An Analysis of Passing On in New Zealand: The Employer's Duty to Manage Concurrent Bargaining in a Mixed Workplace

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I INTRODUCTION

The employer's duty to manage concurrent bargaining in a mixed workplace has long been a topic of great interest. Unions have also been concerned with the tactic of passing on and the consequential effects of free-riding. These two issues have recently come to the fore with the enactment of the Employment Relations Amendment Act (No. 2) 2004 ("ERAA 2004"). Employers, now more than ever, must carefully consider their tactical approach to both individual and collective bargaining. Unions now have the opportunity to address the issue, which has caused them grief since the decline of compulsory membership.

This article explores how the new passing on and bargaining fee provisions (sections 59A-C and part 6B respectively) will operate in practice to address free-riding from the perspectives of an employer, union and a non-union member. As a prelude to this discussion, the article outlines what constitutes a "mixed workplace" and how the parties' interests diverge in terms of passing on.

II PASSING ON AND THE MIXED WORKPLACE

This article is primarily concerned with mixed workplaces. A "mixed workplace" is one where both a collective employment agreement ("CEA") and individual employment agreements ("IEAs") are available in the same workplace covering employees in the same coverage area. In New Zealand, approximately 12 per cent of workplaces and 42 per cent

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of employees have both a CEA and IEAs available.[1] "Concurrent bargaining" refers to the process where an employer engages in both collective and individual bargaining in the mixed workplace.

In this environment, employers, CEA employees and IEA employees all have different interests in, and views on, how a mixed workplace and concurrent bargaining should be managed. Where these interests and views diverge, tensions inevitably arise.

Employers' Interests

Aside from compliance with the law, employers typically have two main motivations when managing concurrent bargaining in a mixed workplace: fairness and cost minimisation.

In order to be perceived as fair, employers typically prefer to treat all employees the same, irrespective of the type of employment agreement and union membership. This approach is intended to avoid internal friction, which can arise where two employees are on different rates, to avoid being seen as preferring union members or non-union members, and ultimately to promote a productive employment relations environment.[2]

In terms of the cost, the process of bargaining with the collective and then with each IEA employee can incur extensive transactional costs. It can be administratively and practically difficult to provide different employment agreements with different terms and conditions. To minimise these costs, employers often prefer take-it-or-leave-it style negotiations. Employers also tend to bargain with the collective first, and then offer those terms and conditions reached in collective bargaining to the IEA employees.[3] Unions and union members refer to this practice as "passing on".

Union and Union Members' Interests

When an employer passes on union-negotiated terms and conditions to IEA employees, union members regard this as unfair because IEA employees have not contributed to the costs of collective bargaining, yet take the benefits for free.[4] These employees are thus called "free-riders"

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[1] Waldegrave, Anderson and Wong, *Evaluation of the Short-Term Impacts of the Employment Relations Act 2000* (2003) 86.
[2] Hughes, "'Passing On' – the Policy" [2004] Employment Law Bulletin 82, 82-83.
[3] Waldegrave, Anderson and Wong, supra note 1, 39.
[4] Hughes, supra note 2, 83.

or "free-loaders". Furthermore, IEA employees effectively receive more take-home pay as they get the same terms and conditions as union members without having union membership fees deducted from their wages.

Unions also claim that passing on undermines their ability to recruit and maintain membership since there is a disincentive to pay membership fees when the union-negotiated terms and conditions are automatically passed on to non-members for free. Decline in union membership, as a result of passing on, subsequently affects the bargaining strength and the ability to secure successful bargaining outcomes for their members. Therefore, although employers may not intend to undermine collective bargaining by passing on, unions argue that "the reality is that any pass on that contains provisions recently negotiated in collective agreements automatically undermines collective bargaining irrespective of intent."[5]

Unions further contend that some employers do in fact use passing on as a tactic to deliberately undermine collective bargaining and its outcomes.[6] This includes, for example, the situation where an employer explicitly encourages employees to choose an IEA over the CEA by emphasising the fact that the two agreements are the same, yet one must pay for the latter.[7]

Non-Union Members' Interests

Although many non-union member employees implicitly or explicitly support passing on, some will prefer the opportunity to bargain individually with their employer rather than be expected to automatically accept what has been agreed to in the CEA.[8] If this is the case, the non-member employees can reject the take-it-or-leave-it proposal and actively negotiate with their employer.

As for free-riders, unions have suggested the introduction of bargaining fees. If given the choice, many non-members would oppose voluntary contributions out of basic economic self-interest. If non-members were compelled to contribute, this would arguably conflict with

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[5] New Zealand Dairy Workers Union Inc, *Submission on Employment Relations Law Reform Bill to the Transport and Industrial Relations Committee (New Zealand)* (2 February 2004) 4.

[6] Hughes, supra note 2, 83.

[7] Waldegrave, Anderson and Wong, supra note 1; New Zealand Council of Trade Unions, *Submission on Employment Relations Law Reform Bill to the Transport and Industrial Relations Committee (New Zealand)* (27 February 2004) ["*CTU Submission*"].

[8] New Zealand Council of Trade Unions, *Factsheets* (2004) NZ CTU Campaigns <http://nzctu.labor.net.au/campaigns/> (at 23 November 2004).

the right to freedom of non-association, and would threaten a non-member's economic freedom and the right to choose how to spend their income.[9]

Passing On: A Catch-22

Due to the diverging interests within a mixed workplace, employers inevitably face a predicament in deciding whether to pass on or not. If employers choose to pass on, they do so against the interests of the union and union member employees, particularly when union members have had to strike for better terms and conditions at the expense of income.[10] If employers choose not to pass on and to bargain independently with non-member IEA employees, they are likely to do so against their own interests. Therefore, passing on is an important issue in the mixed workplace for any employer who is concerned with employee morale and productive employment relationships.

III AN EVALUATION OF THE NEW PASSING ON AND BARGAINING FEE PROVISIONS

From an Employer's Perspective

1 Sections 59A–C: The Passing On Provisions

(a) Complying with Section 59B

Employers fear that section 59B will require individual bargaining with each IEA employee, and that standardised terms and conditions will attract accusations of passing on in breach of good faith. To satisfy good faith obligations, employers will need to consider section 59B in two key situations. First, where there is no enforceable bargaining fee arrangement in place that permits passing on to fee-paying IEA employees, and where the union does not agree that the employer can pass on, employers must consider section 59B when dealing with all IEA employees. Second, where there is an enforceable bargaining fee arrangement in place, the employer must consider section 59B when

[9] As provided for under the Wages Protection Act 1984.
[10] Anderson, "Recent Case Comment" [2003] Employment Law Bulletin 25, 26.

dealing with those IEA employees who have opted out of the arrangement.

There are several ways in which an employer can attempt to comply with section 59B. Each approach prioritises different employers' interests and therefore its suitability largely depends on the types of the employment relationship tactics adopted.

(i) Reverse Passing On

The first approach, "reverse passing on", involves an attempt by the employer to pass on CEA terms and conditions to IEA employees, either before a collective bargaining is formally initiated, or before any terms and conditions are "reached" during a collective bargaining. This process is called reverse passing on because the employer settles the IEAs before passing on the same terms and conditions to the collective, rather than the other way around.

An employer who wishes to engage in reverse passing on must first discover what terms and conditions the relevant union demands. Although he or she can potentially find them out before the collective bargaining is initiated, more often than not those terms and conditions are discovered afterwards.[11] The employer must then cost those claims and decide what standardised terms and conditions will be offered to all employees, both on individual and collective agreements.

Next, the employer may need to suspend the collective bargaining, if initiated, while the employer rounds up the IEA employees and engages in individual bargaining. The employer will then offer take-it-or-leave-it terms and conditions to the IEA employees based on the union demands, while complying with the section 63A(2) good faith requirements. The employer should seriously consider rejecting any attempts by the IEA employees to negotiate more favourable terms and conditions. Rejections should be justified with performance-based reasons such as insufficient level of performance, or fairness-based reasons such as the need to treat all employees equally.

Once the IEAs are settled, the employer should then resume bargaining with the union by offering them the same, or substantially the same terms and conditions as those settled in the IEAs. Because the IEAs were settled first, the IEA employees enjoy the benefits of improved terms and conditions while the CEA is still being settled. Therefore, the

[11] Ronelle Barnes, Interview with James Ritchie (Trade Union Centre, Hamilton, 20 December 2004) ["Interview with James Ritchie"].

union may request back-pay in order to offset this advantage. In turn, the employer can strategically use this particular demand as leverage in order to reject other union requests.[12]

The advantage of reverse passing on is that by signing off the IEA employees before settling the CEA, it does not effectively amount to passing on under section 59B. Unfortunately, however, this approach appears to be rife with difficulties. The first difficulty is that employers still have to bargain independently with the IEA employees, which is contrary to employers' interests in cost minimisation. "Bargaining" in accordance with section 63A(2) may not be onerous if the majority of IEA employees accept take-it-or-leave-it offers without question, as many tend to do.[13]

The second difficulty is that without hard bargaining, employers may struggle to settle the IEAs and the CEA with the same, or substantially the same terms and conditions. This difficulty will arise when the IEA employees attempt to negotiate alternative terms and conditions, and when the union demands more than what was settled in the IEAs. Whether standardised terms and conditions can be achieved depends on how the employer handles further negotiations and manages to reject counter-proposals while complying with the requirements of good faith bargaining.

While good faith bargaining requires a definite position, which is supportable by articulation and defence,[14] the employer must participate actively in the discussion to manifest his or her intention to find a basis for agreement.[15] The employer is required to consider and respond to proposals made by the IEA employees and the union, and should therefore remain at the table willing to listen and be persuaded that he or she is wrong.

The employer may reasonably and lawfully bargain hard and maintain its position on any particular terms and conditions[16] as long as

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[12] When the employer rejects further union proposals, he or she should do so with operative reasons, which do not provide the union with an opportunity to request information under s. 34. For example, the employer can cite the reasonableness of his or her offer, other priorities he or she faces, and the need to treat the staff on the same terms and conditions for staff morale. But the employer should not cite his or her affordability to offer more.

[13] Ronelle Barnes, Interview with Alison Gray, Jane Taylor, Catherine Stewart and David France (Kiely Thompson Caisley, Auckland, 14 December 2004).

[14] "Panel Discussion: Business and Unions Working Together for Mutual Gain: Strategies for the Future" in Institute for International Research, *18th Annual Industrial Relations Conference 2004* (2004) ["Panel Discussion"].

[15] *NLRB v Montgomery Ward & Co,* 133 F 2d 676 (9th Cir, 1943).

[16] Hornsby, "Pros and Cons of Collective Versus Individual Agreements: How to Manage a Workplace with Mixed Employment Arrangements" in Institute for International Research, *15th Annual Industrial Relations Conference 2001* (2001) 10.

the parties proceed in accordance with the agreed collective bargaining procedure and neither party attempts to subvert the bargaining process or undermine the other's bargaining efforts.[17] If the employer has a strict predetermined position with no intention of re-considering, this may lead to an accusation of surface bargaining. Surface bargaining is where the employer fulfils the objective requirements of good faith without having the proper subjective intention.[18] An example is where one party is simply going through the motions of bargaining without actually intending to enter into a CEA with the other party.[19] Although this example is likely to constitute a bargaining in breach of good faith, the validity of surface bargaining has not yet been settled in New Zealand.[20]

Reverse passing on may arguably amount to surface bargaining as the employer is effectively setting a ceiling for the IEAs based on the union's original demands, and then transferring that ceiling to the collective bargaining process. It may be advantageous for employers to agree to better terms and conditions for high-performing employees to provide evidence of having an open mind and to negate surface bargaining allegations, albeit this goes against an employer's interest in achieving standardised employment agreements.

The third difficulty with reverse passing on is that an employer may breach the duty of good faith by suspending collective bargaining while settling the IEAs. The suspension may be necessary because an employer will often discover the demands of the union only after collective bargaining has been initiated.[21] *NUPE Inc v Richmond Fellowship New Zealand*[22] involved an accusation of surface bargaining when the employer suggested that collective bargaining be halted while the IEA negotiations took place. The Court said this suggestion, together with the indication that the employer did not want a CEA, was found to breach the employer's duty of good faith. Thus, to allege a breach of good faith during reverse passing on, a union may potentially require not only evidence of the suspension of collective bargaining initiated by the employer, but also evidence that the employer did not have an open mind and was engaging in surface bargaining.

An allegation of breach of good faith could also be brought under section 4(6)(a), independently of section 59B. If an employer is

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[17] Binnie and Cranney, "The Collective Bargaining Process" in New Zealand Law Society, *Employment Law Conference, 11-12 October 2004* (2004) 27.
[18] Panel Discussion, supra note 14.
[19] Binnie and Cranney, supra note 17, 26.
[20] Ibid.
[21] Interview with James Ritchie, supra note 11.
[22] (17 July 2003) unreported, Employment Relations Authority, Christchurch, CA 78-03.

held to have breached their duty of good faith, a compliance order may require re-bargaining with the union in good faith. In the worst case scenario, an employer will be liable for a penalty fine of up to $10,000 (section 4(7)), although this may be considered as a mere smack on the hand and worth the risk.

Regardless of whether reverse passing on technically breaches an employer's duty of good faith, unions may still argue that it amounts to free-riding.[23] Furthermore, having the same terms and conditions in both the IEAs and the CEA will at least open the employer up to an accusation from the union through section 59B and the court may scrutinise the bargaining process. At a minimum, employers may face the expense and inconvenience of litigation. Where the union feels undermined, there is also the potential for unproductive employment relationships in the post-bargaining environment.[24]

(ii) Settling the CEA First

A less complicated and more effective approach for achieving standardised terms and conditions while still complying with section 59B is to settle the CEA first, and then engage in individual bargaining. In this situation, the higher threshold test in section 59B applies. This means a union must establish that an employer has the intention to undermine, and that the employer's behaviour in passing on has the effect of undermining the CEA.

An intention to undermine may be very difficult to prove, particularly if an employer utilises the factors in section 59B(6) to his or her advantage. For example, before agreeing to the IEA terms and conditions, the employer should bargain independently with the IEA employees (section 59B(6)(a)), consult with the union in good faith (section 59B(6)(b)), and let a reasonable length of time pass after settling the CEA (section 59B(6)(d)). The employer should also consider the number of employees bound by the CEA in comparison to the number of IEA employees who may receive the benefits of passing on (section 59B(6)(c)).

With regard to section 59B(6)(a), the employer should at a minimum comply with the good faith requirements set out in section 63A(2). If 95 per cent of IEA employees automatically accept the CEA terms and conditions offered by the employer, this will look less like

[23] Binnie and Cranney, supra note 17, 27.
[24] Ibid 35.

independent bargaining, and more like automatic passing on. If this response is anticipated, an employer should consider a higher level of engagement, other than take-it-or-leave-it style offers based on the CEA. One suggestion, consistent with employers' interests in cost minimisation and fairness, is to concede improved terms and conditions to high-performing IEA employees. This provides evidence against an intention to undermine by showing that individual bargaining in fact took place. Employers must also be prepared to justify why some IEA employees are on better terms and conditions than the CEA, and these reasons must not relate to membership.[25]

The second factor, under section 59B(6)(b), appears to relate to the new section 4(1A)(b) whereby the duty of good faith requires the parties to be communicative and responsive in establishing and maintaining a productive employment relationship. Accordingly, the employer should consider raising their interest in having standardised terms and conditions with the union in an attempt to seek their approval in accordance with section 59B(5). Even if the union's approval is not obtained, consulting with the union should provide evidence of having acted in accordance with good faith.

This second approach of settling the CEA first is more consistent with what the ERA 2000 intended in the area of good faith relationships and behaviour. Although section 59B does apply, there is a smaller risk of breaching the duty of good faith, so long as the employer does not have the requisite intention to undermine. If an employer's behaviour does breach section 59B, then he or she is automatically liable for a penalty of up to $10,000 under the new section 4A(c).

(iii) Encouraging Employees to Join the CEA

Where an employer has a co-operative and productive relationship with the union, the employer should consider encouraging the IEA employees to join the CEA, in addition to settling the CEA first in accordance with the second approach above. By minimising the number of employees on IEAs, this strategy has the advantage of reducing both the costs of individual bargaining and the risk of breaching section 59B. Under section 59B(6)(c), the smaller the number of IEA employees receiving the CEA terms and conditions, the weaker the argument that a union is being undermined.

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[25] This is necessary to comply with the freedom of association provisions in part 3, and good faith provisions such as s 4(6).

An employee can be encouraged to join a CEA either verbally or contractually with the provision of better terms and conditions in the CEA. When using verbal encouragement, an employer must be careful not to jeopardise voluntary union membership. If undue influence is proven, the employer will be liable for a penalty under section 11(2) of the ERA 2000. When using contractual encouragement, an employer must do so only in accordance with the new section 9(3) of the ERA 2000. The relevant terms and conditions must intend to recognise the benefits of a collective agreement and arise out of the relationship on which a collective agreement is based. If the contractual encouragement amounts to preference under section 9(1), then the provisions in question will have no force or effect in accordance with section 10.

When there is more than one union in a workplace, an employer can still agree to more favourable terms and conditions in one CEA compared to the other when the differences are commercially justifiable.[26] This was illustrated in *NUPE v Asure New Zealand Ltd.*[27] The Employment Court held that section 9 does not require employers to be entirely union neutral, and section 9(2) was inserted to ensure that different terms and conditions do not themselves constitute "unlawful preference". Rather, section 9(2) focuses the inquiry on reasons for preference. In this case, the employer did not offer different terms and conditions to NUPE to discourage NUPE membership, but rather as a result of a history of distrust and ill will. More favourable terms and conditions were offered to PSA to honour their obligations in accordance with a previous agreement, which is concerned with enhancing long-term interests.

This third approach of encouraging employees to join the CEA has the potential to produce a happier and productive employment relations environment. Under this approach, an employer would only have to bargain once with the union, rather than individually with a range of IEA employees. The downside is that by encouraging union membership, the employer risks the costs associated with having a more organised and powerful union in the workplace.

Furthermore, some IEA employees will not join unions for several reasons, regardless of the employer's verbal and contractual encouragements. Therefore, there will often be some individuals with whom the employer will have to bargain independently. In this situation, the employer could encourage the IEA employees to form a new in-house

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[26] Hornsby, supra note 16, 20.

[27] *National Union of Public Employees (Inc) v Asure New Zealand Ltd* (2005) 7 NZELC 97,743.

union "B" with an indication that the employer will work with it cooperatively. Such approach will close the door to passing on claims under section 59B and it would meet the employer's interest in one-off bargaining rather than repetitive bargaining with individuals. The employer must be careful not to breach section 59C by passing on terms and conditions from the CEA "A" to those on the new CEA "B". To avoid this, the employer should consider agreeing to different or better terms and conditions, which are commercially justifiable, in the CEA "B".

This approach also attracts a risk of breaching the good faith and freedom of association provisions in sections 9, 11 and 32. There is a perception that supporting the establishment and development of an in-house union can amount to undermining collective bargaining.[28] Therefore, it is essential that an employer does not set up an in-house union with an intention to undermine an existing union, and that the employer always remain at arms-length from the in-house union.

(b) Complying with Section 59C

Section 59C is a parallel provision to section 59B. Therefore, when deciding how to comply with section 59C, the approaches under section 59B may be applicable.

2 Complying with Part 6B: The Bargaining Fee Provisions

Prior to the ERAA 2004, it was unknown whether bargaining fee arrangements were lawful. In *NZDWU v NZMP,*[29] the Court of Appeal declared that bargaining fee arrangements were illegal in the particular circumstances of that case. Today, part 6B of the ERA 2000 overrides any debate as to legality so long as the arrangement complies with the statutory requirements outlined in sections 69P-W.

From an employer's perspective, three main concerns that may arise are first, whether he or she can refuse to agree to a bargaining fee arrangement, second, what happens if employees opt out of an arrangement, and third, whether he or she can re-negotiate an IEA with employees who fail to opt out within the specified time period.

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[28] Waldegrave, Anderson and Wong, supra note 1, 37.

[29] *New Zealand Dairy Workers Union Inc v New Zealand Milk Products Ltd* [2004] 3 NZLR 652 ["*NZDWU v NZMP*"].

(a) Can an Employer Refuse to Agree to a Bargaining Fee Arrangement?

When a union proposes a bargaining fee arrangement during a collective bargaining, the employer must treat the proposal like any other, consider it, and respond to it.[30] If the employer chooses to reject the proposal, he or she should carefully consider the reasons for rejection so that section 34 is not triggered. An employer should also maintain an open mind and engage in hard bargaining as opposed to surface bargaining.

Toll NZ Consolidated Ltd[31] illustrates the ability of an employer to say "no". In that case, the union alleged that the employer had a predetermined position and had not considered a proposal in good faith. In response, the Employment Court said:[32]

> Unless there is evidence of bad faith, we cannot see that there is an absence of good faith in a party adhering to a genuinely held belief as to the correctness of its position when the matter was clearly arguable one way or the other.

The intention behind good faith is to ensure that reasons are given, and that requests of an employee or union are not rejected out of hand without any reasons.[33]

When rejecting a bargaining fee arrangement, an employer should also consider section 33(2), which states that disagreement about a bargaining fee clause is not a genuine reason to not conclude a CEA, and section 86(1)(da), which makes it unlawful to strike or lockout if it relates to a proposed bargaining fee clause.

Whether an employer *should* agree to a bargaining fee clause is another matter. For example, a bargaining fee arrangement can minimise the risk of passing on allegations under section 59B by allowing passing on to fee-paying IEA employees. Willingness to agree to bargaining fees can also be tactically useful as a leverage point during collective bargaining negotiations.

(b) Opting Out

Once a bargaining fee arrangement is established in compliance with part 6B, IEA employees may decide to opt out of the arrangement within the specified time period. If so, the employer must bargain with them

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[30] In accordance with s 35 of the ERA 2000 and the Code of Good Faith.
[31] *Toll NZ Consolidated Ltd v Rail & Maritime Transport Union Inc* [2004] 1 ERNZ 392.
[32] Ibid [80]-[81].
[33] Panel Discussion, supra note 14.

individually in accordance with the previous section 59B discussion. If this is inconvenient, an employer should consider taking two courses of action to minimise the number of opting out employees.

First, the employer should emphasise to IEA employees that if they opt out they will remain on the same terms and conditions until they bargain independently with the employer. Merely informing the employees of how the new law will operate is not a breach of freedom of association and does not amount to unfair bargaining. After all, the employer is not influencing employees with regards to union membership, but rather with the payment of bargaining fees, which is an entirely different matter.

Second, the employer should take interest in the amount of the bargaining fee as the bargaining agent for the IEA employees, in order to contribute towards a more productive post-bargaining environment.

(c) Can Employees Who Fail to Opt Out Negotiate a New IEA?

When an IEA employee fails to opt out during the specified time period, rather than pay approximately $265.00 a year[34], the employee may nevertheless approach their employer asking to re-negotiate his or her IEA, so as to exclude the bargaining fee clause.[35] Opinions are divided on whether this is legally possible.

On the one hand, unions claim that the IEA employee is bound by contract to pay the bargaining fees and the employer is bound to deduct and remit those monies to the union according to sections 69R-T.[36] Although the Wages Protection Act 1983 ("WPA 1983") provides that an employee has complete discretion over how they choose to spend their wages, section 69W provides that a bargaining fee arrangement overrides the WPA 1983, thus allowing a system of opt in by default. According to this argument, sections 69R-T continue to bind the IEA employee and employer to pay and deduct, respectively, the bargaining fee for the duration of the CEA. This is because the clause still "applies" to the IEA employee, regardless of whether the bargaining fee clause is

[34] This figure is calculated by using the Amcor and EPMU bargaining fee arrangement: $5.10 multiplied by 52 weeks is $265.20 a year.

[35] By not opting out of the bargaining fee arrangement, the bargaining fee clause applies to the IEA employee under ss 69P(a) and 69S, and is included in their IEA by virtue of s 69P, which provides that the clause is a part of the CEA and whereby the IEA comprises of the terms and conditions of employment specified in the CEA.

[36] Email from James Ritchie to Ronelle Barnes, 21 December 2004.

included in the employee's employment agreement. After all, "[m]emory lapses are not usually good excuses for avoiding legal obligations".[37]

Aside from the operation of part 6B, unions may have an argument under the Contracts (Privity) Act 1982 as a third party beneficiary if they are identified accordingly in the IEA, and if it was intended that the union could enforce that promise in the IEA.[38] In this case, the union could cite section 5 of the Contracts (Privity) Act 1982 in arguing that the IEA cannot be varied to defeat their claim, so long as the union as a third party beneficiary has altered its position in reliance upon the inclusion of a bargaining fee in a single IEA.

On the other hand, IEA employees will assert that they are free to re-negotiate their employment agreement. Whether this argument can be made will come down to the law of contract and how part 6B is judicially interpreted, particularly in relation to the conflict between these two areas of law. As the newly amended ERA 2000 will override common law, IEA employees face an uphill battle in attempting to make their case.

Even if IEAs can be re-negotiated, employers may find this to be fairly onerous. Therefore, it is recommended that employers ensure that all IEA employees are fully informed about the opt out period and what opting out means. If any employees then fail to opt out, the employer should seriously consider rejecting any requests by forgetful employees to re-negotiate their employment agreements.

From a Union and Union Member's Perspective

1 Sections 59A-C: The Passing On Provisions

(a) Section 59B: Loopholes

From a union's perspective, the main issues that will arise during the operation of section 59B relate to the various weaknesses identified by unions and a concern that employers will use these weaknesses in search for loopholes so that passing on can continue in a manner that will not breach their duty of good faith under the ERA 2000.

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[37] Ibid.

[38] This line of reasoning depends on s 69P, which provides that the IEA comprises the terms and conditions specified in the CEA, including the bargaining fee clause. Only by opting out will the bargaining fee clause not be included in the IEA by virtue of s 69R(2)(b).

(i) Reverse Passing On

The first loophole unions are wary of is the tactic of reverse passing on. Although employers may avoid this complicated and risky approach, it seems inevitable that at least some will endeavour to use it in order to avoid the application of section 59B. There is also a possibility that reverse passing on may become widely used if the anticipated difficulties turn out to be less problematic in practice.

In this situation, as mentioned above, unions must bring any breach of good faith claim either under section 32(1)(b) (regarding the suspension of collective bargaining) or by showing that the employer had a closed mind during collective bargaining.[39] Similarly, an argument could be made under section 32(1)(d)(iii) alleging that either the suspension of collective bargaining, or the act of reverse passing on, or both, is undermining collective bargaining. Both these arguments require that collective bargaining has in fact been initiated.

An action may alternatively be brought against the employer under section 4(6), for doing "anything with the intention of inducing" employees not to be involved in a collective bargaining or the CEA. The establishment of the requisite improper intention will still depend on a free-riding argument where an employer is not actively or explicitly inducing employees not to be involved in collective bargaining, but rather is merely deciding the IEA terms and conditions by predetermined standards taken from the union demands. The union would therefore have to argue that this is just passing on in another form and is still undermining the union by indirectly inducing employees not to join.

Although it may be obvious in some cases that employers are breaching their duty of good faith, unions will be especially cautious in bringing a case against the employer because of the level of uncertainty around the issue of what constitutes a breach of good faith in sections 32(1)(b), 32(1)(d)(iii) and 4(6). More importantly, unions will want to win these early test cases and therefore, will only tend to bring proceedings in strong cases.[40] This cautious approach is consistent with that taken under the ERA 2000, although unions now have an added incentive under the penalty provision in section 4A. In future, if employers do engage in reverse passing on, unions should recommend section 59B be adjusted to capture such situations by using broader and more purposeful wording.

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[39] A "closed mind" is where an employer objectively looks as though they are complying, but he or she is in fact engaging in sophisticated surface bargaining.

[40] Interview with James Ritchie, supra note 11.

(ii) Settling the CEA First

The second loophole identified by unions is where employers pass on CEA terms and conditions to IEA employees after the CEA has been concluded. This is less of a loophole, and more of a tactical approach, since the aim is to comply with section 59B as intended, but to attract only section 59B(2) cases, if at all. As a result, the higher threshold applies and employers anticipate that unions will have great difficulty in proving an intention to undermine.

Some unions similarly consider that the section 59B(2) threshold is so high that it will render section 59B ineffective because an improper intention is inherently difficult to prove. Ideally, the threshold would have been lowered to an alternative intention or effect test like that in section 59B(4). Other unions are not so concerned. For example, James Ritchie, the National Secretary of the New Zealand Dairy Workers' Union, proposes that unions pre-empt the issue and address the matter in collective bargaining by asking the employer what he or she intends to do about passing on. Some employers may claim that they intend to bargain as required by the law, and beyond that, how individual bargaining is conducted is not the union's concern. Preferably the union and employer will come to an agreement whereby the collective will receive special benefits (such as back pay and superannuation schemes), and the union will accordingly agree that the employer is free to pass on CEA terms and conditions, with the exception of those special benefits.

If no such agreement is made, the union should make it clear to the employer that if the CEA terms and conditions are passed on, then these will in effect undermine the CEA. Because the employer is made aware of this, the union will assume that the employer is intending to undermine the CEA if he or she in fact continues to pass on, notwithstanding the warning.[41] Furthermore, the union has a foundation from which to argue that the employer is intending to undermine, if they wish to bring a court proceeding for breach of the duty of good faith.

Reaching an agreement as to passing on is preferable because it provides security for the union, in the form of special benefits, which offers members an explicit advantage over non-members and thereby reduces the incentive to free-ride. These explicit advantages are important because although unions already offer a range of services other than collective bargaining, free-riders tend to perceive that there is little

[41] Ibid.

to be gained through union membership as the benefits of collective bargaining are passed on irrespective of the membership.

On the other hand, where no agreement as to passing on is secured, a union will be very reluctant to bring a case under section 59B(2) unless they have a very strong case. This is because unions consider the early cases are crucial in setting precedents and therefore must be won. Furthermore, regardless of whether a union may think the employer has intended to undermine the CEA, since the employer ought to have known that they would in effect undermine the union, the outcome of a section 59B case will turn on how intention is interpreted at court and whether a more explicit intention is required.

Therefore, unions will primarily aim at reaching an agreement with the employer and will fall back on litigation only as a last resort, and only where an intention to undermine is especially clear. After all, a special benefit agreement is most likely to satisfy union members, and should meet an employer's interests in maintaining a productive post-bargaining environment and in his or her desire to safely pass on.

(iii) In-House Unions

The third loophole is where employers encourage an in-house union either with or without an intention to undermine the existing union. If the original union can show that the employer has improper objectives in attempting to discourage membership or undermine their CEA, it may have a case worth pursuing in court. The risk of their doing so is small. As unions are highly conscious of the effect of such litigation on the union movement, unions are likely to pursue only the strongest cases.

(b) Section 59C: Competitive Unionism

Although section 59C is a parallel section, and much of the earlier discussion may apply, unions are particularly concerned with the ability of section 59C to unnecessarily complicate collective bargaining where an employer negotiates with several unions under separate CEAs.[42] Section 59C is not an issue in terms of co-operative or collaborative collective bargaining. This discussion is more concerned with competitive unionism. This is where an employer engages in collective bargaining independently with the different unions.

[42] *CTU Submission*, supra note 7, Appendix 1.

Ideally, the employer should in fact bargain with the different unions. The problem with this approach is that the employer may pass on terms and conditions reached in collective bargaining with union "A" to union "B". Section 59C would therefore seem useful for addressing free-riding from the point of view of union "A" and union "B" may resent having to bargain for terms and conditions it previously received automatically. Neither union appears to support the use of section 59C because of the impact such a case could have on the union movement in terms of both negative publicity and fragmentation of union solidarity.[43]

If passing on did occur between CEAs, unions would prefer to work out an agreement between each other. One option is that the unions consider working collaboratively, rather than competitively, by negotiating a multi-union collective agreement. Alternatively, union "A" might agree that passing on can continue so long as some special benefits are retained exclusively for union "A" in recognition of their having done the hard bargaining yards. This is similar to the special benefit agreement reached between a union and an employer in terms of passing on to IEA employees. As mentioned above, special benefits are lawful under section 9(3). They do not breach section 9(1), unless they amount to preferential treatment as opposed to recognising the benefit of the collective.

2 Part 6B: The Bargaining Fee Provisions

Unions are similarly concerned with the three issues discussed above under the employer's perspective. Part 6B creates two additional issues from a union's perspective: setting the amount of the bargaining fee, and organising a successful secret ballot.

(a) Can an Employer Refuse to Agree to a Bargaining Fee Arrangement?

The first issue concerns whether an employer can refuse to agree to a bargaining fee arrangement. From an employer's point of view, it was concluded that employers are basically free to reject a part 6B proposal, so long as they do so consistently with the duty of good faith.

Unions can attempt to persuade the employer that a bargaining fee arrangement would be in both of their interests and would not cause disruption or have counter-productive effects on the employment environment. The level of persistence and extent of concessions made in

[43] Interview with James Ritchie, supra note 11.

pursuing the arrangement will depend upon the perceived importance of a bargaining fee arrangement in the particular situation. With regard to this issue, sections 33(2)(b) and 86(1)(da) also demand consideration.

It has been suggested that only highly-organised unions should propose a part 6B arrangement because of the potential counter-productive effects in terms of non-member resentment, division in the workplace and many employees opting out. After all, part 6B is just a tool for dealing with free-riding, but is by no means a solution.[44]

A less-organised union may be better off foregoing the negotiation of part 6B arrangements, and instead negotiating a special benefit agreement with the employer.[45] This is because special benefit clauses may be just as effective in terms of discouraging free-riding, while providing the collective with recognition of the benefits they bring to the workplace.[46] Therefore, although employers may anticipate part 6B proposals from every union who can potentially win a secret ballot, in practice, many less-organised unions may prefer to deal with passing on in collective bargaining negotiations.

(b) Opting Out

The second issue, from a union's perspective, is what proportion of IEA employees will opt out of a part 6B arrangement, and whether unions can discourage opting out. Where union density is high, the number of employees who opt out may be minimal, and non-members may in fact join the union for no or little extra cost in order to get the added benefits of being a member.[47] For example, when the NZDWU and New Zealand Milk Products Limited introduced their *de facto* version of the bargaining fee arrangement before the Court of Appeal ruled it unlawful, most non-members in fact chose to join the union rather than pay the bargaining fees.[48]

Where union density is lower, unions should consider using marketing techniques in order to persuade non-members not to opt out. For example, unions should emphasise that section 69R(2)(b), combined

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[44] Interview with James Ritchie, supra note 11.

[45] Whereby "less-organised" refers to union density in the mixed workplace, and depending on one's interpretation, it can include up to a 65 per cent/35 per cent split between union members and non-members respectively.

[46] The benefits a collective may bring to a workplace include, for example, the fact that the employer only has to bargain once with the collective rather than individually with all the union members, and, by virtue of the special benefit agreement, the employer can then pass on those CEA terms and conditions to IEA employees, rather than engage in independent bargaining with each individual.

[47] Interview with James Ritchie, supra note 11.

[48] Ibid.

with the new section 59B, will mean that those who do opt out will have to bargain independently with the employer and will not receive improved terms and conditions based on the collective negotiations. Where the employer is in favour of a bargaining fee arrangement, the employer may provide support in these efforts as mentioned above. If the employer is not co-operative and in fact tells employees that passing on will continue, the union may have a case for breach of good faith under section 4(6), so long as a broad interpretation is adopted.

In order to minimise the number of employees who opt out, unions should also consider setting the bargaining fee at a lower amount than the cost of normal union membership, and at a reasonable estimation of the costs of collective bargaining.

(c) Can Employees Who Fail to Opt Out Negotiate a New IEA?

From a union's perspective, re-negotiation of a new IEA after the expiration of the specific time period is either unlawful, ineffective, or both. In support of this perspective, unions can run two legal arguments: section 69W and the Contracts (Privity) Act.

Whether a union will actually run such an argument at court is another matter. This is because, once again, it is anticipated that unions will be cautious to bring only the strongest of cases, if at all, in order to secure wins for the union movement.

(d) Setting the Amount of the Bargaining Fee

While employers are concerned with setting the suitable amount of bargaining fees in order to minimise the number of employees who opt out, unions are additionally concerned with how the bargaining fee operates as an incentive, or disincentive, in choosing to join the union.

Section 69U provides that the bargaining fee must not be greater than the amount of normal union membership fees.[49] Prima facie, unions will be tempted to charge the same amount as normal membership fees. First, this would act as a disincentive for current members to forego

[49] The legality of a clause that charges bargaining fees in excess of the ordinary cost of union membership was argued as a freedom of association issue in Australia, and was upheld on the basis that it did not require membership. *Re Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003 and Other Agreements* (9 February 2001) AIRC, Melbourne, PR900919; (12 October 2001) AIRC (Full Bench), Melbourne, PR910205. See also Parliament of Australia, *Are union bargaining fees legal?* (28 May 2003) Bargaining Fees and Workplace Agreements <http://www.aph.gov.au/library/intguide/ECON/Bargaining_Fees.htm> (at 30 September 2005).

their membership in favour of becoming a "cheap-rider".[50] Second, this would act as an incentive for non-members who do not opt out to join the union at no extra cost. Thus, setting bargaining fees at the full cost of union membership appears to maximise union density, while receiving dues from free-riders who neither choose membership, nor opt out. For example, the New Zealand's Engineering, Printing and Manufacturing Union appeared to act on this reasoning by successfully proposing to Amcor that bargaining fees be set at 100 per cent of normal union membership fees.[51]

Setting bargaining fees at the full cost of membership will encourage some IEA employees to opt out when they might not otherwise have done so had the bargaining fee been lower. Therefore, unions may have to employ the aforementioned marketing techniques to ensure only a minimal number of non-members opt out.

Some employers may not agree to bargaining fees being set at 100 per cent of normal union membership fees. In this case, a union may have to trade-off another benefit in order to persuade the employer to agree to 100 per cent. Before doing so, however, the union should provide information in accordance with section 34 to justify the fee being set at 100 per cent. The union should argue that every expense is related to collective bargaining. A distinction between those which are directly relevant, and those that are less direct, is arbitrary. If this approach is unsuccessful, the union may have to consider a lesser fee, rather than no bargaining fee arrangement at all.

Unions should avoid the temptation of lawfully setting bargaining fees at 100 per cent of ordinary union membership fees because it will ultimately be counter-productive.[52] Within the workplace, non-member employees, whether they opt out or not, will inevitably perceive that the bargaining fee does not reflect the costs of collective bargaining. This fact is particularly evident as unions themselves emphasise the variety of services they provide other than collective bargaining. (Examples include personal grievance representation and insurance.) By appearing unreasonable, or even greedy, the union's reputation will be damaged both within the workplace and beyond. These are important considerations in potential recruitment and in terms of promoting peaceful and productive employment relations in the

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[50] Orr, "Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)Security and the Rights of Free-Riders" (2001) 14 Australian Journal of Labour Law 1, 98.

[51] Claire Trevett, "'Free rider' fee hits workers outside union", *The New Zealand Herald*, Auckland, New Zealand, 6 December 2004, A3.

[52] Interview with James Ritchie, supra note 11.

workplace, which can in turn enhance the relationship between the union and employer.

All unions should agree to set the fee at an amount that reasonably reflects the costs of collective bargaining, not only to minimise the number of employees who opt out, but also to protect the union's reputation. It is anticipated that only highly-organised unions will negotiate bargaining fee arrangements, and only a very few non-members are expected to opt out, particularly when the fee reflects the costs of collective bargaining. These unions will be relatively well-resourced. Setting the bargaining fees at less than 100 per cent of ordinary union membership fees should not, thus, cause any great concern to the unions. For example, the highly-unionised NZDWU introduced a bargaining fee arrangement primarily to satisfy union membership concerns rather than to maximise resources. The bargaining fee was set at approximately 83 percent of the ordinary costs of union membership.[53] Although this was prior to the introduction of part 6B and the ERAA 2004, the NZDWU has indicated that they intend to maintain bargaining fees at this lower amount.[54]

It is nevertheless anticipated that some unions will attempt to set bargaining fees at 100 per cent of the normal costs of union membership. The potential negative effects would be of little concern to them. They simply would believe that the costs of collective bargaining on behalf of IEA employees genuinely amount to the full cost of normal membership, if not greater.[55]

(e) The Secret Ballot

For a bargaining fee to be enforceable, section 69Q requires that it be agreed to in a secret ballot by a majority of the employees who vote. If more than 50 per cent of the employees eligible to vote are union members, the union should ensure they vote in its favour. Otherwise, the union should persuade non-members to vote in its favour, by emphasising that a bargaining fee arrangement would give non-members the choice of receiving improved terms and conditions, albeit while paying for them, as opposed to being required to individually negotiate with the employer in accordance with section 59B. Unions would have to emphasise that non-

[53] The NZDWU bargaining fee was set at 0.05 per cent, or 50 cents per $100, of a non-member's gross earnings (for example $250 a year for an employee on $50,000). Meanwhile, the cost of union membership was 0.06 per cent, or 60 cents per $100, of a member's gross earnings.

[54] Interview with James Ritchie, supra note 11.

[55] Ronelle Barnes, Interview with Richard McIlraith and Gillian Service (Russell McVeagh, Auckland, 22 December 2004).

member employees would in fact have a choice, and will be entirely free to opt out of the arrangement once it is in place. Unions could also appeal to an employee's conscience by explaining that a bargaining fee would allow non-members to contribute to collective bargaining done on their behalf, while not having to pay full membership fees (if set at less than 100 per cent) and while preserving their right not to be associated with the union.

On the other hand, a more cunning way of winning support would be to keep the secret ballot as quiet as possible, providing that the union is confident that those who will vote will do so in favour of the union. So long as the secret ballot is kept low-key, many indifferent employees will most probably not bother voting and only those who truly oppose the union and a bargaining fee arrangement will take the initiative to vote. Either way, marketing and persuasion will be important. Non-members, who may side with collectivism and see the importance of a viable union movement, may still find they are quite happy to oppose bargaining fee arrangements at their own workplace, especially if given a "secret" vote on the issue.[56]

Nonetheless, as discussed above, unions should consider foregoing the implementation of a bargaining fee arrangement unless the union is highly-organised,[57] in which case, provided the union members do vote, winning a secret ballot will not be difficult.

From a Non-Union Member's Perspective

1 Section 59B: The Passing On Provisions

Generally, non-members will be unhappy about the new requirements under section 59B to bargain independently with employers for terms and conditions, which they may have previously received automatically for free. This is particularly annoying for those IEA employees who are happy to accept take-it-or-leave-it style offers from their employer, but are now potentially forced to bargain where the employer is reluctant to automatically offer the union-negotiated terms and conditions. On the contrary, there will also be some IEA employees who did not appreciate being expected to automatically accept the CEA terms and conditions and will therefore appreciate the requirement to bargain.

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[56] Orr, supra note 50, 86.

[57] Interview with James Ritchie, supra note 11. "Highly-organised" means, for example, at least a 65 per cent/35 per cent proportion of union members to non-members.

Some people argue that the freedom employers and non-members may have previously enjoyed in individual bargaining has been diminished to such an extent that section 59B may act as an inducement to join the union, thereby also affecting non-members' freedom of choice. An inducement does not necessarily amount to an infringement upon freedom, as employers are still somewhat free to make take-it-or-leave-it offers, and non-members are certainly free to accept them. In addition to the general discontent and concern for freedom of choice, there are two further issues which non-member employees may be concerned about under section 59B: the so-called CEA ceiling; and whether non-member employees can engage in double dipping.

(a) The CEA Ceiling

IEA employees may expect to face a ceiling, in terms of being unable to bargain for better terms and conditions than those agreed to in the CEA. Employers are clearly entitled to offer different terms and conditions to employees under section 9(2), so long as this does not amount to preferential treatment under section 9(1), or indirect discrimination on the basis of membership.[58] Being reluctant to face allegations of breach of good faith or freedom of association by the relevant union, employers will have a strong incentive to standardise terms and conditions, if not to offer IEA employees less. As discussed above, the latter is now clearly possible under the new section 9(3), so long as the more favourable terms in the CEA are intended to recognise the benefits of the collective.

Despite non-members' concerns, it is also quite possible that employers will instead agree to more favourable terms and conditions for high performing IEA employees. Furthermore, although employers may have reason to fear litigation initiated by unions, courts have traditionally been reluctant to challenge an employer's ability to make commercial decisions and run his or her business.[59] Providing there is an apparent legitimate commercial basis for the difference between the CEA and IEAs, the court is unlikely to scrutinise the terms too meticulously.[60] Naturally, this is still subject to the employer having improper motives to undermine the union or discriminate against union members.[61] Nonetheless, employers may still be cautious when offering IEA employees better terms and conditions. Unions have suggested that they

[58] Hornsby, supra note 16, 10.
[59] Ibid 11.
[60] Ibid.
[61] Ibid.

will be sceptical and may allege breach of good faith in such circumstances.[62]

(b) Double Dipping

If an IEA employee does not want to join the union or CEA, but the CEA has better terms and conditions, the employee could potentially engage in "double dipping". This is where the employee joins the union to receive the CEA terms and conditions, then leaves the union and therefore the CEA. He or she will still be left with an IEA, which is based on the CEA terms and conditions. This is consistent with the principle that an agreement cannot be varied without the consent of both parties, and that the employee always retains freedom of choice regarding whether to be associated with the union or not.

Both the employer and the union may, however, negotiate a "drop dead" clause into the CEA to counter such behaviour. In such a situation, the employee's CEA terms and conditions will continue to apply in the new IEA, only to the extent that they are not inconsistent with other IEAs in the same workplace. Or, alternatively, the clause could state that special benefit provisions will no longer apply if an employee leaves the union and the CEA.[63]

2 Part 6B: The Bargaining Fee Provisions

From a non-member's perspective, there are three areas of concern under the new part 6B. These are: whether to opt out; whether a new IEA can be re-negotiated if an employee fails to opt out within the specified time; and the fair-fee issue.

(a) Opting Out

While some non-members may feel obliged to pay bargaining fees, it can be safely assumed that there will be many non-members who will not be so compliant.[64] As part 6B provides a system of opt in by default, non-members must actively opt out if they do not wish to pay. It will be interesting to observe how many non-members in practice forego opting out. The word "forego", is more appropriate than "choose to" in this context, because it is anticipated that many non-member employees who

[62] Trevett, supra note 51.
[63] Hornsby, supra note 16, 14-15.
[64] Orr, supra note 50, 68.

are indifferent to union membership or paying bargaining fees, will simply do nothing, rather than actively make a choice to opt out or not.

Whether a non-member employee opts out of a bargaining fee arrangement may first depend on the level of the bargaining fee. If the fee is set at 100 per cent of normal union membership fees, there is theoretically more incentive to opt out than if the fee was set at, for example, 85 per cent of normal union membership fees. Yet, realistically, the difference between paying 85 per cent and 100 per cent of union membership fees may only amount to approximately $50 a year, or $1 a week.[65] Of those employees who would forego opting out of an arrangement set at 85 per cent of union fees, very few would actually choose to opt out of an arrangement set at 100 per cent, for solely financial reasons. Those non-members who do choose to opt out of an arrangement set at 100 per cent of union fees may do so more for philosophical and fairness based reasons.

Whether a non-member chooses to opt out or not may also depend on how aware he or she is that section 59B may not actually prevent employers from continuing to pass on the same terms and conditions to those who opt out. If employees do have such an awareness, part 6B arrangements may prove ineffective as non-members may opt out in unison in order to continue receiving the same terms and conditions for free. Confidence may also be a factor in choosing whether to opt out or not. If an employee feels secure enough to negotiate one-on-one with their employer to achieve the same, if not more favourable, terms and conditions than those in the comparable CEA, opting out may be more likely. The present low unemployment rate, for example is likely to instil such confidence.

By and large, it can be expected that the majority of employees who are affected by part 6B arrangements will neither be aware of the implications of section 59B, nor have the confidence to negotiate one-on-one with their employer. Conversely, it is expected that employees will simply pay the bargaining fee in order to receive the improved terms and conditions they previously received for free, unless the employer informs the IEA employee that they will still receive the pass on if they opt out. Employers would be unwise to do this; they risk breaching their duty of good faith to the union by potentially undermining the collective.

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[65] For example, using the NZDWU bargaining fee arrangement, which set bargaining fees at approximately 83 per cent of the normal cost of union membership, non-member employees would have to pay approximately $250 a year on a $50,000 salary. Meanwhile, if bargaining fees were instead set at the full cost of union membership, non-member employees would have to pay approximately $300 a year on a $50,000 salary. Thus the difference amounts to only $50 a year, or around $1 a week.

(b) Can Employees Who Fail to Opt Out Re-negotiate a New IEA?

Regardless of whether or not it is possible to re-negotiate in this manner, employers are advised to refuse such requests of opting out in order to avoid any potential liability by refusing to meet requests. Given that employers may choose not to re-negotiate, non-member employees are advised, in advance, to take notice of section 69R notifications and to opt out within the specified time period, if they wish to do so.

(c) The Fair-Fee Issue: Setting the Amount of the Bargaining Fee

Problems for non-members arise where unions and employers agree to set the bargaining fee at the same amount as normal union membership fees, and where unions use section 69U as a strategy to maximise membership rather than solely as a method to address the free-riding issue.

While the United States and Canada, for example, have developed alternative approaches to address this "fair-fee" issue, it is anticipated that this issue will not be judicially addressed in New Zealand; unions and employers can, without qualification, lawfully agree to set fees at 100 per cent of normal union membership fees. Furthermore, unlike the United States and Canada, New Zealand has no entrenched constitution from which non-members can challenge an otherwise lawful bargaining fee arrangement and its amount. Nonetheless, since courts have shown an interest in the past as to how bargaining fees are calculated,[66] it is likely that courts will, at least continue to be interested in the matter.

Non-members can nonetheless take a few steps. First, prior to agreeing to the bargaining fee arrangement, non-members can encourage their employer to represent non-member interests during collective negotiations by requesting information from the union in order to substantiate the amount proposed.[67] Non-members can also encourage their employer to agree to a more reasonable amount by emphasising the employer's interests in maintaining a motivated and productive post-bargaining environment, which may deteriorate if the fee is set at 100 per cent. Finally, non-members should emphasise that it is in the employer's best interests for non-members not to opt out, rather than to negotiate separately with IEA employees, and that setting the fee at a more reasonable amount will minimise the occurrence of opting out.

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[66] *NZDWU v NZMP*, supra note 29.

[67] In accordance with s 34 of the ERA 2000.

IV CONCLUSIONS

In this context, Orr's remarks are worth repeating: [68]

> How then should we read the union movement putting [bargaining] fees on the agenda for the new millennium? Is it an inventive, but quietly desperate call for some prop or institutional support in the demanding era of enterprise bargaining? ... It is certainly a recognition of the real insecurities of life beyond preference.

Given that the amendments are soft in comparison to many overseas arrangements, for example those that compel union contributions, it will be particularly interesting to see whether optional bargaining fee arrangements are able to address free-riding, or whether there will be a negligible impact, similar to that seen in Spain.[69] The degree of impact will no doubt be limited to the most unionised workplaces, where unions have the resources to undertake a marketing drive to persuade non-members to vote in their favour. These may be the very areas that least require the extra resources from bargaining fees or are best placed to organise and recruit new members.[70]

Even if unions win secret ballots, the impact of part 6B will depend upon how many employees choose to opt out of the bargaining fee arrangements. This may be influenced by the level of unemployment and employee confidence in individually bargaining with the employer. The effectiveness of section 59B will also impact on how many employees opt out of a part 6B arrangement. If employers continue to pass on CEA terms and conditions without breaching the duty of good faith, then there is little incentive for employees to pay bargaining fees. Free-riding may continue.

Therefore, the effectiveness of section 59B appears pivotal in relation to how successful the new attempts to address free-riding will be. As many employers will postpone any passing on until after collective bargaining has been concluded, the likelihood of employers being caught by section 59B depends upon how difficult it is for a union to show intention to undermine. As improper intention is inherently difficult to prove, it is likely that employers will be able to continue passing on as

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[68] Orr, supra note 50, 97.
[69] Mitchnick "Recent Developments in Compulsory Unionism" (1993) 132(4) International Labour Review 453.
[70] Orr, supra note 50, 97.

long as they take steps to avoid evincing the prohibited intention. For example, an employer should not, for any reason, inform employees that they will receive the same terms and conditions regardless of whether they are on the CEA or an IEA.

Section 59B will have the most impact if intention to undermine is judicially interpreted as catching those situations where employers are largely passing on CEA terms and conditions automatically. This could be achieved by applying a hybrid subjective-objective test: an employer who automatically passes on terms and conditions is assumed to have an intention to undermine. This assumption could be justified on the basis that automatic passing on inevitably has the effect of undermining, and employers ought to know this, particularly if the union explicitly brought it to the employer's attention. In this situation, the burden of proof would seem to fall on the employer who would then use the mitigating factors under section 59B(6) to show that there was no intention to undermine.

Although this interpretation of section 59B is unlikely, only time will tell how courts will apply the relevant tests, and accordingly, how effective or ineffective the new amendments are at addressing free-riding. Yet, despite the prediction that section 59B may be of limited use and that part 6B arrangements will only benefit highly-organised unions, those provisions, in conjunction with the new section 9(3), open the way for negotiation over special benefit clauses and passing on agreements. Although preference is still explicitly prohibited under section 9(1), if employers agree to such clauses, preferential-like terms may flourish in New Zealand employment relations by a side-wind.

Whether employers will agree to such clauses will come down to considerations such as the importance of standardised terms and conditions, the value of shelving any potential future section 59B proceedings, and whether special benefit clauses are preferred over bargaining fee arrangements. Employers who fear increases in union membership and wealth may perceive that bargaining fee arrangements are more threatening when indifferent non-member employees do not bother to opt out, in comparison with an agreement which merely provides CEA employees with an additional advantage, such as back-pay.

If the impact of the amendment is minimal, as the New Zealand Council of Trade Unions anticipates, it can safely be assumed that unions will be lobbying for a further amendment so that the ERA 2000 can effectively address free-riding and promote collective bargaining as was intended. If, on the other hand, the New Zealand Business Roundtable and Business New Zealand are correct in predicting increased compliance

and litigation costs, there will be strong and vocal lobbying from the business community in favour of repealing the ERAA 2004 amendments.

Although collective bargaining has been a relatively straightforward process for the majority of cases under the ERA 2000,[71] unions have not had proper legal recourse to address the issue of free-riding. Now that there are legal options, the extent of free-riding and the potential pool of resources to which unions could have access raises the likelihood of litigation ensuing. Despite the business community's financial concerns, litigation is not necessarily a bad thing. Test cases ideally provide more certainty as to how statutes should be interpreted. There have been a few test cases under the ERA 2000, causing much uncertainty. It is equally likely that this trend may continue if unions continue to approach litigation with trepidation caused by a lack of adequate remedies and a continued uncertainty as to what amounts to a breach of the duty of good faith.

Whether the impact is great or small, a government of different political persuasions would likely see the ERAA 2004 amendments repealed. The ERA 2000 may survive. It is well established and on the whole, it has not created any great impact on the business community compared to what was anticipated. Under a changed government, it is likely that freedom of association will once again prevail over any form of promoting collective bargaining and unionisation.

Whether there should be further amendment by the current government ultimately comes down to a policy judgement as to the purpose of employment law and whether a system of collective bargaining is vital or perfunctory.[72] Considering only the objectives and underlying policy of the ERA 2000, a further amendment will most likely be needed both to further the intentions of the ERA 2000 and the intentions of the ERAA 2004 amendments, which are likely to fall short in some areas. Where and to what extent those changes are necessary will only become apparent with time as employee, employer and union behavioural trends develop in response to the new amendments.

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[71] Binnie and Cranney, supra note 17, 35.
[72] Orr, supra note 50, 16.