second, this limited consultation was encouraged by New Zealand’s unicameral form of government which, by placing all power in the hands of a small controlling group within the dominant party, imposes no necessity to seek advice or to persuade anyone but the already converted. This concentration of power and control, which operated with few constraints, rewards those willing to act in the least democratic way and ultimately calls into question whether modern New Zealand can truly be called a democratic pluralistic society. As Jane Kelsey puts it, “[H]ealthy participatory democracy was a threat to the success of the reform programme, and indeed to the national interest itself.”

Finally, some within these ranks did not understand democracy and saw its need for discussion, compromise, and deliberation as impediments to efficiency, rather than as a slow but valuable way to find a wise approach to a problem. For example, in 1991, Simon Upton, Minister of Health, explained that elected boards of health had been eliminated because voting for representatives, meetings of consultative committees, “‘and the potential for political paralysis doesn’t add up to choice in my vocabulary.’”

It is ironic that the process of drafting the ECB and the hurried manner in which it was enacted were precisely those criticized by the NZEF just before the October 1990 elections. In its September 1990 issue of The Employer, the NZEF said that employers were concerned that the legislative process lacked public participation.

The Federation has become increasingly concerned with the amount of legislation being introduced, the lack of time to make reasoned submissions


215. Some might argue that this “true-believer” fervor was but a cynical pose of those who realized they could benefit greatly from the imposition of a program which depended on depressing wages and working conditions. However, having talked to ECA proponents and read their literature, I believe many do believe in its philosophy and will continue to do so, regardless of the outcome.


217. Cf. Robert Dahl, Democracy and Its Critics 252 (1989). In terms of legal process theory, it can be said that the behavior of the ECB proponents defied the basics defined as necessary to procedures which can ensure good legislative decisions: “openness to the views of all affected persons and groups, focus on factual information subjected to expert and critical scrutiny, and public deliberation through which the pros and cons are thoroughly discussed.” William N. Eskridge, Jr. & Gary Peller, The New Public Law Movement: Moderation as a Postmodern Cultural Form, 89 Mich. L. Rev. 707, 721 (1991).

218. Kelsey, supra note 81, at 28.

219. Id. at 34.
and the predominance of the legislative programme over the public interest and importance of proposed bills . . . .

Another point is the amount of legislation being pushed through and the urgency required. Although urgency has been modified, the rush, particularly at the end of sessions, is not good for reasoned legislation or informed debate.220

Although these were certainly valid criticisms of a problem-filled legislative process, they were only made as part of the political campaign. The NZEF certainly did not find fault with the ECA and the way it came into being, despite the fact that the process of its implementation and enactment exhibited all the faults it described, as well as others. This lack of criticism cannot be explained as a consequence of the NZEF’s lacking information on the manner in which the ECA was drafted and enacted. The NZEF was the only nongovernmental body consulted prior to the release of the ECB.221 Indeed it boasted: “The Federation was heavily involved in the new legislation from the outset—briefings and consultation with Ministers and Caucus, advice in drawing up the draft legislation, and extensive consultation with employer organisations and employers in general, through the regional employers’ associations.”222

It would be unfair to fault only the ECA proponents for this lack of sympathy with democracy. The process surrounding the enactment of the ECA makes it clear that, in important ways, New Zealand is not a democracy. Undemocratic attitudes and actions did not spring solely from the National Party and its adherents. At least in part, they were only reacting to the undemocratic actions of their predecessors who were unwilling either to grant legitimacy to or pay heed to grievances about the functioning of the industrial relations system that had long been expressed by the NZEF and NZBR. The longer there was no apparent response, the more dogmatic they became and the less willing to be satisfied with simple tinkering.

The dynamic involved was more complex, however, than a simple refusal by Labour to listen to complaints about the industrial relations system. During the Labour government, the forces of Rogernomics, which elsewhere held sway, limited the scope of action for the Department of Labour by charging that unions and unionization were inimical to the country’s

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The process by which the ECA became law exemplified all these problems and more. The time for submissions critiquing the ECB after its introduction was brief and fell during the Christmas holiday and summer vacation period; it appeared that the Select Committee members did not engage in the process as an information-gathering vehicle; and when it came time to debate the ECB, National was in such a hurry it refused to wait until Members of Parliament could be given copies of the bill to read and to refer to during the debate.


well being. This occurred despite the fact that unions had been a major force in Labour's victory in the 1984 election. Douglas and his supporters shut out unions and targeted them as part of the problem and unable to offer any help in finding a solution.\footnote{223} Thus, shutting out important players created an embattled attitude, and it became less possible to be flexible, creative, or honest in seeking solutions. Listening to and trying to accommodate grievances felt by the opponents of one's allies became not a pluralistic, democratic exercise, but an act of betrayal.

This strait-jacketing of democratic processes carries within it seeds for an unsettled future, whatever the success or failure of the ECA.

The key which reconciles the rights and duties of citizenship with the values of individualism and freedom by the people is participation by the people in the governing process. . . . First, a decent society is not something that a government can impose on its citizens without (as a bare minimum) democratic consent, not even if it is Hayek's 'free society'. Rather, all citizens must be allowed to participate in defining and then creating what is collectively determined to be a decent society.\footnote{224}

Unfortunately this sense of grievance and National's assumption of power all came at a time when in other countries, such as the United States and the United Kingdom, the tendency to exercise power to its limits and to vilify the opponent rather than to seek common ground had gained ascendency. If this did not reinforce the righteousness National and its allies felt, it certainly provided no means of suggesting the need for self-appraisal.

Following the formation of its government, National began the formal work of radically changing New Zealand's labor relations laws. Paul Bell continued to consult on the draft legislation. On November 2, 1990, Minister of Labour Birch met with Secretary of Labour C. J. McKenzie and General Manager of the Industrial Relations Service Ralph Stockdill to initiate the formal drafting process. In that meeting, Birch stated his intention of introducing new legislation approximately one month later.\footnote{225}

Thereafter, Ralph Stockdill and D. J. Martin, Assistant Commissioner of the State Services Commission, issued a memorandum to their respective Ministers, dated November 12, 1990. The memorandum identified the legislation's goal to be "greater labour market flexibility" defined to mean "giving employers and employees the freedom to decide how they wish to negotiate wages, conditions of employment, and resolve disputes."\footnote{226}
two noted the "tight timetable" that had been given for producing draft legislation did not allow "time to explore the issues identified [in connection with the change in the law] in any detail." The memorandum cautioned that the goals of the legislation would create complications. A system that "focuses solely on rapid short-term adjustment is likely to lead to costly and unstable settlements in those parts of the labour market in which workers are able to exercise industrial muscle (e.g. through re-negotiating agreements, industrial disruptions and high settlements)."

In addition, should a time come in which the number of jobs outnumbered those seeking them, the proposals would expose employers to volatile bargaining pressures, particularly as labour market conditions improved.

The memo forecast problems that would result from giving employers the right to decide whether or not to recognize the worker's designated bargaining agent. It was simply impossible, the authors pointed out, that workers should have freedom to choose their representatives and that employers should have this absolute power, for this would give employers the ability to completely nullify workers' choices. By placing these two rights in conflict, without providing a means for resolution, other than the abstraction of freedom of choice, the government invited the parties to exercise their power and to engage in unproductive strikes, lockouts, or other unrest in the workplace.

National's draft labor law reform met criticism from other quarters. The Treasury Department opposed Birch's revision of existing labor laws on the ground that it did not "achieve as comprehensive a reform as is possible. In particular, it [did] not bring labour market contracting firmly within the law of contract and general law." Treasury, guided by Minister of Finance Ruth Richardson, stood for a complete free market approach which would apply only the common law to labor relations. As Murray

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227. See id. at 1.
228. Id. at 3, 10.
229. Id. at 9.
230. Id. at 4-5, 9.
231. Id. at 9-10.
232. See Memorandum from Bill Birch, Minister of Labour to the Chairman, Cabinet Strategy Committee 4 (Nov. 1990) (on file with author).

In some ways, the effort to make employment law conform more closely with general contract law was not necessarily less protective of workers' rights than the ECB. General contract law protected a weaker party from overreaching on the part of a stronger party. It had broader appeal rights than were to be available under the ECB. Finally, the High Court, which had long been fairly hostile to expanding rights in the employment arena, had recently provided protection on a par with those under the LRA for wrongful termination. In addition, laws such as the Hire Purchase Act or the Sale of Goods Act protected commercial contracting parties when one is in a more vulnerable position. See ROSE RYAN AND YVONNE OLFIELD, YOUR EMPLOYMENT CONTRACT: A HANDBOOK FOR WORKERS 11 (1991) (on file with author).
French of the Wellington Regional Employers Association described the situation:

[I]n deed a large degree of influence was exercised by the spokesman for Finance, Ruth Richardson, albeit that she in fact at that time had very much a far more radical approach to labor relations and that essentially was that there was no need for an act at all, it would simply be covered by normal contract law. And in fact labor relations legislation could be something in the order of three or four clauses. And indeed that was a serious possibility at one time.233

These policies would come in time to be referred to as “Ruthanasia.”234

These advocates viewed the free market, freedom of contract, and the common law as a means of achieving all things good, and even as being a desirable end in and of themselves. This concept draws its strength, to some degree, from the last century’s view that the common law embodied “transcendental principles that were not simply the enacted rules of a particular regime but general legal principles that applied to all societies.”235 This view of the common law has, however, long been repudiated as other theories of law and lawmaking, such as legal positivism, have successively assisted in explaining the nature of law more fully.236 Furthermore, while it appears that some ECB proponents did subscribe to the value of freedom of contract with what can be characterized as an almost religious zeal,237 more seemed to view the ECA less as an embodiment of common law principles and more instrumentally, as a means of achieving other ends, such as lowering wages, increasing measures of productivity, or making employers more competitive.238

In addition, taking Richardson’s views at face value, the contract model was certainly short-sighted, for a contractual regime also assumes an


234. EASTON, supra note 216, at 150.


236. See id. at 835-36.

237. See Interview with Anne Knowles, Labor Market Manager, New Zealand Employers Federation, in Wellington, May 21, 1992 (explaining that it is not proper to measure the ECA’s success in terms of the achievement of any goals other than providing options for employers and employees to structure their bargaining).

238. Lowering wages for workers itself has a religious element. Thomas Aquinas believed that the common people “were entitled to a ‘just price’ (justum pretium) for their labor, that is, enough to provide a bare livelihood for oneself and one’s family.” Byrne, supra note 139, at 67.
adversarial, arm’s length relationship, deceitful negotiations, and the advancement of narrow self-interest. ECA proponents recognized that the workplace requires cooperation—and cooperation which is more than mere formal adherence to work requirements—but they failed to see that it is difficult to elicit cooperation within a contractual regime. They chose to ignore work as a social exchange and as a part of society beyond the economic.

The general failure to examine the role of the corporation within New Zealand demonstrates that the instrumentalist view exercised greater sway than the more ideological commitment to the common law. In fact, these free market advocates never suggested that employers be freed by exposing them to the full rigors of the marketplace without the special protections offered corporations and their shareholders. Certainly, it can be fairly argued that if anyone ought to be governed by the free market, the most appropriate entity would be those engaged in buying and selling. Despite this, none of the ECA’s supporters ever recommended removing laws that allowed corporations to exist. No one even suggested that corporations and society would be better off had they to face the full consequences of their actions, rather than seek refuge behind limited liability laws.

The move to ordering the workplace on an individual contractual basis glossed over the wisdom of change. The ECA’s proponents possessed unquestioning optimism that bargaining on an individual basis could adequately deal with the level of specificity required to order the workplace. They ignored the important role that past practice and past dealing plays in industrial relations. The eradication of the past regime meant that what had been implicit elements of the employment agreement would have to be made explicit, an incredibly complex task in order for each contract to have the level of freedom of contract the ECB’s proponents said they desired. However, each contract would have to contain more explicit, less flexible terms and would necessitate increased negotiating costs or else present the dangers of not being explicit and allowing one party to dictate the terms of the relationship. If anything betrays the naivete of those who advocated the ECA, it is that they failed to understand that a successful workplace depends on a complex interplay of factors which are difficult to state explicitly in contractual form.

239. See Mahoney & Watson, supra note 92, at 142.
241. See Easton, supra note 210, at 5.
242. See Easton, supra note 192, at 11.
243. Cf. Mahoney & Watson, supra note 92, at 140. Some tried to do so. One New Zealand employer gave its workers a twenty-word two-sentence contract containing only the hourly rate. When this proved unsatisfactory, the employer presented the workers with a six-page contract with blank spaces left for the wages and other conditions, and with a provision that the contract’s terms would be
At its meeting on November 21, 1990, the Cabinet decided to follow the Minister of Labour's recommendations, rather than those of Treasury.\textsuperscript{244} This included deciding to introduce a second bill early in 1991 "to integrate any institutional arrangements that flow out of the initial draft legislation, with the two Bills being brought together in consolidated form during the Select Committee stages."\textsuperscript{245}

In the month that remained before the anticipated introduction of the ECB, the drafters worked feverishly to resolve problems. On November 29, 1990, Ralph Stockdill wrote Labour Minister Birch to question how the law would treat the status of employees and employers at the expiration of collective contracts.\textsuperscript{246} It would seem that employers would have very little incentive to negotiate a successor collective agreement. This was likely to be an enormous problem if employers refused to renegotiate. In such a situation, each party's exercise of absolute freedom to bargain meant a standoff. Stockdill recommended that, should a collective contract expire without a successor agreement having been reached, the worker should continue to work for the employer but on an individual contract "based on" the terms of the prior collective contract. Thus, any terms involving collective rights would be dropped.\textsuperscript{247}

Stockdill noted that "as long as a worker continues to work there is always a contract of service, whether it be individual or collective, in force. There can never be a period of work when there is no contract governing the conditions of employment."\textsuperscript{248} These words forecast the regime that would come into being. Although the ECB was premised on freedom of contracting, which suggests a bargaining process, in fact it was possible to anticipate that for many or even most workers, bargaining would be nothing more than either being hired to work or continuing to work for an employer.\textsuperscript{249}

The problem was that the drafters' focus was quite narrow in terms of collective bargaining. The drafters were influenced by a view of collective bargaining as limited to the formation of the agreement only. As a result, they gave no thought to the fact that in employment relations the more important issue is the day-to-day running of the relationship. The drafters' short-sighted view, influenced by an ideology that asserted that an employment contract was no more and no less than an ordinary contract, ignored

\textsuperscript{244} See Memorandum of Cabinet Strategy Committee Meeting 1 (Nov. 21, 1990) (on file with author).
\textsuperscript{245} See id. at 2.
\textsuperscript{246} See Memorandum from R. A. Stockdill, General Manager, Industrial Relations Service, Department of Labour, to William Birch, Minister of Labour 1 (Nov. 29, 1990) (on file with author).
\textsuperscript{247} See id. at 3.
\textsuperscript{248} See id.
\textsuperscript{249} See infra text accompanying note 552.
special aspects of this relationship that are central to its nature. It may not be appropriate to think of an employment relationship in a contractual sense at all. To the extent it can be characterized as a contractual relationship, the employment contract is unique in that it involves complex interactions, usually existing for a very long time and occupying much of adults' time, and which, almost alone defines status, lives, and options. If the average work agreement could be fully reduced to writing, it would be constantly in a state of breach, since even such ostensibly clear terms as the manner in which work is performed or the hours of work are normally subject to reasonable reinterpretation.  

On December 3, 1990, the draft ECB was ready for review by the Cabinet. The Bill was to be divided into six sections: (1) Freedom of Association; (2) Bargaining; (3) Personal Grievances; (4) Enforcement of Employment Contracts; (5) Strikes and Lockouts; and (6) Institutions. Stockdill's assessment of the ECB noted: "All of the Bill is likely to be contentious." Considering the public reaction to the ECB, which was to culminate in demonstrations by 500,000 of New Zealand's 3 million population, this appears understated in the extreme. The ECB was likely to be contentious in part because of its nature, and in part because of the process which led to its enactment. Thus, the ECB was the fruit of a very undemocratic process in its drafting and purpose. No effort was made to solicit or provide for the concerns of other than a very limited part of New Zealand society. The only non-governmental body consulted was the NZEF. Indeed, the drafters confessed they had failed to consult with those most likely to be interested in the legislation, including the Council of Trade Unions, "workers, unions and employers in general."  

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250. See Easton, supra note 241, at 9.  
New Zealand labor law, however, has relied on common law contract principles as the backdrop for employment rights to a greater extent than has been the case in the United States for the most part. See generally Geare, supra note 28. As a consequence, they may have been more easily predisposed to view contract as an adequate way to characterize and govern the employment relationship. While this may have been adequate when there was a protective regime which set the tone for the majority of workers, its adequacy may have been called into question when that regime was eliminated.  

251. See Letter from Stockdill, General Manager, Industrial Relations Service, Department of Labour, to Bill Birch, Minister of Labour (Dec. 3, 1990) (on file with author).  
252. See Memorandum from Bill Birch, Minister of Labour, to Cabinet Legislation Committee 3 (Dec. 1990) (on file with author).  
254. See id. at Annex B, p.2. That advance consultation may have given the NZEF an advantage when it came to drafting a submission to Parliament. Other organizations complained in their submissions of the brief time given to respond to such a major piece of legislation. It appears that the process of consultation may have been a bit irregular. A rumor going about Wellington was that each night drafts went out to the NZEF from the Minister of Labour and each morning were returned with comments.  
255. See Memorandum from Bill Birch, Minister of Labour, to Cabinet Legislation Committee Annex B, p.3 (Dec. 1990) (on file with author). When the ILO criticized this failure to consult, Minister of Labour Doug Kidd argued that the National Party, by winning a majority, had in fact consulted the people on a platform of changes found in the ECA. Kidd charged: "It is almost impossible to have a
On December 6, 1990, the Cabinet Legislative Committee agreed to refer the draft ECB for approval and submission to the Caucus. Certain last minute changes were made, most of which appear to have incorporated matters desired by those most in favor of a total free market approach. In a nod to the free marketers, the ECB provided a means to “contract out” of the legislation. Thus, clause 2A provided: “Nothing in this Act limits the right of any person to negotiate for an employment contract in a manner other than that provided by this Act.” In addition, clause 10 of the ECB provided that procedural aspects of the bargaining relationship, such as the choice of collective or individual employment contracts, the number of applicable contracts, and the relationship between applicable collective and individual contracts would be subject to negotiation.

These simple additions together had the potential to make the ECB a nullity. Anyone interested in preventing the negotiation of the terms and conditions of employment could exhaust the other side just by negotiating the preliminaries of what sort of contract they were to have. If this was not enough, those truly unsatisfied with the regulation the ECB provided could set up their own regime by contract. As a consequence, an employer could use its power over negotiations, a power enhanced by prevailing economic conditions, to force the parties outside even the meager protections of the ECB. Bargaining under this system was thus likely either not to exist because the stronger party would set all the terms or to be so chaotic that it became utterly ineffective.

All of the uncertainty was not on the side of the employer. On December 7, 1990, Ralph Stockdill wrote the Minister of Labour to caution him about problems that would accompany the far-reaching changes in the new legislation and the controversy that would ensue. Oddly enough, the memorandum seems to recognize for the first time some of the perplexing problems left unsettled by the vague provisions concerning representation and bargaining procedures. Many of the problems Stockdill foresaw would come to pass under the new regime within the first year. First, Stockdill asked if the system might not create instability since workers need not be

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[stronger mandate from the people than we received in 1990.” He added that by making this sort of criticism, the ILO was guilty of “directly challenging the democratic and parliamentary processes of member states” and that “the ILO risks being portrayed as a partisan advocate in domestic politics.”

Doug Kidd, Speech to the Plenary Session of the International Labour Organisation 2 (June 8, 1994) (on file with author) [hereinafter Kidd].

256. See Memorandum of Cabinet Legislative Committee, Leg (90) M 28/6 Pt.2, 1 (Dec. 6, 1990). Richardson claimed there had been a move to release the ECB at this point, but it was decided to wait to bring it out with the mini-budget. See Colin James, Now For the Main Course: A Recipe for Self-Reliance, NAT’L BUS. REV., Jan. 16, 1991, at 11.


259. See Memorandum from R. A. Stockdill, General Manager, Industrial Relations Service, Department of Labour, to W. F. Birch, Minister of Labour 1 (Dec. 7, 1990) (on file with author) [hereinafter Memo from Stockdill].
bound by their choice of bargaining agent for any period of time. He sug-
gested that bargaining could become protracted should workers not approve
the agreement reached by their agent and withdraw their agent’s authority
after the fact. This could necessitate beginning negotiations again, with all
the preliminary matters left to be resolved. 260

Second, Stockdill pointed out that under the ECB employers might
have to deal with more, rather than fewer, bargaining agents. 261 A major
source of unhappiness with the old system had been the necessity of dealing
with multiple agents representing each job classification. 262 Under the ECB
the potential number of agents was not even limited to one for each worker
employed. 263

Third, Stockdill pointed out that the ECB was a potent source of seri-
ous problems in certain important industries. The construction industry, for
example, would have trouble making bids if it had no contract in place on
which to project labor costs, and it could have no contract in place until the
workers for the project were hired and the contract or contracts negotiated.
In addition, different subcontractors could have conflicting provisions
which would have to be resolved on an ongoing basis after the project had
started, adding expense and disruption. 264

Stockdill noted that the ECB would also disrupt any industry reliant on
apprentice training. 265 The system of apprentice training was tied into the
award system and could not exist without industry-wide support and bind-
ing agreement on that basis. The ECB, however, promoted individualism
and a concentration on current needs. Its very nature meant that the system
would disintegrate, since bargaining would be too atomistic to support such
a longterm, ongoing program. The lack of a collective—industry-wide—
view and planning for the future, rather than focussing only on a single
workplace’s then existing needs meant that New Zealand was likely to lose

260. See id. at 2. This would become one of the most frequently heard objections to the ECB on
both sides.

261. See id.

262. Dannin, supra note 23, at 24-25.

263. See Memo from Stockdill, supra note 259, at 2.

264. See id. at 4. The American system had a long period of grappling with a similar fact of
industrial life. The issue was finally resolved with the enactment of § 8(f) of the Taft-Hartley Act,
which permitted the execution of pre-hire contracts in the construction industry.

265. The problem of training illustrates the intricacy of social groups. Unions may be the only
institutions capable of fostering certain sorts of industry-specific training. Individual employers have
little incentive to provide training since they may lose the costs incurred should the employee then be
able to seek a better job. Government may not be able to ascertain training needs accurately. Rogers,
supra note 41, at 25. In addition, in a period in which a philosophy of individualism is dominant,
government is likely to feel that training is not its role. Individuals may not be able to pay for such
training, particularly if they are not well off and if the skill learned is of a low level and unlikely to be
recouped in a job or higher wages in the short run. Thus, even necessary training may go undone in a
society with a low level of unionism, low pay, and highly competitive employers.
an important source of worker education at a time when its industry and economy could ill afford to lose them.\textsuperscript{266}

Finally, the Stockdill memorandum contended that the ECB, contrary to its free market approach, mandated that newly hired workers lacked the freedom of choice given those working before a collective agreement was consummated, since the ECB would not allow them to join an existing collective contract. Such an employee would be required to negotiate a new agreement.\textsuperscript{267} Finally, Stockdill noted that the removal of certain minimum conditions provisions, such as the limitation of a forty-hour week, put New Zealand in contravention of ILO Convention 47, which it had ratified.\textsuperscript{268}

On December 19, 1990, one week before Christmas, the National Government introduced the ECB. It was part of legislation aimed at radical change in the welfare state.\textsuperscript{269} Its partner legislation, the Economic and Social Initiative, made major cuts in most areas of social welfare benefits. These cuts had the potential to exacerbate the impact of the ECA by forcing people to accept any work under any conditions offered. First, the legislation limited those entitled to receive welfare benefits. Any unemployed worker who rejected “suitable employment”\textsuperscript{270} faced a six month “standdown period.” That is, anyone who resigned without good reason, who was

\textsuperscript{266.} See Memo from Stockdill, \textit{supra} note 259, at 5. This fear was not exaggerated. The Engineers Union was able to address and overcome this problem under the ECA by essentially recreating the award system through the creation of multi-employer bargaining and me-too signers of its model agreement. See \textit{infra} text accompanying notes 586-89. After legislative change, which led to decreased unionization in the construction industry in Utah, construction training decreased and was not replaced by either private or public sources. The resulting decline in wages also led to an exodus of skilled workers from the trade. Hamid Azari-Rad et al., \textit{The Effects of the Repeal of Utah's Prevailing Wage Law on the Labor Market in Construction, in Restoring the Promise of American Labor Law}\textit{ 207, 209, 212-20} (Sheldon Friedman et al. eds., 1994).

The issue of continued employee training is one existing in the United States. See \textit{Need for Ongoing Bargaining, Employee Training Stressed During Atlanta Hearing by Dunlop Panel, 8 Daily Lab. Rep., Jan. 12, 1994, at D9.}

\textsuperscript{267.} See Memo from Stockdill, \textit{supra} note 259, at 5.

\textsuperscript{268.} See \textit{id.} at 7. In March 1994, the ILO did indeed issue its interim conclusions which found cause to believe that New Zealand might be in violation of conventions No. 87 on the freedom of association and protection of the right to organize and No. 98 on the right to organize and bargain collectively. \textit{International Labour Organisation, 292nd Report of the Committee on Freedom of Association, Case No. 1698 T} 724-740 (Mar. 1994).

\textsuperscript{269.} Of this package, economist Brian Easton comments:

Thus the substantial reductions in unemployment benefits—some of the cuts were over 20 percent—plus harsher entitlement conditions, were intended to reinforce the changes in industrial law, by keeping unskilled wage rates lower, and—it was hoped—so generating extra jobs. Unfortunately the fiscal impact of the package—involving substantial reductions in social welfare spending—collapsed a fragile economy into its sharpest post-war contraction, so the harsher welfare measures and the changes in the industrial relations law, compounded the social pressures of an economic downturn.


\textsuperscript{270.} Finance Bill § 15(3). “Suitable employment” was defined as “employment determined by the New Zealand Employment Service as suitable for that person to undertake.” § 15(4). The prior standdown period was six weeks. \textit{Kelsey, supra} note 81, at 83.
fired for misconduct, or who turned down a job offer of at least minimum wage would be denied welfare benefits for six months.271

Second, the legislation lowered wages payable to large segments of the unemployed workforce. The key provision raised the age up to which a youth rate—that is, a subminimum wage—could be paid to age 25.272 When the ECA was finally enacted, the minimum wage was $NZ245 [$144.55] per week or $NZ6.125 [$3.69] per hour for those older than twenty years.273

Third, the new rates lowered welfare benefits to a point that it was unlikely anyone could survive on them. For example, they cut benefits paid to single adults by $NZ14 [$7.50] per week. The new benefit available to those younger than 25 became $NZ108.17 [$58.41] from the prior figure of $NZ114.86 [$62.02] per week.274 These new levels of social welfare payments led people to refer to Jenny Shipley, the Minister of Social Welfare, as “Jennicide.”275 They reflected an old strain of thought—but one which was at odds with New Zealand’s socialist past—that poverty is a sign of a weak character, that the well off have no responsibility to the poor, and that such requirements, in a time when the opportunity to work is limited, are not unrealistic.276

271. See Patricia Herbert, Stripping Away Workers’ Protection, THE DOMINION Feb. 20, 1991, at 14. “The logical consequences of this are extreme for low paid workers. Where jobs, the skills for which can be learned quickly on site, are available or are currently held, the potential to depress the rates of pay for those positions, given the structure of individual and collective contracts, is clear and frightening.” Maryann Street, The New Act’s Effect on Low Paid Members 12 (n.d.) (unpublished paper given at Longman Professional Conference, Auckland, May 7-8, 1991) (on file with author).

This, in fact, would be an effective tool to lower wages once the ECA was enacted. As Rick Barker observes:

Carpenters used to be on an average rate of about $12 an hour with traveling time and with guarantees of pay when the building was stopped because of bad weather. All of that is gone. Carpenters are now being employed in the Lower Hutt on a rate of $8 an hour. So they’ve lost $4 an hour. No travelling time and no downtime. There is no overtime. Job and finish. Flat rate.

Well, it’s very difficult on those carpenters. Not that they are necessarily anti-union. They are not. They have a good history of union organization. But they have families to feed and the unemployment benefit is below eight bucks an hour. And if they turn the job down, they face twenty-six weeks’ standdown. So they are being press-ganged into accepting terrible rates.

Barker, supra note 45.


274. See Herbert, supra note 271, at 14.
275. Easton, supra note 216, at 150.
276. Cf. Byrne, supra note 139, at 65.
Shipley's nickname was probably not fully merited. Even these very low figures could have been worse, had the Minister of Social Welfare not prevailed over the Minister of Finance who wanted far greater cuts.

For example, the Minister of Finance originally put forward a proposal in which sickness and unemployment beneficiaries with one child would have their benefits cut by $88.50 ($US52.22) a week if married (the eventual cuts were $9.22 ($US5.44) and $25.20 ($US14.87) respectively or by $40.71 ($US24.02) if single (the eventual cuts were $27.21 ($US16.05) in both cases).\textsuperscript{277}

Although the new benefits figures were severe, it appears that their severity was not fully intended by National. The depth of the cuts came about, in part, as a result of calculations based on faulty data and assumptions. This is not to say that National did not intend to institute cuts which were quite severe; these just went farther into the bone than had been intended. Mistakes or not, there can be no doubt National intended the most onerous cuts possible, since at each point the lowest figures of a range were chosen.\textsuperscript{278}

First, the figures were derived from a budget plan which assumed the ability to acquire food from supermarkets and bulk purchases, even though for many New Zealanders, particularly those without automobiles, there might be no access to such sources. It was also based on the prices for in-season fruits and vegetables for the Dunedin area, close to the major fruit growing regions. These already low figures were then multiplied by 0.75 for an austere level of diet. This food share was then multiplied by a factor of four, on the assumption that food would constitute $\frac{1}{4}$ of the budget. However, data from the Department of Statistics had concluded that, at that time, food was actually $\frac{1}{6}$ of a family's budget. Thus, a result arrived at by multiplying the figure for food by 4 as opposed to multiplying by 6, could only produce a figure that was but a fraction of that needed to provide for even an austere existence. The government did not pause to consider the implications of this, but rather proceeded to institute these benefit levels since these figures were found to compare favorably to another study. That study, however, did not include costs for accommodation.\textsuperscript{279} Thus any figure based on this amount for all costs, including housing, would inevitably be inadequate.

The changes in the social welfare budget would not have been particularly important in terms of the ECA's impact but for the high unemployment at the time. In May 1991, unemployment was 10.1% or 163,800


\textsuperscript{278} See id. at 111-13.

\textsuperscript{279} See id.
unemployed. By June 1991, the figure had soared to 253,000. This meant that employers could take a hard line on wages and other working conditions, confident they had a large pool of unemployed with low benefits who would be eager to work. Workers would be at a tremendous disadvantage in negotiations, since, once they lost or gave up a job, they were unlikely to find another. The scenario of workers bidding against one another for ill-paid jobs presaged divisiveness and a lack of collectivity, which the ECB again fostered. It is important to grasp this background concerning contemporaneous economic conditions and the nature of the legislation to comprehend fully the foreseeable impact of legislation designed to have individual workers bargain their working conditions with their employers. As Alan Geare commented:

The EC Act presumes an individual employee can negotiate on an equal footing with an employer. One must assume the drafters and supporters of the Act are strongly unitarist and believe all, or certainly the vast majority of employers will always operate in the best interests of everyone. If not, they demonstrate a callous disregard for the weaker members of society.

IV

UNION REACTION TO THE EMPLOYMENT CONTRACTS BILL

During the period between National’s victory and the release of the ECB, unions survived on rumors. As Stockdill’s memorandum stated, they were shut out of the process that shaped the legislation. As then CTU legal counsel Robyn Haultain said: National “didn’t want to sit around having cups of tea with Ken Douglas talking about how terrible it was going to be for workers.” Although normal channels of communication were blocked, unions made every effort to learn what was in store for them. There was lots of scurrying around trying to find out, trying to see things on paper. We knew that Paul Bell was preparing things, and Wellington leaks like a sieve and usually you can get your hands on things quite easily. That was quite a subject of discussion at the technical services division meeting about “this thing is as tight as a drum. How come there is no paper around? There must be something falling off the back of the truck.” But there didn’t seem to be.

It was a weird atmosphere. We kept on being given dates. The Nats won the election and Ruth Richardson was going to have—what was it?—40 days of action or 60 days of action or something like that. It gave a time frame when they were going to blast off with the foundations of their vision for the next three years of the country.

280. See Rebecca Macfie, Unemployment Rate Tops 10%, NAT’L BUS. REV. 1, 1 (July 9, 1991).
282. Geare, supra note 24, at 196.
283. Haultain, supra note 141.
284. Id.
For most unions it was not until the text of the ECB was released on December 19, 1990, that they realized the extent of change they would have to face. The ECB was based on the concept of freedom of choice. It gave unions no specific role to play. There were not even any provisions concerning unions, rather there was the concept of "employee organisations" or "incorporated societies." All negotiations were to take place between the employer and the employee or between whoever either chose as a representative. Unions could only play a role in collective bargaining if they could prove a specific employee had designated the union to act as an agent for the specific task. Thus, a union given authority to negotiate might not have authority to take a strike vote, unless that was expressly provided. Even if a union were designated as a bargaining agent, the employer had freedom to refuse to negotiate. The ECB provided, finally, that it would be effective May 1, 1991—May Day, a choice which some found highly offensive.

The impact of the draft ECB was not only philosophical. Many unions were in the position of having an award that would expire in the period following the introduction of the ECB on December 19, 1990, or shortly after its planned effective date of May 1, 1991. Most union awards at that time were negotiated for one year periods, so even those whose awards were to expire after May 1 still faced the prospect of having to negotiate under extremely inhospitable conditions. Thus virtually all unions had to face difficult tactical decisions immediately: whether to renegotiate their awards early while still under the Labour Relations Act, a process that would inevitably require giving major concessions as an inducement to employers, or to stand firm and wait to renegotiate at the expiration of their awards, whatever the state of the law. The price of the former choice was known: accepting concessions. The price of the latter, however, was less clear, but could be higher than even a concessionary agreement.

In addition to deciding bargaining strategy, unions had to decide what their reaction would be to the ECB in terms either of formal responses through legislative hearings or protests. The various factionalized groups within the labor movement needed to build alliances within and without the...
house of labor if they were to have any chance of fighting this threat. To put this another way, if they were unable to overcome their differences because they thought infighting or clinging to the status quo was more important than opposing a serious threat to their existence and to their members' welfare, there was something seriously wrong with the New Zealand labor movement.

All these important strategic decisions had to be made in a climate which was as inhospitable to rational thought and planning as can be imagined. The response of most trade unionists to their first reading of the ECB was dismay. Even those who had foretold its terms with fair accuracy were not immune when they saw the degree of change entailed by the Bill. Rick Barker, for example, said:

> I thought we had overstated the case. It went beyond what I thought. I always saw myself as being one of the more extreme in what my views were. And it had gone beyond what I expected.

> ... I had passing admiration for the skills of those who had thought of it, drafted it. I thought it was an extremely clever piece of legislation.

> ... Well, quite often the legislators who are anti-union put in place legislation or laws which could completely hinder unions in what they do by directing them to do this or not to do the other. And the net effect of that is you can see the legislators are anti-union. This law didn't do any of them. It was anti-union because it de-recognized unions and transferred them all to societies.

Bill Birch was able to say—not that I think he's the main one either—what they were able to say to unions was not that you can't do this or can't do that. You can do whatever you like. They simply prescribed for a completely open situation and by creating a system of almost total anarchy, there's going to be the complete antithesis of organization.289

A. Negotiating in the Shadow of the Employment Contracts Act

During the period before its enactment, some employers came to believe the ECA would allow them unfettered freedom to order the workplace as they liked. Even though many key factors, such as the economy and the terms of the ECA were the same for all, New Zealand unions engaged in many different strategies and met different problems and outcomes.

1. The Distribution Workers290

The Distribution Workers is a union which represents workers in retail businesses. To analogize to American unions, it represents some of the

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289. Barker, supra note 45.

290. Although discussed here as one union, prior to the ECA, there were three distribution unions: the Northern Distribution Workers Union and the New Zealand Distribution & General Workers Union, which later amalgamated and then covered all workers except those in Nelson and Marlborough, who were covered by a separate Nelson Marlborough Distribution Workers Union. Hector et al., supra note 72, at 330.
range of workers represented by a combination of the Teamsters Union and the United Food and Commercial Workers Union. It began this period with organizational difficulties akin to those of the Clerical Workers Union, since a number of its members were workers spread over 10,000 small worksites. The organizational task facing the Distribution Workers was enormous under any circumstances. This was reflected in their numbering as members no more than 27% of eligible workers under the LRA. This failure extended not only to small enterprises but those employed at establishments employing over fifty workers.

... [T]he Second Sweating Commission (1990) uncovered a strong, almost obsessive anti-unionism among retail employers. This was strongest among the owners of small shops who resented any intrusion of "outsiders" into the affairs of their business. But it was also evident in the attitude of management in some large chains too.

Union weakness in the retail industry even before the ECA was all too evident. The union had long been unable to make conditions in the industry keep pace with those in other industries. The loss of compulsory interest arbitration in 1985 had led to annual declines in wage rates in the retail industry. Accompanying this relative decline in pay were increased concessions on the part of the union, including allowing increased hours, a higher ratio of youth workers to more highly paid adults, and a lower number of minimum hours for casual workers. Thus, when the ECB was introduced, the Distribution Workers faced negotiations with retail employers who had grown accustomed to concessions, were now in a position of power, and believed they would gain more.

Added to these deficits, the Distribution Workers faced negotiations before the effective date of the Employment Contracts Act, and, therefore, almost inevitably had to make concessions just to get an award. Under the circumstances it is hard to criticize any positive results they achieved, no matter how minor. On November 6, 1990, in the midst of the uncertainty just before the ECB was introduced, they were able to settle the national grocery and supermarket award, which covered 25,000 workers, for a flat 2% increase. This was a victory under the circumstances. The employers

291. See Brosnan, supra note 63, at 21. More specifically, a survey in 1990 showed that the Northern Distribution Union had members distributed as follows: 7,211 sites had 1-5 members; 181 sites had 5-15 members; 112 sites had 16-50 members; 37 sites had 51-100 members, and 18 sites had over 100 members. Id. A visitor to New Zealand at the end of the 1980s could see a transition being made from small neighborhood food stores, the sort which would be characterized as "Mom and Pop" stores in the United States, to larger supermarkets in the larger cities. New Zealand is a very rugged country with many very small towns which are unlikely ever to be able to support anything more than small stores.


293. Brosnan, supra note 63, at 21.

294. See id. at 24-25.

295. See id. at 25.
had offered a 2% wage increase in exchange for the elimination of penal rates for night and weekend work, with time and a half for Sunday work.\textsuperscript{296}

When the ECB was introduced, however, the Distribution Workers were caught with a number of other awards still unsettled, including the important Retail Nonfood Award, covering all shops that were not supermarkets or food-related shops. This very large award expired without a replacement document having been consummated and remained unsettled through late 1990.\textsuperscript{297} In November 1990, employers offered a 2% increase conditioned on the removal of penal rates for Saturday work. The retail employers received support for their position from the NZEF and the Hotel Association. The union responded vigorously by picketing stores and announcing a consumer boycott for the Christmas period.\textsuperscript{298} On December 6, the negotiators agreed to resume negotiations the following year on penal rates.\textsuperscript{299} On December 21, 1990, the award expired.\textsuperscript{300} In February 1991, the union proposed that new negotiations begin in April. The employers replied that they saw no need to settle the award because things were going smoothly without it.\textsuperscript{301}

The situation of the Distribution Workers demonstrated some of the dangers of bargaining once the ECB was introduced. When the union, in desperation, offered to settle by agreeing to the same concessions which the employers had originally sought, employers had no interest in settling. They could see that the new legislation would give them the power to determine working conditions without the union.\textsuperscript{302}

2. The Engineers Union

The Engineers settled their major award, the Metal Trades Award on October 11, 1990,\textsuperscript{303} two months before the ECB was introduced, so they faced little pressure from the impending introduction of the ECB. The new agreement had many features which were attractive to employers. For example, it allowed individual workplaces to vary their shifts and hours if approved by a vote of the workers.\textsuperscript{304}

All was not easy for the Engineers, however. Negotiations for the Motor Trades Award—an award covering mechanics and service station at-

\begin{footnotes}
\item[296] See Roth, supra note 74, at 97. The term “penal rates” is used in New Zealand to refer to rates other than straight time, including overtime, shift premiums, special rates for weekend work and any other rates which “penalize” the employer for requiring work at unpleasant times or in unpleasant amounts.
\item[297] See Kimble, supra note 67.
\item[298] Roth, supra note 74, at 97.
\item[299] See id. at 100.
\item[300] See id.
\item[301] See id. at 103.
\item[302] Kimble, supra note 67.
\item[303] See Roth, supra note 189, at 295.
\item[304] Id.
\end{footnotes}
tendants—demonstrated the sorts of pressure the ECB could place on even a strong, well-prepared union. The award covered service-sector workers, a group which often has little power. Employers in these negotiations claimed they were under external pressure from employer groups to achieve conditions equal to those that they thought would be available after the enactment of the ECA.\textsuperscript{305} NZEA negotiator Murray French, however, explained that employers' demands to remove penal rates and to lower pay were motivated by individual employers' desires to avoid more job losses and to deliver better weekend service.\textsuperscript{306} The Engineers' view was that employers "used the Act to claw back concessions as a favor for settling their Award" just before the ECA became law.\textsuperscript{307}

The Engineers had wanted to keep the mechanics and service station attendants together so the more powerful group could protect the less powerful. In the end, the union accepted its inability to settle unless it split the two groups. As a result, the new Motor Industry Award, which covered automotive repair and parts workers but not pump attendants, was easily settled.\textsuperscript{308} On April 25, just days after the revised ECB was introduced into Parliament, the Engineers agreed to cut 1500 service station attendants from the new Motor Industry Award they were negotiating.\textsuperscript{309} Thus, settlement came by breaking the award to cover two different groups: automotive workers and service station attendants.

The decision to break the award in two was a pragmatic one: the Engineers decided it was better to cover as many workers as possible with a wage increase than to have allowed the talks to break down or to have agreed to a pay cut for all those covered.\textsuperscript{310} Many of the agreement's terms accede to employer demands for flexibility: by allowing individual companies to vary shift provisions, by simplifying pay structure and overtime provisions into a three-rate system, and by eliminating double-time pay.\textsuperscript{311}

To the extent there was capitulation, however, it was not complete. The award did grandparent existing penal rates and attempted to figure double-time into the normal base rates so employees would receive comparable pay for a week's work. The resulting agreement also was one the Engineers saw as tailored to the industry's needs, including providing for employers' collective training needs.\textsuperscript{312} In addition, the union was able to maintain a multi-employer format for bargaining in the industry, a difficult

\textsuperscript{306} See id.
\textsuperscript{307} Loader, supra note 43.
\textsuperscript{308} See Herbert Roth, Chronicle, 16 N.Z. J. INDUS. REL. 201, 204 (1991).
\textsuperscript{309} See Service Station Attendants Cut Out of Industry Award, \textit{THE DOMINION}, Apr. 26, 1991, at 3 [hereinafter Service Station].
\textsuperscript{310} See id.
\textsuperscript{311} See Loader, supra note 43.
\textsuperscript{312} Id.
achievement indeed given the rhetoric advanced for single enterprise bargaining. The agreement provided a 2% raise, extra tool money, cuts in penal rates, and increased workplace flexibility if agreed to by workers and union officials.\textsuperscript{313}

The Service Station Agreement, however, was heavily attacked by independent operators.\textsuperscript{314} They said, “The Act’s coming in. As soon as it comes in, I can do what I bloody well like. So this award’s nonsense anyway. I’m going to use it to try and get concessions from you that I might not be able to get from my workers. Because you wanted to settle before it’s a nightmare for you in this sector.” It’s a very casual, highly mobile group, workers shifts all around the clock. Very difficult to organize sector. So they were using the fact, they knew that it was a difficult sector to unionize to undermine any kind of conditions that we could claim.

We ended up making a few minor concessions, but on the whole we got the main employers to agree that they wanted a service-driven organization. They wanted a service driven company, that’s what they were about. They were advertising on TV for Christ’s sake about how they trained their workers and that they were intelligent service people. And we’d say, “You want to pay those people peanuts, you’re going to get monkeys for that.” That’s what we said, and they ran with it.\textsuperscript{315}

\subsection*{3. Service Workers Federation}

Early March, 1991 found the Hotel Workers Unions, affiliates of the Service Workers Federation, all but ready to concede and accept the employers’ offer, which provided “for an end to penal rates, the introduction of youth rates, and more freedom to use casual staff” coupled with a 2% wage increase.\textsuperscript{316} Under the circumstances this concessionary agreement looked like the best the union could hope for. It was difficult to reach a better settlement because their membership failed to attend stop-work meetings and was willing to accept what the employers offered.\textsuperscript{317} The union’s weakness was palpable in the employers’ characterization of their own offer “as a package deal, not a negotiating position.”\textsuperscript{318} The agreement, which was finally reached on March 13, 1991, provided for no weekend penal rates, increased wages, youth rates, and incentive pay for learning new

\textsuperscript{313} See Roth, supra note 308, at 204; Service Station, supra note 309, at 3.
\textsuperscript{314} See Loader, supra note 43; see generally Rosalie Webster, Operating Under the Act: One Union’s Experience, in EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES 237 (Raymond Harbridge ed., 1993).
\textsuperscript{315} Loader, supra note 43.
\textsuperscript{316} Rebecca Macfie, Hotel Unions Ready to Concede, NAT’l BUS. REV. Mar. 5, 1991, at 1.
\textsuperscript{317} Id.
\textsuperscript{318} Id.
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skills.319 Service Workers National Secretary Rick Barker said the settlement was the result of employers’ using excessive power.320

As of April 1991, however, the SWF was unable to renew its main award covering 20,000 restaurant workers. Employers offered a 2% raise in exchange for removing all penal rates, such as overtime, shift premiums, and holiday and weekend premiums, and other “restrictions on employment.”321 In mid-April, after employers refused to retreat from demands to eliminate penal rates, to remove the union’s right to access,322 and to allow employers to impose a ten-hour day, four-day week, the Service Workers Federation decided to abandon efforts to renew its Tearooms and Restaurants Award for bargaining within each site.323 In Rick Barker’s view, they had “nothing to lose by moving to enterprise bargaining, given the ‘extreme’ claims of the employers on an already low-paid document.”324 The union’s tactic was bold, but reasonable under the circumstances. Barker felt employers who were forced to deal directly with their own staffs might take a less severe stance than when insulated by bargaining through their representative body. Inevitably, however, this also meant many of the small work sites would fall through the cracks.325

Even though the security of an agreement may have seemed a prudent goal, in retrospect negotiating under these conditions in order to buy time ultimately may not have been a wise strategy. It gave employers an opportunity to see how to turn the law to their advantage. In addition, if the agreement was gained by giving concessions, the next negotiations would take place with a prepared employer, based on a concessionary contract.326

4. Other Negotiations

By mid-March 1991, collective bargaining took on a character akin to panic buying. “Major concessions have been agreed to by unions negotiating documents under the shadow of the bill, concessions that would have

319.  See Penalty Rates Dropped, THE DOMINION, Mar. 14, 1991, at 1; Roth, supra note 308, at 202. This emphasis on paying for learning new skills stands as an interesting counterpoint to decades of Taylorism, which bent every effort to deskill jobs in order to ensure managerial control. See BYRNE, supra note 139, at 129. Taylorism refers to the ideas of Frederick Taylor, which were advanced in the early twentieth century. Cobble, supra note 35, at 286 n.2. They feature supervisory and managerial hierarchy, breaking down jobs into narrow functions, managerial control over the work process, design and organization of work, efficiency, and productivity. Id. at 287.
320.  See Roth, supra note 308, at 202.
321.  See id. at 204.
322.  Union right of access to the workplace became subject to negotiation, as did all other terms. Grills, supra note 94, at 88-89.
323.  This was one of the nation’s largest awards, covering 20,000 people in fast food restaurants, cafeterias, tearooms, and restaurants. See Rebecca Macfie, Union Ready for Enterprise Bargaining, NAT’L BUS. REV., Apr. 15, 1991, at 2.
324.  Id.
325.  Id.
326.  Barker, supra note 45.
been considered sacrilege by the union movement even twelve months ago.\textsuperscript{327} Employers, such as Chemby Vinyl in Onehunga, which had declared a half-year profit of nearly $NZ350 million [$189 million], demanded a 25\% pay cut.\textsuperscript{328} In this period, agreement after agreement was settled, on terms that can only be explained by their having taken place in the shadow of the ECB. Among the major agreements or awards settled were ones involving the Hotel Association Award, the Major Accommodation Hotel Award, a McDonald’s enterprise agreement, the Combined Early Childhood Workers Award, and waterfront enterprise agreements by the Waterfront Workers Union.\textsuperscript{329}

Although some employers leapt at the chance to capitalize on a good deal, some more fearful employers themselves embraced the opportunity to renew their awards to give themselves time to adjust to the impact of a radically new legislative system.\textsuperscript{330} The Plumbers and Gasfitters was one such organization. It explained it had renegotiated its award because of its “terrible uncertainty” over the Bill and its belief it could not survive under the new regime.\textsuperscript{331} Ultimately, this was a motivation for settling the hotel industry award on March 13, 1991.\textsuperscript{332} Many were surprised that hotel employers had settled at all, since proponents of the ECB had “repeatedly cited [it] as a likely beneficiary of the Employment Contracts Bill.”\textsuperscript{333} In any case, it did well by doing good. It achieved substantial savings through that agreement.\textsuperscript{334} Even though employers’ fears may have prompted them to enter into a contract with a union, all was not on an equal footing. Even where employers were willing to settle, such settlements had to be on the employer’s terms, that is, usually with concessions.\textsuperscript{335}

In other words, unions and employers both behaved as if enacting the ECB essentially as drafted was certain.\textsuperscript{336} Certainly seizing the opportunities presented a no-lose situation for employers, almost regardless of what became of the Bill. A management consultant summarized the advantages to employers as including:

The opportunity to delay their exposure to the coming period of instability.

\textsuperscript{329} Macfie, supra note 327, at 2.
\textsuperscript{332} See Roth, supra note 308, at 202.
\textsuperscript{335} Macfie, supra note 333, at 1.
The chance to get a good deal now from unions keen to retain coverage of workers for as long as possible. Agreements under existing law will bind new employees who join the company.

The opportunity through composite agreements to have all or most employees under one agreement with one expiry date rather than face separate negotiations with a fragmented workforce under the new system.

Employees fearful of the new system are prepared to make concessions to postpone its impact.

Unions may opt for longer-term agreements to guarantee their coverage for a longer period.

This offers employers a longer period of stability but may mean delaying future change.

The opportunity to include provisions which constrain what employers see as potentially troublesome possibilities under the Bill such as second tier bargaining via individual employment contracts.337

5. Public Sector Bargaining

The most unusual negotiations during this time involved the National government and the public sector unions. The government had an opportunity to be a model of the sort of free market bargaining it advocated. Instead, its stance ultimately was inconsistent with the philosophy it advocated for everyone else. In mid-April 1991, the Public Service Association offered an agreement which would either provide no wage increase and retain other conditions of employment, or a 1.5% increase with a 32% reduction in other terms.338 Most of the fifty documents involved were not set to expire for several months.339 This offer thus telegraphed the PSA’s fears of having to bargain with National. Nonetheless, the government accepted the union’s offer on May 8, only a week before the effective date of the ECA. The agreement included only a rollover of the fifty documents and no wage increase.340 This could have been National’s opportunity to achieve all the structural and other changes employers claimed to want and need were they not held back by the LRA. This was precisely the situation the ECA was created for,341 but the government passed on the opportunity. Part of the government’s motivation may have been to soft pedal the radical nature of the ECB by not taking advantage of the situation, thus quelling fears.

It may also have been to suggest that more extreme measures were not available under existing law. Indeed, the government and the ECB’s sup-

338. Rebecca Macfie, Redundancy Issue Not Solved by PSA Options, NAT’L BUS. REV., Apr. 17, 1991, at 2; Roth, supra note 308, at 205.
340. See id.
341. See Macfie, supra note 327, at 2; Munro, supra note 21, at 2; Paul Loof, Bargaining Style in Sudden Switch, NAT’L BUS. REV., Aug. 14, 1991, at 18.
porters took widely varying positions as to what the LRA did and did not allow. In April 1991, NZBR Executive Director Roger Kerr admitted that the processes of change it claimed could only be achieved through the ECB had actually been under way for several years. Indeed, there was abundant evidence the LRA had never been the impediment to change that the ECB champions had claimed it was. One could see evidence of this in negotiations undertaken by the Engineers Union. Within two years of the enactment of the LRA, the Engineers Union reported substantial changes in the basic documents they negotiated, so that within this period basic change had been made affecting one-fourth of the union’s membership.

Max Bradford noted during Select Committee hearings that the pendency of the ECB had significantly affected parties’ negotiations and that the conditions employers considered undesirable had been eliminated. To Bradford, however, this did not demonstrate no need to alter industrial legislation since change could already be achieved. Instead, Bradford contended this showed “that the old format Labour Relations Act is a significant constraint on flexibility.”

6. Seafarers Union

It would be a mistake to believe that no unions that were engaged in negotiations in the weeks just before May 1, 1991 were unable to achieve a respectable settlement. The Seafarers Union, for example, moved management from a plan of direct employment of workers to retain their hiring hall system, referred to as “the corner.” The corner was a subject of particular employer attention. The NZEF contended:

343. More specifically, they reported new or radically changed agreements in 3 of 22 single union awards; in 6 of 8 multi-union awards; in 22 of 46 stand-alone agreements; and in 34 of 47 composite agreements. See Brian Easton, Labour Market Issues 11 (Sept. 12, 1990) (unpublished paper, on file with author).
345. See id. It is interesting to note that the Australian employer association, the Metal Trades Industry Association, concluded in June 1992 that the LRA was unnecessary and that any desired changes could have been achieved under the LRA. O’Neill, supra note 27, at 19.
346. The Seafarers Union was not allied to the CTU out of concern that to do so “would in fact dampen or kill the fighting spirit of the trade union.” In addition it had a membership of between 1500 and 1800. It would have seen itself as most aligned with the M CWU. Interview with David Morgan, President of the Seafarers Union, in Wellington, N.Z. (May 21, 1992) [hereinafter Morgan].

[It is a union based in its rank and file and, moreover, all of its decisions taken are rank and file decisions. Its been a source of our strength in fact. In some ways, its stood us in very good standing, maybe a little bit apart from the mainstream unions in New Zealand in respect to that decision making process. Sometimes, the members have turned the leadership around and what have you. They bump up underneath us all the time in terms of progressing. Often, we find that a decision taken or a recommendation made gets turned around and somehow we don’t do it.

Id.
The corner system gives the Seafarers’ Union a classical pre-entry closed shop, and all the bargaining strength that goes with this. The relationship between employee and shipowner is not seen as a strong one: the employee’s loyalty is with the union which gave access to the “register,” and therefore to jobs. Employees frequently refer to the union as the employer and union officials frequently describe themselves as employers. The NZBR called the corner “inconsistent with the principles of the Employment Contracts Bill” and thus likely to lead “to monopolistic behaviour . . . not conducive to staff development, company loyalty and productive employment relationships.”

The Seafarers were able to meet their opponents by credibly threatening a prolonged strike to begin April 10. This was spurred by government plans to open coastal shipping to foreign ships. One month earlier, in March 1991, the Seafarers picketed the tanker World Spring in New Plymouth to protest state-owned enterprise Petrocorp’s registration of the ship under the Panamanian flag and use of a Korean crew. As a three-island, maritime nation, New Zealand was highly dependent on its ports. Thus, a strike there of any length could mean a disaster for the country.

The Seafarers’ achievement was more remarkable than merely having consummated an agreement at this time. What was truly remarkable about the Seafarers’ achievement was that it came at a time when the government had specifically announced it would open the ports to foreign competition. First, the government’s announcement had made taking on a permanent workforce appear less desirable because it suggested there would soon be heightened competition from employers who were able to retain lower priced workers. Yet this is precisely what the Seafarers got.

2. The corner was a register of seafarers. Access depended on membership in the Seafarers Union, but it was the government which assigned the workers to the ships, with the employer and employee having the right to veto an assignment. In fact, individuals generally returned to the same ship after each period at sea ended, creating a great deal of stability in employment. See Jason Barber, Stoking the Boiler for a Fight With the Seamen, THE DOMINION, Oct. 30, 1991, at 9 [hereinafter Barber, Stoking the Boiler]. The corner was actually implemented by state legislation against the union’s desires in the 1970s. Morgan, supra note 346.


350. See Rebecca Macfie, supra note 347, at 1; 12 PARL. DEB. (HANSARD) 1469-70 (Apr. 23, 1991). Until this time, there had been a reasonable level of industrial harmony. In the prior seven years, 97% of all 24,500 scheduled sailings had been met (sailers were scheduled 11 per day, seven days a week). David Barber, The Worst Job in the World, NAT’L BUS. REV., May 1, 1991, at 9.

351. See Roth, supra note 308, at 202.


353. See Macfie, supra note 347, at 1; 12 PARL. DEB. (HANSARD) 1469-70 (Apr. 23, 1991). The Labour government had begun the assault on the old ways of arranging port business. On August 3 and 4, 1990, the Seafarers had demonstrated in Wellington and New Plymouth against the state-owned enterprise Petrocorp’s using a Panamanian ship to export oil to Australia.

354. See Macfie, supra note 347, at 1.
ond, these changes came at the end of a period of upheaval in the ports. Finally, the Seafarers were fighting deregulation both in labor law and in their industry.

The Seafarers obviously were in a powerful position, since the nation depended on a flow of goods through its ports. In addition, the Seafarers may also have benefitted from earlier deregulatory pressures, akin to those experienced in education. The Seafarers and other waterside workers had faced continual pressure for change in methods of working to improve competitiveness. The NZBR in particular had pushed for change through the release of commissioned studies. During the period 1989-1990, Australian economist David Trebeck issued two such reports. High on his list of improvements was a change from awards to port-by-port agreements. Changes had saved $58 million with the loss of 40% of the Harbour Workers jobs and 44% of the Waterfront Workers Union jobs, when the port companies had been created in October 1989. These enormous savings and dramatic changes were not, however, sufficient in the eyes of many port users. "What they did not do, however, was slake the port users' appetite for reform. On the contrary, they whetted it." In 1990, calls had come for further reductions in the work force. Part of what motivated employers may have been founded in the sort of power which the port workers were seen to have wielded in the past—wielded irresponsibly, according to the port users and many in the public. Reducing the scope of the Seafarers' hold was important to breaking their power.

The settlement did not come easily or quickly, not a surprising outcome given the circumstances and the recent history. The effects of port restructuring and the ECB made agreement difficult. The bargaining dispute lingered throughout the period prior to the scheduled implementation of the ECB. As of April 9, with the dispute not settled, the Seafarers reaffirmed their threat to strike as of the next day. A major opponent, Federated Farmers, the umbrella organization of farmers of New Zealand, stood


357. Id. Confirmation of this change came on November 1, 1990, when the first fully integrated ship, the Milburn Carrier, sailed from Westport to Onehunga with a crew reduced from 18 to 13, with no demarcation, and with common messing of crew and officers. Roth, supra note 74, at 97.


359. Id.

360. Cf. id.

361. See Rebecca Macfie, Shipping Sector Still Faces Strike Threat, NAT'L BUS. REV., Apr. 9, 1991, at 2. This was but a continuation of a long-running dispute. In the 1990 wage round, an important element of the dispute for the Harbour Workers' award was the employers' demand for "port-by-port negotiations in line with a Business Roundtable report which stressed the need for 'strengthening the local orientation, rather than the national orientation, of the awards.'" Herbert Roth, Industrial Summary September - October 1990, INDUS. L. BULL., Nov. 1990, at 88.
firm that additional cuts could be achieved. They focussed on the thirteen captains and their pay rate of over NZ$100,000 [$54,000], their two days off for each day on schedule, and their fourteen weeks' leave.\footnote{Barber, supra note 350, at 9.}

The scheduled strike began April 10 with 1100 Seafarers out.\footnote{Roth, supra note 308, at 205.} David Morgan, Seafarers' President, said that unless they chose to fight then, employers would walk all over them under the ECA.\footnote{Id.} By April 15, the effects of the stoppage had become quite severe. The New Zealand Air Force was preparing to fly passengers, some of whom had been stranded for a week, and their cars across Cook Strait. The strike had also left 50,000 metric tons of freight abandoned.\footnote{See Martyn Gosling, Air Force Prepares for Cook Strait Airlift, THE DOMINION, Apr. 16, 1991, at 1; Rebecca Macfie, Strait Airlift Is Not Strike-breaking Move, Says GOV_, NAT'L BUS. REV., Apr. 17, 1991, at 2.} On April 15, five employers settled—Union Shipping, Tasman Express Line, Milburn Cement, Pacific Management, and Pacifica Shipping—with five remaining in dispute.\footnote{Macfie, supra note 365, at 2; Roth, supra note 308, at 205.} The twelve-month settlement agreement included continuing to operate the "corner" and hiring hall and a 2% wage increase.\footnote{Macfie, supra note 365, at 2.}

One of the major impediments to settlement with all the employers was New Zealand Rail, the state-owned enterprise which was the operator of the inter-island ferry, a vital link in transport between the North and South Islands. During this time, New Zealand Rail was being restructured with an eye to future deregulation and privatization.\footnote{See Rebecca Macfie, Rail Ready for the Long Haul, NAT'L BUS. REV., Apr. 19, 1991, at 1.} Nonetheless, after an eleven-day strike, on April 19, New Zealand Rail also settled essentially on the Seafarers' terms, with a 2% pay raise and twelve-month renewal of the award agreed upon,\footnote{See Long, supra note 334, at 2; Roth, supra note 308, at 205. NZ Rail had offered a .5% raise and a three-month renewal of the award. Id. According to NZ Rail, the settlement would give it a savings of $5 million over the next year. Part of this may have been the avoidance of strikes by two other unions as part of the settlement. See Rebecca Macfie, Ferry Deal Sets Up Reform, Says NZ Rail, NAT'L BUS. REV., Apr. 23, 1991, at 3.} but with nine jobs cut and a commitment to agree to savings of $5 million by June 1991.\footnote{Barber, supra note 350, at 9, 10.} The vice-president of Federated Farmers called the settlement a cowardly cave-in by incompetent management.\footnote{Roth, supra note 308, at 205.}

Once NZ Rail settled, all but one other holdout employer, Golden Bay,\footnote{See Barber, Stoking the Boiler, supra note 347, at 9. For the aftermath of the dispute with Golden Bay, see Morgan, supra note 346; NZ Seafarers' Union v. Golden Bay Cement Co., [1991] 1 E.R.N.Z. 932 (1991).} quickly concluded the agreement.\footnote{See Macfie, supra note 369, at 3.} The government immediately
discounted the agreement’s value, claiming the work was now opened up to competition by non-New Zealand crews who could be paid minimum wage.\footnote{374. See Rebecca Macfie, \textit{Coastal Shipping to Open Up: Storey}, \textit{Nat’l Bus. Rev.}, Apr. 24, 1991, at 3.}

Even clear union victories were mixed blessings during this period. The Seafarers settlement came to have some very negative repercussions for the union movement. Those who were anti-union seized on the strike and settlement as evidence that legislation banning or restricting strikes should be enacted.\footnote{375. \textit{See General Opposition to Contracts Act: Poll}, \textit{Nat’l Bus. Rev.}, May 15, 1991, at 4 (Ninety percent of people polled called for the ferries to remain an essential service).} Over the years shipping industry strikes and their attendant inconvenience had created a reservoir of anger in the country.\footnote{376. \textit{See Barber, supra note 350, at 9.}} The news media exacerbated popular feeling which opposed the Seafarers’ militancy by focussing on the union’s actions and the inconvenience it caused, while failing to explain the reasons the union had resorted to its actions.\footnote{377. \textit{See id.}} The prominence of the Seafarers’ strikes in the public mind was reflected in National’s election manifesto, which had an illustration of a ship in its section of proposed industrial reforms. “Asked if this was significant, [then] Opposition Leader Jim Bolger chuckled and said they had been careful to ensure the illustrations were ‘appropriate.’ ”\footnote{378. Herbert, \textit{Wharfies}, \textit{supra note 355, at A9.}}

The conclusion of the Seafarers’ strike just prior to the introduction of the final draft of the ECB into Parliament provided perfect ammunition for National.\footnote{379. \textit{See, e.g., 12 Parl. Deb. (Hansard) 1444, 1451, 1462-63 (Apr. 23, 1991); 13 Parl. Deb. (Hansard) 1652, 1671 (Apr. 30, 1991).}} Prime Minister Jim Bolger railed against the union as “bloody-minded” and “warned that the system which brought their excessive pay and conditions would end under the bill.”\footnote{380. Long, \textit{supra note 334, at 2.}} The \textit{National Business Review} observed: “Meanwhile, the government has reacted to the disruption with all the intelligence used in handling industrial disruption during the 1970s. From the sidelines it has added heat by abusing the union side of the argument, whipping up anti-union feeling to the best of its ability, and moving in the armed forces.”\footnote{381. Gareth Morgan, \textit{Consumers Pay the Ferrymen}, \textit{Nat’l Bus. Rev.}, Apr. 23, 1991, at 6.}

In Parliament, the settlement was subjected to much more complex analyses. The government tried to have it both ways, both condemning and praising the ferry settlement. National’s Minister of Labour Bill Birch praised the settlement as a victory. Labour MP Richard Prebble responded: “In light of the fact that all New Zealand Rail Ltd. has actually got is a commitment for everybody to go along to have ‘talkies,’ will the Minister
take any notice of the suggestion of the president of Federated Farmers that the board ought to be fired?" Birch denied that this would be appropriate since the settlement was the means of achieving "an immediate saving of $1 million" and "a unique arrangement whereby the conditions in the award will be subject to renegotiation at an early date." Mike Moore, Leader of the Opposition, responded: "Is the Minister saying that all those great achievements were achieved under the old industrial relations Act?" Birch was quick to attribute only the strikes and delays to the LRA.

B. The General Strike That Never Was

The second front on which unions had to mobilize during this time was on their campaign in opposition to the ECB. Throughout its pendency, everyone wondered when and if the CTU would call for a general strike. If the CTU can be faulted for anything, it is in this area. From the introduction of the ECB to its enactment, the CTU vacillated and finally did nothing. The CTU failed to provide a cohesive public, visible leadership in opposition to the ECB and, instead, left others to take the lead or to flounder because of its lack of direction. Its failure to take action has further split the trade union movement. Some unionists are bitter in their denunciation of the CTU's lack of leadership;

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383. Id.
384. Id.
385. Id.
386. Payne, supra note 141. A number of other groups actually took the leadership away from the CTU in spearheading opposition. For example, in Palmerston North, a small college town north of Wellington with a population of about 70,000, 60 people from various groups met on December 18 to form the Peoples Alliance, a coalition of community and union groups. See HARD TIMES: NEWSLETTER OF THE MANAWATU PEOPLE'S ALLIANCE (Manawatu's People's Alliance, Palmerston North, N.Z.) at 1 (n.d.) (on file with author). The People's Alliance was composed of significant numbers of women, church groups, community aid agencies, individual unionists and unions, including the Service Workers, the Hotel Workers, the Clerical Workers Union, Footwear Workers Union, Clothing Trade Employees Union, and Manufacturing and Construction Workers Union. Gay, supra note 161.

[W]e did things like thin Santas and carol singing. It was right at Christmas, December 19th, and so one of the first activities was rewriting all of the Christmas carols to make them quite political and getting the thinnest person that we could find and dressing him up in a Santa Claus suit and marching around the square. And for many people that was their first public street protest.

Id. Other groups, such as Poverty Action, appeared as allies to fight mainly against the benefits cuts. Id.

387. Graeme Clarke, for example, supported demonstrations and active opposition as a viable tactic. To the extent that opposition was made clear, he felt, it helped reign in employer excesses after the ECA was enacted. Clarke, supra note 68. David Morgan of the Seafarers is of the opinion that, "We ended up with it, I think rather because of the fact that people just were not prepared to fight around it. There was no leadership for them to do that." He stated:

I think had they called a national strike at that time, the CTU, they would have achieved as an absolute minimum a sixty percent participation, which would have to be counted as a success rate but probably would have been higher. We will never ever know. But I think that would have indicated, and I don't think excesses have since gone on, that the employers would have leaped into with the alacrity that they have, in regards to whacking people and to implementing the Act to its nth degree.
others support the CTU for its realpolitik and condemn its critics as schismatists.388

Trade unionists were not caught by surprise by the timing of the ECB's introduction. They had been expecting the new legislation to be released about this time. There were leaks that it would be introduced soon, but details about the legislation were unusually difficult to come by.389 Thus, summer malaise does not explain the slowness with which unions responded to the ECB. Indeed, they had arranged to meet December 20 in anticipation that it would be released by then. As it turned out, this was the day after its introduction.390

The Employment Contracts Act was part of the December budget package and we kept on hearing rumors that it was going to be the end of November, the beginning of December, the second week in December, the 15th of December, and finally the bill was made available on the 18th of December. And I'm pretty sure that the 18th of December in 1990 was a Friday. Most union offices would be closing for Christmas on the Monday because that would take you through 19, 20, 21. Some union offices would have worked the 21st and 22nd, maybe even the 23rd.391

The slowness of their initial response seems to have been a reaction to facing an event that many had believed to be impossible, an event they saw as akin to the end of the society they knew. One commentator suggested that trade unionists were "shellshocked" by the ECB's extremism.392 Up to the release of the ECB, many unionists had convinced themselves that things would still be "business as usual." Thus despite all the evidence, many had refused to believe the changes could be as extreme as they were.

A second reason the unions were slow in responding may have been that the ECB is quite long, and the implications of its provisions can be difficult to appreciate on a first reading. Robyn Haultain, then an attorney working for the CTU, described the situation within the unions when they first met to deal with the new legislation.

Morgan, supra note 346. It may be that such animosity would exist in any situation of comparable tension. A good example can be found in the tensions which were created within the various groups involved in the Jay, Maine International Paper strike. See generally Getman & Marshall, supra note 44.

388. Roz Noonan of the NZEI supported the CTU's action and was critical of its opponents within the union movement. In fact, the calls for a national strike came on the whole from union officials who could not actually deliver their members. They wanted our members and their state sector unions to take action because we could deliver our members. They would claim that CTU was a sell out, but the reality was that a lot of that was old sectarian divisions amongst the union officials. I've got very little time for that.

Noonan, supra note 141. Hel Loader characterized a general strike as stirring up hysteria. Loader, supra note 43.

389. Haultain, supra note 141.

390. Id.

391. Haultain, supra note 141.

So a meeting was called of as many union labour people and advocates and officers—basically anyone who thought they had anything to say about the legislation. I think it was probably on the 20th. Most of the people who came to the meeting had not read the Bill. Many of them who would have read the Bill would not have... they are not legally trained people, and the implications of some of the stuff that was in the Bill I think missed people. It was a real pressure cooker kind of a meeting.\(^{393}\)

The CTU's initial response appeared focussed on preparing written analyses of the ECB and disseminating pamphlets. It produced numerous papers directed at various constituencies, from the individual worker or person on the street to the members of Parliament to employers. In a pamphlet entitled “Your Union: The Protection You Need,” the CTU presented examples of ways the ECB would operate to the detriment of the average worker.\(^{394}\) It explained that even the most basic terms of employment currently in effect could be lost if not negotiated in an agreement. It claimed that the ECB's “freedom to negotiate” was likely to have an anti-democratic effect and could permit a tyranny by small groups. For example, “[i]n a workplace of mostly women, a group of men might sign an agreement that wipes out maternity leave. . . . Or some workers can change their negotiators in the middle of bargaining, delaying or stopping a contract for the remainder—and putting extra costs on the employer and other workers.”\(^{395}\) It raised the impact the large number of unemployed could have on wages: “Another possibility is the employer could simply hire unemployed people off the street for half the wages and conditions. This can’t happen now because all existing conditions apply to new workers.”\(^{396}\)

In addition to these appeals, the CTU busied itself with creating a series of internal analyses of various aspects of the ECB,\(^{397}\) including: a plain English summary,\(^{398}\) health and safety issues,\(^{399}\) the interaction of the ECB, the Finance Bill and the current economic situation,\(^{400}\) the status of ILO

\(^{393}\) Haultain, *supra* note 141.

\(^{394}\) *New Zealand Council of Trade Unions, Your Union: The Protection You Need* (n.d.) (on file with author).

\(^{395}\) *Id.* at 3.

\(^{396}\) *Id.*


conventions, and the actions of the NZBR. On February 4, it issued all its affiliates a kit entitled "Turning Up the Heat."

Although the CTU was engaged in reacting to the ECB, the one thing it did not do was to take leadership of the activist opposition welling up at this time. Indeed, given the union’s past willingness to take to the streets it seems odd that it did not provide leadership at a time when its very life was at stake. Many previously inactive people were concerned by the implications of severe benefits cuts at a time of high unemployment and the loss of legislative support for collective bargaining. Early on, some within the union movement urged the CTU to make common cause with diverse ad hoc groups which were springing up to oppose the ECB and the social benefits cuts.

So an idea was proposed that the CTU should facilitate meetings with all sorts of people like all the church charity groups, because within the Anglican church, they have a commission of social responsibility, whose job and the staff’s job is to comment, to give the church’s views on various aspects of government policy and what it will mean to the people that they represent. There’s people like the Anglican church and groups like women’s refuge and rape crisis and all of those organizations that have reported in the past that the poorer people be, the more demand there is for their services. Basically, anybody who did any kind of charity or public helping kind of work, it was thought that a coalition should be formed with those people so that the union movement’s voice was stronger in making its complaint against the Employment Contracts Act and also so that there would be kind of like a pan-movement of people representing workers and other dispossessed, powerless people.

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403. See Memorandum from New Zealand Council of Trade Unions to All Affiliates (Feb. 4, 1991) (on file with author).

404. The ad hoc Action on Benefit Cuts (Wairarapa) put out a flyer that showed the cuts under the new legislation and stated:

- The national Government has rushed these benefit cuts through already without real consultation with those affected. They follow cuts already made by the previous Government.
- Instead of providing work for those whose incomes are being cut, we are seeing unemployment continuing to rise - to the point where it is now this country’s most common profession.

The other side of the flyer addressed the ECB. It stated that the ECB meant: “Back to the 19th Century! The poor are too well off!” “The reason you aren’t rich is You’re Lazy!” “After setting out features of the current system that would be lost, it asked a number of questions: “Who’s going to stop you getting the sack? How are you going to protect your wages? How are you going to pay your rent or mortgage? How are you going to feed your kids - or yourself? Will there be family support? Do we want to go back to the 19 [sic] Century? STAY WITH YOUR UNION JOIN THE FIGHTBACK.” Action on Benefit Cuts (Wairarapa) (on file with author).

405. Haultain, supra note 141.
This idea was squelched internally by opposition from CTU economist Peter Harris who was convinced that other groups would have no interest in protecting union rights.\footnote{406}

It meant that the CTU did not do anything to promote that coalition. It happened anyway because people like Pat Kelly went ahead and organized it. I was involved quite a lot in speaking at meetings about the Act and the consequences that I saw for workers both as employees and as human beings involved in relationship and being parents of kids and so forth.\footnote{407}

Haultain found, in attending meetings with these disparate groups and discussing the impact that the ECB would have, that there was a great deal of interest and sympathy.

They were very interested. It was really heartening. I enjoyed it a huge amount working with those people. And there was no hint of "Unions are just a bunch of communist rabble rousers trying to bring the country to its knees and we don't want to be associated with them." That attitude didn't surface at all.\footnote{408}

Unions faced a serious problem of educating their members about the impact of the ECB and motivating them into action. Many New Zealanders knew no more about the ECB than that it was supposed to promote freedom. Even those who knew more assumed it only meant outlawing union security clauses and thus were reluctant to take action.

... [O]ne of the good things about the Employment Contracts Act was that it really impelled union officials and organizers out of their offices and into workplaces. There were lots and lots of stop-work meetings and workplace meetings, and also, public town hall meetings, organized by unions about the Employment Contracts Act. The interesting thing was that at these special affiliates meeting, when the decision was made about whether there should be a 24-hour strike against the Employment Contracts Act, that a lot of the officials got up and said that their personal view was that there probably wasn't a hell of lot of point in taking 24-hour strike action at that stage, but they were required, because of the message that they received from their membership to come to that special affiliates meeting and say "Vote yes" in favor of 24-hour strike action. So they obviously did quite a good job when they went out and had those workplace meetings explaining the consequences of the Act for workers and workers, it was reported, wanted to take action.\footnote{409}

In late February 1991, the CTU announced that there would be a week of protests combined with a $NZ150,000 [$81,000] media campaign to oppose the ECB.\footnote{410} Instead of the expected general strike, the CTU requested affiliates to present proposals for a week of protest action which could in-

\footnotesize
\begin{itemize}
\item \footnote{406} Id.
\item \footnote{407} Id.
\item \footnote{408} Id.
\item \footnote{409} Id.
\end{itemize}
clude stoppages, rallies, and minor disruptions. The CTU also tried to enlist involvement by unionists throughout the country in other actions against the ECB. Some opined that the failure to call for a general strike was a consequence of the CTU’s fears of not being able to make a credible showing. Many angrily viewed the CTU’s response as too weak and modest.

There was a general feeling it was a fait accompli and marching down the streets wasn’t going to make any difference, although there were demonstrations organized by some union groups. The Service Workers Federation seemed to be quite a leader in that area. The NZNA [New Zealand Nurses Association] finally got with other health unions. Again the Service Workers is also involved in the health sector. We started to organize the membership to oppose the Bill, and we had demonstrations throughout the major cities in the country. They were incredibly well attended by our membership.

The lack of organized direction meant that unions pursued different strategies. The New Zealand Nurses Association (NZNA), which represented nurses in public sector hospitals, took a very activist approach. The NZNA used its publications to broadcast what it saw as the legislation’s threats. In addition, the NZNA decided to strike concerning its contract and in protest of the ECB. This strike, however, was called off when a compromise was reached in the face of an injunction. It is interesting to note that so important was the ECA to the strike action that the Employment Court judge felt it was necessary to emphasize that his decision “should not be interpreted as . . . this Court’s views of the moral correctness of the position of any party or other group in the community concerning the proposed legislation.” The announced action, however, acted as a vehicle to make employers aware of the strength of nurses’ concerns and determination. In place of a strike, the NZNA held educational seminars and organized other forms of protest against the ECB.

411. See, e.g., Gay, supra note 161.
413. See Tattersfield, supra note 410, at 1.
414. See, e.g., Gay, supra note 161.
415. Payne, supra note 141.
416. Judge Colgan recognized this in his decision enjoining the strike. “This is not a case about the content or effect of proposed legislative reform of the labour laws of New Zealand. To the extent that the Employment Contracts Bill currently before the House of Representatives features in this case, it is as a catalyst of strike action scheduled to take place in hospitals next week.” Auckland Area Health Bd. v. N.Z. Nurses Ass’n, [1991] 1 E.R.N.Z. 795, 796 (1991).
418. Id. at 796.
419. Payne, supra note 141. The NZNA gained membership after the ECA was enacted as a result of nurses’ experiences with their employers’ attempts to alter conditions of employment, and nurses’ desire, therefore, for collective protection.” Report of the Labour Committee on the Inquiry Into
The Engineers Union came in for a great deal of criticism for the role it played in the actions taken against the ECB. Many of those who were critical of the Engineers felt that they were responsible for the CTU’s failure to take a more active stand against the ECB, such as calling for a general strike. The picture that emerges is far more complex than this critique suggests.\textsuperscript{420}

To get a clearer idea, we can first take a look at the Engineers’ explanation for their actions. They say that before taking any action, they examined public opinion as to the ECB and found there was a great deal of complacency towards it. This complacency was rooted in two perceptions: (1) that union opposition was purely a matter of self-interest and (2) that the only impact the ECB would have was to mandate voluntary unionism. The Engineers were particularly concerned since there had recently been strong and unsuccessful union opposition to legalizing Sunday store openings. In the public mind, the opposition so overstated the consequences of Sunday trading that they lost credibility.\textsuperscript{421} This led the Engineers to conclude that the most pressing need was to disseminate information to members about the ECB, rather than “trying to whip up hysteria,”\textsuperscript{422} and then let the membership decide how to react. The informational campaign included providing resources, increasing organizer rotations, and holding workshops to explain the ECB and to dispel the idea that it only involved voluntary unionism.

The Engineers tried to inform people in a way that would be seen as providing information and not propaganda.\textsuperscript{423}

We had humorous ways of doing things that grabbed people’s attention. [The Engineers’ “Bill Birch Bares All” poster\textsuperscript{424}] had little comments about, “This is what the Act does. Will my union go? Will my wage rates change?” That sort of thing.

It grabbed peoples’ attention, and it made them read it. And they became informed. Whereas, if we had said, “This Act is bad. Your union says protest.” they would just ignore it. We thought that was dangerous. But, we had a whole lot of placards with that, and we posted the town with them. It was posted all over the march route, right up to the Employers Association [headquarters], all around government [buildings], naked Bill Birches. They weren’t graffitied either. They stayed up for ages opposite the Employers Association.

\begin{thebibliography}{99}
\item Loader, supra note 43.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item The poster portrays a caricature of a nude Labour Minister Bill Birch surrounded by questions and answers about the Employment Contracts Bill. It is captioned, “Bill Birch Bares All.” (on file with author).
\end{thebibliography}
... [O]ur whole approach was we did not call, we did not force our members to get out on the street and march. And we did not whip up hysteria against it. We gave them information, and they were free to do what they wanted with it. Believe us, not believe us, take part in industrial action, not take part. And many of them felt that they wanted to take some symbolic protest against it. And the officials were certainly involved in doing that. But it wasn't some orchestrated union campaign.\footnote{Loader, supra note 43.}

The content of the information was so worrisome to members that it left the Engineers with the opposite problem—to tell the membership that the union would not disappear since some had come to the conclusion that unions were outlawed. Some became concerned that if they protested they would be out of a job because the union would disappear overnight.\footnote{Id.} There were marches for the Engineers' members to participate in, but they were not organized by the Engineers or by the CTU. They were organized by groups such as the Public Service Association, the Communist Party, the Unemployed Workers League, and others, as well as general anti-ECB marches.\footnote{Id.}

Although there is some plausibility to the Engineers' strategy of simply providing information, one must ask how effective and appropriate such a strategy and role is for a union. Indeed, this strategy is directly contrary to the sort of multi-layered information related to guidance the Engineers had been providing their stewards about union action. Thus, at the critical point when Engineers' members had been galvanized into action, their union was not there to lead them. Furthermore, although the Engineers thought such protest could only have been "symbolic," given the certainty that the ECB would pass, the failure to protest meant, at worst, lost opportunities to defeat or wound the legislation and, at best, a lost opportunity to be perceived by their members and by the public as playing a vital role in the important issues of the day.

The MCWU opposed the ECB, because it felt it would adversely affect many workers through the operation of the market and create pressures to drive down wages and conditions. Their form of opposition was to circulate leaflets in areas where the union was weak, such as panel beating [collision] and spray painting shops, and to have face-to-face meetings elsewhere. The Coachworkers' leaflets outlined the likely effects of the ECB. In their stop-work meetings in better organized areas, the union and members discussed the issues and tried to work out a position on the ECB. At the national level, the Coachworkers favored a general strike, a position they urged to colleagues in the trade union movement. When the CTU

\footnote{425. Loader, supra note 43.}
\footnote{426. Id.}
\footnote{427. Id.}
failed to endorse a general strike, the Coachworkers decided not to engage in a strike themselves.\textsuperscript{428}

Although there was no general strike, there was a great deal of activism, including strikes, in opposition to the ECA. The anti-ECB campaign which took place from April 1 to May 15 may even have had positive effects in helping the unions have more highly organized members as they went into the post-ECA period. It may also have made employers more reticent to press their advantage.

So from the point of view in a depressed economy, those people that stayed in for six months longer than they otherwise would have represent six months of income with which to try and organize and make sure that you hang on to the base areas, if you like, of the union. So, people became aware of what was going to happen, and now that things have happened along the lines that were predicted, then people can say: “Well, yeah. It was correct.” You know and that this is where the source of their problem is. If nothing had been done, people would have looked at what happened, and would have said: “Well . . .” and they might have had a variety of explanations for it, but it’s unified a core of opinion that the problems we are now experiencing derive from this Employment Contracts Act.

Now, in terms of shaping people’s opinions, it was quite successful, because the Minister of Labor was forced to respond with a householder’s leaflet which is now widely quoted and shown to be a lie. He lied to the constituency about the intentions of his legislation and did so, in writing, to every household in the country.\textsuperscript{429}

Despite the CTU’s failure to endorse a national strike, in early March, a number of mainly public sector unions, such as teachers and health workers unions, announced a call to a “day of action” to be held on April 4.\textsuperscript{430} In fact, some of the strongest action in opposition to the ECB came from those unions which represented what would be regarded as weaker sectors of the workforce, those with largely female memberships—teachers and early childcare workers. Their action took a range of forms, including “stopwork” meetings\textsuperscript{431} and the announcement of their readiness to strike to oppose the ECB.\textsuperscript{432}

\textsuperscript{428} Clarke, \textit{supra} note 68.

\textsuperscript{429} Id.

\textsuperscript{430} The involvement of the public sector unions contrasted with their unanimous vote against a general strike. This may be explained, in part, by the fact that their actions were motivated, not only by opposing the ECB, but by trying to secure new agreements with the government—the author of the ECB—as their negotiating partner.

\textsuperscript{431} Stopwork meetings were a longstanding tradition in New Zealand labor relations. Just prior to the enactment of the ECB, unions were allowed to call two paid stopwork meetings a year to discuss pertinent issues. \textit{LRA} § 57. These are popularly referred to as “stopwork meetings.”

\textsuperscript{432} See \textit{Teachers to Stop Work Over Bill}, \textit{The Dominion}, Feb. 18, 1991, at 7.
The day of action evolved into a “week of action” that began April 3.\textsuperscript{433} It included strikes, stopwork meetings, rallies, and marches involving approximately 500,000 of New Zealand’s population of 3.2 million\textsuperscript{434} and a workforce of 1.3 million.\textsuperscript{435} Actions included a twenty-four hour strike by 50,000 education workers on April 4;\textsuperscript{436} 50,000 health workers who engaged in a two-hour stopwork meeting;\textsuperscript{437} a strike by storeworkers, drivers, and engine drivers of the Northern Distribution Workers Federation; a strike by the Seafarers Union; a strike by the Harbour Workers Union; a strike by workers at the New Zealand Steel plant; and a march and public meeting by the members of the Railway Trades Association.\textsuperscript{438}

The Week of Action found an extraordinary number of rallies, strikes, and marches throughout New Zealand, including in all the major, and even more minor, centers: Auckland, Wellington, Christchurch, Dunedin, Whangarei, and Invercargill.\textsuperscript{439} They included strikes of Inland Revenue staff in Nelson and journalists in Wellington.\textsuperscript{440} Wildcat strikes drew out Meatworkers at AFFCO in Moerewa and Whangarei and at Weddel New Zealand, also in Whangarei; Hutt Valley Railway workers; Kinleith Pulp and Paper Workers; and journalists at the Wellington Evening Post, The Dominion,\textsuperscript{441} and the New Zealand Press Association.\textsuperscript{442}

The level of participation in strikes and other actions against the ECB was quite astonishing, given the lack of leadership provided. In a country of 3.2 million, some 500,000 were involved in some way in the strikes, demonstrations, or other protests during this period. The ECB cost the country over 50,000 lost working days in the first week of April 1991.\textsuperscript{443}

\begin{itemize}
\item \textsuperscript{434} Jason Barber, \textit{500,000 Workers Expected to Protest}, \textit{THE DOMINION, Apr. 2, 1991}, at 2. The actual number is not certain. One Labour MP put the number at 300,000. 12 PARL. DEB. (HANSARD) 1473 (Apr. 23, 1991). Others stick by the figure of 500,000. \textit{See, e.g., Morgan, supra note 346.}
\item \textsuperscript{435} \textit{See 12 PARL. DEB. (HANSARD) 1446 (Apr. 23, 1991).}
\item \textsuperscript{436} \textit{See Macfie, supra note 433, at 1. For those who feared that the ECB might lead to greater union activism, events in this period might have fueled that concern. It was, for example, the first time education sector unions, formerly friendly rivals, joined together. \textit{See Barber, supra note 434, at 2.}}
\item \textsuperscript{437} \textit{This was to include a concerted action by members of the Nurses Association, Public Service Association, Service Workers Federation, Local Government Officers Association, and the Association of Salaried Medical Specialists who had joined into the Combined Health Employees’ Committee. \textit{See Barber, supra note 434, at 2.}}
\item \textsuperscript{438} Barber, \textit{supra note 434, at 2.}
\item \textsuperscript{439} \textit{See Debbie Dawson, \textit{50,000 Education Workers Set to Strike Against Bill}, \textit{THE DOMINION, Apr. 4, 1991}, at 1.}
\item \textsuperscript{440} \textit{See Much of Contracts Bill Flak “Outrageous Lies”—Birch, \textit{THE DOMINION, Apr. 4, 1991}, at 2.}
\item \textsuperscript{441} Rebecca Macfie & Brad Tattersfield, \textit{Gov’t Rules Out Action Against Teacher Strike}, \textit{NAT’L BUS. REV., Apr. 4, 1991}, at 2.
\item \textsuperscript{442} Rebecca Macfie, \textit{Anti-bill Protests “Shows Need for Change,” NAT’L BUS. REV., Apr. 5, 1991}, at 2.
\item \textsuperscript{443} \textit{See Erin Kennedy, \textit{Protests Cost Over 50,000 Working Days}, \textit{THE DOMINION, Apr. 8, 1991}, at 8.}
\end{itemize}
Some of the strikes were not planned but, rather, were spontaneous demonstrations of the feelings of trade unionists. For example, a simple two-hour stopwork meeting scheduled for March 22 by the Northern Distribution Union led to a one-day wildcat strike after a worker made a motion from the floor. This led to public concern that worker anger, without a stronger outlet provided by the CTU, might lead to more generalized wildcat strikes.

The National government, of course, criticized the strikes and opposition activities as illegitimate, with its strongest condemnation directed towards teachers. Speaking in his role as State Services Minister, Bill Birch blasted teachers for setting an "appalling example" by going on strike and for inconveniencing thousands of families.

The unions have had ample opportunity to make submissions to the select committee. That should be the responsible way of addressing any concerns.

Teachers, more than anyone else, should be setting standards. They should be ashamed that as the guardians of our children they are setting an appalling example to them.

As May 1 (the scheduled effective date of the ECA) neared, the CTU felt increasing pressure to call for a general strike. The CTU leadership, however, telegraphed its opposition in advance of the April 18 delegates meeting at which the decisive vote was to be taken. In the week prior to that meeting, CTU president Ken Douglas declared that there had to be another solution than leading a protest parade. It thus came as no surprise that on April 18, CTU delegates voted not to call for a general strike led by the CTU. Delegates from thirty-nine CTU affiliates voted instead to let each individual union decide what action to take and to have a national day of activity to be held April 30, the day before the ECB was scheduled to be enacted. This CTU sanctioned action on the last day before the effective date of the ECA, April 30, would be too late to have any impact on Parliament’s deliberations, since the vote would be taken before then but could send a timely message about the readiness of workers to oppose any draconian measures taken against them.

The CTU’s decision to refrain from a general strike cost the union movement solidarity at a time it could ill afford division. It remains to be seen if this will cause a fatal or long-lasting rift. Even a year after the ECA had become law, one could find trade unionists split about the CTU’s deci-

444. Macfie, supra note 433, at 1.
445. Id. at 1.
Theories abound as to why stronger action was not taken. It may have been a reaction to the CTU's loss of its position as an important regulator of social and economic policy, a possibility suggested by Douglas' remark in opposition to a general strike.

The CTU's position at the spearhead of the protest must seem a painfully retrograde step for an organisation that has spent over three years attempting to establish a constructive social and economic policy agenda for the union movement, shaking off the traditional union pre-occupation with wages and conditions to the exclusion of all else and establishing a quasi-official role in the process of government.450

The CTU tried to hang on to this larger role by promoting a post-ECA strategy of talking "past the act directly to employers, on the basis that only unions can deliver the stable, co-operative relationship basic to both profitability and job security."451

Other reasons for failing to take to the streets to oppose the ECB may have been grounded either in realism or in despair at the prospects of defeating this powerful attack on its existence. Douglas observed, quite accurately, "[T]he government has[s] the machinery to ram the bill through parliament."452 Early on, Douglas took the position that the CTU would not try to defeat the ECB but would try to change it, recognizing that it did not think it could be defeated.453 Given Douglas' savvy and intelligence, it was certainly obvious to him that the ECB marginalized unions454 and portended unmitigably difficult days ahead. Even had the CTU decided to throw every weapon at its disposal into the fight, its chances of winning any concession were poor, given the uphill nature of the battle. A January 1991 CTU poll found that the public had little awareness or understanding of the ECB, and, to the extent the public had any opinion, it supported the govern-

449. The CTU's inaction was cited as one reason a competing union federation, the New Zealand Trade Union Federation, was created on April 30, 1993. Its president was Seafarers president Dave Morgan, and its interim secretary was MCWU secretary Graeme Clarke. New Union Alliance Formed, LABOUR NOTES, June 1993, at 7. By late 1993, only 57% of unions belonged to the CTU, and there was speculation they might have further defections. Sarah Boyd, Unionism Finds New Ways in Fight to Survive, EVENING POST, Sept. 8, 1993, at 7. For a description of the CTU's model, see generally Ha- worth, supra note 27.

450. Rebecca Macfie, Mass Protests Feed On Workers' Unease, NAT'L BUS. REV., May 3, 1991, at 12. On September 17, 1990, the Labour government had executed an "Agreement for Growth" with the CTU which brought the union movement into the government as a force for centralized planning. The compact was endorsed on April 3, 1990, by unions with a vote of 363,481 to 64,775, with 34,388 abstentions. See Roth, supra note 198, at 193. The NZEF took the position that "they wanted no part of such a formalised, predetermined structure." Steve Marshall, Time for Employers to Have Their Say, THE EMPLOYER, Apr. 1990, at 3. Indeed, it took a similar approach to the annual Tripartite Wage conference, calling it ritualistic since employers made their decisions based on the market and not on government or union wishful thinking. Wage Talks Ritual, THE EMPLOYER, Sept. 1990, at 2.


454. Macfie, supra note 450, at 12.
ment's claim that the legislation would boost productivity. It is obvious, with the advantage of hindsight, that this favorable public opinion underwent a massive change, largely as a result of union education campaigns. However, by the time this change in public opinion was obvious—so that in the end only 7% of the public believed it would bring productivity gains—it was too late for the CTU to change its strategy.

C. Evaluating Unions' Reaction to the ECB

There is certainly hubris involved in engaging in an after-the-fact assessment of different unions' reactions and preparations in the face of the ECA and from a foreign perspective. Second, any analysis based on less than the whole society, as this one is, can present only parts of the story. Nonetheless, with these caveats, there are valuable lessons to be learned from the actions and reactions of unions during this period. Many of the unions examined here were forward-looking and had taken reasonable action to prepare themselves for life under a radically changed legislative environment. Even though the reality of the ECB was a shock, for many it was not an unanticipated one. Several unions did a good job of predicting the form the new act would take. Of these, most had already taken effective steps to get themselves in the best possible shape to weather the conditions which they were to experience. Certainly, one could not ask for more from any organization.

The place where one can most criticize the unions and the CTU is in their inability to formulate a common cause and to take common action to fight the ECB. There were all sorts of plausible reasons why forceful opposition did not seem worthwhile. These ranged from the claim that the ECB was essentially a fait accompli to the claim that unions would be unable to muster enough opposition to make a credible showing. It is impossible after the fact to know if this would have been true. Certainly the ECB was enacted largely as introduced; it seemed impervious to criticism. Certainly, as the Engineers concluded, the public was quite uninformed as to the potential consequences of the new legislation when it was introduced and, thus, unwilling to take to the streets at that time.

However, if one thinks about what the role of a union should be, these arguments begin to seem beside the point. If a union can help organize workers, it must do something with that organization besides merely providing information and letting the members decide what action to take; it needs to lead. At the most crucial point, many New Zealand unions came up with plausible excuses why they could not or should not exercise this role. It is impossible to characterize this as anything except a serious failure.

455. Leading, supra note 392, at 32.
456. Id.
It is interesting to note which unions decided not to organize their members and why they made that decision. A major factor affecting the two most influential bodies—the CTU and the Engineers—was rooted in their having taken on a quasi-governmental role. For example, Ken Douglas found it demeaning to have to move from a statesmanlike partnership with government in which he helped determine policy to standing in the streets shouting, shut out of the locus of power. The Engineers, too, seem to have been caught up in their vision of themselves as partners in the workplace and, consequently, were unable to act.

In fact, it may have made no difference in the ECA’s final form had unions made their strongest protest. The point, however, is that when an organization ceases to act as organizations of that type ought to, it loses an important part of its identity. By failing to be a lightning rod for dissent, by failing to make common cause with the larger community at a time when it stood ready to align itself with unions and by failing to represent the needs and interests of their constituents in the most forceful way, New Zealand unions ceased in important ways to be unions.

Much of this critique mirrors that of the MCWU, Seafarers, and other critics of the CTU and Engineers as exemplars of “business unionism.” It is important to understand, however, that even though that assessment was correct in many ways, they actually contributed to the problem. Much of the criticism seemed to have been done in a sniping manner and had gone on in a divisive manner for so long that at the critical moment it was impossible to join together. Thus, the critics of the CTU and the Engineers may have forced them to take even less action than they might otherwise have, solely so they could maintain their relationship of being on different sides of all issues.

V

Life Under the Employment Contracts Act

The Employment Contracts Act was passed essentially unchanged from the ECB and became effective May 10, 1991.

A. The ECA’s Impact on Inter-Union and Intra-Union Relations

ECA proponents had long contended that the free market system in the Act would have a benign impact on unions by increasing competition for members, which would lead to improved member services.457 They also claimed that eradicating unions’ monopoly privileges would enhance the

457. Anne Knowles of the New Zealand Employers Federation stated: "We have been saying: 'Well, if the unions are actually providing a good service, then they have nothing to fear with the removal of the absolutely compulsory requirement for people to be a member of theirs.'" Knowles, supra note 237. In essence this constituted an extreme extension of the service model of unionism. See supra note 116.
community's opinion of trade unions and lead to unions which attracted member allegiance and loyalty without compulsion. In fact, the ECA has led to competition in many areas, including inter-union competition; however, it is far from clear that competition has been benign.

The ECA's impact on union representation is twofold. On the one hand, by giving workers the right to choose their own representatives, it tends to promote the existence of small fragmented unions, even though collective bargaining and organizing under the ECA necessitate larger organizations to be effective in meeting greater demands on union resources. On the other hand, by effectively—although not formally—giving employers the power to decide whether to deal with a worker's representative and given the desire of employers to have only one consistent set of terms to administer, the ECA promotes plantwide or employerwide contracting.

Unions themselves can promote the tendency to schism (as can employees in choosing a representative) through inter-union rivalry and raiding. An example of this is the disputes between the Engineers Union and the Manufacturing and Construction Workers Union (MCWU). Since the enactment of the ECA, the two have effectively traded members at Mitsubishi and Honda as the MCWU has taken Engineers' members at Mitsubishi and the Engineers gained MCWU members at Honda. The ECA certainly did not create the conflict; there is a long history of strife between the two unions. What the ECA did, however, was to reward conflict by allowing them to lure members who were now free to go where they wished.

The ECA also provided incentives for inter-union rivalry where none had previously existed, since raiding other unions could make up for losses in one's own ranks. First, many unions went into the ECA period with losses in members as a result of stagnation and decline in many industries which had led to lost members as industries shed workers. For these unions, the ECA offered a chance for continued existence. Second, many unions had lost members as an impact of the ECA. Thus, there were more unions tempted to make up their losses at other unions' expense. It is interesting to note, however, that in many worksites conflict did not arise.

459. For the MCWU's views as to events at Honda, see Honda Schemes Our End, M & C WORKERS News, Dec. 1991, at 12; Clarke, supra note 68; Loader, supra note 43.
460. Clarke, supra note 68; Loader, supra note 43. The MCWU's view of this conflict was that the ECA would have the effects of dividing the trade union movement in two: the business unions who would collaborate with employers to try to retain a captive membership and secure their financial base through concessionary bargaining, and the genuine unions who would protect wages and conditions and "stop business unions from collaborating with the employer to the detriment of the genuine unions." To the MCWU, the Engineers exemplified the business unions. Clarke, supra note 68.
461. The Engineers Union was accused of raiding the Wood Industries Union in late 1992 and responded that bargaining status was a matter of individual worker choice. Engineers Fingered Over Alleged Membership Raid, LABOUR NOTES, Mar. 1993, at 3. The phenomenon of unions raiding other unions' "turf" is not unknown in the United States. Indeed, traditional industrial unions, such as the Steelworkers, Teamsters, and UAW, have increased organizing efforts among workers they have not
The union which had the largest number of members at a site tended to become the representative of the entire workforce in negotiations, either by default or by consent of the other unions as part of coordinated bargaining.\textsuperscript{462}

Some large unions have also fragmented under the ECA, as a consequence of philosophical or other disputes. The Public Services Association met such a challenge from its Canterbury region. Canterbury regional secretary John McKenzie took an aggressive stand with regard to the ECA. He felt it had dealt unionism a blow but would help unions eventually by making them grow stronger as they fought for existence.\textsuperscript{463} In a reference to the PSA, McKenzie criticized unions who might be tempted to enter sweetheart deals as the price of recognition.\textsuperscript{464}

Eventually McKenzie led over 1,000 Canterbury and Nelson members to resign from the PSA and to form a new union, the National Union of Public Employees. The issue that sparked their resignation was the central union’s overriding their wishes to oppose the ECA actively and manipulating the PSA’s representational structure to reduce effective member participation.\textsuperscript{465} They were also angered by the PSA’s breaking from a national bargaining campaign planned for the 1992 public health sector negotiations to enter an agreement with the Otago Area Health Board. This agreement recognized the PSA without the PSA’s having to obtain worker authorization to represent them or to negotiate for them.\textsuperscript{466} These were not the only defections from the PSA. The prior December, 300 Auckland Customs workers left the PSA to form the Customs Officers Association because they felt they could negotiate a better deal.\textsuperscript{467}

Such schisms were easy to effect under the ECA. A new union or form of representation could be created by a simple change of an employee’s authorization of a bargaining representative at any time.

\textbf{B. Negotiations Under the ECA}

It is impossible to talk about negotiations under the ECA outside the context of the country’s economic situation. In June 1991, construction in the March quarter had declined 20\% in value over the prior year’s quarter traditionally represented. The UAW, for example, has set up special divisions to represent professional and government employees.

\textsuperscript{462} McAndrew, \textit{supra} note 25, at 11-12. McAndrew noted that he thought it was likely some of the minority unions might not reappear during the next negotiations. \textit{Id}.


\textsuperscript{464} \textit{Id}.


\textsuperscript{466} Pearce, \textit{supra} note 465, at 6, 7.

The May figures were even more distressing: construction's dollar value fell by 72% over the prior year, with only $NZ3.1 million [$1.89 million] worth of permits approved compared with $NZ21 million [$12.39 million] the prior year.669 Furthermore, investment in fixed assets in manufacturing fell 30% in the last quarter of 1991.470

At the same time, in May 1991, unemployment was on the rise, topping 10.1% or 163,800 unemployed for May 1991.471 By June 1991, the figure had soared to 253,000.472 Ruth Richardson responded that this was part of the transition necessary to turn New Zealand's economy around, holding out the promise of eventual job creation.473 However, as CTU economist Peter Harris pointed out, the ECA had unleashed no job opportunities but had, instead, caused the greatest job loss ever experienced in New Zealand.474 Of 48,000 jobs lost between November 1990 and 1991, most—36,700—were lost between May 1991 and November 1991.475 In addition, if there had ever been hope of a reduction in the deficit, that was dashed in May 1992, when the targeted deficit of $NZ1.7 billion [$920 million] had to be revised to $NZ3.7 billion [$2 billion], more than double the original figure.476 This occurred because the cuts caused the economy to contract and business tax revenue to decrease.477

There was also a human toll of this economic downslide. In May 1992, the Council of Christian Social Services, an organization representing six Christian churches, issued a report entitled Windows on Poverty in which it called on the government to stop making human sacrifices to its economic policy.478 The report described the new phenomena in New Zealand of children going to school so hungry they could not concentrate and of homes infested with vermin.479 The Salvation Army reported an increase

471. See Macfie, supra note 280, at 1 (citing Statistics Department numbers).
472. Roth, supra note 281, at 317 (citing Statistics Department numbers).
473. Id.
474. See Barber, supra note 470, at 3.
475. See id. at 3.
476. See Denis Welch, Welch's Week, LISTENER & TV TIMES, May 18, 1992, at 36.
477. Brian Easton, State of the New Zealand Economy 4 (Sept. 11, 1992) (unpublished manuscript) (on file with author). Easton also observed that, although the budget deficit was running at the same levels which had prompted the government to destroy New Zealand's welfare state, once the cause of the deficit "was due to business tax avoidance the merits of deficit financing became evident to them." Easton, supra note 216, at 159. That deficit carried with it the possibility of being a "short term stimulant for growth" and "the major source of the economic upswing" New Zealand began to experience late in 1992. Id. at 159-60.
478. See Lynsey Morgan, Beneficiaries "Sacrificed" by Government, EVENING POST, May 6, 1992, at 5; Oliver Riddell, NZ should learn lesson from Los Angeles tumult, PRESS, May 9, 1992, at 20. Riddell and others sought to assess if a lesson should be learned from the riots in Los Angeles in late April and early May 1992. See id.
479. See Morgan, supra note 478, at 5.
of 548% in the need for food assistance in 1991. The impact was uneven across the economy. By March 1992, white collar workers began to be affected, to the extent of receiving salary increases of only 3.6%, as opposed to the 7.1% they received a year earlier. The group least affected were those at the top. While 3% of top executives took pay cuts and some received no increase, 98.6% of chief executives received increases in excess of $NZ100,000 [$54,000] per year.

By late 1993, at the time of the new Parliamentary elections, the economy finally began to show some improvement, with a growth rate of 2.9% in the year to June. Building permits were up 30% over the prior year. Unemployment declined to 9.9%. Not all was rosy, however. The demand for food parcels had increased 1,000% since 1990. Many workers had their pay rates cut. The numbers in poverty rose from 360,000 in 1990 to 510,000 in 1993, about one-seventh of the population. In this period, a family in the poorest fifth lost 20.9% of its income. The seeming inconsistency between job growth rates of 2.5-3.5%—resulting in a gain of about 27,000 jobs a year—and continued unemployment can be explained in part by the fact that New Zealand's population was growing at a rate of 12.2%.

In December 1993, three New Zealand clergymen created controversy when they publicly declared that there could be a moral justification for stealing "when society deprived people of their 'birthright' of good housing, health and adequate food, and they had previously tried every other option to survive." In 1993, New Zealand had the highest youth suicide rate of all industrialized nations; reported cases of child abuse had doubled.

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480. See id.
482. See Executive Pay, supra note 481, at 8; Salary Raises, supra note 481, at 17.
484. Walker, supra note 483, at 17.
485. Id.
486. Kelsey, supra note 81, at 337.
since 1985; and those living below the poverty line had risen by 40%. Currently, 122 per 100,000 New Zealanders are in jail, as compared to Britain, with the highest rate in Europe: 98 jailed per 100,000. With this, crime rates, particularly crimes of violence and burglary, have increased to the point that a New Zealander is more likely to be a crime victim than a citizen of any other country in the industrialized world, including the United States.

The enactment of the ECA was seen by some employers as giving them freedom to order their workplaces as they wished. Murray French of the Employers Association mentions one such incident.

For instance, an employer in Christchurch announced that he was going to employ people for a dollar an hour and that the Employment Contracts Act allowed him to do that. What that employer wasn't aware of was and in fact he had taken advice from his accountant or someone that wasn't a specialist in labor relations, that in fact that was possible and there was some linkage to some welfare payment that the people could also get that was going to be a benefit to everyone.

He wasn't a member of ours, but we took it upon ourselves to contact that employer and say to him, hey, are you aware that you're in fact bound by the minimum wage act? And when he became aware of that, he very quickly agreed and acknowledged that in fact he was wrong. And that's an example of the sort of silliness that occurred at the very early stages of the Act.

French blamed unions for this sort of action, claiming unions had used exaggerations to stir up fears.

In its first issue after the ECA was enacted, the NZEF's publication, The Employer, exhorted employers to rise to the positive opportunities created by the ECA.

Irrespective of when their current collective employment contract expires, employers should be focusing now on bringing their labour relations strategies into the same planning arena as sales, marketing and so on. They should be communicating with their staff so that when it comes time to meet at the negotiating table, employees know the state of the business, their part in it and their employers' business objectives.

Slightly over a year later, a study performed by industrial relations consultant Gavin Fitzgerald found that, among the sample contracts he examined, two-thirds provided for straight time payments for Saturday or weekend

488. David Barber, Economic Miracle Hard on the Poor, OTTAWA CITIZEN, Nov. 4, 1993, at A8. The suicide rates for young males was 38 per 100,000, the highest in the industrialised world. Walker, supra note 483, at 17.
489. Walker, supra note 483, at 17.
490. French, supra note 55.
491. Id.
492. We've Arrived But the Work's Just Starting, THE EMPLOYER, June 1991, at 1.
work. In addition, 73% had extended the ordinary hours of work for which no shift premium was payable.\textsuperscript{493}  

Another study performed by Ian McAndrew found that by mid-1992 fundamental changes had taken place in the coverage of New Zealand workers. In early 1991, just about the time the ECA became effective, 80% of firms had as their dominant collective document a national or near national award; 8% had a regional or local award; 9% had an enterprise contract; and 3% had a multi-plant, employerwide contract. One year later, the respective figures were: 10% national award; 2% regional award; 80% enterprise contract; and 8% employerwide contract.\textsuperscript{494} McAndrew found that this radical shift had occurred relatively easily and with the impetus to move from awards to individual contracts 88% of the time coming from the employer.\textsuperscript{495} A 1993 study found a similar distribution:

\begin{table}[h]
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\begin{tabular}{|l|c|c|c|}
\hline
\textbf{TYPE OF COVERAGE} & \textbf{1991} & \textbf{1992} & \textbf{1993} \\
\hline
Award/Multiemployer CEC* & 59\% & 9\% & 6\% \\
Single Enterprise CEC & 13\% & 35\% & 35\% \\
Individual Employment Contracts & 10\% & 36\% & 37\% \\
Combination IEC & & 5\% & 8\% \\
No Formal Contracts & 18\% & 16\% & 14\% \\
\hline
\end{tabular}
\caption{Changes in Employment Contract Structures: 1991-1993\textsuperscript{496}}
\end{table}

* Collective Employment Contracts
\textsuperscript{\textsuperscript{\textsuperscript{*}}} Includes contracts negotiated individually, informal contracts—those not actually negotiated—and those which the law recognized as contracts, such as contracts based on the terms of expired awards or agreements.

McAndrew found that in 37\% of cases the employer had not heard from a union about collective contract structure and fewer than 10\% of the employers heard from the unions which had represented smaller groups of workers.\textsuperscript{497} Of firms with collective contracts, 23\% developed the terms without union or other employee representation through direct negotiations with the staff; 21\% signed workers up individually to a collective agreement without the involvement of any representative; and 56\% took part in

\begin{thebibliography}{9}
\bibitem{494} McAndrew, \textit{supra} note 25, at 5. Many workers remained in limbo, their conditions determined by old expired awards or with no contractual arrangements, something quite close to the American system of employment at will. \textit{Id.} at 17. These figures do not include firms which have moved to individual contracts.
\bibitem{495} \textit{Id.} at 6.
\bibitem{496} Whatman et al., \textit{supra} note 38, at 56.
\bibitem{497} McAndrew, \textit{supra} note 25, at 6. In many respects this confirmed the bargaining regime elegantly described—albeit, anecdotally—by Rick Barker of the SWF. \textit{See} text \textit{infra} at notes 547-55.
\end{thebibliography}
collective bargaining with the employees' authorized representative. The average time spent negotiating for the first type of collective contracts was a total of two hours. The 21% who signed employees individually to collective contracts did so by starting with a few employees seen as close to management, usually supervisors, clericals or other employees who were least affected by any changes. These employees were asked to sign at the same time so that the document qualified as a collective contract and could be presented to the remaining employees on that basis.

Thirty-two percent of the third group—those who participated in collective bargaining—did so without any assistance from any staff or outside personnel or industrial relations specialists. In fact, outside personnel specialists participated in only 29% of the negotiations. Only three of the 229 firms in the sample employed lawyers to assist them. Seventy-nine percent of the collective negotiations were with paid union representatives. These negotiations involved more thought and preparation in ascertaining firm needs and objectives, with an average of twenty-two hours of preparation and at least eighteen hours of face-to-face meetings.

Of employers who moved to individual contracts, 56% of the initial proposals were developed by management with no consultation with employees, while 44% consulted at least with some affected employees. There did not tend to be much movement once management's proposed contract was put in front of employees. Only 6% of firms with new individual contracts reported that there were "significant" modifications made to management's initial position as a result of individual negotiations with some or all employees. A majority (62%) reported making some "minor" modifications during individual negotiations, though generally these applied to only a quite small percentage of affected employees.

One out of every three firms with new individual contracts indicated that all employees accepted the individual contract terms initially proposed by management without modification.

In other words, McAndrew found that many of the features of the prior system had been carried forward into the post-ECA era. Employers under the LRA and its predecessors had not really seen much of unions or actual collective bargaining, and that continued to be the case after the ECA was enacted. Those employers who had a history of real negotiation with un-

498. McAndrew, supra note 25, at 9. Some of this negotiation involved targeting a more highly paid group to reduce their earnings, often with the concurrence of other workers, through a divide and conquer strategy. Id. at 9-10.
499. Id.
500. Id. at 10.
501. Id. at 11.
502. Id. at 12.
503. Id. at 8.
ions tended to carry that relationship forward. One thing the ECA did was to make the absence of union activity more visible. In addition, but for studies such as McAndrew’s, it might have been possible to ascribe the decline solely to the ECA; whereas, it is more properly attributed to circumstances which antedated the ECA. This also suggests that even the most radical legislative changes are likely not to have the impact anticipated. Forces such as a reluctance to move from what is known, the recognition of the value of unions in the workplace and a lack of imagination allowing radical change appear to have discouraged using the ECA to eliminate unions and lower wages to the legal minimum.

To appreciate collective bargaining under the ECA, it is important to take a look at various unions’ experiences as they coped with the forces that led to this dramatic change.

1. Distribution Workers

The retail non-food industry, in which the Distribution Workers Union represented workers, had been depressed since at least 1984, but with some small recovery beginning about early 1992. This depressed state was affected by the 1984 deregulation in two ways: first, it allowed overseas firms to enter the New Zealand market and compete, Kmart being the primary example, and, second, the importation of cheaper overseas goods led to price competition and a lowering of profit margins. The retail industry also experienced increased pressure to extend hours as a result of the repeal of legislation in 1990, which permitted longer hours of operation, and pressures from competitors and a public which needed or wanted to shop on weekends or in the evening. As hours increased, so too did overtime become a greater factor in labor costs.

The Distribution Workers Union had a very mixed experience under the ECA. As mentioned earlier, the Distribution Workers represent a workforce that is geographically dispersed in many small worksites. In addition, a number of the workers are part-time and youth workers. All these factors make organization difficult. In the first month under the ECA, the Northern Distribution Union lost about 56 members from a membership of 24,000, yet they gained another 800 new members while collecting signatures for bargaining authorizations. That, however, was clearly not to be an accurate predictor of the impact the ECA was soon to have on the union. The combination of employer militancy and union powerlessness

504. Id. at 14.
505. Hector et al., supra note 72, at 328-29.
506. Id. at 329.
507. Id. at 331.
soon led to the loss of important ground in the retail industry. In the first year under the ECA, the Distribution Workers estimate they lost between 20-25% of their members, "largely as a result of hostility from employers to union involvement in contract negotiations and of continuing business closures."  

Four key themes emerged early on in retail sector bargaining and have since been repeated across other sectors: the reduction or abolition of penal rates; the dramatic and overnight shift away from national industry bargaining to enterprise or site bargaining; the collaboration of union and employers in the lowering of conditions for new workers while those already on the payroll are protected; and the effective abandonment of small sites by the unions to concentrate on the power base of the larger sites.

Some employers, such as Whitcoulls, one of New Zealand’s largest stationery and variety stores, saw the ECB as an opportunity to de-unionize. They hired Rob Campbell, a management consultant and formerly a Distribution Workers organizer, to spearhead the process. His strategy was to set up a staff association called "Team Whitcoulls." The philosophy of Team Whitcoulls was that the employer and employees were united, that unions were disruptive of this positive relationship, and that remaining with the union would not help employees advance in the company. Whitcoulls management held meetings in which they pointed out the irrelevance of many award provisions and the union. They also placed a great deal of pressure on employees, particularly on delegates [stewards], to leave the union. Whitcoulls distributed union resignation forms and made it clear that employees were expected to sign them. Eventually the union was left with about 10% of the employees prepared to recognize the Distribution Workers as their bargaining agents.

The employer then negotiated individual employment contracts with some details personal to each employee. The key differences were a trade of a small hourly increase in pay for the removal of penal rate payments for Saturday and Sunday work and overtime; job reclassification and simplified classifications; changes in leave provisions; changes in the definition of misconduct; the expansion of in-house grievance and dispute procedures; less differential between youth and regular rates; and the ability to

[510] Hector et al., supra note 72, at 331.
[514] Id.
[515] Hector et al., supra note 72, at 333.
schedule more flexibly. Campbell represented both the workers and the company in what was termed a "facilitation process." In the union's view, Campbell developed a base contract "and marketed it to everybody on the basis of we're all one big, happy family." More specifically, the employer selected a consultant company to formulate the contracts and negotiate with the staff with minimal union involvement.

Whitcoulls was not an isolated incident. It quickly began to look as if the loss of membership meant that the Distribution Union resources were likely to dwindle to the point that it had to make surgical choices as to who it could afford to represent. It hoped to maintain wages at smaller employers as best as possible, holding on to what existed until the day the economic situation changed so that employers competed for workers. In July 1991, the Northern Distribution Workers Union tried to forge collective agreements of small retail employers on a shopping mall or small-town retail community basis. Union officer Peter Conway opined that such an arrangement would create closer employee involvement at a lower cost of time and money for each individual employer. By then, most of the Distribution Union's members were on individual contracts since their expired award had not been renewed before May 15.

The exceptions to this were employees of Farmers and Kmart, who were covered by collective contracts to which the union was a party. The Kmart contract was not, however, markedly different from Whitcoulls. It too raised youth rates, reduced penal rates, and increased scheduling flexibility. However, by maintaining a role for the union, union access to work-

516. Id.
517. Kimble, supra note 67. The Engineers Union had encountered similar instances where an employer hired a labor management consultant and, following the completion of an agreement, made the workers pay for the consultant through deductions from the workers' paychecks. In other words, the workers have by default paid for the employer's bargaining agent. Loader, supra note 43.
518. Hector et al., supra note 72, at 333.
519. Macfie, supra note 509, at 19.
520. Id.
522. See id. Such an arrangement would have been in the union's interest as well since, at the same time it was losing members (and income), the Distribution Workers were encountering higher costs as the work of negotiating each agreement increased. Hector et al., supra note 72, at 331.
523. See Macfie, supra note 521, at 3.
524. See id. The union's party status was essential for it to enforce the agreement that the company would offer specific negotiated contract terms to new employees. Id. By June 1992, retail industry collective employment contracts filed with the Department of Labour (those covering twenty or more employees) covered 11,249 of approximately 140,000 workers in the industry throughout the country. The distribution unions, however, claimed to cover 20,000 in the contracts they had negotiated. Hector et al., supra note 72, at 330. It is interesting to note that, as in the food industry discussed below, the non-New Zealand employers were less likely to refuse to negotiate. See infra text at notes 559-62 (for a discussion of the SWF's negotiations with Kentucky Fried Chicken).
ers, including new workers, and allowing union education leave, the contract was seen as far more progressive.525

One of the most difficult areas for unions to remain as a viable force was within the retail food industry. Grocery stores tended to operate with a very low profit margin, about 1.5-4%.526 Furthermore, as with the industry internationally, there had been a change from an industry which employed semi-skilled workers, many of whom were male, to one employing unskilled part-time workers who were primarily youths.527

By late 1991, the union took on a more aggressive and public organizing style to meet this challenge. For example, on November 26, 1991, it picketed New World supermarkets asking customers to shop elsewhere after the employer refused to allow union access and attempted to negotiate directly with employees, shutting out the union.528 Picketing quickly ended the impasse at the New World supermarket in Titirangi when, on December 4, a settlement was reached that allowed union access to the premises.529 In Kaikohe, on December 3, the supermarket owner was unable to get an injunction against the picketing. The representative of the Auckland Retail Grocers Association was surprised at this failure of the courts and that the pickets "were not being chased out of town by people with pick handles and baseball bats."530

By 1992, the Distribution Workers stepped up its use of what was for New Zealand innovative methods to increase public awareness and support for unions. Part of this campaign involved consumer boycotts and informational picketing.531 In addition, it borrowed from American and British unions and began a "Buy Union" campaign, which listed 500 unionized retail outlets. NDU General Secretary Mike Jackson explained that they had been hit with "American-style tactics" and would respond with "American-style tactics."532 The Distribution Workers also enlisted the support of New Zealand celebrities and politicians, including Gary McCormick, Elizabeth McRae, Bruce Kendall, Jim Anderton, Sonja Davies, Helen Clark, and Phillipa Bunkle.533 Furthermore, it decentralized its provision of services to members.534 It is interesting to note that the one thing missing from these campaigns was involvement by the workers at the targeted store, who, even in

525. Hector et al., supra note 72, at 333.
527. Id. at 311.
528. Roth, supra note 467, at 122.
529. Id. at 124.
530. Id.
534. Hector et al., supra note 72, at 331.
the union's view, admitted there had been almost no contact between union officials and the workers. Most of the pickets were union members motivated by a desire to protect industry conditions of employment.

Despite all this effort their successes were at best only partial victories. By 1993, changes that allowed employers to deploy full and part-time workers at will had virtually eliminated overtime pay. Not only did these increase numbers of hours and the days of the week worked, they increased employer discretion and decreased worker freedom, such as by eliminating the amount of notice required for changes in scheduling. In many cases, the Distribution Workers obtained only two-tier agreements which lowered terms for future workers. The trade-off of wages of as much as 40% lower for new hires was necessary to maintain a union presence and collective representation. This belied claims the ECA would promote better terms through individual negotiation; in fact, those yet to be hired faced worse conditions than they would have under the protections of an award.

Unfortunately for the Distribution Workers and other unions representing similar workforces, their situation was so desperate, it was hard to fault them for reaching such weak agreements. The reality was they had few alternatives. When they refused to accede to these sorts of arrangements, no collective agreement was reached, and the workers finally agreed to individual contracts and cut the union out.

Indeed there is some evidence to suggest that the union's present involvement in collective agreements has been the consequence of employer policy decisions, rather than the result of the so-called "countervailing power" of an organised workforce. This invites the question, will organised labour continue to have a role in the setting of conditions of employment in this industry; and if so, who will it organise and to what purpose?

A survey of contracts in the retail food industry found that within Dairy Farms subsidiary stores, only Price Choppers had a collective employment contract and one that included a union. Foodland Associated Stores had a mix of individual and collective employment contracts, with

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535. Conway, supra note 531, at 5. The lack of contact appeared to be the result of the employer's denying access to the union and threatening of organizers with trespass, and that few employees were willing to make contact with the union. Id. It is also possible that unions were not only hampered as a result of employer restrictions or worker fears but by the ease of access they were accustomed to under the LRA. The prior legislation provided union representatives with liberal access to the workplace. LRA § 196.

536. See Pringle, supra note 526, at 332.

537. See id. at 317 n.4.

538. Id. at 317.

539. Macfie, supra note 509, at 19. The parties reached a new agreement covering 1400 staff with a 2.6% raise but with reductions in penal rates and the elimination of some allowances. Roth, supra note 532, at 253.

540. Macfie, supra note 509, at 19.

541. Id.

542. Pringle, supra note 526, at 321.
none of its subsidiaries having any contracts, and the majority had a union as bargaining agent. Foodstuffs had mostly individual contracts with collective contracts only covering thirteen North Island stores. The existence of no contracts, collective contracts or individual contracts cannot tell the whole story about changing employer attitudes. The three groups and contracts within the groups displayed a range of conduct from tending to stick to former practices to adopting some changes, such as performance-based pay to anti-unionism, the latter most evident among Foodstuffs stores. Furthermore, even the existence of a union contract did not mean that all workers joined the union. As many as one-third on some sites chose not to join, further weakening the union.

2. Service Workers Federation

If powerful unions were unable to exert the pressure necessary to settle contracts, those with weaker memberships, such as the Service Workers Federation, were even more handicapped. The SWF was faced with a radical change in employer attitudes once the ECA was enacted. Rick Barker estimated that 4-5% remained friendly and willing to negotiate, but only as a strategy to get a collective agreement and avoid the fragmentation, numerous agreements, and varied terms of employment the ECA promoted. Under the ECA, an employer could offer a collective agreement and effectively bind others whom the union did not represent to its terms. Despite the advantages of such a course, very few employers agreed to negotiate with the union—mainly those who had found that dealing with a bargaining agent who had credibility with their workers was useful to their business goals.

543. Id. at 313.
544. Id. at 314.
545. Id. at 322.
546. The Distribution Workers Federation became defunct, eventually emerging as the National Distribution Union, which represented shop and most warehouse employees. There were a number of break-away groups who formed their own groups, merged with other groups, such as the Engineers Union, or formed new unions, such as the Amalgamated Workers Union of New Zealand. Harbridge & Hince, supra note 160, at 359.
547. According to Rick Barker, aside from the 4-5% of employers who remained relatively unchanged in attitude, the rest to a greater or lesser degree decided to take advantage of the environment to their benefit. Barker, supra note 45. This observation by Rick Barker, based on his experience, which might be termed “anecdotal” was convincingly confirmed by Ian McAndrew’s study. See supra text accompanying notes 494-04.
548. The ECA allowed a proliferation of individual contracts and terms only as long as there was no collective agreement. However, once a collective agreement came into existence, “each employee and the employer may negotiate terms and conditions on an individual basis that are not inconsistent with any terms and conditions of the applicable collective employment contract.” ECA § 19(2). A collective employment contract was defined as “an employment contract that is binding on one or more employers and 2 or more employees.” ECA § 2. Thus, an employer could reach an agreement with the two most easily dominated workers. No other agreement could be inconsistent with this agreement. This provided employers with a great deal of leverage.
549. Barker, supra note 45.
Many employers, guided by the Employers Federation, decided a wise strategy was, if they did not repudiate the union, to at least deny unions party status to any agreements. Thus, they were willing to negotiate with the SWF but would not let it sign as a party to the agreement. For some, this was a way to defer to the Employers Federation position while remaining pro-worker and reasonably pro-union. These arrangements resulted in a contract only between an employer and the individual workers who signed the contract, often with signature pages which were longer than the substantive portions of the document. This resulted in an odd dissonance between the processes of negotiation and being bound to an agreement.

In many places the process of bargaining took place in name only. Workers would be asked to sign employment documents, including tax forms and their employment contract. As an alternative, in many places the contract was presented to the individual worker who was told that if he or she enjoyed working there or working at all, the worker's only options were either to sign or quit. Workers who had little employment security tended to sign.

There is no individual bargaining. It's "Take the job or leave it. This is all we offer, and that's it." I mean, if you are unemployed or you're between jobs there is no bargaining. This is an incredible environment.

See, what people get is the misimpression that collective bargaining presupposes collective contracts. Well, they are not collective contracts in the sense that you would believe in internationally or in an American sense. They are, in effect, individual contracts which happen to coincide with other individuals and so the individuals all came in, put their pen to the paper on the same document. We have a number of contracts that we have signed as an organization on behalf of those who we represent and what we have to supply to the employers is a list of names and a copy of the authorization they have signed with us to make us the agent, so it is administratively very complicated and is almost as difficult as you can get.

As of 1993, unions were parties to only 25% of collective contracts. Grills, supra note 94, at 89.

Barker, supra note 45. Harbridge found that this reflected national trends. Although unions were involved in contract negotiations covering 80% of the 192,637 workers in the sample, they were party to contracts covering only 47,000 workers. Raymond Harbridge, New Zealand's Collective Employment Contracts: Update November 1992, 18 N.Z. J. INDUS. REL. 113, 118 (1993).

This is particularly interesting in light of one of the major claims for the need for this legislation, that is, to allow the creation of individually tailored documents.

The Service Workers were not alone in finding that the sort of bargaining that often occurred under the ECA bore little relationship to that process elsewhere. At Pacific Steel, workers represented by the Engineers Union were given company drafted individual contracts they were expected to sign. See Loader, supra note 43. Dau-Schmidt explains that the presumption of a union's continuing majority status actually is more efficient because it raises the costs of nonproductive behavior "because such behavior threatens the success not only of current negotiations but also of future negotiations in which the other side might seek revenge.” Kenneth G. Dau-Schmidt, A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace, 91 Mich. L. Rev. 419, 504 (1992).
The SWF also encountered anti-union employers. In some—but not most—cases the union was able to overcome the resistance. The SWF's experience confirmed McAndrew's observations. Employers were effective in splitting their workplaces four ways—between union and non-union, and between existing and new staff. For example, in the hotel industry, it became common for an employer to hire workers for a three-month trial period at $NZ6.80 [$4.01] per hour and then terminate the worker at the end of that time. During the employee's retention period, however, he or she might be provided with more favorable shifts and conditions than those with higher pay.

When faced with firm opposition, the SWF's only choice was the difficult decision as to which members it could feasibly represent. Workers in very small worksites whose employer refused to negotiate a contract were the most likely to lose union representation. Such members were told that they could retain their membership and that the union would offer whatever services it could. However, the union explained, there would be no real negotiations; when their awards expired, the law would convert their collective terms to individual employment contracts. Even under these terms, a number of members decided to retain their membership.

The SWF's experience has been that employers' taking advantage of the bad economic climate has not necessarily meant simply lowering wages. More frequently, they removed disfavored contract terms, such as penalty wages designed to limit hours of work or times of work or straightforward restrictions on hours. Employers rid themselves of these by offering a higher base pay—usually 2%—as a tradeoff during the first year. This had the added advantage of allowing them to portray themselves as not being as brutal as the law permitted them to be, a reasonably credible portrayal under the circumstances, and one made more plausible when they explained that these actions were forced upon them in order to compete in the economic environment. However, most workers who experienced these sorts of changes faced an actual loss of weekly wages. At this time, penalty wages made up such a large percentage of wages that even very large increases in base pay in lieu of lost penalty pay resulted in a lower weekly income.

From 1991-1993, there was a 40% reduction in hours paid as

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553. Barker, supra note 45.
555. Barker, supra note 45.
556. Harbridge found that a four-day standard work week had been introduced in the hotel sector as a trade-off with about a 5% wage increase. Harbridge, supra note 551, at 121. The impact was that when the Department of Labour studied only base pay rates, rather than the total impact on wages, it found that there had been increases in pay under the first year of the ECA. See infra notes 688-95 and accompanying text.
557. Barker, supra note 45; accord Harbridge, supra note 551, at 123.
   Hourly rates are going up, but income is going down. We may be getting a 2 to 5% pay increase, but there was one in Wanganui where workers sold off their time and half and double time and received an extra dollar an hour to do that. So for them initially it looked like
overtime for all employees and a corresponding increase in hours paid as regular time.\textsuperscript{558} If the fact that those penal rates paid were paid often at reduced rates, the significance of the reductions is more easily comprehended.

In some cases, the union was able to fight these tactics. In July 1991, Kentucky Fried Chicken tried to lower pay rates by offering two-tiered individual contracts which reduced pay for new hires by more than a dollar an hour, lowered weekend penal rates for new hires, and cut wages for sub-standard performance.\textsuperscript{559} In response, Invercargill workers walked out on July 19. The Service Workers Federation placed advertisements on radio to tell members not to sign the individual contracts. The SWF also asked Labour MPs to make public statements about Kentucky Fried Chicken and asked community leaders to put pressure on Kentucky Fried Chicken.\textsuperscript{560} On July 19, Kentucky Fried Chicken withdrew its contracts and began to negotiate with the union. Talks collapsed on July 26, and KFC announced it would provide a 3.4% raise to those who had completed an in-house training program and still reduce pay for new hires.\textsuperscript{561} On August 9, they finally reached an agreement which would retain the current starting rate for new hires and provide a $0.25 increase the next February. However, it also reduced weekend penal rates for new hires to time and a quarter.\textsuperscript{562}

This happy conclusion from the union's point of view was, however, not the norm under the ECA. The norm for the SWF has been that the employer who decides to go on a campaign to undermine the union has been relatively successful. In many ways the assault the SWF has experienced has seemed relentless throughout the various industries it represented. In the health care industry, in July 1991, a nursing home sent individual contracts to its workers which provided for twelve-hour shifts with no overtime and which lowered pay for sixteen year olds from $NZ8.54 [$5.04] per hour to $NZ6.30 [$3.19] per hour.\textsuperscript{563}

In June 1992, the Service Workers rejected a multi-employer contract offered by the Hotel Association that provided for a flat rate of $NZ8.25 [$4.87] with no penal rates. The Hotel Association contended that the content...
tract "reflected 'the harsh economic reality and the state of the industry.'" In the end, the Service Workers gave up trying to hold a multi-employer agreement together and decided to try to negotiate collective agreements with individual employers.\footnote{564} By October 1992, wages in the hotel industry had plummeted, having gone from the award's minimum of $NZ8.49 \([\$5.01]\) per hour to the average of $NZ7.00 \([\$4.73]\) per hour. This change was achieved by hiring workers for a three month trial period at $NZ6.80 \([\$4.01]\) per hour and then discharging the worker at the end of that time. At the same time, employers worked to erode conditions of those workers who had refused to negotiate away their award conditions by giving those workers the less favorable shifts.\footnote{565} The NZEF did not deny the drop in wages but attributed it, not to employers' taking harsh measures, but to the economy and the need to have businesses remain viable.\footnote{566} NZEF officials also said that if workers felt exploited or mistreated they had the option of seeking legal redress; however, the Labour Inspectorate manager said that often workers did not realize they had government assistance available or were "far more keen to hold on to their jobs, whatever the level of apparent exploitation."\footnote{567}

The level of exploitation was greatest for young workers. Georgina Bailey reported in October 1992:

A delicatessen had a practice of taking on students, offering $4 \([\$2.36]\) an hour. After three or four weeks, when they asked for wages, they would be told they were on trial so would not be paid. Then they would be paid for two or three weeks and sacked, while more students were taken on trial.\footnote{568}

The SWF lost approximately 30\% of its members in the first year after the enactment of the ECA.\footnote{569} Although this figure sounds grim, it was within the parameters the SWF had expected to see and not as bad as its worst case scenario.\footnote{570} Barker attributed this lower loss to several factors. First, the severely depressed New Zealand economy and workers' feelings of insecurity caused people to be nervous about their jobs and to want as much protection as possible. This general insecurity was coupled with very aggressive tactics employed by a number of employers, which frightened people into staying with the union as a source of protection. Second, staff turnover was lower than normal, so the union did not have to organize new workers.\footnote{571}

\footnote{564} Id. at 258.  
\footnote{565} Bailey, \textit{supra} note 554, at 5.  
\footnote{566} Id.  
\footnote{567} Id.  
\footnote{568} Id.  
\footnote{569} Barker, \textit{supra} note 45.  
\footnote{570} Id.  
\footnote{571} Barker, \textit{supra} note 45; Harbridge, \textit{Collective Employment Contracts: A Content Analysis, in Employment Contracts: New Zealand Experiences} 70 (Raymond Harbridge ed., 1993); Raymond
As it turned out, one of the most troublesome aspects of the new legislation, from the SWF's point of view, was the ECA's elimination of requirements that the government keep records as to collective bargaining agreements or provide data as to current employment conditions. As a consequence, it was difficult to gather accurate information to assess the state of unions and terms of employment.

3. The Engineers Union

Different unions chose to pursue different strategies in dealing with life under the ECA. The Engineering Union chose to pursue a program of cooperation with employers in the workplace to demonstrate their utility to the employer and to members, and to promote training and productivity.

This has led to a three-pronged approach: a preference for industry bargaining over occupation bargaining, as more efficient and rational; industry agreements which are responsive to the needs of individual enterprises; and bargaining agendas which include more than "industrial matters."

The result has been an unusual situation in which the Engineers have implored management to restructure their work organization and bargaining structures in line with the demands of a high-technology, high value-added economy. Clouding employers' responses to these initiatives have been a combination of factors: skepticism about the motives of the unions, uncertainty about the ability of the unions to deliver on productivity, and an unwillingness to recognize unions as partners in the restructuring process.

Oddly enough, this led to attacks on the Engineers from both trade unionists and employers. In addition, despite holding out a hand to management, the engineers could not prevent serious union losses. Within a month after the enactment of the ECA, the Engineers had lost more membership than they had gained. By September 1991, it was down to 40,000 members from

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572. ECA § 24 provided that only collective employment contracts covering 20 or more employees had to be filed with the Secretary of Labour. ECA § 24(1). In addition, § 24(2) stated: "Nothing in the Official Information Act 1982 shall apply to copies of collective employment contracts lodged with the Secretary of Labour under subsection (1) of this section." Contracts with state employers were not included in the coverage of the Official Information Act. Kelsey, supra note 81, at 103.

573. Barker, supra note 45. The Engineers Union also saw the importance of retaining monitoring devices to make it possible to draw conclusions as to the Act's impact. The addition of the requirement for registration of documents for workplaces of over 20 workers was advocated and fought for by the Labour Department against the opposition of some within the National Party who claimed this was simply an attempt to justify a job. Loader, supra note 43; See also Harbridge, supra note 551, at 113.

574. See Herbert, supra note 508, at 12.

575. Haworth, supra note 27, at 297.

576. Id.

577. Herbert, supra note 508, at 12. Some of these losses may have been attributable to the recession and consequent loss of jobs and not to outright resignations. It was impossible to know which was which. Id.
60,000 in the mid-1980s, but with the union saying it had lost only 170 as a direct effect of the Act.778

It also was often held up as a model by those within government—both Labour779 and National780—and without, especially the press, yet the Engineers was regarded with suspicion by many within the union movement.781 Its one major supporter among trade unionists was the leadership of the CTU.

The Engineers Union entered the ECA environment with the greatest experience of any union with a form of bargaining more adapted to life under the ECA. The Engineers' efforts to anticipate the ECA meant they had tailored the terms of agreements to what they thought would be suitable in the new environment. In 1987, the Engineers decided that they must move away from occupational to industry bargaining.782 From 1987 to 1991, it reformed half of its 123 documents.783 Under the ECA, the Engineers attempted to continue that approach and to persuade employers to do so as well, rather than seeking concessions. A key concern was promoting industrywide practices such as worker training. The Engineers argued that productivity and profits under the ECA were likely to come from cooperation with unions, as opposed to confrontation.784

[W]e'd actually developed a dialogue with those employers under the old Labour Relationships Act and taken on a bargaining strategy of promoting a positive industry framework . . . . We promoted that agenda. We said: "This is the Act. We'll just put it to one side. We'll make sure that our documents conformed to the legal requirements of the Act. This is their attitude. And our attitude is one of cooperation, and we intend to stay by that." And for employers that have worked that way, we've continued in that way.785

The Engineers were able to hold together a number of their multi-employer arrangements. Within the first year, they achieved a national automotive industry multi-employer agreement, negotiated without the involvement of the Employer's Association. Also within the first year of the ECA, the Engineers became party to the two largest industry multi-employer documents settled under the ECA: the Metal Trades and the National Service Station Agreement. Both covered approximately as many

580. See Barber, supra note 578, at 30.
581. Even its own members could be severe critics of its actions. See Barber, supra note 578, at 30.
585. Loader, supra note 43. According to Loader, the Engineers took the position: "Let's ignore what the Act lets you do. Yes, you can do that if you want to be bastards. You can do that." We're saying 'What do want for your industry and how can we help you and help our members.'" Id.
workers as they had under the old system. In September 1991, the Engineers put together a “plain English, multi-boss employment contract for the metal industry” which it hoped “to market . . . to companies.” 586 The collective contract was a hybrid of the Metal Trades Award and the new contract required under the ECA, including means to incorporate all employees and room for negotiations specific to each employer. 587 Achieving employer agreement to such a contract was logistically difficult under the ECA, since it was illegal to strike to pressure an employer to agree to a contract covering other employers. 588 The document appealed to employers as a means to save time and money, to coordinate training, and to create standard qualifications in the industry. 589

The Engineers Union preferred industry agreements as the most economical way to negotiate and as the only bargaining mode that allows discussion of training. 590 It recognized that individual employers have less incentive to invest in training, since they are at risk of losing their investment should individual workers leave. 591 It also opposed enterprise bargaining as tending to lead employers to become insular in their thinking. 592

This was no small accomplishment, given both the nature of the ECA and the fact that the Metal Trades Award had been a particular target because it was regarded as the pattern setter for other negotiations. The employer associations, however, advised employers not to join the agreement and to seek separate agreements. 593

[T]he Employers Association took the view that if they could break the Metal Trades Award then they would break the back of the industry unions, break the back of industry awards and be able to get company bargaining off to the right start. So they put up a massive campaign against us getting the Metal Trades Award renegotiated. 594

The NZEF’s official view of employers’ agreeing to multi-employer agreements was that the “Federation’s prime concern has been that [employers] are doing so consciously and for the right reason—not because the option to change was too hard, too disruptive or too time-consuming.

587. See id.
589. See Scott, supra note 586, at 4. Other unions and employers were able to achieve Engineer-like arrangements, as for example was the case of ICI and the United Food and Chemical Workers Union and Stores Union. See Patricia Herbert, Democracy Versus Fringe Benefits, THE DOMINION, Nov. 28, 1991, at 6.
590. Herbert, supra note 583, at 6.
591. Id.
592. Id.
593. See Roth, supra note 281, at 324.
594. Loader, supra note 43.
Rather, they should make their decision with knowledge of all the facts and the pros and cons of changing or not changing."  

In early May 1992, the Engineers Union achieved a major coup, given the bargaining climate. It consummated two multi-employer contracts covering 5000 workers employed by more than 1000 members of the Motor Trades Association and the Engine Reconditioners Association. The Motor Trades Association embraced this new form of organization, in part because they had come to see the Engineers as prepared to play a constructive role in their industry’s problems by having bargained with them directly rather than through the NZEA as an intermediary. The Motor Trades Association explained that it regarded the contracts as a means to allow companies to compete on the basis of skill and quality, rather than by undercutting wages. However, as a trade-off for the agreement, the Engineers negotiated a no-increase agreement.

Part of the Engineers’ success can be attributed to their promoting the organization of trade employers into a multi-employer group to deal with mutual concerns within the industry, in addition to collective bargaining. After it failed to prevent the formation of the multi-employer association and the consummation of the initial agreement, the Employers Association tried to prevent other employers from joining the multi-employer agreement. The Engineers, in their turn, sent organizers out with copies of the new industry contract to promote it as a simplified document tailored to the metals industry. Given New Zealand’s recent experience, it was easy to see

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597. Loader, supra note 43.

598. See Industry-wide, supra note 596, at 3; Roth, supra note 532, at 254.

599. See Industry-wide, supra note 596, at 3.

600. There is some dispute about the matter, but the Engineers claim they promoted the formation of the Metal Trades Association, in the face of opposition by the Employers Federation. Loader, supra note 43. The Association says this was not the case, but that they negotiate the sorts of contracts desired by their members. If they did not, then they would lose work.

If I’m asked, quite clearly my advice is I believe that you are better served by an enterprise agreement. I don’t believe that a national, or a large multi-employee contract is as responsive to, and that’s based on my experience, in comparison to what can be achieved at an enterprise level because apart from the employment conditions it’s very much a spinoff of enhancing the relationship of employment. Interestingly enough on that subject, where employers wish us to negotiate a multi-employer contract and they believe that’s what they want and with the benefit of all of the information available, to them, we are quite happy to negotiate and in fact have done so. We have been involved in the Northern Metals contract that was negotiated by us. We’ve been involved in the plastics industry. We negotiated that multi-employer contract. We negotiated the security industry multi-employer contract.

French, supra note 55.

601. See Rosalie Webster, Operating Under the Act: One Union’s Experience, in Employment Contracts: New Zealand Experiences 237, 244 (Raymond Harbridge ed., 1993); Loader, supra note 43.
that a multi-employer agreement could be particularly useful in promoting a
level playing field and as a base for promoting industry training.\textsuperscript{602} The
multi-employer Northern Metal Industries Contract had been executed by
120 employers by April 1992 and 153 by the end of June.\textsuperscript{603} Southern
Metal had more than 47 signatory employers by the end of June, and the
multi-employer plastic industry contract had more than 100 employer
signatories.\textsuperscript{604}

The attraction of the agreement was so great that eventually the Em-
ployers Association asked to become a party to it. This was ironic given the
NZEF’s firm position that unions were third parties and thus had no right to
be party to an agreement. The Employers Association realized, however,
that the union planned to continue to promote the agreement to other em-
ployers and that if it did not join the agreement, the Employers Association
would lose its position as representative.\textsuperscript{605}

Indeed, it may have been that part of the NZEA’s opposition was
rooted in a calculation of which form of bargaining would be more profita-
table to them. Hel Loader contended:

[T]hey were as blunt as to admit . . . to us . . . that they weren’t going to
support multi-employer documents because they could make more money
out of negotiating company contracts on a one-by-one basis. And an indus-
try document undercut their rights because it had been done. It was cheap;
they didn’t have to get involved, I mean, they could get it without paying
for it, because it was paid for by the workers. So that’s why they helped us
negotiate because they wanted to become party, so they could have some
control over the employers’ coming into it, and they are going to charge
them.\textsuperscript{606}

The Engineers also encountered employers who used the poor eco-
nomic environment and the uneven power afforded by the ECA to force
contracts on workers.

They’ve got the power. A lot of them take the point of view that during the
‘70s you guys used to whack us around and get extremely high pay rounds.
Now the boot’s on the other foot, and it’s our turn to have a bit of fun: And
we expected that. That happens, and nobody’s perfect. Unions have had a
history of being greedy, in cases. We acknowledge that. That doesn’t mean
to say that during this period we’re going to go back and revert to a very
confrontational style of not giving an inch and protecting everything. Be-
cause I think that would be very unproductive in the end. I think we would

\begin{footnotes}
\footnotetext{602.} Loader, \textit{supra} note 43.
\footnotetext{603.} Roth, \textit{supra} note 532, at 254, 258.
\footnotetext{604.} \textit{Id}.
\footnotetext{605.} Loader, \textit{supra} note 43.
\footnotetext{606.} \textit{Id}. One particularly interesting aspect of the ECA is that it may have negative effects on one
of its major proponents, the NZEF. One consequence of the ECA and the greater need for bargaining
experienced by employers was that many began to look elsewhere or within to develop their own re-
sources. As a consequence, the NZEF may lose its hold on employer bargaining policy and may even
lose membership and income. See Barker, \textit{supra} note 45.
\end{footnotes}
end up cracking under that kind of strain. So we’ve continued with the positive attitude where we can and we necessarily have a lot of industrial action when we need to resolve the contract.\footnote{607}

In some of these cases, they were able to hold on. At Pacific Steel, the company presented the workers with individual contracts to sign. However, the workers successfully held out for a collective contract with the union as a party to enforce it. Rather than striking in response, the workers printed stickers with the words “Collective Contract” on them. When the company had an open house, the workers wore “Collective Contract” stickers on their helmets. When one manager threatened to discharge a group of workers unless they signed the contract and took off the stickers, the workers struck. At another plant, a manager responded by sticking a dinosaur tag over the collective contract sticker he had been given. The strike ended within a couple of hours when a senior manager agreed to enter into negotiations for a collective contract with the union.\footnote{608}

All unions during this period, no matter what their approach, experienced at least one disaster. For the Engineers, it was Tiwai Point, a large aluminum plant on the South Island. Prior to the enactment of the ECA, Tiwai employed 1200 workers who were represented by the Engineers, Electricians, Drivers, and Storepersons. The Engineers represented 75% of the workforce.\footnote{609} At one time, the Engineers had 760 members there.\footnote{610} When the dust had cleared by November 1991, it had but 200, and these were not regarded as firmly in the union’s camp.\footnote{611}

That loss should have been foreseeable. The union had had problems with that shop for a number of years. Union-management relationships had deteriorated and some delegates, in attempting to achieve positions of power, acted in opposition to the union in important areas. That affected worker views of the union and whether it was acting in the way they wanted to be represented.\footnote{612}

For its part, the company was prepared to use the ECA to avoid negotiations with the unions at the site and to achieve their economic goals through individual contracts.\footnote{613}

\footnote{607._loader, supra note 43.}
\footnote{608. id.; metal, Apr./May 1992, at 1.}
\footnote{609. George M. Mark, Principal Industrial Advisor, New Zealand Aluminium Smelters, Address at the New Zealand Employers Federation 2 (May 13, 1992) (on file with author).}
\footnote{610. See Herbert, supra note 589, at 6.}
\footnote{611. See id.}
\footnote{612. loader, supra note 43.}
\footnote{613. Compare this situation to those strategies used by American employers who permanently replace their workers and who offer inducements to strikebreakers. “Employers are now effectively empowered to make separate deals with each of their employees to get them back to work one by one . . . .” David Abraham, Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy, 63 N.Y.U. L. Rev. 1268, 1275-76 (1988).}
They timed it beautifully to coincide with the lay-off of 3000 freezing workers in the Southland area, so there was considerable fear for job protection. I’m not saying it was orchestrated, but it certainly would have helped their case. They put a substantial pay raise into the document at a time when people were signing documents with nil rights. . . .

. . . They [the company] controlled a little port down there and they had problems with the stevedores there in the past. So they'd actually brought down individual contracts for that group earlier. And they saw that as working. So that they'd actually seen that on a small scale this approach had worked for them. And so they thought they would do it on a larger scale.

It’s going to be a nightmare for them to administer. There’s several thousand individual contracts, all varying pay rates and God knows whatever else. A lot of them for all intents and purposes are identical and there are certain groups that have the same rates and the rest of it. But as it grows, various workers may say their productivity is better than someone else’s and try a pay raise. All sorts of things can happen and for them to keep control on that amount of bargaining is just phenomenal. So I think they’ve bought a big headache for themselves. They saw it as a way to get the kind of flexibility, cross-skilling they wanted that they were having difficulty getting through multi-union negotiations.614

Even in the face of this situation, some of the Engineers’ members at Tiwai retained a collective contract, but to do so, they had to forgo a pay raise. Furthermore, the union found it difficult to keep in contact with this small outpost. The Engineers tried to maintain a presence on site by visiting the plant and tried to encourage workers to come back. They were helped in this by issues such as pot room asthma which had caused some workers to conclude that the company’s interests were not those of the workers. Others had become interested in the union as a consequence of the information and assistance it provided on issues such as legislative changes to health law. In the new deregulated climate, the government no longer provided universal health care and workers were dependent on coverage provided by their employer. In addition, in the past, unions had helped them with health care problems. The absence of the union meant that there was no other agency they could turn to.615

From the employer’s point of view:

Negotiations were invariably protracted, with all night sittings being not uncommon. They were frequently acrimonious and on some occasions downright rude. Until 1982 it was normal for breakdowns to occur in negotiations with resultant work stoppages. 1982 culminated in the longest

614. Loader, supra note 43. The question of changes in work rules can be a complex one. While increased levels of skills may have an attraction to workers by improving the meaningfulness of their work, it can also have negative effects on job satisfaction and productivity. Multi-skilling of the sort introduced at Tiwai often has cost cutting as its purpose. For examples where such programs led to lower wages and were also used as a means of de-unionizing, see Byrne, supra note 139, at 128.

615. Loader, supra note 43.
strike in our history (8 days) and was the first occasion when a return to work occurred with no additional concessions having been made by Management.

It is also the last strike to have occurred despite many threats over the years.\footnote{Mark, supra note 609, at 3.}

Management concluded that the workforce was dissatisfied with the existing agreement because the 1990/1991 agreement required three ratification meetings over two months.\footnote{Id.} Management stated that its frustrations were founded in provisions which restricted its ability to unilaterally determine whose work would be done and which then led to discussions as to their application. From management's point of view, "the senior delegates exploited this situation ensuring that much time was lost in discussion and that maximum frustration was caused to our engineers and supervision who were anxious to have the work proceed. These situations did nothing to create good working relationships and in fact generated and reinforced deeply felt feelings of hostility."\footnote{Id. at 4.}

According to NZAS official George Mark, the ECA seemed to be "a visionary approach which allowed people the opportunity for choice and a more appropriate means of being rewarded in accordance with their work effort."\footnote{Id. at 5.} Mark concluded that it was in the company and workers' interest to engage in direct negotiation.\footnote{Id.} He prepared an education package to give to the workers and had the company managers meet with all workers. Marks says: "During the discussions considerable interest was expressed in the possibilities surrounding individual contracts of employment."\footnote{Id. at 6.} He then decided to move to "a single status workforce."\footnote{Id. at 7.} This would require seeking individual employment contracts.

To reach this goal, the company commenced a targeted campaign.

A letter was prepared and signed personally by me which was mailed to each employee's home. This letter was personalised with the use of the employee's first name (or indeed nickname in some cases) and dealt with the issue of union membership, the state of the aluminium industry and the Company's wish to pursue the option of individual contracts of employment.\footnote{Id. at 8.}

According to Mark, there was no response by workers for a week and "[t]hen suddenly the floodgates opened and replies started to pour in."\footnote{Id. at 9.} The contract the company offered the individual was a standard letter of
offer which had been used with staff employees. Managers met with individual workers with the contract to set all terms except salary. Negotiating individual salaries took from fifteen minutes to two hours each, with all agreements concluded after three months. Mark claimed the union stated that it did not want to renegotiate the collective contract. Other observers tell a different story. In July 1991, New Zealand Aluminium Smelters, Comalco, announced it would cut its Tiwai Point workforce by 350 and that it would put the 1000 remaining workers on individual contracts in order to create flexibility in work and enable management to reward workers based on merit. The Engineers' members had voted to pursue a collective contract. The employer met with the unions to negotiate a composite agreement. Rather than continue meeting with the unions, however, management sent letters to all waged workers saying it wanted individual contracts and to make them all salaried workers. Shortly thereafter 98% of them agreed to individual employment contracts.

The company was able to attain this dramatic turnaround by having offered workers a deal that was too good to refuse: a special superannuation scheme which had before been confined to management, medical insurance, reimbursement of telephone costs, subsidies for children's education, fifteen days sick leave, four weeks vacation leave to be paid at the rate of five or six weeks, and thirteen weeks long service leave after fifteen years. In addition, workers were given pay increases from $NZ5000 [$2700] to $NZ9000 [$4860]. In exchange, workers were put on salary and lost penal rates. Wages were to be reviewed annually, and no increases were guaranteed. These changes were accompanied by elimination of job demarcations and other restrictions, all of which had resulted in large gains in productivity. An important aspect of the factors that motivated workers was not only the

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625. *Id.* at 8.
626. *Id.* at 9.
630. *See id.*
632. *See id.*
633. *See id.*
634. *See id.*
635. *See id.*
636. *See id.*
carrot offered but also a stick in the form of the announcement of 150 redundancies to begin soon. Those with the shortest service felt incredible pressure to sign or face layoff.\footnote{637}

Although agreement was reached as a consequence of awards, not of threats, once again it became evident that freedom of contract and bargaining seemed to offer less than advertised for workers. All had contracts identical in every respect, with the exception of the wage clause, thus not delivering the individuality ECA proponents had argued was needed. Although collective in their terms, workers had no collectivity to give them strength in negotiations. All contracts were offered to workers on a take it or leave it basis.\footnote{638} Thus, workers at Tiwai had no real involvement in the process of governing their worklives.

The loss of Tiwai created other problems for the Engineers. It set a precedent in the aluminum industry for individual contracts and was taken as a model by some companies. Tiwai claimed that although their wage expenses were higher, they had achieved greater flexibility as a consequence. On the whole, though, the Engineers have fared relatively well under the ECA, having lost only about 10% of their membership.\footnote{639}

4. The Manufacturing and Construction Workers Union

The Coachworkers have tried to pursue a radical stance toward bargaining under the ECA. In the words of Graeme Clarke, their General Secretary, this means doing what the members want. This mandate can be interpreted rather liberally. As mentioned earlier, one aspect of this was setting up a union loan fund.\footnote{640}

At Mitsubishi, the Coachworkers were one of eight unions which in the past had bargained through one spokesperson, Graeme Clarke, for a composite agreement. The company was willing to pursue bargaining only if there was one agent speaking on behalf of all the workers. This led to a complex and rancorous process of sorting out how the agent would be chosen.\footnote{641} Eventually individual workers, regardless of their union affiliation, designated the Coachworkers as their representative for bargaining purposes and set internal ground rules that decisions would be made by binding majority vote. All union meetings to discuss the employer's offer were to take place together to prevent divisiveness which could weaken the unions. The resulting bargaining structure is one bargaining unit to which workers can elect bargaining representatives annually. The union that wins the election becomes the bargaining agent on behalf of all workers at the plant for

\footnote{637}{Johnstone, supra note 629, at 6.}
\footnote{638}{Herbert, supra note 610, at 6.}
\footnote{639}{Loader, supra note 43.}
\footnote{640}{Clarke, supra note 68; see supra text at note 171.}
\footnote{641}{Mitsubishi, M & C WORKERS NEWS, June 1991, at 3.}
the purpose of negotiating the contract. In that respect it operates as though it were a single union.642

The contract is enforced, however, by the worker’s individual union. No union is a party to the contract, including the designated bargaining agent. The only parties to the contract are the employees and the company.

There’re seven unions in the plant. And it is difficult to keep them all in line. What I want to aim for is at least to have one union covering the production workers who, historically, have been split into three unions. Then the groups like drivers, or trades persons, or cleaners, their conditions are somewhat different to the production workers, so what they do doesn’t really adversely impact upon the production workers. What I’m trying to do is to establish a monopoly of coverage over the production workers. We’ve got six Engineers left to get and about 12 storemen, which are the other union in the production workers’ area.643

Although creating one bargaining unit was in the interest of both workers and unions at Mitsubishi, it was also very much in the employer’s interest. Graeme Clarke observed that having one bargaining agent and one unit meant that one group of workers was not able to use any special bargaining power it might have to whipsaw the employer into granting concessions based on their important skills.

And then there’s the other factor which is the traditional lines of demarcation. If you can destroy the traditional lines of demarcation amongst production workers, then there’ll be less down time, less rigid job definition, and, particularly in low levels of build, people will be more productive. So that what’s happened is that the Store’s Union has tended to disappear. . . . [T]heir line runners who feed the lines with components have tended to start doing a bit of production work just to fill in their days, because the volumes are so low and that’s more efficient.644

On January 15, 1992, Mitsubishi Motors locked out 500 workers at its Porirua assembly plant to pressure them to sign a collective contract.645 This was one day after the return to work from the holiday shut down.646 When they had returned to work, the company told them to accept one of two contracts or face a lockout.647 The contracts offered either a renewal of the collective employment contract with no raise or a 2% raise with a cut in sick leave from ten to five days.648 The workers had voted to reject both contracts.649 Instead, they had offered to accept a contract based on a one

642. Clarke, supra note 68. This bears some similarity to the bargaining procedures set up in the American automobile industry in 1934-1935 by President Roosevelt. Cf. Brody, supra note 96, at 38.
643. Clarke, supra note 68.
644. Id.
646. See id.
647. See Id.
648. Roth, supra note 467, at 126.
649. Barber, supra note 645, at 1.
year rollback of the sick leave, with the terms of the contract remaining the same.650

The company justified its actions publicly on the ground that it needed one collective contract with one set of conditions.651 However, it appears that the workers were prepared to negotiate such a contract. The reason for the company’s desire to remove the sick leave was given various justifications. On the one hand, the company claimed that leave had been abused, and it wished to stem this abuse by cutting back on the amount of leave available.652 On the other hand, Graeme Clark, the union secretary, denied the company had raised sick leave abuse as an issue; he claimed the company had told him they wanted the change because of economic conditions and manufacturing costs, and to keep their conditions equal with those of other New Zealand car manufacturers.653

The lockout lasted one day and allowed the workers to have a day in the sun on picket duty. At 3:30 pm that day, the company contacted Graeme Clarke to resume negotiations at 4:00 pm. At the fifteen minute meeting, the company offered to accept the union’s terms.654 The terms of the return to work, as reported in the papers, were that the workers would get a 2% pay increase but would have their sick days cut from ten to five days, for a period of one year.655 The settlement thus met the problem of an industry downturn, while leaving the base terms intact.

The Coachworkers version of this confrontation is different from the public story presented in the newspapers. According to the M & C Workers News, the other unions at Mitsubishi finally agreed to conduct bargaining based on its proposal that there would be an annual election of a bargaining agent who would then be authorized by each individual worker.656 This would mean that the plant would be covered by one collective contract. Management then sought a concession reducing sick days from ten to five, excluding temporary and casual workers from coverage, reducing site delegates from sixteen to six, deducting 12.5% of union fees as a collection fee, using the term “employee organisation” as opposed to “union,” and giving no raise.657 Employees voted to reject these demands, to allow the agreement to expire, and to move to individual employment contracts to preserve current conditions.658

652. See Barber, supra note 645, at 1.
653. See id.
654. Unity, supra note 650, at 5.
657. Id.
658. Id.
The negotiations basically got down to a couple of key concessions the employers were demanding and our insistence on having some kind of wage rise for the year.

The employer in the beginning of January threatened to lock out, and we had a crucial meeting of the delegates. We stopped all the officials from voting, and allowed only the site delegates to vote, and we carried a vote 8-4 to fight the lockout. The employer went ahead with the lockout, and there was nothing on the news that day, because it was during our Christmas holidays really. We had all the news media, and they were asking people: "How long are you gonna be out." And they said: "Ah, these things normally go about three weeks." And the employer thought that the threat of a lockout would bully people, but really that's our best situation to be in—where the employers lock you out, rather than going on strike. And when the news got back to the employer, they caved in and agreed to settle on terms that were offered prior to Christmas.

A lockout's good from our point of view, because if we go on strike, we have no right to the unemployment benefit and we must look after people ourselves, whereas if we're locked out, apart from the standdown period, people are eligible for the unemployment benefit. So, when the employer locks you out, the unemployment benefit for many people is not that much different from what they earn. And, so, it's far easier, economically, on people to be locked out. The employers haven't locked us out since 1974. They've always been very careful to make sure that we were on strike, but they felt that, because other people were being locked out and being bullied into accepting concessions through lockouts, that if they bullied us, that we would knuckle under and accept.

And, of course, they hadn't calculated that they were dealing with people that were organized and who were going to fight and who said: "Well, if we do this this year, we'll be doing it every year. So, this is the year, we have never given concessions and now is the time to draw the line." And that's what they did.

And the lockout lasted a day, and it was an ignominious defeat for the employer, although it possibly might not have been represented that way in the media, through sheer misfortune of timing, but they didn't get what they wanted. They had to back off.659

At its April 16, 1991 National Conference, the MCWU voted to change its membership rules to include anyone who wished to join. There were certain exceptions, for example, if the worker was covered by a union which did not try to raid the MCWU, then it would not allow the worker to join without the other union's consent.660 After the Clerical Workers Union dissolved, the MCWU decided to create a Clerical and Administrative Workers Council.661 The MCWU also extended an invitation to represent

659. Clarke, supra note 68.
the clerical workers employed by other unions who were left with no one willing to represent them after the Clerical Workers Union disbanded.662 These employees were likely to be particularly vulnerable if the CTU went forward with its plans to consolidate all unions into eight sector unions. The MCWU saw its status as a non-affiliate as providing greater independence to represent these workers’ interests.663

Even though the Coachworkers opposed the Engineers, their approach to problems was often quite similar, even though their motivation differed. The Coachworkers advocated standard employment contracts in each industry to prevent employers from whipsawing union working conditions.664 The Engineers sought a standard contract for this reason but also as a means of promoting training and achieving other goals.

In the face of cutbacks which were so easily forced on workers under the ECA, the MCWU took the position that they had a duty to oppose all concessions “because, if we do, it only puts pressure on others to do the same. Ultimately we’ll get all the jobs we need when we match the Indonesian rate of 28 cents an hour.” As evidence of this, the union pointed to statements by Brierly’s chief executive, Bruce Hancox, who said “‘Capital is not interested in a moral society, ethical rights and equal distribution of wealth, or income, or fairness. Capital is interested in getting a return.’ . . . [Hancox continued:] ‘That’s criminal in every sort of moral sense . . . I know all that. But everybody else is doing it, and the competitors we have in this business are doing it, so we’re doing it.’”665

A radical approach to collective bargaining, while conducive to maintaining a high level of member involvement, does not mean that the Coachworkers have been invulnerable to the impact of the ECA. The Coachworkers too have experienced losses under the ECA.

Our main strategy for keeping members is to do what we’re told. It doesn’t always work, because we had one small plant where they’d asked us to stay away for a month and come back when the work level was expected to increase, and when we came back at the end of the month and found that the boss had offered them 2% for a collective contract that removed all union rights, and they got one or two to sign them and then the rest had to follow suit and you wound up—we don’t know yet—but we’ll probably wind up with a de-unionized site. There was only nine people on the job. Doing what you want, what the members want doesn’t always work, but in the main it does.666

662. *Id.*
663. *Id.*
666. *Clarke, supra* note 68.
5. The NZEF / NZBR Reaction to the ECA

As soon as the ECA was enacted, missionaries for it spread out around the world to proselytize for it. NZEF Director General Steve Marshall described his visit to Geneva:

Significant interest was shown at the Geneva [ILO] Conference in New Zealand’s economic and labour relations reforms—in fact, we’re seen as a world leader in the reform process, particularly with our emphasis on freedom of association and choice, the non-interventionist policies of the current and previous governments, and the non-prescriptive nature of our labour relations.667

In late October 1991, it was disclosed that an advertisement had been running in Australia touting New Zealand as the land of cheap labor to entice Australian firms to move to New Zealand.668 The advertisement claimed that the ECA had the “effect of reducing wages”, and that employers could cut wages by up to 25% without having to pay penal rates or pensions.669 The advertisement said:

The bottom of the world has just become a top proposition as a manufacturing base. Right now there are many good reasons to consider relocating your manufacturing base in New Zealand. The recent Employment Contract Act abolishes industrial awards, leaving employers free to negotiate terms of employment for a labour cost saving of up to 25%.670

Unions were quick to point out the incongruity of such actions with National claims that the ECA’s purpose was to promote doing things better, not doing them more cheaply.671

In 1992, the State of Victoria in Australia enacted new legislation and orders that resembled the ECA. Collectively, this legislation provided all industrial awards would expire March 1, 1993; required workers to move to enterprise agreements—either collective or individual; placed jurisdiction over industrial disputes in the common law courts; abolished penalty and holiday payments unless agreed to by employers; and expanded the definition of vital industries so that strikes or threats of strikes became more widely punishable.672

667. New Zealand Employers Federation, supra note 595. In fact, Victoria, Australia did enact similar legislation within the year. See infra text at note 672. The ILO, contrary to these rosy predictions, found that the ECA violated various conventions.

668. See Jason Barber, NZ Touted as Land of Cheap Labour, The Dominion, Oct. 30, 1991, at 1. The advertisement also lauded New Zealand’s depressed economy as creating attractive opportunities. Id.

669. Id.; Roth, supra note 281, at 324.

670. Bosses Law Exposed, supra note 665, at 1. Missing from this praise for the ECA was any mention of the impact on the workers. “In fact, this very silence on the subject of workers exemplifies the traditional attitude of management that labor is simply a cost of doing business and so should be reduced as much as possible.” Byrne, supra note 139, at 20.

671. Barber, supra note 668, at 1.

C. The Costs of the ECA

Many would see the terms in which the ECA was advanced as full of irony. The purpose of the ECA was defined by its proponents as promoting individual freedom, commonly held economic values, and the improvement of the lot of the individual employee materially and in his or her relationship to the employer.\textsuperscript{673} The reality as experienced by most working New Zealanders has been far different. The ECA prefigured a rejection of much that formed the values of most New Zealanders. This rejection could be seen in the language it employed. Replacing terms commonly employed such as industrial relations, worker, and union in favor of labor market, employee, and association was not merely of semantic importance. The ECA profoundly reordered those relationships.\textsuperscript{674} The substitution signaled a change from the collective to the individual and from communal or humanistic values to economic and quantitative values. Of the impact of the ECA, one of the foremost New Zealand labor experts commented:

The broad parameters of life under the Employment Contracts Act were already apparent in its first six months of operation—a substantial, perhaps irreversible fall in trade union membership and collective bargaining coverage, the continued erosion of employment conditions and employment security, a growing sense of employer strength and (in some quarters) militancy, and a more conflictual and antagonistic approach to industrial relations rather than the idealized picture of harmonious co-operation sketched by its advocates. Additionally, a more legalistic approach to industrial relations has emerged, accompanied by a new group of private bargaining agents, who may be an important force resisting future proposals for changes to present bargaining structures.\textsuperscript{675}

1. The Costs for Workers

The month of May 1992 became a period of introspection with respect to the ECA. One wag suggested a regime of efficiency and productivity be imposed on parliament.

In keeping with the current attitude on remuneration matching the productive output, and to be consistent with the provisions of the Employment Contracts Act, I suggest ... a panel of citizens, selected at random could negotiate a suitable emolument package with each MP, reflecting the value of their contribution and success with regard to the format on which they were elected.\textsuperscript{676}

\textsuperscript{674} See id.
\textsuperscript{676} K. Ingram, Letter to the Editor, LISTENER & TV TIMES, May 18, 1992, at 10. This was matched by another letter of the same era in which the author claimed that he had enjoyed stories of knights who had ridden out to succour the weak, the poor and the needy. "From the account of the policies emanating from the latter day Roundtable in New Zealand ... one sees that little has changed—
Among the various bargaining disputes during this period, Ross Martin, the highly paid managing director of Wellington City Transit, managed to stand out as an example of the sensitivity some employers displayed to their employees. On hearing a suggestion that management take a cut in pay at the time they were demanding wage cuts of 17-18% from the drivers he characterized it as "‘a strange little gesture’ which would produce ‘damn all’ savings." 677

Facing such statements were workers who were suddenly stripped of the union’s skirt. Coral Shaw of the Air New Zealand workers explained what this meant to an individual worker.

It’s all very well for a member of a major union to say “No, I won’t accept that, it’s wrong, unfair, or unjust”, and to say that with some confidence, or to not even have to say it directly to the employer but through his agent. But now we’re in a situation where workers are without their strong union backing, and are face to face eyeballing the employer. Suddenly the balance of power is weighted very much in favour of the employer. 678

Workers who had no union protection fared even worse. In October 1991, one worker who had been made to work without pay for eight months as a construction worker tried to bum down his employer’s home. 679 He was supposed to have been employed for $NZ2.50 [$1.35] per hour. 680 Instead of paying these wages, the employer claimed that he had given the employee in kind payment, including tools to perform the work, a bicycle, a motorcycle, and work shoes. 681 The employee was convicted for arson and the theft of NZ$970 [$572] from the business. The employer stated that he certainly would not be reemploying the worker, since he said he had really “‘stuffed it up for himself now.’” 682

Just prior to the enactment of the ECA, Birch had sent a “householder’s pamphlet” which stated that changes in collective contract terms could come about only if both employer and employees agreed to the change. 683 The application of partial lockouts demonstrated that this claim was accurate at best only in a technical sense. Employers were allowed to suspend the contractual terms until employees agreed to those the employer

except the word succour is spelt differently.” Peter Henderson, Letter to the Editor, Listener & TV Times, June 1, 1992, at 10.


680. Id.

681. Id.

682. Id.

had suspended. In practice this distinction meant little. In addition, em-
ployers developed the practice of making offers which were “first, final, and
non-negotiable,” and the employee had to sign or lose their job. The news-
papers reported numerous stories of workers put to these choices.684

The ECA made wage cutting the easiest option when faced with finan-
cial difficulty, rather than pursuing the slower more fundamental process of
change and accommodation necessary to achieve industrial reform.685 In
other words, the ECA encouraged short-term goals over longer term plan-
ing. As is apparent from the sorts of contracts employers have negotiated
and the sorts of offers they have extended, wage cutting most often did not
come in the form of hourly wage rates. Rather, it came from the elimina-
tion of penal rates, including overtime, shift premiums, and weekend pre-
mium pay. Given this, there was a great deal of interest and speculation as
to how overall wages would fare.

Apart from wages, one study concluded that workers were required to
engage in more unremunerated work than before, thus lowering money re-
ceived for time worked. Examples of the unremunerated activities included
para-work, such as ‘time collecting earnings, unpaid overtime, unpaid time
‘on call,’ travel time, job search time . . . ’.686 Rankin noted that workers
were expected to work harder or faster without an increase in pay and also
had to cover for laid off employees or increased workloads that, in the past,
might have led to the hiring of a new worker. “Most of these features are
symptomatic of falling market-clearing wage rates at a time when people
cannot afford a reduction in their wage incomes. An increase in work inten-
siveness is an increase in the quantity of labour supplied . . . ”687

On May 7, 1992, the Department of Labour released wage figures.688
They showed workers experienced the following:

684. In testimony before an “alternative select committee” one worker told of being told he must
sign an agreement with a paycut from $NZ190 [$112.10] to $NZ110 [$64.90] or be fired. When the
worker asked to consult with his union, he was fired.

Another worker was hired as a trainee manager in a fast-food outlet. Two weeks later her
employer presented her with a contract to sign within half an hour.

“When I tried to negotiate, I was told to take it or leave it. He said he would hold pay
owing until I did,” she said.

Her punishment for being the only one of 15 workers who resisted the employers’ offer
was to be sacked on the spot.

subject of partial lockouts is explored in Ellen Dannin & Clive Gilson, Impasse Tactics Under the NLRA
(U.S.) and the ECA (N.Z.): The Implications for Collective Bargaining Reform (unpublished manu-
script, on file with authors).

685. See Rebecca Macfie, Survey Reveals Employers Sticking to Status Quo, NAT’L BUS. REV.,
Apr. 16, 1992, at 27.
686. Rankin, supra note 194, at 229.
687. Id. at 230.
688. See Wages Static for 50% of Workers, PRESS, May 8, 1992, at 6 [hereinafter Wages].
These figures have to be looked at with caution for a number of reasons. First, they were based only on contracts covering 5%, or 60,400, workers because the study relied only on contracts which were required to be filed with the Department—those covering worksites of over 20 workers. Second, although in April 1992 the preliminary Department of Labour figures had shown most contracts to have no wage increase, when the official figures were released, this group was collapsed into a band of not less than a 1% increase, putting a more optimistic spin on the results. Furthermore, the study did not examine the impact lost or lowered penal rates or other concessions had on total wages, confining its examination only to stated hourly or weekly wage figures. This is a significant omission since the data showed a rush to remove just this sort of work restriction: 98% of contracts had no weekend restrictions; although 98% retained penal rates, of which 10% applied to weekends only, 9% to weekdays and weekends, 21% to Saturday and Sunday, and 18% to weekdays. As a consequence, the figures are not particularly meaningful except that they can be fairly seen as presenting the best case scenario.

There were a number of other problems with measurements of wages and unemployment. As in the United States, a number of new jobs were created in this period; however, they were part-time and not easily fit into the classification scheme of employed or not employed. One problem with assessing the impact of the ECA was the National government’s elimi-
nation of information collecting functions. The lack of meaningful information allowed the National Party to make extravagant—and at times conflicting—claims about the early impact of the ECA. Harbridge described the difficulties he encountered in trying to arrive at meaningful figures, even after extensive and creative attempts to find all extant employment contracts.

Determining how wages have moved under the Employment Contracts Act presents all kinds of difficulties. First, there is a very large number of workers who appear to have no collective employment contracts in place and about whom we can make no estimates of wage change. Second, 208 contracts in our sample, covering 22,000 individuals, don’t contain any wage rates. . . . Third, there have been obvious restructurings of the terms of employment, and “trade-offs” between certain conditions (primarily penalty rates) and wage increases. . . . Fourth, it is important to compare “apples with apples”, and thus, the wage increase needs to be considered both as a raw and an annualised increase. . . . In many cases, while we can identify the raw increase, we have been unable to annualise the increase as the contract contains no specific expiry date. . . . Fifth, we have had considerable difficulty identifying the contract’s parentage under the old system. In some cases, there are genuinely new contracts where no comparison with old rates is possible.

Furthermore, there had long been a “tradition” in New Zealand of cyclical emigration during times of recession. This emigration by those who were underpaid or unemployed had the impact of lowering unemployment rates and possibly skewing any attempts to interpret the operation of wage setting and unemployment under the ECA.

Thus, in late 1992 Bill Birch could claim that wages had increased 3% since the introduction of the ECA based on the findings of the May 1992 Quarterly Employment Survey. The accuracy of the figures seems suspect. Harbridge found support for anecdotal information that there had not

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697. From the 1890s until the ECA, the government collected data on bargaining outcomes and made them a matter of public record. This made it possible to analyze bargaining trends.

A direct corollary of the individual and contractual thrust of the legislation, is the Government’s decision to keep no public record of collective bargains. Confidentiality of settlement outcomes has become an important aspect of negotiations. While the Government has determined that there will be no public record of collective bargains, it has decided that for “analytical and research” purposes, employers who enter into collective employment contracts that cover 20 or more staff should forward copies of those contracts to the Secretary of Labour.

Roper, supra note 483, at 8.

698. Harbridge, supra note 551, at 118-19. These difficulties left Harbridge with 119,000 workers of the 193,000 originally in the sample. Id. at 119.


700. Harbridge, supra note 551, at 113. Harbridge found numerous flaws in the QES statistical methods, in particular, based on its tendency to fail to account for changes in the composition of the workforce and the impact this has on wages. Id. at 122-23. Several key indices of wages did not include those of workers under 20. See Bob Edlin, Making Youth Rates Pay, SUNDAY STAR, Feb. 13, 1994, at D4. During this period, 32,700 jobs were lost. See REPORT OF THE MINORITY OF THE LABOUR SELECT COMMITTEE ON THE INQUIRY INTO THE EFFECTS OF THE EMPLOYMENT CONTRACTS ACT ON THE
been large increases in wages. His more rigorous study found mean increases in raw wage changes from 0.1% to 0.6% and of annualised wage changes from 0% to 0.3%. These averages reflected wage changes from a decrease to gains of over 20%; however, over half those in the study received annual changes from a decrease to an increase of under 1%. Thus, Birch could find economic support to talk down wages and expectations when it suited him, as in dealings with the public sector unions.

In late 1993, the NZEF could make sanguine statements that this was "a time when the Employment Contracts Act has seen more employers than ever before talking directly to their employees, to the benefit of all parties. It has not been an overnight change, but the change is happening and the impetus is likely to increase." However, other evidence suggested that the reality was not quite as positive. For one thing, an analysis of employment contracts found that those contracts negotiated by union or other employee organizations contained better terms than those negotiated by workers. Indeed, a significant number of contracts were found in one study that contained no wage rates at all, suggesting that whatever dialogue occurred between employer and employee it did not deal with wages.

On September 21, 1993, the Labour Select Committee issued Minority and Majority Reports based on an investigation into the impact of the ECA. The Minority Report found that there had been a serious erosion of basic rights and exploitation of workers. This included cuts of as much as 50% in pay, being employed at no pay, and a refusal to provide written contracts of terms. It also found that there was no real negotiation: in most

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New Zealand Labour Market 20 (Sept. 21, 1993) [hereinafter Report of the Minority of the Labour Select Committee], thus making this oversight quite significant.

701. Harbridge, supra note 551, at 119-20. Another study found the following, calculated in 1990-1991 dollars, for those between the ages of 20-24:

<table>
<thead>
<tr>
<th>Year</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
</table>

Rankin, supra note 194, at 226.

702. See Harbridge, supra note 551, at 113; see also Whatman et al., supra note 38, at 62-64.

703. New Zealand Employers Federation, supra note 233, at 205.

704. Roth, supra note 689, at 267.


706. Cuts from $NZ7.16 [$4.22] to under $NZ4.00 [$2.36] were found, particularly in work performed by women. Report of the Minority of the Labour Select Committee, supra note 700, at 3. In addition, the percentage of union members who were women declined from 50% in 1991 to 47% in 1992. Harbridge & Hince, supra note 160, at 357. The majority noted evidence of workers under twenty years being paid $NZ1.50 [$0.89] per hour, being paid less than older colleagues for the same work, or being paid nothing on the grounds the worker was being trained. Report of the Labour Committee, supra note 419, at 32.


708. Id. The Majority report also noted:

A much repeated statement by employees was that the Act has given too much power to employers. Employees feel powerless to negotiate suitable conditions if employers refused to
cases, employers insisted and workers acceded for fear that the loss of the job would leave them with no access to benefits and thus without income.\footnote{709}

Among the anecdotal evidence cited by the Minority Report is the situation of a funeral director:

The employer issued individual contracts of employment which in his case meant a reduction of $NZ2500 ($1475). He and another worker held out for a collective [contract]. A week later the employer confronted them and criticised their work and told them their attitudes had to change and if not that they should find other work. The employer refused to sit down and negotiate a collective. He told the employer he would take a personal grievance and the employer replied “Take me to court, you won’t win, don’t forget you have to come back here and I will make it very difficult for you both”. His colleague was dismissed in January.

In holding the dismissal was justified the [Employment] Tribunal simply noted that the perceived difficulties over negotiating the contract were normal.\footnote{710}

Stories of gross inequity surfaced, particularly involving youths who were unprotected by any minimum wage law. As mentioned earlier, one employer hired students at $NZ4.00 ($2.36) per hour, refused to pay them on the grounds they were on trial, then released them, and finally replaced them with new students on a trial basis.\footnote{711} There were other stories of
youths being hired at rates of $NZ1.50 [$0.89] per hour.\textsuperscript{712} Data on wages actually paid to youth were notoriously difficult to find, particularly for those youth workers not covered by collective employment contracts. For those covered by collective employment contracts, assuming they were paid the youth rates set out in the agreements, significant numbers of youth ages 16 and 17 were paid as little as 25\% of the adult contractual rate.\textsuperscript{713} In early 1994, the National government decided to impose a minimum youth rate of $NZ147 [$86.73], or 60\% the adult rate.\textsuperscript{714}

As the Labour Department’s Ralph Stockdill had predicted when the ECB was being drafted, one problem was that employers were under no obligation to recognize the employee’s designated representative.\textsuperscript{715} This was accompanied in some situations by employers’ establishing their own company unions.\textsuperscript{716} The Minority Report found that “employers only respected workers’ choices where they had a far-sighted strategy or good relationships before the Act.”\textsuperscript{717} Practices such as these appeared to flourish, at least based on the anecdotal evidence, either because they were actually legal or because the environment did not constrain them. In its March 1994 report, the International Labour Organisation concluded that the ECA failed to provide the means to ensure employers met their obligations to recognize the representatives of their employees.\textsuperscript{718}

The Majority Report concluded that raises had been given to compensate for lowered overtime rates and penal rates, resulting in no drop in pay received; however, to achieve those amounts, workers in some cases put in

\begin{itemize}
\item \textsuperscript{713} Harbridge & Lane, \textit{supra} note 705, at 275.
\item \textsuperscript{714} Brent Edwards, \textit{Gov’t Split on Minimum Youth Rates}, \textit{EVENING POST}, Feb. 9, 1994, at 2. Ruth Richardson, now out of Cabinet, condemned the move as a step backwards. \textit{Id}.
\item \textsuperscript{715} \textit{REPORT OF THE MINORITY OF THE LABOUR SELECT COMMITTEE}, \textit{supra} note 700, at 6-8. In addition, representatives were often stymied by employer requirements that they have specific authorization for each action. \textit{Id}. at 7. Rosslyn Noonan of the NZEI explained that
\begin{quote}
under the Employment Contracts Act, as you know, there are appallingly, essentially irrelevant, but intended again to make a union’s job extremely difficult, there are technical requirements if you were to bargain for people. It’s not sufficient that people are members and paying a subscription fee. We have to have separate bargain authorities from them and then within three months of the negotiation starting, we have to get individually signed ratification forms. It is just a nightmare task. Again, we have done it, relatively speaking, incredibly well, but the resources that have had to go into achieving that and it is still far from perfect. We are in the process now of following up, so lists are going out that say “these are the members and here’s our record of who signed bargaining authority. Here’s our record of who has signed ratification forms, and we need to fill in the gaps.”
\end{quote}
Noonan, \textit{supra} note 141.
\item \textsuperscript{716} \textit{REPORT OF THE MINORITY OF THE LABOUR SELECT COMMITTEE}, \textit{supra} note 400, at 7.
\item \textsuperscript{717} \textit{Id}.
\item \textsuperscript{718} \textit{INTERNATIONAL LABOUR ORGANISATION}, \textit{supra} note 268, at ¶ 726. The president of the NZEF dismissed the importance of these findings and the ILO’s factfinding visit to New Zealand based on the ILO’s bias in favor of unionism. Richard Tweedie complained: “When a huge, international body like this has the ability to interfere in the operations of a free, democratic country, which acts according to the rule of law, perhaps the time has come for a complete re-evaluation of its purpose and reorganisation of its structure.” \textit{ILO a Blot on Economic Horizon—Employers}, \textit{THE DOMINION}, May 19, 1994, at 12.
\end{itemize}
longer hours for the same total pay.\textsuperscript{719} In addition, in some cases, rates set forth in agreements did not reflect reality. Some employees told how they received their pay as part of the hourly rate only to find that they had no paid holidays, even though this was illegal.\textsuperscript{720} The Majority Report found that workers under twenty years of age were being paid very low wages, evidence which the majority both dismissed as anecdotal and suggested needed more study, and noted that it was clear employers and employees did not understand their rights and responsibilities under the ECA.\textsuperscript{721} The Majority also found evidence that the ECA was having a troubling impact on workplace relations.

[E]vidence received has also shown that some employers are using the removal of compulsory unionism as a way to tell employees less than before about their rights. Witnesses said that, especially in companies where the employer has actively encouraged staff to resign from a union, employers often impose contracts without negotiations. Sometimes these contracts contain scant information about employment conditions. Many witnesses, particularly from service and retail industries, said employers do not communicate with them about their contracts and frequently intimidate employees into signing contracts with the message that they will be dismissed if they do not.\textsuperscript{722}

The ECA appeared to have a different impact on women and men. Women received better leave conditions than men under the ECA; however, men received higher wage increases,\textsuperscript{723} although all increments were so small that the difference seems hard to characterize as significant. In addition, men tended to retain overtime and shift rates,\textsuperscript{724} a significant component of total wages received.

A major part of the propaganda for the ECA was based on the claim it would generate new jobs. From May 1991 to November 1992, 32,700 full-time jobs were lost.\textsuperscript{725} The Majority Labour Committee Report admitted that as of late 1993 there had been no increase in jobs but expected there would be increases since “there was considerable evidence tabled showing that companies are now in a stronger financial position because of increased

\begin{flushright}
\textsuperscript{719} \textit{Report of the Labour Committee, supra note 419, at 10.}
\textsuperscript{720} Bailey, supra note 554, at 5.
\textsuperscript{721} \textit{Report of the Labour Committee, supra note 419, at 7, 19. The Majority report also noted arguments against legislating a minimum wage for those under twenty based on a number of factors. These included the need for the young to work even at very low wages, the benefits of gaining job experience and self-esteem by working, the needs of business to employ young workers who might need training at lower wages so that businesses could expand at a lower cost and eventually establish more permanent positions. Id. at 32.}
\textsuperscript{722} Id. at 20.
\textsuperscript{723} Hammond & Harbridge, supra note 91, at 27; see also Whatman et al., supra note 38, at 62-63.
\textsuperscript{724} Hammond & Harbridge, supra note 91, at 27-28.
\textsuperscript{725} \textit{Report of the Minority of the Labour Select Committee, supra note 700, at 20.}
\end{flushright}
productivity and competitiveness obtained under the Act." In addition, although there was GDP growth in 1992, a great deal of the growth was attributable to the low the economy had reached earlier, in mid-1991.

2. **The Costs for Unions**

By the beginning of 1992, events had become sufficiently clarified so that it was possible to come to some conclusions as to the impact of the ECA on unions. One cost was evident, first, in the number of unions which survived. A study made in 1993 found the following:

<table>
<thead>
<tr>
<th></th>
<th>Unions</th>
<th>Membership</th>
<th>Density</th>
</tr>
</thead>
<tbody>
<tr>
<td>December 1985</td>
<td>259</td>
<td>683,006</td>
<td>66%</td>
</tr>
<tr>
<td>September 1989</td>
<td>112</td>
<td>648,825</td>
<td>73%</td>
</tr>
<tr>
<td>May 1991</td>
<td>80</td>
<td>603,118</td>
<td>65%</td>
</tr>
<tr>
<td>December 1991</td>
<td>66</td>
<td>514,325</td>
<td>56%</td>
</tr>
<tr>
<td>December 1992</td>
<td>58</td>
<td>428,160</td>
<td>46%</td>
</tr>
<tr>
<td>December 1993</td>
<td>67</td>
<td>409,112</td>
<td>43%</td>
</tr>
</tbody>
</table>

These figures demonstrate a trend to lower numbers of unions and union members even before the enactment of the ECA. The LRA forced unions to amalgamate to meet the threshold number of 1000, thus explaining the figure for September 1989 and also, in part, the figure for May 1991. Declines in numbers of unions thereafter are due to the impact of the ECA on workers and on their desire or ability to join unions. However, the increase in number of unions by 1993 suggests that the ease with which new representatives could be created, or the ECA's encouragement of union schisms, was actually occurring. The declines in union density is not due to the high levels of unemployment, since the method of calculation was based only on wage earners. These data demonstrate the dramatic impact of the ECA, coupled with changes in the economy, on unions. The largest absolute losses were in the wholesale, retail and hotel industries, those represented primarily by the Distribution Unions and the SWF. By 1994, it appeared that the trend to declining numbers of members was slowing: only approximately 20,000 members were lost in 1993.

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726. REPORT OF THE LABOUR COMMITTEE, supra note 419, at 11. The report fails to attempt to draw any connections between higher productivity and persistent high unemployment.


728. Harbridge & Hince, supra note 160, at 355 (1993). The source for data in each time period is different, so this may contribute to some of the changes found.

729. Id. at 353.

730. Id. at 357-58.

731. Harbridge, supra note 551, at 180.
In January, the Labour Department issued a report finding that only half of ninety-five collective contracts had been negotiated by unions. The balance were negotiated by the workers themselves or other non-union bargaining agents. A study of contracts as of November 1992 by Raymond Harbridge generally confirmed the magnitude of the drop in union-negotiated agreements. The Employers Federation response to the report was praise for the impact of the ECA and the sorts of contracts it produced as "practical documents." Director General Steve Marshall stated that the fact that unions were retaining 50% of "market share" was very reasonable. By 1993, however, unions seemed to be regaining "market share." In the private sector, for the 1991-1992 wage round, unions represented 61% of employees in negotiations for collective contracts; in 1992-1993, unions represented 72% of employees.

<table>
<thead>
<tr>
<th>FORMS OF REPRESENTATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>CEC Representation</td>
</tr>
<tr>
<td>Public</td>
</tr>
<tr>
<td>Trade Union</td>
</tr>
<tr>
<td>Individual</td>
</tr>
<tr>
<td>Nominated Group*</td>
</tr>
<tr>
<td>No Bargaining/No Representative</td>
</tr>
<tr>
<td>Other</td>
</tr>
</tbody>
</table>

* Collective representation which does not involve a union.

The 1992 Department of Labour study found changes in bargaining structure. Of the contracts on file, 88% were enterprise agreements, 5% were workplace agreements, 4% were occupational and enterprise agreements, and 1% had no bargaining or representative. The unknown variable in this move is whether the move was an "up" movement or a "down" movement. It seems likely, for example, that middle management removed from a collective settlement and placed on an individual contract may well have received additional benefits as part of that move. On the other hand, media reports over the last year or so have identified many individual workers who have received pay cuts as a result of being required to move to individual contracts. On balance it seems almost certain that there has been more "down" movement than "up" movement for individuals who have been placed on individual employment contracts.

733. Harbridge, supra note 551, at 117. Harbridge notes:
There is no way of identifying at this point what bargaining, if any, has taken place for this group of workers, or whether in fact these workers have any written employment contract at all. Technically these workers have moved to individual contracts in the absence of a collective contract. The unknown variable in this move is whether the move was an "up" movement or a "down" movement. It seems likely, for example, that middle management removed from a collective settlement and placed on an individual contract may well have received additional benefits as part of that move. On the other hand, media reports over the last year or so have identified many individual workers who have received pay cuts as a result of being required to move to individual contracts. On balance it seems almost certain that there has been more "down" movement than "up" movement for individuals who have been placed on individual employment contracts.

Id. It is interesting to note that women appeared to retain close to the 50% of union coverage they had before the enactment of the ECA. Hammond & Harbridge, supra note 91, at 26.
734. See Barber, supra note 732, at 3.
735. See id. at 3.
736. Whatman et al., supra note 38, at 59.
737. Id. at 60.
agreements, and 1% each were industry, regional, occupational, and regional and enterprise agreements.  Harbridge found in November 1992 that 15% of workers in his sample were covered by multi-employer agreements; 20% were covered by single employer/multi-union collective contracts; 60% were covered by single employer collective contracts; and 5% were covered by individual employment contracts. Enterprise agreements also tended to cover all job classifications located in the workplace. In other words, awards and the level playing field appeared to be gone. However, in some instances the award essentially lived on.

A good proportion of the employers surveyed had retained the framework of the old award, often simply translated into individual contracts by the deeming provision of the Employment Contracts Act. Some had adjusted aspects of these individual contracts. There were few genuinely new contracts in Wanganui, rather more in Ashburton and significantly more in Wellington.

The Labour Select Committee Report issued by the majority National members in late 1993 found that employer/employee relations had improved “mainly because of the removal of third party involvement at the workplace where employees and management do not want it.” It noted, rather discreetly, that where unions continued to represent workers, “there was generally a much more healthy relationship between the parties prior to the Act.”

738. Ralph Stockdill, Address to the New Zealand Employers Federation, Table 2 (May 13, 1992) (on file with author). This was confirmed in Raymond Harbridge’s November 1992 study. He found that only 15% of workers in his sample were covered by multi-employer contracts. Harbridge, supra note 551, at 117.

739. Harbridge, supra note 551, at 118. Again, these figures do not include large numbers of workers. They are presumed to be on no specific contract terms. Harbridge overstates his collective employment contract figure by including within it individual contracts which contain the same terms for all employees. Id. Indeed, anecdotal evidence suggested that the vast numbers who fell within the unaccounted for had particularly onerous conditions. SWF organizer Judy Sheppard contended that small employers, the group least likely to have reported to Harbridge and completely absent from the government studies, “do not draw up contracts with workers. They just tell workers ‘these are the conditions’ and they can take it or leave it.” Bailey, supra note 554, at 5. The problem with this survey and the Department of Labour survey was that they were actually focused on a very small proportion of the workforce—those working for larger employers.

740. In November 1992, only 49 of 4000 employers studied had more than one collective contract covering its workforce. Harbridge, supra note 551, at 117.

741. Hector et al., supra note 72, at 337.

742. Report of the Labour Committee, supra note 419, at 8. The data collected by Ian McAndrew and discussed earlier generally confirms this but with far greater detail and rigor. See supra text at notes 493-504. The discussion of unions as third parties suggests an anthropomorphic view of employment based on a small workplace: one person who is an employer and perhaps two or three workers. This iconography is frequently applied to corporations, however, a situation in which the employing entity is so abstract it becomes difficult to say just who is the employer in terms of having the power and right to set policy and determine the nature of the workplace. Even more peculiarly, while anthropomorphizing the corporation as employer, we often make the worker abstract, hiding the human face in statistics about unemployment and the like.

The Committee was confronted with quite a substantial amount of evidence that suggested that some employers were either in breach of certain provisions in the Act, or certainly in breach of the spirit of the Act allowing for freedom of association. . . .

The intent of the Act is to give an individual employee the final right of choice who, if anyone, shall be their bargaining agent. . . . The committee notes that care is needed to ensure that employees' rights under this section are not effectively eroded, and that employers should respect the intention of the Act.744

The Majority Report concluded that unions which lost membership did so for several reasons. Some employees had good relations with their employers and saw union membership and dues as a waste of time and money. Other employees, particularly those at smaller workplaces, had never seen a union representative (thus confirming the urgent need expressed by the Engineers, NZEI, and SWF to increase contact between members and the union). Some unions declined when they lost automatic dues deductions because they could not afford to make periodic collections and workers could not afford to make one annual payment. The Report found that employees who continued membership did so in order to have the security of union representation or to make use of union knowledge, power, and ability "to carry out fully informed, effective negotiations."745

The Majority Report did not include the impact of employer pressures on workers either to resign from or not to join unions as a cause of union losses.746 The Report received evidence that employers had given workers letters of resignation, stating that they would not deal with a union and that any union involvement would mean a contract with inferior terms, and evidence of discrimination against union supporters in job assignments and promotions. However, the Report made little of this evidence.747 Some employers had used stronger pressure, including giving large payments to

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744. Id. at 9.
745. Id. at 25-26. This outcome most likely has important implications for American unions. Studies of American worker attitudes shows that there has been a growth in the number of non-union workers who do not perceive unions as an effective means of securing improved working conditions. Van Wezel Stone, supra note 16, at 582-83. Were Kirkland's wish to move to a law of the jungle granted, it is likely these perceptions would lead to a further union decline.

The results of the Worker Representation and Participation Survey performed by Professors Joel Rogers and Richard Freeman, released December 1994, found that, although 40% of non-union employees "would join unions tomorrow," they are reluctant to do so because 66% think management is strongly opposed to unions and will resist them, including the use of illegal means. Joel Rogers, Talking Union, 259 THE NATION 784 (1994); Workers Want More Influence, 232 Daily Lab. Rep. (BNA), Dec. 6, 1994, at D15.

746. The ILO Committee on Freedom of Association did note violations in this area. INTERNATIONAL LABOUR ORGANISATION, supra note 268, at ¶ 741(f), (g).
747. REPORT OF THE LABOUR COMMITTEE, supra note 419, at 27-28. The IHC wrote to its employees that they could be represented in bargaining by anyone they chose as long as it was not a union representative from the Community Services Union. Id.
those who resigned their union membership and threats of termination.\textsuperscript{748} It is interesting to note that employers who, in the past, had experienced the greatest level of union pressure and who had faced the most aggressive unions were the ones most likely to have consummated a new agreement and for that agreement to be a collective contract.\textsuperscript{749} The McAndrew study also found that in negotiations which involved unions, employers were significantly less able to achieve concessions.\textsuperscript{750}

The ECA created instability for unions in dealing with their members. Unions always had to be concerned that they would lose members should they try to lead into new areas or to use new tactics. Thus, in some ways the ECA—as a result of the peril it created for unions—might lead unions to forego a leadership role and settle for a safer relationship.

One major disadvantage of the ECA has been the greater cost of negotiating under it. The Engineers have found they have had the added expenses of promoting negotiations within multi-employer associations, something the prior legislation provided as part of its basic framework. In addition, the number of contracts to be negotiated and administered has increased dramatically. Before the ECA, the Engineers had 120 documents. One year after the ECA, they had 190.\textsuperscript{751} The Nurses Organization formerly negotiated eight awards but, after the ECA, negotiated seventy-five contracts.\textsuperscript{752}

Conditions under the ECA had also led to an immense increase in the number of grievances filed concerning violations. This had led to a backlog and increased expenses for all parties.\textsuperscript{753}

\section*{3. Costs for Employers and Society}

Some of the losses caused by the ECA are less tangible. It has contributed to long-term social losses by promoting an individualistic philosophy which makes it difficult to foster endeavors that need to be undertaken collectively. Programs which benefit industry and society as a whole, such as training, cannot take place through just one employer. One employer cannot bear the expense, and the single employer will be concerned that if it

\textsuperscript{748} Id. at 28.
\textsuperscript{749} McAndrew, \textit{supra} note 25, at 14. This suggests the validity of the observation that unions play a complex role. "They act as partners and as adversaries of employers, through consent and through coercion; they insist on process, and they provide incentives. In short, they both help to guarantee the existing social order and press to modify it." Abraham, \textit{supra} note 613, at 1274.
\textsuperscript{750} McAndrew, \textit{supra} note 25, at 17.
\textsuperscript{751} Loader, \textit{supra} note 43. These increases also hurt the Distribution Workers. Hector et al., \textit{supra} note 72, at 331.
\textsuperscript{752} \textit{REPORT \ OF \ THE \ LABOUR \ COMMITTEE}, \textit{supra} note 419, at 41. Many of the contracts negotiated by the Public Service Association and Seafarers Union actually contain the same conditions, so that they were spending more time to achieve effectively the same results gained under one award. \textit{Id}.
\textsuperscript{753} Id. at 44-48.
loses skilled workers it has lost its investment.\textsuperscript{754} This was not only theoretical. The number of enterprises which failed to take on the job of training, quality improvement, or other workplace reform grew from 1992 to 1993. In 1993, 51\% of enterprises employing 48\% of workers fell in this category, up from 41\% of enterprises and 33\% of employees the year before.\textsuperscript{755} In 1993, only 24\% of enterprises employing 29\% of employees had met the gap by increasing provisions promoting training.\textsuperscript{756}

Related to this problem for the long-run health of the economy was the ECA’s making it too easy for employers to solve their problems through lower pay and working conditions. In the depressed economy of the 1990s, New Zealand employers focussed on lower rates of pay, rather than on more pressing long-term societal needs, such as modernizing industry. The issue of the impact of the ECA on skills and training is one which must at some point concern employers. A study of New Zealand Nurses Association bargaining with area health boards supports claims that the ECA would cause employers to take a short-term paycutting approach to workplace problems. Management proposals by the area health boards all focussed on lowering wages and eliminating penal rates. Issues such as training, workplace design and reform, and fostering improved employer/employee communication were only part of the union’s proposals. Management rejected them on the ground that they were not part of the negotiations, that management’s focus was on short-term issues, and that “issues relating to consultation with employees are outside this document.”\textsuperscript{757}

The Engineers’ Hel Loader observed:

It actually effectively stops [modernization from] happening because it means employers can take the short side of cost-cutting as opposed to actually having to invest in creating growth and creating a contract or framework for increased skills inducement. They can avoid it because they can just slash and cut, slash and burn.\textsuperscript{758}

\textsuperscript{754} The Australia employer association, the Metal Trades Industry Association, concluded that the ECA had led to a lack of attention to training, quality, service, and the like by employers; rather, employers had focussed on working hours and pay. Coincident with this was a “dramatic decline in apprenticeship” and shortage in skills. O’NEILL, supra note 27, at 5. This conclusion is duplicated in the retail sector, in which employers responded to difficult economic conditions by reducing labor costs through lowering numbers of staff and changing pay rates. Hector et al., supra note 72, at 336, 340.

\textsuperscript{755} Whatman et al., supra note 38, at 70.

\textsuperscript{756} Id.


\textsuperscript{758} Loader, supra note 43. The Labour Select Committee Minority Report found that in some cases employers who had found themselves unable to reach agreement restructured their companies so there were fewer positions. They then offered the new positions to workers on the condition that they accept the inferior terms or be laid off. The report concluded: “We do believe that the Employment Contracts Act provides a cop-out scenario for poor management in that it can disguise its own organisational deficiencies by artificially cutting labour inputs.” REPORT OF THE MINORITY OF THE LABOUR SELECT COMMITTEE, supra note 700.
Loader's observation was supported by statistical analysis, which found little evidence of an employer concern with improving the workplace. For example, in only 44 of 1053 contracts studied was there any linkage of improved productivity with pay. This belied Birch's contention that the ECA had engendered a significant move to "implementation of a new remuneration package, which includes innovations such as performance related wage or salary reviews."

This state of affairs should not be surprising, since the ECA was premised on a conservative neo-liberal view which stressed the paramount importance of individual rights to contract for the sale of human labor. The problem raised by the neglect of communitarian values was a denial of any need for citizens to "rise above their merely private concerns to join in a public dialogue to define the public good."

The very seriousness of these problems has made it necessary for ECA supporters to develop blindness to the lives most of their workers are living. They like to focus on a narrow range of economic measurements. Indeed, many economic figures have improved so that the OECD, the IMF, and National Party members can accurately make glowing claims for the ECA; however, in human terms the impact has been devastating. One

759. Harbridge, supra note 551, at 121.
760. Labour Minister Bill Birch, Address at the New Zealand Industrial Relations Conference 10 (Feb. 17, 1992) (on file with author).
762. The economy has finally sputtered to life with a growth rate of 2.9% in the year to June. Exports have grown in three years from about $15 billion (Pounds 5.5 billion) to $19 billion. Mortgage interest rates have dropped from 15% in 1990 to a 20-year low of 7.5% today; building permits are up 30% on 12 months ago; and inflation has been cut to 1.5%. After climbing inexorably for years, unemployment has levelled off at 9.9%.

Munro, supra note 483, at 1.
763. The International Monetary Fund also has held New Zealand up as a model, claiming that a fall in the unemployment rate of 2% between March 1992 and September 1993 was "an example of the benefits of thoroughgoing labour market reform." Peter Norman, IMF Seeks Labour Reform to Cut Europe's Jobless, FINANCIAL TIMES, Apr. 21, 1994, at 30. The IMF report failed to note how high the unemployment rate was and had been; it failed to give proper credit to a complex array of factors that played a part in any decline; and it claimed too much for the change in labor law.

A study by the Australian employer association, the Metal Trades Industry Association, found that the ECA had made, at best, only marginal contributions to economic changes since it had resulted in such a narrow focus on changing working hours and penalty rates and that most of these had taken place in the retail and hospitality sectors. O'NEILL, supra note 27, at 20.
764. See, e.g., Kidd, supra note 255.
765. In the first twelve months of the ECA's operation, the unemployment rate fell 0.1%. O'NEILL, supra note 27, at 24.

In many suburbs churches and charities run "foodbanks" for the needy. Demand for food parcels has jumped 1,000% since 1990, when National cut welfare benefits as it set about getting the state's finances in order. Sweeping labour market changes, which saw trade unions written out of law, the closed shop banned and national agreements scrapped, led to a fragmentation of the workforce. Tens of thousands of workers have had their pay rates cut. Munro, supra note 483, at 1. As of March 1994, unemployment had declined from 10.7% two years earlier to 9.1%. Kidd, supra note 255, at 4.
year after the ECA was enacted one could find in the classified advertisements persons seeking full-time work for $NZ50 [$29.50] per week for an experienced worker.\textsuperscript{766} In November 1992, 50% of employment contracts provided for a minimum adult wage of $NZ328 [$193.52] per week or less, with some contracts actually providing for a rate below the legal adult minimum rate of $NZ245 [$144.55] per week.\textsuperscript{767} Rob Crozier, executive director of the New Zealand Association of University Staff and former Ford labor relations supervisor, reported in January 1992:

Under the new regime, some New Zealand employees are now working for no pay at all.

Kiwi kids are leaving school and asking employers if they can work for nothing so that after three months they can apply for other jobs, citing their "work" experience.

"A Christchurch cafeteria recently advertised a job for a kitchen-hand for no pay, work experience only, and got 73 applicants."\textsuperscript{768} The clash of economic figures with the human problems created by the system clarifies the core questions of labor policy. These core questions are moral and ethical, not just legal or economic.\textsuperscript{769}

The ECA was not wholly favorable to employers. A study of negotiations in the public health-care sector, for example, found that management was unsuccessful when it attempted a policy of divide and conquer, and when it negotiated by emphasizing its power under the ECA and the need for cost savings and wage cuts. Breaking collective bargaining down into fourteen regional units in the era of the ECA meant that the union bargaining teams were far more inclusive than they had been in the past. Teams included all levels of nurses and aides. This provided the team and workers with feedback on the course of negotiations and work site reactions. It also meant that workers whose interests were in conflict were assured of active representation of their views within the bargaining team. This helped maintain solidarity. Altogether this representation may have proved to be a


\textsuperscript{767} Harbridge, \textit{supra} note 551, at 121. This was the case, even though the government had announced in June 1991, it would block loopholes that allowed employers to pay less than minimum wage. Harbridge & McCaw, \textit{supra} note 20, at 14.

\textsuperscript{768} Russ Francis, \textit{New Zealander Warns of Free Trade Havoc}, \textit{Vancouver Sun}, Jan. 16, 1992 at E3. This is part of a "managerial dream of profits without payrolls . . . ." Byrne, \textit{supra} note 139, at 5.

\textsuperscript{769} For the American situation, see James Gross, \textit{The Demise of the National Labor Policy: A Question of Social Justice}, in \textit{Restoring the Promise of American Labor Law} 45, 53-55 (Sheldon Friedman et al. eds., 1994). Gross argues that while

[i]ncreased efficiency and labor peace are appealing objectives, particularly in hard economic times . . . the sole or even primary purpose of a national labor policy should not be to increase workers productivity and employer competitiveness, although these may be byproducts. The primary purpose of a national labor policy should be to find a moral basis for achieving human dignity, solidarity, and justice for all parties at the workplace and in the larger communities affected by what goes on at the workplace.

\textit{Id.} at 55.
greater asset than having experienced negotiators. In sum, even in a negotiation in which the employer—in this case the government—had sought to exclude the union and achieve decreased wages and benefits, factors such as worker solidarity, communication, and an essential industry overcame the employer’s strategies.

Added expense and complication were not factors which affected only unions. Hel Loader observed:

It is also more expensive for employers.

I know instances of non-union contracts where the companies go around on a tour of the country trying to sell a contract to its workers, receiving mixed reactions. Now it’s in a situation where they’ve got half of them in and half of them out. So it’s still not finished. And they’ve ended up holding a lot of stop-work meetings to discuss the contract, shipping people around to explain the contract. They could have given the workers a bloody 20% wage rise and got the thing done for the money they’ve spent on it, and the time it’s taken them.

A reporter for the New Zealand National Business Review came to a similar conclusion:

Longer, slower and less formal discussions are required to sell major or controversial changes to employees. . . .

Parties are devoting a lot of time to preliminary “courtship” matters before negotiations commence. The process of identifying who will represent employees will often be complicated and time consuming with pro and anti-union factions as well as new players seeking the bargaining agency. Some employers will seek to influence this choice and even fund a bargaining agent whose involvement they wish to support.

In other words, there was a hidden expense to ECA negotiations. Employers needed to undertake a more expensive, time-consuming process for setting the terms and conditions of employment, resulting in lower productivity. It appears that one way this problem was resolved was to stop negotiating contracts on an annual basis, with the trend to greater than one year to two year contracts by 1993. In addition, it was smaller employers who were less likely to renegotiate contracts. By 1993, 84% of employees in companies with more than 100 employees had contracts negotiated under the ECA; whereas, for those employing 4-9 employees, only 37% had contracts negotiated under the ECA.

770. Oxenbridge, supra note 757, at 21-23.
771. Loader, supra note 43. Employers also have the added expense of conducting their own bargaining, something that used to be undertaken collectively.
772. Loof, supra note 341, at 18.
773. Whatman et al., supra note 38, at 57-58, 61-62. This study showed that for 1993, in 58% of enterprises no new contract was negotiated in the last year. Id. at 58. This is a slightly different approach to the subject than looking at the express term in the contract and may indicate an intent to drift into longer term contracts in the low inflation period of the 1990s.
774. Id. at 58.
The ECA also has the potential to be destructive to the economy. The ECA's structure tends to intensify the strength of the more powerful party. This makes it possible for the stronger party of the moment to extort the other. Swings in the economy make it likely that the weaker party will become the more powerful party at some point. As a consequence, that party will have an incentive to claw back the conditions it lost. This appeared to be a concern of the National Party. When Prime Minister Jim Bolger said that he would alter the ECA should more buoyant times arrive, Engineers President Rex Jones pointed out this would only exacerbate the "revenge mentality" that existed among those who had suffered under the ECA.775

D. Positive Impacts of the ECA

1. Positive Impacts for Workers

Not all workers suffered from the introduction of the ECA. Without question several groups experienced exponential growth as a direct result of the enactment of the ECA. One was the legion of lawyers and labor consultants necessitated by the greater complexity of the ECA and by the necessity for each employer to do its own negotiating.776 By early 1992, it was estimated that there were between 50 to 100 labor consultants,777 who competed with the employer associations affiliated to the NZEF. Management consultant Rob Campbell praised the ECA for "providing a market to sort out the most efficient bargaining agents."778

The backgrounds of these consultants were often quite interesting. Some gained experience as employer negotiators, often for the NZEA or one of its affiliates. One prominent consultant, Mike Hanson of Teesdale-Meuli, an American immigrant, made the easy transition from work as a management representative to that of being a consultant.779 He had been a negotiator for the Wellington Employers Association and, in 1985, was accused by Labour Prime Minister David Lange of "being 'prone to some of the most extravagant excesses of socialist philanthropy'" when he negotiated a 15.5% pay raise.780

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775. Barber, supra note 578, at 31. Such a change in policy might follow in the European model that occurred when plague in the Middle Ages transformed labor surplus into labor scarcity. "To this new problem ... the secular side of society responded by imposing severe civil and even criminal penalties on identified shirkers. The spiritual side of society, in the meantime, was able to find a duty to work in their sacred texts." Byrne, supra note 139, at 68.


778. Michael Stutchbury, Shake-Up on NZ Shop Floor, FIN. REV., July 3, 1992, at 14. This presented an ironic outcome, given the NZEF's support for the ECA as providing a means for unions to better themselves as a consequence of competition. See supra text at notes 457-58.

779. See Herbert, supra note 777, at 7.

780. Id.
Others came from the ranks of union representatives. Francis Weevers, for example, was a regional organizer for the Public Service Association until the late 1980s. Rob Campbell had once been a union representative with the Distribution Workers. His pronouncements during this period suggested he had embraced his new role with ardor. In fact, his former role as a trade unionist created a great deal of disquiet on the part of union representatives who were concerned that he might use union tactics against them and because it was seen as a betrayal of past relations.

Although Weevers and Hanson had once, metaphorically speaking, sat on opposite sides of the table, by the time the ECA came into existence, their views and modes of operation had many similarities. They tended to regard themselves as facilitators and to try to involve themselves in a process beyond just that of negotiating a contract. Both also were mainly employed by employers, not a great stretch for Hanson, but certainly a major change from Weevers’s background. Indeed, Weevers found as he continued in this new role that, while he felt the ECA to be an unbalanced piece of legislation in practice, he had become a convert to decentralization.

Neither man saw himself as anti-union, but their words and actions often belied this. For example, while Hanson made this claim, he stated: “If a union is part of the picture and if it will accept change, that’s great. But if it won’t, I will shift on to other options.” These options included dealing directly with the employees until at least two have signed an agreement, which then, as a collective contract, effectively sets the terms for the workplace. If such an approach proved to be ineffective, Hanson would then move to imposing a partial lockout by refusing to apply the conditions in dispute. Weevers himself had other approaches which effectively put the train on the track to a collective agreement, with the union welcome to come along in the baggage car.

782. See supra text at notes 512-17.
784. See Herbert, supra note 783, at 6; Rob Campbell, The Employment Contracts Bill: Two Very Different Perspectives, The Examiner, Apr. 18, 1991, at 18, 19.
785. See Herbert, supra note 777, at 7.
786. See id.
787. Id. Murray French of the Wellington Employers Association also admitted the ECA was unbalanced. However, he felt he could not advocate change, because that would be betraying those he represented. French, supra note 55.
788. Herbert, supra note 777, at 7.
789. Id.
790. Id.
791. See Weevers, supra note 781.
One unexpected entrant was the Maori gang "Black Power," which announced that it wished to expand into this business. "The Prime Minister Mr. Bolger, while pleading for the gang to operate within the law did make the observation that gang members 'were a very versatile group.'" Bolger actually seems to have initiated Black Power’s interest when he responded to the claim that workers would be unable to bargain effectively under the ECB by suggesting they turn to Black Power as their bargaining agents. The director-general of the NZEF defended the right of workers and employers to appoint their chosen agents, regardless of criminal background.

Some condemned all consultants in no uncertain terms. Ken Douglas described them as follows:

Having raped and wrecked finance, forex, share and property markets, yuppiedom is turning to the labour market as a new source of plunder. I don’t think they will be a big influence in the longer term. The work is too hard and there really isn’t the money-for-nothing opportunity that these parasites seem to need.

When they represented management, the view on them was certainly mixed. Some in the union movement felt they provided expertise on the opposite side of the table without the ideological baggage of the NZEF.

From the time the ECA was introduced, the NZEF stirred itself to prove its relevance and importance to its members.

[O]n the introduction of the Act all members were in fact sent by us a copy of an Employment Contracts Act kit which contained a number of papers outlining the way in which the Act would operate and of course we could only do that in a final form when we were aware of the actual Act’s contents.

The NZEF took on additional staff to meet the greater bargaining demanded by the ECA. It attempted to develop long-term strategies to help employers adjust to the ECA.

To a great extent, however, management consultant’s services and other schemes to represent workers appeared to be little more than dreams. In a 1991 survey the Department of Labour performed of employment con-

792. O’NEILL, supra note 27, at 26.
793. Simon Kilroy, PM Says Employment Bill’s Opponents “Thick,” THE DOMINION, Apr. 9, 1991, at 2. Elsewhere, National made it clear that it felt Black Power would not qualify as a representative. MP Ian Revell said he “was astonished to read that the Black Power gang, and, no doubt, other undesirable and irresponsible groups, are already offering themselves as potential bargaining agents under the Bill.” 12 PARL. DEB. (HANSARD) 1464 (Apr. 23, 1991); see also 12 PARL. DEB. (HANSARD) 1452 (Apr. 23, 1991).
794. Roth, supra note 308, at 203.
796. See Barker, supra note 45.
797. French, supra note 55.
798. Id.
tracts, private negotiators were rare. In addition, in some cases, the NZEF representatives seemed to have fallen on hard times. In some instances, when a NZEF advocate became aware that workers had grievances, he referred them to union representatives so that their employers then needed the advocate's services.

A second group who saw employment opportunities grow were Labour Department inspectors. By early 1993, it was receiving 6000 complaints per month about breaches of minimum working conditions and was issuing three times as many complaints as a year earlier.

The NZBR continued to be a strong supporter of the ECA and concluded that it had brought on many positive changes. On February 19, 1993, NZBR spokesperson Roger Kerr claimed that public confidence and business optimism were at all-time highs. He claimed that 74% of employees were either "satisfied or very satisfied with the outcomes of their new employment contract." Kerr claimed that, although it was a buyers' market for labor, during the second year of the ECA there had been wage increases negotiated of up to 8% with increases in productivity of 17%. According to Kerr, the improved productivity due to the incentives and flexibility allowed by the ECA "are the stuff from which future folklore is going to be made." In addition, he asserted, "Employers and employees are now working much more closely together, with better communication and more trust and cooperation. Multiemployer contracts have almost disappeared, down from 59 percent in 1991 to 8 percent according to a recent survey. There has been a big swing to individual contracts."

Kerr cited Tiwai as an example of success since all but a few of its workforce had been put on individual contracts with terms that resulted in a 31% reduction of man-hours per tonne of aluminium. He also cited a 37% drop in union membership from 600,000 to 380,000 and a drop in strikes of 65% since May 15, 1991. Kerr denied that the ECA shifted the balance

799. Macfie, supra note 509, at 19. One study of retail employers found they tended to do their own negotiating with occasional questions to accountants, other retailers, or employer organizations. Hector et al., supra note 72, at 337.
800. Gay, supra note 161.
803. Id. at 5.
804. Id. at 10-11.
805. Id. at 15.
806. Id. at 11. Many of those individual contracts were likely to have been far less than the description suggests in terms of a process of negotiation. Bailey, supra note 554, at 5.
807. Kerr, supra note 802, at 11. These figures are somewhat suspect. In those cases in which the employer replaced striking workers, the government did not include the workers as on strike. New Zealand: Longest Lockout Sinks Into Statistical Black Hole, NAT'L BUS. REV., Oct. 23, 1992.

The drop in strike activity appears likely to be short-lived. More working days were lost to strikes in 1992 than in 1991, Roth, supra note 689, at 265, although the total number of strikes may have
of power towards employers and claimed that the NZBR had even opposed changes that would tend in that direction. Thus, to a great extent, Tiwai appeared to be on the track of achieving productivity without a payroll.

The 1993 Majority Report of the Labour Committee found that the ECA had promoted closer communications between employers and employees by removing third parties—both unions and employer representatives—resulting in workers feeling they had co-ownership of the company. It is difficult to know if this sunny conclusion is accurate or not. The committee dismissed evidence of dissatisfaction as unproved and anecdotal but at the same time relied on equally anecdotal evidence of positive results as more reflective of reality. Studies are mixed on the issue of communication between employer and employee.

One study of the retail industry found that many employers did not use representatives to negotiate but either did the negotiating themselves or did no negotiating at all. Other studies found less trust felt by employees, that there was a high level of worker exploitation, that there was a high level of worker exploitation, that conflict still existed or had increased, and that employers tended to determine working conditions unilaterally without bargaining. A 1993 study found that as many as 36% of contracts were negotiated by off-site employer representatives, but the figure for 1992 was 48%. It is difficult to say, though, whether this means closer communication is occurring or whether on-site negotiation is simply undertaken to save costs. That same study found that when employees were asked about changes in their work conditions in the past year, the results were more equivocal.

dropped. Id. By early 1994, a number of very serious and prolonged strikes were taking place in key sectors. Kelsey, supra note 81, at 107-08; O’Neill, supra note 27, at 33-34; Sarah Boyd, Straitened Unions Hoist Storm Signal on Ferries, Evening Post, May 12, 1994, at 5.

808. Kerr, supra note 802, at 12.

809. Byrne, supra note 139, at 61. Missing from the discussion was the issue of the impact on the workers no longer needed as a result of the 31% increase in productivity. Does the increased productivity justify the dislocation suffered? Cf. id.


811. Hector et al., supra note 72, at 337.

812. Oxenbridge, supra note 757, at 18.

813. Whatman et al., supra note 38, at 61.
### Employees’ Perceived Change in Work Conditions, 1992-1993\(^{814}\)

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<thead>
<tr>
<th></th>
<th>Increase</th>
<th>No Change</th>
<th>Decrease</th>
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<tbody>
<tr>
<td>Work Effort</td>
<td>42%</td>
<td>52%</td>
<td>6%</td>
</tr>
<tr>
<td>Communication with Management</td>
<td>31%</td>
<td>52%</td>
<td>16%</td>
</tr>
<tr>
<td>Opportunity to Learn Skills</td>
<td>30%</td>
<td>59%</td>
<td>9%</td>
</tr>
<tr>
<td>Job Satisfaction</td>
<td>23%</td>
<td>56%</td>
<td>21%</td>
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<tr>
<td>Cooperation with Management</td>
<td>22%</td>
<td>60%</td>
<td>18%</td>
</tr>
<tr>
<td>Promotion Opportunities</td>
<td>17%</td>
<td>64%</td>
<td>17%</td>
</tr>
<tr>
<td>Employee Trust of Management</td>
<td>15%</td>
<td>53%</td>
<td>31%</td>
</tr>
<tr>
<td>Job Security</td>
<td>14%</td>
<td>58%</td>
<td>27%</td>
</tr>
<tr>
<td>Flexibility to Choose Hours</td>
<td>12%</td>
<td>75%</td>
<td>11%</td>
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These figures for employees' views do not appear to support the optimistic conclusions reached by supporters of the ECA. To a great extent the conclusion seems to depend on with whom you speak. The same 1993 survey found dramatic differences between employer and employee perceptions of the impact of the ECA when each was asked if they saw improvements in specific areas.

### Perception of Workplace Improvements\(^{815}\)

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<tr>
<th></th>
<th>Employers’ View</th>
<th>Employees’ View</th>
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<tbody>
<tr>
<td>Job Security</td>
<td>60%</td>
<td>14%</td>
</tr>
<tr>
<td>Job Satisfaction</td>
<td>51%</td>
<td>23%</td>
</tr>
<tr>
<td>Communication</td>
<td>52%</td>
<td>31%</td>
</tr>
<tr>
<td>Trust</td>
<td>42%</td>
<td>15%</td>
</tr>
<tr>
<td>Cooperation</td>
<td>61%</td>
<td>22%</td>
</tr>
</tbody>
</table>

These differences in perception extended to the power employees had to choose their representative and type of contract, with employers believing their employees had less power as to these matters than employees did. These conflicting results appear even more anomalous when compared with employer and employee perceptions of employee bargaining power under the ECA.\(^{816}\)

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814. Id. at 66.
815. Id. at 68.
816. Id. at 69.
In addition, for many workers there were advantages to the new system, as even the CTU admitted. On the second anniversary of the ECA, CTU secretary Angela Foulkes stated:

"Experience with the ECA has suggested that, despite its many and obvious imbalances and shortcomings, there are many advances on the old system that neither employers nor workers wish to see reversed. One is the right to choose a union, one is the right to ratify a contract and the last is the extra degree of freedom that has followed in the wake of a removal of rigid occupational demarcation."

2. Positive Impacts for Unions

To the NZEF, the ECA had proved highly beneficial for unions. In late 1993, it stated: "If we have learned anything we should now know that providing unions with statutory protections removes their need for a broader visions. Only in the absence of protection, with proper membership accountability required (as it is under the Employment Contracts Act), is the need for a genuinely expanded view likely to be recognised."

Rick Barker, of the SWF, found that one good impact of the ECA was that it made it easier to change when change was needed. He felt that, before its enactment, many in the SWF could see the union needed to be more responsive or more streamlined; however, they found it difficult to implement these changes.

"We were always too late. Our one failure is that we would not move when common sense dictates that we should do. The question is about being pushed and jumping. Quite often there are people in two categories—those who jump ahead of the inevitable and those who wait until the last minute and will only go when they are pushed. I feel that we were too..."
conservative and had too many people who liked to be pushed in rather than jump in.

You just can’t change people’s psyches. They have the influence. They just want to see the inevitable staring them in the face and then they’ll say, “Okay, we’ve got to do something. We agree now.” There wasn’t sufficient attitude of examining the world ahead of us at the distance, and saying, “These changes are inevitable, these things are happening. We need to make the move now.” And that was not done because a number felt that if they made the move, and what was anticipated didn’t arise, then they may have to pay the price or consequence for it. Fear and concern are their attitudes.819

The ECA became the catalyst for a massive change of attitude. It increased unions’ desire to engage in study and to reach out for information and ideas. Union representatives and members no longer saw trips abroad as junkets, but as opportunities that should be taken seriously. The ECA led to a much more expansive view of the world and of the value of affiliating to and actively participating in international organizations. It also led people to attempt to anticipate change and to a general maturation of unions as a consequence.820

Doug Marsh, a Food and Textile Workers site delegate at NZ Dairy Group, Waitoa, observed that the ECA would “‘make unions in representing their members a lot more accountable. They have to use skills to negotiate with management rather than use the workers to try and beat the management up.’” He added: “‘The union officials have to keep talking to the rank and file, finding out what their true feelings are and taking them forward. The bottom line is that workers want security in their jobs.’”821

Workers also saw some positive aspects of the ECA. Site Delegate Ina Rangiwhetu of the NZ Wool Spinners stated: “‘People are sticking together much more since the Employment Contracts Act. They are also much more interested in politics and the other changes the government is making.’”822

Graeme Clarke of the Coachworkers concluded that the ECA had other positive consequences which helped in the coalition Mitsubishi negotiations.

What would have happened in years gone by is that one union would have split away and signed a deal. And the others would have been compelled, probably, to sign the same deal. Employers have played that tactic in the past.

So we were trying to avoid that situation from emerging by making sure that there was formally only one bargaining unit. In our situation in

819. Barker, supra note 45.
820. Id.
this one plant, technically, we were better off under the Employment Con-
tracts Act because we could attack the yellow unions, the business unions,
and defend our position and stop them from being able to go behind our
back. That was a big improvement for us. In the past the coverage was a
monopoly that had been legislated that was inviolable, we couldn’t touch it.
All we could do is try and organize their own members in spite of the offi-
cials, and that’s very difficult to do. So, our position has been more unified
as a result of the Employment Contracts Act.\textsuperscript{823}

Another positive impact from Clarke’s view was the opportunity it cre-
ated for workers to have the power to force unions to represent their desires.
Under this law, they can actually get out, they can break away, if they want
to stand up. But unfortunately, these sorts of concepts are not very wide-
spread. And so the prevailing trend is the reverse, and this is the minority
trend, but it is there.

If you give people the right to walk away or to change it, without
making that too difficult an operation, then you hopefully keep the leader-
ship of unions honest. I think that’s a preferable situation to having the
government legislate that you will have a secret ballot or you will have a
report and you will wait two weeks before having a meeting or all those
kinds of things.

\ldots Legislatively for [a proper] form as the protection of workers isn’t
really going to help them. What will help them is if they don’t have a
vote, they decide: “Well, we’re going to leave that organization. We will
join this one that requires a vote in its rules.” And if they don’t carry that
out, we can take them to court and force them to carry it out, because it’s in
their rules. That, to me, is far preferable than the state protecting a monop-
oly and legislating minimum democratic norms. I don’t think that will
work.\textsuperscript{824}

The ECA also created the possibility for new forms of unionism. At
the same time the CTU was promoting amalgamations into larger unions,
some small unions were emerging at worksites but loosely federated to
larger structures. For many, the MCWU became the organization with
which to affiliate.\textsuperscript{825} In early May 1993, fourteen unions formed an alliance

\textsuperscript{823} Clarke, supra note 68.

\textsuperscript{824} Id. This view was seconded by Maxine Gay:
I don’t think that the total rights that unions had before was healthy. And so I think I would
like to see unions having to clean up their act and compete for workers in that sense and I
don’t believe that anybody has an inalienable right to represent other people. They needed to
earn that right. And I think that the lessons have been learned.

For example, talking with workers within public service as I’ve been doing recently.
They have always been a voluntary union that always had high membership but that was
primarily, workers are telling me, because it was either the PSA or nothing. So if the PSA
doesn’t clean its act up now we will get somebody else because there are other opportunities
and I think that epitomizes to me really the fact that unions if they had too much by way of
legislative assistance, they simply became lazy and didn’t necessarily, in the best possible
way, represent the interests of the workers or their members.

Gay, supra note 161.

\textsuperscript{825} Sarah Boyd, Unionism Finds New Ways in Fight to Survive, EVENING POST, Sept. 8, 1993, at
7.
called the New Zealand Trade Union Federation (TUF) with a membership of 35,000 workers. The officers were president Dave Morgan (Seafarers Union), vice-president Garth Fraser (United Food, Beverage and General Workers Union), and secretary Graeme Clarke (MCWU).\textsuperscript{826}

Some found they could set up their own unions tailored to their views of how a good union should function. Maxine Gay and Dolly Larkins, former Clerical Workers organizers, created an organization called the Administrative and General Workers Union in October 1991. By May 1992, it had four part-time organizers and 120 members.\textsuperscript{827}

Some organizers found the ECA was a good organizing tool. One organizer who formerly had represented a law firm’s clerical workers found that the attorneys wanted to join her union.

\textit{I returned there and held meetings to seek to represent the workers for a collective employment contract, and the bosses were quite happy to let them go on because they really thought that I was going to be booted out. I came out of there with 27 members, including some staff solicitors who really knew that they were going to get done over. I mean they just really believed that. And so, in a funny way in some areas it has been a recruiting tool.}\textsuperscript{828}

This suggests that the ECA might take a course similar to that of the employee representation plans which existed before the enactment of the NLRA in the United States. In some cases those ERPs became a halfway house towards unionization by fostering local leadership and by educating workers as to the value of collective representation.\textsuperscript{829} Were this to happen, it might lead to a renewed and strengthened union movement with members who understand what they need and who have the ability to demand it from their unions. To some extent this may have happened under the ECA, with higher union involvement in contract negotiations in 1993 than in 1992.\textsuperscript{830}

By ignoring unions, the ECA gave them the freedom for the first time under any New Zealand legislation to order their internal affairs unfettered by government regulation.\textsuperscript{831} In addition, whereas under the prior system award terms were passed on to all covered workers whether or not they were union members, under the ECA those who did not sign the agreement did not receive its full benefits, including rights to substantial severance pay. This situation led to employers’ being able to dismiss such workers much more inexpensively than union members.\textsuperscript{832} Thus unions could take advantage of a perceived advantage to extend their appeal.

\begin{itemize}
\item[826.] Roth, \textit{supra} note 689, at 267. In a surprising move, in May 1993, TUF decided to support Labour in the 1993 elections, while the CTU decided not to endorse any party directly. \textit{Id.} at 268.
\item[827.] Gay, \textit{supra} note 161.
\item[828.] \textit{Id.}
\item[829.] \textit{Cf.} Brody, \textit{supra} note 96, at 36.
\item[830.] Whatman et al., \textit{supra} note 38, at 59.
\item[831.] See O’Neill, \textit{supra} note 27, at 26.
\item[832.] See \textit{id.}
\end{itemize}
VI

IMPLICATIONS

Because of my empirical work I have a vision different from many of my colleagues which adds something useful to our ongoing discussions of the nature of legal scholarship. I have developed a strong sense of the arrogance of legal decision-making. Much of my labor law course is devoted to demonstrating to the students the extent to which the law rests upon assumptions by an elite group concerning the behavior of people whose lives they do not share, whose attitudes they do not understand, and to whose concerns they are indifferent. 833

The assertion 'it takes a theory to beat a theory' is not strictly correct. A theory indeed may beat a theory. Nothing, however, beats a theory like a practice, and reference to practice makes the pure contractual corporation untenable. 834

New Zealand's experience in moving from a highly supportive environment to one based on the model of common law free contracting can help us understand complex factors that affect law, law reform, and unions. First, it not only suggests that the relationship between law and union strength, vibrancy, and viability is far more complex than is generally recognized, it makes visible ways in which that interaction occurs. Second, New Zealand's experience tells us a great deal about what qualities are necessary to union success. Finally, these events demonstrate the importance of inter-union relationships in promoting the viability of unionism as a whole. In short, these provide a deeper understanding of power and its use by and impact on the important institutions in this area. This knowledge can be useful as a guide both in making the decision whether labor law reform is desirable and then in refining the best means to achieve the goals of legislative reform.

A. The Interrelationship Between Law and Union Strength

This article began with Lane Kirkland's assertion that American unions would be better off with the repeal of the NLRA or "the law of the jungle," as he put it. Kirkland, no doubt, was not serious about this extreme action. When Reed Larson, president of the National Right to Work Committee, responded that he would be willing to join Richard Trumka, president of the United Mine Workers, and Lane Kirkland in an appeal to Congress to repeal the National Labor Relations Act, 835 Kirkland and Trumka did not join hands with Larson on this issue.

In many ways, one can characterize the experience of New Zealand unions as being close to living under the law of the jungle. New Zealand

833. Getman, supra note 3, at 493.
834. Bratton, supra note 2, at 185.
unions, as a whole, have not thrived in this environment, and it would be possible to use this as an easy rebuttal to Kirkland’s bombast. It seems likely that what has occurred in New Zealand would be just as likely to occur in the United States under such a law. While it is possible to argue that law fetters unions by channeling resistance into less effective, more socially acceptable paths, there is no evidence that American unions have ever flourished for more than a relatively brief period without laws which at least support unions’ legitimacy and right to exist. It is time to face the fact that there is no evidence that American unions would exist even at their current level without legislative support. Furthermore, there is no competent evidence that unions do better without laws to support their existence. Any other position is a product of “straw-clutchism” and a dangerous romanticism.

If laws are necessary for unions to exist, does it follow that unions are illegitimate or weak? To ask this question is to admit to focussing on the wrong place. No one asks if corporations are weak because they could not exist without legislative support. The two types of organizations must be viewed as parallel in this respect. Unions and their historic predecessors mirror the form of the entity they deal with, now usually corporations. Corporations could not and do not exist outside extensive legislation that provides for and supports them. Thus, it would be unusual in the extreme were unions able to exist without some sort of legislative support.

Furthermore, we have to face the romantic notion that unions would be better off without laws to regulate them. Unions will always be governed by some law, even if it is the general common law. That law may be more or less favorable to unions, but there will never be no law that unions either

836. Marion Crain provides a good overview of this historical interrelationship and the isomorphic nature of unions and corporations. See Crain, supra note 15, at 1833-36. At least in the United States, current events appear to have altered the view that the market provides an adequate explanation for the operation of even corporations. “The claim that everything in corporate life and law is contract at some deep structural level has outlived its usefulness. The idea never worked all that well as it was.” Bratton, supra note 2, at 184. The inadequacy of that model appears to have led to an important change in perceptions. This includes a recognition that the theory of pure contracting sometimes fails as a result of parties’ engaging in sub-optimal opportunism or “because of intrinsic limits on the problem-solving abilities of contracting parties.” Id.

In practice, corporations are complexes of diverse elements that resist reduction into the neat rationalized blueprints of legal and economic theory. They have a complex of foundations. They are welfarist instruments. They also are nexuses of interpersonal relationships with ethical implications. They advance each participant’s self-interest. But they also demand individual sacrifices to collective goals. They are nexuses of contract relationships. At the same time they are self-referential systems—separate entities with identifiable, albeit reified contents. They include relational contracts and discrete contracts. They result from free contract and yet entail empowerment and dependence. They amount to hierarchical power structures in some respects, and artifacts of arm’s-length contracting in others.

Id. at 212.

837. The New Zealand employer associations argued that the ECA type of regime was the functional equivalent of deregulation for businesses. See Dannin, supra note 23, at 32. An honest comparison of the two demonstrates that this is inapt. The parallel for corporations would have to be removing legislation that permits corporate aggregation of money and limitation of liability.
have to respond to or operate within. The minimum goal of law as it affects unions must then be to do no harm. Although unions need laws to exist, too much legislative protection and support—although attractive—may be harmful to unions and to their constituencies. In New Zealand's case, pre-ECA law provided an artificial sense that unions were strong because the law ensured there were high rates of unionization. However, those figures made it easy not to see a union movement that was weak, moribund, and directionless. Greater legislative protections did not have a beneficial effect on New Zealand unions, and it seems likely they could have that impact on American unions. In fact, protective legislation that removed the need to bargain eventually contributed to unions' decline as unions. This suggests that those who call for law reform measures designed to shore up unions' weaknesses may not ultimately be doing unions a favor.

Perhaps in the area of collective bargaining, the law must find a way to act as a good parent does: providing adequate support to protect the weak and young from their own follies and from abuse by the world, all the while preparing the child to be strong enough to live an independent life. Those who see themselves as allied with unions find it easy to argue for laws that provide protections for them, while refusing to consider that they might hold the seeds of unions' long-term destruction. The New Zealand experience strongly suggests that, in the long run, an overly protective environment is not good for unions or their members. Thus, a good bargaining law cannot allow unions such a level of comfort and support that they find it easy to become slothful, short-sighted, disconnected or neglectful of those they represent. At a minimum, structures should not be created which, in the name of protection, will stultify unions. Any new legislation must provide some appropriate mechanism to create challenges and provide invigoration. Law that fosters unions' losing touch with their members is ultimately destructive of unions. Unions need to be ever conscious that their strength and reason for existence is their members and not their treasuries.

This conclusion does not mean that law can do nothing. It does prompt the question of what law can best do to help unions live up to their purpose as vehicles of worker empowerment while avoiding the negative impacts observed in New Zealand. New Zealand's experience is instructive. In the period preceding the enactment of the ECA, some unions were able to stir themselves from the general malaise to take action to prepare for it. Prominent among these unions were ones which, stereotypically, should

838. This insight provides an interesting addition to Van Wezel Stone's view that legal rules have an important relationship with union strength. She notes that legal rules can act to weaken unions and that weak unions are unable to achieve favorable legislation. The unfavorable laws she would point to are those which prevent unions from exercising full power in the sense that unions are unable to win. Van Wezel Stone, supra note 16, at 584. It is true that laws in New Zealand also acted to weaken unions, but they did so by making them winners, even when they didn't deserve to be.
have been weak and timid: those with large minority, female, and part-time memberships, those whose members perform menial work, and those undergoing large membership losses as a result of economic forces. On the other hand, some unions which represented mostly well-paid, male-dominated industries were the least active in planning. In the period of the ECA, many of these “weaker” unions have fared far better than would have been predicted from their membership bases.

Why have they been successes (in the sense of not perishing—their numbers have certainly declined)? It is not because the ECA protects the weak. If that were the case, the Clerical Workers Union would still be in existence. All evidence demonstrates that the ECA disproportionately empowers the strong. The traditionally stronger unions reaped the greatest rewards from the old system and, as a result, had became so wed to and dependent on that system they were unable to imagine existence without its supports. This then led them to discount the possibility of change or to feel that they would be so unable to cope nothing could prepare them for it. In contrast, those unions which represented the relatively disenfranchised always had more reason to be aware of changes in the environment and less reason to be wed to the old system. They had experience by surviving adversity, and by the time the ECA arrived they were habituated to finding ways to survive. Unions, such as the MCWU, which consider themselves to be outsiders, may have assimilated a similar attitude towards the law and their relationship with it and thus were able to contemplate life without it.

The preparation of these groups may explain figures that showed that approximately 50% of private sector union members (and approximately 60% of all members if the public sector unions were included) after the enactment of the ECA continued to be women, despite the fact that they tended to work in sectors that experience teaches are less often organized. There are other explanations. This may have been a consequence of women’s concentration in larger workplaces, which tended to remain organized and to have coverage under collective employment contracts.

It is impossible to examine the impact of labor law reform without considering differences in leadership. The one thing that distinguished the Clerical Workers Union from the Service Workers Federation was visionary, purposeful, intelligent leadership or the lack of it. Thus many of these unions were fortunate in having leaders at this crucial moment who were thoughtful and creative and who recognized the value of embracing and incorporating change within their organizations. Even though these unions approached the problem from different directions, all of them undertook actions which had strong similarities: they all increased their relevance and contact with their members. It is difficult to legislate for intelligent, crea-

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840. Id.
ative, purposeful leadership; however, the importance of this factor should be considered in formulating new legislation. It would appear likely that complacent bureaucratic organizations are likely to stifle creativity and unlikely to foster its development.

It would be too facile, however, to conclude that the ECA caused "every valley to be exalted" or the meek to inherit the earth. New Zealand’s experience suggests that even a very hostile law is not necessarily all bad for unions. Even those who opposed the ECA and its principles recognized that there had been benefits from its enactment. It is important to be cautious here, because there can be no question that the ECA did not have a benign effect for unions. Many benefits gained through its enactment could have come about through less drastic means and with less destructive consequences. Nonetheless, it is imperative to recognize that the ECA had important positive impacts on unions. It motivated increased union members’ attachment to their unions, and it increased unions’ commitment to their members and their members’ interests.

This is not to recommend that the United States follow Victoria, Australia into the ECA fold. The negatives far outweighed the positive. All New Zealand unions lost members, and many went out of existence. Work conditions declined for many New Zealanders. Thus, the law of the jungle is not particularly desirable. Although protective legislation may have a negative impact, the New Zealand situation demonstrates that there is some basic level of legislative support which is essential. It is important not to conclude, as many free market advocates would, that unions are illegitimate for relying on legislative supports. When corporations, the bodies that unions most often interact with, operate without legislative supports, unions will be able to operate equally well.

What is the bare minimum that any labor legislation must have? It is clear that a major impediment to bargaining in New Zealand under the ECA is the ephemeral nature of designating a bargaining representative. Full freedom to choose a representative contributes to a level of instability that makes bargaining meaningless and impossible, as well as chaotic and destructive to unions. The New Zealand experience underscores the American system which defines bargaining rights based on coverage of the job or classification of work and not the individual worker. Further, this bargaining must take place in a unit that is appropriately constructed to meet the needs of collective bargaining. In addition, bargaining demands a certain level of stability; this cannot be achieved if workers can constantly alter their choices. It does not seem unreasonable to put some time limits on when and how often workers can make this choice. How long that time period is remains open to debate. We can certainly say that the perpetual representation provided by the LRA and IC & A Act was too stable.
The regime of the ECA demonstrated the ultimate meaninglessness of full freedom in collective bargaining. While that system gave a worker the right to choose any representative form, that choice was hollow since the employer had no corresponding need to recognize that choice in a worthwhile way. Recognition of a union must be more than formal. It must include a process that acknowledges the workers’ choice. Unfortunately, this is one situation in which no compromise or middle ground is possible since the employer must either recognize or not recognize the worker’s choice. If a society believes that collective bargaining performs a valuable role, then it must support that choice. This means that the law cannot allow the employer to walk away or control the process of bargaining because it is unwilling to try to seek accommodation. Any other result is to create an illusory right, and history teaches that such a course may lead to dissatisfaction and social unrest.

The New Zealand experience also suggests that employers want, and workers benefit from, a meaningful structure in which bargaining can take place. Many employers do not want to take on the administrative task of a completely fragmented workforce to which unique benefits and wages must be paid and particular conditions must be granted. Indeed, the way in which New Zealand employers have reacted to the regime of the ECA belies any claims that they have a thwarted desire to achieve results tailored to their enterprises. Thus, a law predicated on providing this is unlikely to meet a need employers feel. In fact, although a major contention in support of its enactment was the need for wages to promote specific enterprise levels of productivity, once it was enacted, wages tended to be set based on the relative wages being paid by competitors. The result was little change from the method of determining wages and benefits from that which occurred under the prior legislation.

This was particularly apparent in the fourteen area health board negotiations with the New Zealand Nurses Association.

It is interesting to note, however, the [Canterbury Area Health] board’s enthusiasm for adopting contracts proposed in other regions. At one stage, when it appeared ratification of the proposed Nelson settlement was immi-

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841. The ECA was found not to provide such a system of recognition. International Labour Organisation, supra note 268, at ¶ 733-35. National Minister of Labour Doug Kidd defended the ECA of this charge by arguing that every New Zealander had a right to decide to belong or not to belong to a union and that the ILO’s view was based on its support for a special status for unions and for collectivism. Kidd, supra note 255, at 2.

842. Rick Barker observed:

They all talked about how relativities should be gone, but with the Employment Contracts Act, all I’ve heard from the employers is relativities, that they don’t them want to be paying any more than their competitors down the road or anybody else.

This is not only so in the hospitality sector but in the health area. Southern Cross have told our organisation that their wage cost is fifteen percent below that which is being paid by the state, and they wish to maintain that differential or advantage or improve on it.

Barker, supra note 45.
nent, the CAHB’s advocate aligned himself with the Nelson-Marlborough Area Health Board and was insistent that an almost identical document be settled by the Canterbury negotiators. . . . Thus, the employer in this study was somewhat reliant on “relativities” between regional bargaining outcomes when it was perceived to be to advantage. This contrasts directly with criticisms of the “inflexible” nature of the previous industrial relations framework, based on what Birch described as a “rigid system of relativities” . . .

It follows that there must either be a requirement for the employer to bargain in good faith or some equivalent mechanism that enables or forces bargainers to come to a settlement. After two years experience with the ECA, small employers and employees came to a similar conclusion.844 Any system that allows bargaining to proceed for years without agreement is a failure. This mechanism could take the form of arbitration. The key, however, is that the system cannot promote or reward a refusal to come to agreement, as does the United States now by permitting the employer to implement its offer at impasse.845 Whatever mechanism is chosen must make agreement preferable to any other course, including resort to arbitration. This is necessary because, however reasonable and valuable arbitration may be, a reliance on it is likely to promote the dependency which was disastrous for New Zealand unions. In addition, arbitration or some other method of resolving impasse must be available by a process that does not allow preventing or thwarting resort to arbitration when necessary to become a strategy that is rewarded.

The New Zealand story tells us that the exercise of collective power by workers is important as a counterbalance to employer power; however, it also tells us that reality is more complex than one of war between the employed and employers. Not all employers used all of the power the ECA gave them to exploit their workforces, but many did. Not all workers were supine in the face of superior power existing at a time of great weakness in labor demand, but many were. Analyses that cannot and do not come to grips with these complex relationships and reactions, that rely only on simplistic ideas of class war or of identity between the interests of worker and employer, cannot help us understand how society functions and how and if it should be regulated. The framework of the original NLRA actually does provide for this complexity. It promotes collective action by employees whose puissance is thus made to equal that of employers because it finds that “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership” leads to

843. Oxenbridge, supra note 757, at 23.
844. Whatman, supra note 38, at 70.
detrimental effects.\textsuperscript{846} It also encourages the "friendly adjustment of industrial disputes."\textsuperscript{847}

\section*{B. Union Success}

The second point to be gleaned from the New Zealand experience is that, even though the ECA was a law which was inimical to unions, some unions were far more successful than others. Those most likely to succeed were those which employers and members perceived as having been active in pre-ECA days in representing their members and in being a vigorous adversary of the employer.

Members of such a union perceived the union as necessary and valuable. These members were able to resist rhetoric which tried to paint unions as unnecessary third parties, because the members had experiences that belied such claims. In addition, these members had become habituated to union representation and thus were more likely to want to keep an advocate and aid they found helpful.

The more surprising factor is that those employers who faced worthy adversaries in the unions which represented their workforces were not ready to seize upon the ECA as an opportunity to rid themselves of an impediment to management of their workforces. Instead, they were less likely to repudiate union representation than in those instances in which unions were supine or absent. Pre-ECA rhetoric painted quite a negative picture of precisely these activist unions as standing between an employer and its employees or as creating an obstacle to productivity. As a consequence, this result seems anomalous. It may have been that these employers were fearful of having to face effective opposition, should they try to discard the union. On the other hand, they may have found that such unions performed a worthwhile function in the workplace.

Whatever the motivations that prompted employers and workers not to reject activist unions, the message is clear that union success hinges on union activism. This result reflects recent American studies which have found that union organizing success increases for unions which use activist methods that encourage close ties with workers.\textsuperscript{848} Beyond a union activist approach, the New Zealand experience suggests that there is no one right way to be a union. Certainly, it demonstrates that union power in terms of treasury is less a guarantee of success than power founded on membership support.

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\textsuperscript{847} Id.
\end{flushleft}
C. Inter-Union Relations

The New Zealand experience supports the conclusion that there are many ways to be a good union as long as an organization operates as a representative of its members. Unfortunately for them, New Zealand unions failed to believe this to be true. New Zealand unions varied from small to large, from radical to establishment, and each acted as if it believed that it had found the only way to be a real union. Union criticism and antagonism mounted as they pointed out each other's failings. Even on the eve of the ECA, New Zealand unions appeared locked in internecine dispute. The MCWU and Engineers are the best example of this, although not the only one. Each union was certain it had the correct take on how to be a union and that all others were wrong.

This sniping might have been merely an intellectual exercise in the safe days of the LRA, but it was deadly in more dangerous times. First, it meant that these old enemies could not make common cause against a threat to their existence. They acted as if it was more important to prove their opponents were wrong in every respect than to unite. Second, it meant that they were unwilling and even unable to listen to the other side's point of view and glean anything of value from it.

A consideration of the operation of New Zealand unions in the face of the ECA leads to the conclusion that there may be no optimum form for a union. The form a union takes, the ideology it espouses, and the goals it sets appear to be the result of complex evolutionary interactions of history, personality, occupations, membership, and pressures. It seems plain that different types of workers would naturally be attracted to and would create different sorts of unions. Some unions will be more activist and some more interested in "management" issues. Since this seems to be a natural outgrowth of those represented, there is no reason to try to force all unions to conform to a single model. It would be unlikely that a union appropriate for one niche would work in another. Furthermore, this diversity may be important for more than being an inescapable artifact of their various histories.

In a sense, it is possible to see New Zealand unions operating as a single organism within the society. In this mode, they could have provided and sometimes did act as self-correcting mechanisms. For example, without the MCWU and others constantly questioning the Engineers' behavior, they might actually have become collaborators with employers. Criticism is beneficial when it is delivered in a manner that permits correction and improvement. Unfortunately, in New Zealand it often did not serve this purpose. It thus became destructive of the greater union movement at a time when it needed unity.

Diversity among unions may also be advantageous to the survival of unions in the same way that genetic diversity promotes the survival of organisms. The availability of different models of organizing, representing, and
opposing may make unions as a whole more viable. Thus, while a union may be effective within a particular time and political climate, should these change it would be useful to find other modes of operation which may have become more effective. Unions can also learn from others' mistakes and decide to forego certain courses of action. In other words, having other models available may make it easier to adapt to change when that is necessary.

What are the implications of this? It would be going too far to say that unions should live and let live, accepting any group that wants to call itself a union in the name of solidarity. Not every organization is a union. Organizations which are corrupt should not be included. Corruption can usefully be defined as more than actual criminal actions. It can also mean those situations in which the organization fails to perform the most basic function of a union: the representation of members' interests and desires. However, once an organization meets the basic definition of a union, the union movement must find room for it.

D. Suggestions

There are many important lessons we can draw from the process that led to the enactment of the ECA. New Zealand's experience can provide useful data and instruction for drafting new legislation. For example, as we move toward a world in which growing numbers of workers can be classified as contingent workers, the workplace orientation of the NLRA and similar state legislation may make unionization impossible for large segments of the population. Dorothy Cobble estimates that current labor law effectively excludes as many as 38% of women workers by precluding organization of certain occupations and another 25% by creating barriers which affect women more than men. If unions are isomorphic structures, as Crain suggests, then as the form of work changes from permanent, full-time, long-term employment with one employer to one of looser attachment to one workplace, then so too must the form of unionization change. It is estimated that part-time and contingent workers (including temporary workers, independent contractors, and workers performing subcontracted work) constitute one-fourth of the workforce. As a whole, these workers face less job security, poorer benefits, and other problems resulting from their atomism and inability to organize under the current structure of the NLRA.

849. See, e.g., Cobble, supra note 35.
850. Id. at 288-91.
851. See supra notes 836-37.
852. Francoise I. Carre et al., Representing the Part-Time and Contingent Workforce: Challenges for Unions and Public Policy, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 314, 314 (Sheldon Friedman et al. eds., 1994). Manpower is now the country's largest private employer. Id.
As it is currently written, the NLRA presents almost insuperable obstacles to part-time, contingent workers’ ability to organize. It is impossible to define an appropriate unit that includes both these workers and permanent employees because these two groups do not share a community of interest. Furthermore, it is often difficult to identify the temporary employee’s employer at all. Unions also face serious challenges in trying to organize such workers into an employer-based unit since their tenure at each site may be too brief to provide them with any of the benefits of unionization. In order to be effective, collective bargaining laws must meet the need for new forms of unionization or face becoming irrelevant.853

The IC & A’s occupational basis for organization may be a useful model to provide the means to allow these workers to organize. Furthermore, such a method of organization would not necessarily be a wholly foreign import. Significant numbers of American workers have long been in work and representational systems (of greater or lesser success) that bear a strong resemblance to those of the IC & A regime: construction workers, restaurant servers, actors, and writers. In addition, structures such as hiring halls, which are found in several of these occupations, could provide due process and collective protection, training, portable benefits, and flexible employment opportunities for the growing class of temporary or independent contractors. In other words, unions could take over the limited functions of temporary agencies and also provide workers with the collective power of a union. To make this effective § 8(f) of the NLRA854 might have to be extended to cover more industries than construction. It is ironic that New Zealand should have moved to a form of unionism least able to meet the needs of more complex work arrangements just at the time when they are becoming more prevalent.

One of the most important insights we can draw is that the law that preceded the ECA contributed to the failure of New Zealand’s unions at least as much as did the ECA. That prior law teaches us that it is possible, but unwise, to provide a structure that allows and encourages unions to disregard the needs and desires of those they are supposed to represent.855 In a perfect world there would be no drones and all would execute their duties faithfully and competently, whether or not there was any reward for doing so. Need it be observed that this is not a perfect world? Unfortunately, we do need to be on the watch to ensure duties do not go unmet nor responsibilities shirked.

There is an important message here for American unions. In 1991 and 1994, Kate Bronfenbrenner found persuasive evidence that union tactics

853. For a general overview of these issues see id. at 314-23.
855. Julius Getman suggests the need to revitalize the organizing process and carefully select and train organizers. Since the employee perceives the organizer to stand for the union, employees are likely to study the organizer for clues as to how the union will behave. Getman, supra note 18, at 46, 56.
have a strong influence on winning elections. Bronfenbrenner found that those unions which ran “rank-and-file intensive campaigns,” featuring personal contact and rank-and-file leadership, involving house calls, small group meetings, and employee committees from the bargaining unit were most successful, winning 61% of elections. Those which ran more removed campaigns dependent on leafletting, mass mailings, phone calls and videos won only 37% of certification elections.\textsuperscript{856}

Julius Getman has suggested that to be successful, a union representative must get uncommitted employees to hear the union’s message; convince employees that the union is not an outsider but is composed of fellow employees; demonstrate that the changes the union proposes are worth fighting for; reassure workers that the union will be able to protect them from reprisals; and persuade workers that the union official can be trusted.\textsuperscript{857} To accomplish these things, union representatives must familiarize themselves with employees and their concerns and then address those concerns specifically;\textsuperscript{858} develop a strong internal organization so they can represent the union to their fellow employees and help the organizers learn nuances of how employees perceive the campaign; avoid mistakes because mistakes by the union are more costly than mistakes by the employer;\textsuperscript{859} advance employee voices as the voice of the union;\textsuperscript{860} blunt the employer campaign by predicting it;\textsuperscript{861} and generate employee fervor for the union.\textsuperscript{862}

A union’s failure to have the support of its members hurts every effort the union makes. As Maxine Gay observed:

[Y]ou have to go on . . . from a position of strength rather than a position of weakness. And I don’t think that we did enough of our own work with our own members to have that position of strength.

. . . [W]e didn’t know [what our members wanted]. I mean we would say, “Our members just won’t tolerate this.” We didn’t know if they wouldn’t tolerate because we were never willing enough to take the chance. We had no idea. We knew how many union members we had pretty much generally in the movement but we didn’t know how many unionists that we had and when it came to the crunch, we were too scared to find out.\textsuperscript{863}

Many American unions, too, appear to have undervalued the importance of organizing and of organizers who can generate commitment and enthusiasm.\textsuperscript{864} To the extent they have failed to make close connections

\textsuperscript{856} Unions Need to Adopt ‘Organizing Model,’ supra note 848, at A8-10; Union Tactics, supra note 848, at A-7-10.
\textsuperscript{857} Getman, supra note 18, at 59.
\textsuperscript{858} Id.
\textsuperscript{859} Id at 60.
\textsuperscript{860} Id.
\textsuperscript{861} Id. at 62.
\textsuperscript{862} Id at 63.
\textsuperscript{863} Gay, supra note 161.
\textsuperscript{864} Getman, supra note 18, at 64-65.
with workers, unions have contributed to their own decline. A challenging question is whether there are ways in which law can provide incentives for unions to be more effective. Laws can be drafted which either foster union activism or which provide disincentives to unions which fail to represent their constituents.

This is not a simple matter, given what we know of the complex interplay of American labor law and the principal actors. We know that there are ways in which law provides disincentives to unions to organize. The line of cases following *Communication Workers v. Beck*,\(^{865}\) provide active disincentives for unions to spend money on organizing, since it prohibits unions from spending compulsory fees on activities other than those involving collective bargaining. This has an incremental effect in discouraging unions from being actively engaged in organizing new worksites so there will at least be a replacement for those lost to employer closures.

The law also provides incentives for unions to be fair representatives of their members. Even these are not trouble-free because the key incentives are indirect or ineffective. The first of these is the natural consequence for unions which fail to represent their constituents. They will be unable to mount effective contract campaigns, including gaining support for strikes. However, as the law now stands, even very effective unions are unable to take effective strike action. American unions now fear and avoid strikes because the law makes strike action unreasonably perilous. Employees who exercise their legal right to strike risk being permanently replaced.\(^{866}\) Unions which are not effective embodiments of their members' will may, however, have to face the prospect of decertification as an expression of worker dissatisfaction. Decertification is an extreme step, and once the petition is filed there may be such disaffection that no union will be able to take effective corrective action.

Second, American labor law provides actual sanctions for unions which are not democratic. One set of sanctions are provided for in the Labor-Management Reporting and Disclosure Act of 1959 for union infringement on member rights to freedom of speech and assembly and due process.\(^{867}\) The second set of sanctions are a suit for breach of duty of fair representation for unions which fail to exercise their duties to their members.\(^{868}\) Neither of these courses of action, however, is particularly effective. First, their enforcement mechanisms are so complex or expensive that

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866. See Getman & Marshall, *supra* note 44, at 1877-82; *Weiler, supra* note 13, at 264-68. Labor law professors enjoy posing the conundrum to their students as to whether they would prefer to be discharged or permanently replaced.
868. The doctrine of duty of fair representation was developed by the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 176-78 (1967); *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 204 (1944).
they do not provide real recourse for aggrieved members. Second, they are punitive in nature. A better means of legislating in this area would be to provide positive incentives to unions to be actively engaged with their memberships.

One positive incentive would be to require union recertification periodically. This would allow members to pass direct judgment on the value of the union to them. Recertification is an idea worth exploring since it could have many positive effects for unions, workers, employers, and the larger society. Unfortunately, recertification would neither be effective nor desirable within the existing labor relations regime. It is an idea worth considering, however, since most of the legislative reforms required for its effectiveness are ones already being advanced to reform our current system.

The matter of choosing a period for recertification is a delicate one. There must be a balance of employee freedom of choice tempered by the need for stability and union functioning. The period chosen should be adequate to ensure that it promotes the benefits of recertification but does not occur so frequently that unions can never stop campaigning. Perpetual campaigning can have debilitating effects and prevent unions from having time and resources to do their primary work. On the other hand, an organizing approach to union affairs would suggest that everything a union does is, in effect, campaigning.\footnote{869 Labor Research Review, AN ORGANIZING MODEL OF UNIONISM (No.17 1991) (on file with author).} In any case, a period of ten years from the last certification should be appropriate to accomplish both goals. By this time there should be sufficient turnover in most workplaces that it would be likely that few there actually did vote for the union.

What are the advantages of recertification? Recertification could be beneficial to unions for a number of reasons. First, it would provide unions with indisputable evidence that they were the representatives of their constituencies. This would remove any doubts or denials as to whether a union truly represents those whom it claims to represent. Unions would enter collective bargaining or grievance handling with all parties aware of their support. It would reward unions that are responsive to member desires.

Periodic recertification should reaffirm for workers that the union is not an external or distant entity but is a way of self-organization which they have freely chosen. It should also defuse the filing of decertification petitions. First, there would be less need for them, since members would have been able to vote on representation. Second, the setting in which that vote took place would be less contentious. It would be part of the normal order of things and not the result of festering dissatisfaction with all the intensity of feeling that entails. By providing an opportunity to pass on union performance collectively, recertification would provide workers with the abil-
ity not only to influence the internal operation of unions but also feel they have that ability.

There is always going to be some worker dissatisfaction within unions. Unions need to compromise and mediate diverse needs within their organizations in order to operate effectively when, for example, they formulate collective bargaining proposals. Some will inevitably lose in this process, and this can lead to the entrenchment of dissatisfaction unless dealt with properly. Losing should less often be a source of festering grievance if the union member feels there is an effective method of achieving power. The most democratic, effective way to do this is to provide the means to persuade others of this view and to give the opportunity to vote the "bums" out. If the organization makes itself impervious to change, to new viewpoints, to the ferment of democracy and minorities and majorities, those castle walls will be bought with the price of member dissatisfaction and alienation. Recertification should be a means of ensuring there is a high level of democracy within unions and that members have meaningful recourse to deal with their grievances. Otherwise, they guarantee the growth of alienation, cynicism, apathy, and lack of support.

Perhaps of equal importance to the benefits already mentioned, recertification would remove a powerful argument made by those who oppose unions. As things now stand, anti-unionists can advance the argument that most unions were not chosen by those whom they purport to represent and are therefore unrepresentative and illegitimate. We have to admit that the current system provides ample evidence to support their premise and allow them to advance this conclusion. It is impossible to have no doubts that the certified representative is one that has been freely chosen. Currently, many unionized workers, such as those at the Big Three automobile manufacturers, are represented by unions which were certified two generations ago. Longevity does not necessarily mean illegitimacy or dissatisfaction by any means. The problem is that the current system provides no means of knowing whether or not long-lasting unions remain truly representative.

870. These suggestions go to the problems that exist within established strong unions. They say nothing as to the issue of how to ensure the unrepresented have the ability to decide, without penalty, whether they wish to be represented. At this time, studies by Paul Weiler, William Cook, and others demonstrate that increasingly workers must pay the price of job loss as part of the process of seeking union representation. Cooke, supra note 7, at 111-23; see generally, Weiler supra note 13.

871. Such a system seems akin to the feminized union advocated by Marion Crane as a model. Such a union would be a nurturing community based upon an emotional connection among employees and a commitment to the union’s goals. See Crain, supra note 15, at 1213.

872. The key recourse now open to those members who are dissatisfied with their union representation are decertification and suits for breach of duty of fair representation. Anyone who has handled breach of duty of fair representation cases is well aware that, however fine the concept is, it does not now operate as a satisfactory remedy. In fact, it is almost worse than no remedy for it holds out the promise of being a means of seeking redress, but the procedural barriers are so high it is virtually useless.
In the automobile industry, for example, the bargaining unit has been expanded to a nationwide unit. Decertifications can only take place within the entire bargaining unit. Even if there were widespread dissatisfaction with a union, workers effectively can never exercise any choice. In my years with the National Labor Relations Board, I was assigned to work on several cases involving decertification petitions under precisely these conditions. The union did not have to worry that it might be decertified not because it knew it could win a vote, but because technical rules made it impossible for the discontented to get to a vote. However, it must be asked whether as much was not lost as won. If the focus is shifted to the decertification petitioners, I think the negative consequences are clear. The petitioners filed petitions supported by the signatures of at least 30% of their worksite, who said they no longer wanted to be represented by their union. They filed the petition with the expectation that they would get to vote on this matter. Being told they would continue to have representation, which they had tried to eliminate, and that this was because they were not allowed to vote, would only exacerbate the unhappiness within the unit. This is an uncomfortable situation for a democracy and effectively brings certain unions to a state closely akin to that of New Zealand unions’ entrenchment just prior to the ECA. The American unions’ entrenchment does nothing to defeat the claim that unions are not legitimate representatives. Recertification would remove this argument.

An argument can be made that recertification might lead to a union’s losing and being decertified. This is a real concern. However, if members identify with their union and value it as an embodiment of their collective will and if workers can vote without coercion, the union should have no reason to fear the members’ vote. Each part of the preconditions should be examined. Assuming, for the moment, freedom to exercise their choice, would unions be likely to lose? New Zealand’s experience may shed light indirectly on such an exercise. In 1977, the National Party introduced legislation which mandated elections for compulsory payment of union dues. As a result, 195 unions with a membership over 405,000, that is, 65% of all unions and over 81% of all union members, held ballots on compulsory unionism. Not one clause was eliminated as a result, and the overall vote was in excess of 89% in favor. Under the LRA, employees voted on compulsory unionism if employers refused to agree to a union membership provision. As of February 13, 1990, 70 ballots had been held, all supporting compulsory unionism. In other words, having an election on an issue vital to union survival does not mean the union will lose.

873. See Dannin, supra note 23, at 15; LRA §§ 61-68. The factor that should concern unions is that the percentage of workers voting was very low in these elections. This was used to suggest that the outcomes were illegitimate. See Dannin, supra.
However, no recertification can be meaningful unless workers really have the ability to cast votes which reflect their uncoerced views. Unfortunately, any vote taken under our current laws would likely be meaningless based on current experience with certification votes.\textsuperscript{874} If this lesson would also apply to recertifications, they would be nothing more than a means employers could and would use to deunionize, and they would therefore be an unreliable barometer of employee desires. Persuasive evidence suggests that employers in the past decade have not hesitated to commit illegal acts, including discharging union supporters, in order to prevent employees from choosing union representation. William Cooke found that discriminatory discharges and other forms of illegal discrimination against union activists are an effective way to persuade employees not to vote for union representation.\textsuperscript{875} More recently, others have concluded that pervasive and aggressive employer anti-union behavior exists and has a very negative impact on NLRB election outcomes.\textsuperscript{876} Employee freedom of choice is necessary to the usefulness of recertification, as it is to the functioning of the NLRA as a whole.\textsuperscript{877}

Thus, instituting a periodic recertification would necessitate concomitant legislative reforms. This is not only because these actions violate the law, but also because the NLRA was enacted to make the expression of employee interests and desires more effective. Morris Kleiner has argued that the remedies currently applied by the NLRB are inadequate to protect these rights and to remove the incentive for employers to violate the law.\textsuperscript{878} Nothing in the statute requires this, but the NLRB’s own bureaucratic methods have led it to seek “one size fits all” remedies, rather than making an effort to make the punishment fit the crime.\textsuperscript{879} Until employers cannot profit by violating the law, employees will be deprived of the freedom of choice necessary to make the NLRA meaningful. This means that there can be no recertification until action is taken to ensure employee freedom of choice.

\textsuperscript{874} For a collection of cases, see Robert W. Hurd & Joseph B. Uehlein, Patterned Responses to Organizing: Case Studies of the Union-Busting Convention, in Restoring the Promise of American Labor Law 61 (Sheldon Friedman et al. eds., 1994).

\textsuperscript{875} Cooke, supra note 7, at 149.

\textsuperscript{876} Kate L. Bronfenbrenner, Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform, in Restoring the Promise of American Labor Law 75, 77 (Sheldon Friedman et al. eds., 1994); Comstock & Fox, supra note 112, at 98-102.

\textsuperscript{877} Part of that freedom of choice might involve improving the access that unions have to workers on the job. In New Zealand, it was suggested workers should have the right to promote union organization at work, including displaying and distributing union materials and inviting union representatives to meetings; union representatives’ having a right of access to members and potential members for general union business; and employers’ remaining neutral as to union membership. Anderson & Walsh, supra note 512, at 169.

\textsuperscript{878} Morris M. Kleiner, What Will it Take? Establishing the Economic Costs to Management of Noncompliance with the NLRA, in Restoring the Promise of American Labor Law 137 (Sheldon Friedman et al. eds., 1994).

\textsuperscript{879} See Dannin, supra note 17, at 629.
A second change would be appropriate if unions are periodically recertified: recertified unions should be entitled to dues payments from all those they represent. This area is one that is now a major source of turmoil. Under current law, the right to collect dues (a union security agreement) has been made an issue to be decided in collective bargaining. At times, it has become a major issue and even an impediment to consummating an agreement. Employers who wish to block agreement can refuse to agree to a union security clause, an issue which unions consider vital.\textsuperscript{880} It seems odd that the issue of workers' paying dues to a union is one that an employer should be involved in at all, let alone be able to use as a tool to prevent reaching an agreement. Providing for the automatic right to receive dues upon periodic recertification would remove an impediment to negotiation on the matters that do exist between employer and union.

Recertification makes it easier to legislate for automatic dues payment. If workers have a periodic opportunity to reconsider union representation and they are aware this includes providing the union with dues to be effective, then there can be no legitimate argument that workers need to be protected from union overreaching. Citizens are not relieved of paying taxes just because their side loses an election; so, too, periodic recertification should entail mandatory dues payment to meet the union's costs. It may also be the case that those who are represented are more likely to concede their representative and its need for funding.\textsuperscript{881} Indeed, if New Zealand's experience in this respect is any measure of American workers' sentiments, it is unlikely that paying dues is controversial among all but a very few workers.

Another lesson taught by the ECA is the importance of knowledge. The ECA abolished record-keeping as to union membership, changes in wages and benefits, and terms in agreements. The result has been an inability to know how the legislation has affected workers on other than an anecdotal basis. It is an interesting choice to deprive oneself of the knowledge necessary to make informed decisions. Trying to formulate plans in the absence of information has underscored the importance of thorough record-keeping.

The lack of information as to the impact of the ECA was truly appalling. With no way of assessing how well it was functioning, each side was reduced to trotting out sunny generalities or horror stories to fit their preconceptions. In the absence of a more scientific or at least rigorous methodology, it is difficult to give credence to any blanket conclusions

\textsuperscript{880} Dannin, \textit{supra} note 845, at 41.

\textsuperscript{881} Kenneth Dau-Schmidt suggests that union security clauses should not be seen as "needlessly interfer[ing] with the individual's right to contract . . . but instead rightly permit the employees to solve the free-rider problem that otherwise might undermine their ability to secure collectively a share of the cooperative surplus and to express their views on consumption and production." Dau-Schmidt, \textit{supra} note 552, at 493.
reached. Indeed, in the case of post-ECA experience, the anecdotal evidence has often proved more accurate than the generalities based on incomplete data.

The New Zealand experience demonstrates that relying on numbers may fail to provide information which is meaningful and accurate. For years, scholars have decried the decline and low density of American unions.\textsuperscript{882} Other countries, New Zealand among them, have been held up as models for the sole reason that they report higher levels of union density. A deeper look at New Zealand’s situation makes it clear that union density, while easy to calculate and compare as a simple percentage, failed to capture the deep moribundity of most unions’ functioning, indeed their failure in many respects to exercise the role we think of unions as playing. The reverse of this may be that we need to look at more than mere numbers to determine and diagnose problems in our own system.\textsuperscript{883} Would a system that had low density of union organization, but high member commitment, be worse than one with a high level of organization and low member commitment? This does not mean sitting back comfortably and saying that statistics are meaningless. It points up the need to dig deeper and to look at the human situation.

The New Zealand experience also suggests the danger of relying on theory that is divorced from reality. The ECA was the spawn, in great part, of American neoclassical economic theory as advanced by people such as Richard Epstein. Although these theories may have some appeal because they appear to be rigorous and, hence, scientific, in fact any abstract perfection comes at the price of accuracy and thus relevance to policy-making.\textsuperscript{884} Certainly, the New Zealand experience must prompt us to inject new issues into public debate. We tend to act upon those issues which are measured and studied. For a very long time, the question of economic performance has outweighed, and even made irrelevant, any discussion of the impact of economic decisions on the individual.\textsuperscript{885} This seems to be the social equivalent of the old saw: “The operation was a success, but the patient died.” Measurements which once were intended to help us understand and

\textsuperscript{882} Cf. Freeman & Rogers, supra note 4, at 13.

\textsuperscript{883} Kochan, Katz and McKersie argue that the aggregate figures misrepresent much that is important in trends of union density. Thus, many of the largest firms have high levels of union representation and are likely to continue to have similar levels into the future. On the other hand, unions have made no inroads in organizing new industries and new occupations. Thomas A. Kochan, et al., The Transformation of American Industrial Relations 238-39, 248 (1994).


\textsuperscript{885} Byrne observes that the conflation of law and economics has had a pernicious impact in the world of work. “What is lost by coming under the influence of this dragon is the flesh and blood of people whose values and aspirations are reduced to the periodic printing of a paycheck.” Byrne, supra note 139, at 4. Approaching the impact of development from a specific analytical viewpoint—particularly a material focus—he suggests, creates blindness to the effects of actions on real people. These effects are dismissed as necessary costs of achieving a greater good. Id. at 240-41.
order phenomena in the larger world now have become that larger world. The New Zealand experience should awaken us to the danger of continuing to measure the wrong things and thus to lack the necessary data to examine in resolving problems of governance. There must be a way to make human misery caused by governmental policy comprehensible and respectable so that it cannot be dismissed as merely anecdotal or lacking in rigor.\footnote{886}

The last word on the lessons to be learned from the New Zealand experience should be given to those who have been participant in the experiment. Rick Barker sums up the experience saying:

As it stands here, it’s hopeless. At the end of the day, if you are not going to get a settlement, there has to be a new dimension and if the employer continues to exercise that right—and this is one thing that the employers have learned is that they have the right to veto, the right to say no and, my God have they exercised it. Take this or leave it. And that’s the end of it in 99% of the cases. And if the workers disagree with it, they just simply either deal with them individually or lock them out either technically or by direct lockout and reengage workers, if they locked them out physically, engage them behind our backs.

I mean, it’s impossible to bargain in these situations as an equal. It’s not designed to be equal, of course. So, for some workers who are in key and strategic industries, who are organized and understand all that, they will always be able to bargain and get a settlement.

For workers who are employed in industries or in places who do not have economic clout, they will always continue to do worse.

So, it comes down to what we want as a society. Do we want a society that has a great spread of incomes so you have very poor or very wealthy, or do we want a society which treats everybody with some respect and dignity. And if we want to treat everyone with some dignity, then I think the state has to intervene on behalf of those who are less powerful and the most open to exploitation, the most vulnerable in society.\footnote{887}

In important ways the experiment of the ECA has implications which should give us pause. Amid the disruptive legislative reform and the in-

\footnote{886. An example of this can be found in the sneering attack in Douglas L. Leslie, Retelling the International Paper Story, 102 YALE L.J. 1897 (1993), in which Leslie attacks Getman and Marshall’s empirical study of the International Paper strike at Jay, Maine. Leslie argues, for example, that if inequality of bargaining power means a large company bargains with an individual, or that a company refuses to negotiate over the terms of any “deal,” or that a company has monopoly power over its market, “it is a trivial concept.” Id. at 1902. If Leslie finds this trivial, then it means Leslie has lost the ability to see the blood of human beings as they are affected by these trivial concepts. In fact, it is a trivial concept only in the sense that, if these are the relations individual human beings face in every interaction of their daily lives with large corporations, human beings are powerless and must bow to the greater force. In other words, if this is where theory leads the thinking person—and Leslie is a thoughtful person—then the theory is sterile and cannot help us understand anything of value.

The split between Leslie and Getman and Marshall reflects a fundamental split in attitude to workplace decision-making: when a corporate decision is made, some will presume it to be just while others will presume it to be unjust. See Byrne, supra note 139, at 14.

887. Barker, supra note 45.}
creased levels of crime and poverty, "there is the feeling that something irreplaceable has already been lost. For 40 years, New Zealand tried to build a civil society in which all its people were free from fear or want. That project has now lapsed. In its place is only a vague exhortation for individuals to go and get rich."^888

^888. Walker, supra note 483, at 17.