



09/86984

4 August 2009

Hon Kate Wilkinson, Minister of Labour

## **POLICY OPTIONS ON COLLECTIVE BARGAINING**

### **Purpose**

- 1 You have directed the Department of Labour to develop options to “restore workers’ rights to bargaining collectively without having to belong to a union”, without undermining the current status of unions. This paper provides you with advice around how this might be done, with attendant risks and benefits. Options range from practice change through to legislative change. In particular we have focused on an option that contains the features you outlined to us in earlier discussions.
- 2 This paper also assesses the implications of the collective bargaining policy options for related work around “union access to workplaces by consent” and for New Zealand’s international labour obligations.
- 3 We understand that you may wish to discuss the matters raised in this paper with the Prime Minister.

### **Executive summary**

- 4 You have directed us to provide you with advice as to how to “restore workers’ rights to bargain collectively without having to belong to a union” (“your policy intention”). In exploring your policy intention, we have made some assumptions about the outcome(s) you are seeking from establishing such a right. We have assumed these to be all, or some, of the following:
  - a enabling ‘alternative’ collective agreements that have been negotiated by a non-union group (the end product)
  - b enhancing bargaining choice for employees (representation of employees in bargaining), and
  - c achieving efficient bargaining outcomes that do not increase transaction costs, industrial disputes or lead to a fragmentation of bargaining.
- 5 Because you have also indicated to us that you do not wish the establishment of any such right to undermine unions, we have not progressed outcome 4a above (“enabling ‘alternative’ collective agreements”), as this outcome would clearly not meet this test. Policy options with respect to achieving 4b and 4c are set out in the paper and range from legislative change through to practice change and awareness raising / information provision. In particular we have focused on designing a model for improving bargaining choice (4b) that contains the features you have indicated you would like to see in a new bargaining model (viz. permissive, flexible, non-prescriptive and fairly informal).

- 6 In designing such a model, we have drawn from previous experiences under the Employment Contract Act 1991 ("the ECA") and have looked at how the new model 'fits' with the objectives of the Employment Relations Act 2000 ("the Act").
- 7 Our overall assessment is that opening collective bargaining to non-union groups is possible but that the costs and benefits of this initiative need to be weighed against what is already possible under current arrangements; the demand for such a bargaining option; and the likely reaction of unions and the International Labour Organisation (ILO). In respect of these considerations, we found that:
  - a enhancing bargaining choice would benefit those employees who would like to bargain as a group, but who currently feel constrained from doing so
  - b to avoid undermining unions, the product of such bargaining could not be an 'alternative' collective agreement but would need to be individual employment agreements for each member of the group that contain shared terms and conditions; the group (unlike unions) could not represent the broader collective interests of its members or have the right to strike
  - c as the Act does not currently preclude groups bargaining for shared (or 'joint') terms and conditions in IEAs, implementing your policy intention could be as straight forward as raising awareness that such a possibility exists now, or amending the legislation to make such a right explicit
  - d while it is not precluded as a bargaining practice, establishing such a right in the law is problematic. This is because, one of the objectives of the Act is to promote ILO Conventions including the right of all workers and employers to form and join organisations of their choosing and the authorisation of worker representatives in collective bargaining. If any change in the current law promotes an alternative to the authorised representatives of employees (unions), this is likely to be viewed as inconsistent with international labour obligations. For this reason we would anticipate both a highly adverse response from unions to a legislative solution, and probable criticism from the ILO
  - e finally, it is the Department's view that the demand for enhanced bargaining choice would be low (we have no evidence for such a demand), and the opportunity was not well utilised under previous provisions in the ECA.
- 8 It is the Department's view that it is inadvisable to legislate for a new model of bargaining as the benefits for employees and employers from such a change are likely to be marginal when compared to the anticipated adverse reaction from unions and the ILO. Raising awareness about what is currently possible under present arrangements and/or providing information and guidance around how to organise are considered to be preferable options as they may achieve a similar result in practice while avoiding the risks associated with a legislative change.

### **How this paper is structured**

- 9 This paper is divided into four sections, with three appendices attached.
  - a Section A: background on bargaining under the Employment Contracts Act 1991 and the Employment Relations Act 2000, the 1993 NZCTU complaint to the ILO, and the international context (p.3)
  - b Section B: policy options are described and links to related work (p.6)
  - c Section C: assessment of policy options (p.9)

- d Section D: conclusion (p.11)
- e Recommendations: (p.13)
- f Appendix A: more detail on past and existing bargaining provisions (p.15)
- g Appendix B: more detail on policy option A (p.21)
- h Appendix C: indicative view of social partners (p.23).

## **This work is part of the Regulatory Review Programme**

- 10 This work forms part of the Government's wider Regulatory Review Programme for 2009 and 2010 [CAB Min (09) 6/5A refers]. It is linked to other work signalled before the election in relation to the employment relationship problem resolution system and union access to workplaces by consent [draft Terms of reference for this related work are set out in the Department report 09/84579, earlier policy work around union access is set out in the Department report 09/85338].

## **A Background**

- 11 Your policy intention broadly seeks to restore rights that existed under the previous employment relations framework. For the purposes of this paper it is important to consider how the bargaining rights were previously provided under law and how this worked in practice.

### ***Collective bargaining under the Employment Contracts Act 1991***

- 12 The ECA enabled employees and employers with the opportunity to negotiate at a level that suited them. It allowed them to choose how they associated, who they would associate with, and the type of contracts they would negotiate in bargaining.
- 13 The parties could freely choose bargaining processes within the framework of the ECA. The provisions for bargaining were left to the discretion of the parties such as ratification procedures. The ECA did prescribe, however, that all employees must directly authorise their chosen representative, and must have an agreement with that representative about the ratification procedure for any proposed settlement. Bargaining representatives also had access rights to workplaces. Strikes and lockouts were lawful in relation to the negotiation of a collective contract, but were restricted in relation to multi-employer contracts.
- 14 There was a low uptake of collective bargaining by non-union employees (less than 10% of non-union employees). Individual contracts were the most common form of employment contract with enterprise-based bargaining the preferred form of "group-based" bargaining. Unions remained the main form of representation for workers, with workplace-based representatives being the preferred choice if unions were not the representatives. The low uptake may have been due to issues related to bargaining that emerged under the ECA including:
- a permissive provisions and minimalist regulation allowed for a wide range of conduct by employers in the bargaining process
  - b perceptions of unfairness and a balance of bargaining power in favour of employers, particularly in situations where employers could exercise undue influence including through designated bargaining agents
  - c uncertainty around rules relating to communication between employers and employees during negotiations, with a risk of increased transaction costs, and

- d workers in low-skilled occupations, on lower incomes or working part-time most frequently had little choice about bargaining and representation, had little or no negotiation options and were unlikely to secure changes if any negotiation occurred.

#### NZCTU Complaint to the International Labour Organisation

- 15 The New Zealand Council of Trade unions ("NZCTU") took a complaint to the ILO in 1993 in respect of the non-union bargaining provisions. A key allegation was that "...collective employment contracts under the Act are not collective agreements as contemplated by the ILO because they do not necessarily result from a process of real collective bargaining involving workers' organisations". The ILO's Committee of Experts on Freedom of Association found that the ECA did not encourage and promote collective bargaining and requested the Government take appropriate steps to ensure that legislation encouraged and promoted collective bargaining.
- 16 More detail on the ECA system, bargaining issues, and the NZCTU complaint are provided in appendix A.

#### ***The bargaining framework under the Employment Relations Act 2000***

- 17 Under the Act, the framework for bargaining whether it is for individual employment agreements or collective agreements is based on a bargaining framework that promotes both collective bargaining and the integrity of individual choice. Promotion of collective bargaining forms one of the key pillars of the Act (the third of six overarching objectives). The framework for collective bargaining set up under the Act includes:
  - a recognition that employment relationships must be built on good faith behaviour
  - b acknowledgement of the inherent inequality of bargaining in employment relationships, and
  - c promoting collective bargaining, while protecting individual choice.
- 18 These features of the legislation were intended by Parliament to address problems that emerged in bargaining under the ECA. For these reasons, collective bargaining conducted in good faith was considered to be the most effective way of redressing the imbalance of power in employment relationships and for enabling employees to have a genuine voice in setting the conditions that govern their employment relationship. The Act went further than the ECA, which required employers to recognise only employees' bargaining agents, by requiring employers to recognise and bargain in good faith with unions to secure collective agreements. Lessons from the ECA showed that certain conditions are needed to ensure that collective bargaining is viable. These are the types of bargaining that can occur under the Act:

#### Collective bargaining

- 19 Specific provisions for collective bargaining are covered by Part 5 of the Act. The Act prohibits employers from bargaining directly with employees for a collective agreement, or from bargaining collectively with anyone other than a registered union. Only employers and unions are able to negotiate and be parties to collective agreements.
- 20 Under the Act any group of employees can set up and register as a union. To be a union, a group of employees must first become an incorporated society (under the

Incorporated Societies Act 1908) and register as a union under the Employment Relations Act 2000. An objective of the society is to promote its members' collective interests in the workplace. To become an incorporated society and to register as a union the group requires at least fifteen members and the group must be independent of employers. Unions are recognised and given appropriate status to act as the representatives of employees. They are required to be: democratic; not contrary to law; its rules must not be unreasonable; not unfairly discriminatory; or unfairly prejudicial. In addition, unions are financially accountable to their members.

#### Collective bargaining by enterprise-based unions

- 21 A number of enterprise-based unions have been established for the sole purpose of bargaining for a collective agreement for the employees of that enterprise, e.g. the Warehouse People Union (formerly People First Union)<sup>1</sup>. A collective agreement can cover as few as two employees. More detail about the specific provisions in the Act prescribed for collective bargaining are set out in appendix A.

#### Individual Employment Agreements – negotiated by a group (“group-based bargaining”)

- 22 The Act does not preclude groups of employees who wish to bargain together for common terms and conditions within their individual employment agreements (as they could under the ECA) but it does not expressly provide for this arrangement.
- 23 Employees who do so, bargain as a group of individuals outside the scope of collective bargaining as defined in the Act. The result of such bargaining is that a group of employees and their employer enter into a series of identical or very similar individual employment agreements. Such a group does not have the ability to enter into a collective agreement as set out by the Act or the right to take industrial action in pursuit of an agreement. The Act does not preclude these groups from nominating a workplace-based representative or an external bargaining representative to negotiate on their behalf. Where employees wish to undertake “group-based bargaining”, employers would be obliged to continue to recognise any previously agreed provisions in employees’ individual agreements (until any changes are agreed). Good faith obligations would continue to apply when entering into and undertaking “group-based bargaining”.
- 24 The individual agreements that are owned by individual employees and their employer are enforced on an individual basis, thus employees remain on an individual employment agreement even though they have jointly negotiated the same terms and conditions, thus it is not a collective agreement.
- 25 The Department understands there is currently a low uptake of “group-based bargaining” by non-union employees. This was also the case when it was legislated for under the ECA. This may be due to a lack of awareness of employees of their rights or a lack of incentive to do so.

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<sup>1</sup> We cannot quantify the number of enterprise-based collective agreements as their titles do not distinguish them from other collective agreements.

## ***International Context***

### International Obligations

- 26 In 2003, New Zealand ratified Convention 98 - the Right to Organise and Bargain Collectively, which seeks to promote the free exercise of the right to organise while safeguarding the independence of employers' and workers' organisations for the purposes of collective bargaining over employment terms and conditions, and to promote those rights to facilitate collective bargaining.
- 27 New Zealand has not ratified Convention 87 - Freedom of Association and Protection of the Right to Organise. This Convention concerns both union access and collective bargaining. To all intents and purposes, New Zealand already complies with the letter and spirit of this 'Fundamental Convention' (we are required to report annually on how we are putting these principles into practice). New Zealand is unable to ratify it given that ILO jurisprudence requires that sympathy strikes and strikes on general social and economic issues should be able to occur without legal penalty. This has been contrary to New Zealand's employment relations legislative framework under successive governments.

### International comparisons

- 28 Collective bargaining is conducted by unions and employers (or employer representatives) in all the countries with whom New Zealand traditionally compares itself (for example, Australia, the United Kingdom, Ireland, the United States of America, Scandinavia and Canada). In some European countries (for example Germany, the Netherlands, France and Austria) Work Councils are also able to undertake collective bargaining, with limited rights, and over limited issues. In Spain, Work Councils and the major union representative in the respective workplace negotiate on behalf of employees. There are a small number of examples where in recent years authorised non-union bargaining representatives have been created, for example, Estonia, Kazakhstan and Latvia. In these cases, the non-union representatives have a range of rights including the ability to request information from employers and undertake consultation in regards to bargaining.

## **B Policy options**

- 29 Your proposal is "to restore workers' rights to bargain collectively without belonging to a union". We have assessed options that give effect to this policy intention that are distinguished by the different outcomes you may be seeking to achieve through this change:
- a enabling 'alternative' collective agreements that have been negotiated by a non-union group (the end product)
  - b enhancing bargaining choice for employees (representation of employees in the bargaining process), and
  - c achieving efficient bargaining outcomes that do not increase transaction costs, industrial disputes or lead to a fragmentation of bargaining.
- 30 We have not progressed the first outcome as you have indicated that you do not wish to undermine unions, and such an option would not meet this test. We have, however, developed and assessed options around the second and third outcomes.

- 31 Options are:
- a amending the legislation to expressly provide for groups of employees to bargain with their employer for shared terms and conditions of work (except for rates of pay) that are then set out in their individual employment agreements. The Act does not currently preclude this practice (it is silent on it) but we think that is rarely used. For the purposes of this paper and to distinguish this option from "group-based bargaining" available under current arrangements, we refer to this proposed change as establishing "joint bargaining", and
  - b raising awareness about such a bargaining choice is presented in this paper as an alternative to legislative change. At the practical level the two options are similar, but the means of achieving it (legislation or education) have quite different implications (that are addressed further in this paper).
- 32 The options are identical in practice; they differ in how they are implemented and, consequently, their anticipated impacts.
- 33 A summary of the policy options is outlined below, further detail on these policy options are attached in appendix B. Option A has been developed further as it contains features you have specifically outlined to us in earlier discussions.

**Table one: Policy options comparison (summary)**

	<b>Option A: Joint bargaining</b>	<b>Option B: Awareness raising around group-based bargaining</b>
<b>Vehicle</b>	Legislative change (Employment Relations Act 2000)	Information provision (status quo regulation)
<b>Purpose</b>	To establish an explicit legislative framework to enable colleagues to bargain together with their employer  We envisage that any such change would be expressed as a clarification within the context of bargaining for individual employment agreements  A stronger signal would be given if the change was expressed as a variation on collective bargaining, (but the Department would not recommend this approach for reasons set out under 'risks' below)	To raise awareness about group-based bargaining under current arrangements
<b>Description</b>	A 'permissive' model with a minimum set of regulations  Group members do not need to form a union to bargain for joint	Colleagues can currently bargain as a group for shared terms and conditions with their IEAs

	<b>Option A: Joint bargaining</b>	<b>Option B: Awareness raising around group-based bargaining</b>
	<p>terms and conditions</p> <p>Employees may (or may not) engage someone to bargain on their behalf</p> <p>Groups have the same rights and obligations as those bargaining for individual employment agreements (IEAs) - but not the same rights associated with bargaining for collective agreements</p> <p>The resulting agreement is common to the members of the group. Variations of IEAs (e.g. different terms and conditions) may be negotiated between an employee and the employer as under current arrangements for IEAs and collective agreements</p> <p>Non-union bargaining groups will not have the right to strike</p>	
<b>Risks and benefits</b>	<p><u>Benefits</u></p> <p>Employees have a greater bargaining choice</p> <p>May suit employees in small and medium sized (SME) firms</p> <p>May suit employees who are unable to, or do not wish to, join a union to bargain with others</p> <p>May reduce transaction costs for multiple IEAs for both parties (if group equates to a reasonable proportion of staff)</p> <p><u>Risks</u></p> <p>High risk that unions will respond negatively to this option and view it as an attempt to undermine their role and function</p> <p>May be costly and will require guidance materials for implementation</p>	<p><u>Benefits</u></p> <p>No legislative change required but would still meet policy intentions</p> <p>Employees have a greater bargaining choice</p> <p>May suit employees in SME firms</p> <p>May suit employees who are unable to, or do not wish to, join a union to bargain with others</p> <p>May reduce transaction costs for multiple IEAs for both parties (if group equates to a reasonable proportion of staff)</p> <p><u>Risks</u></p> <p>May not be seen as a significant change from current arrangements</p> <p>May create initial uncertainty about court precedent and accepted work practices (due to a potential uptake)</p>

	<b>Option A: Joint bargaining</b>	<b>Option B: Awareness raising around group-based bargaining</b>
	<p>May create initial uncertainty about court precedent and accepted work practices (due to a potential uptake)</p> <p>May increase employment relationship problems if agreement is not reached</p> <p>May increase transaction costs and fragmentation of bargaining for employers (particularly SMEs)</p>	<p>May increase employment relationship problems if agreement is not reached</p> <p>May increase transaction costs and fragmentation of bargaining for employers (particularly SMEs)</p>
<b>Departmental view</b>	The Department considers this option as feasible but is likely to be costly and will receive a hostile reaction from unions and the ILO	The Department considers this option to be the most cost effective option as it would not require legislative amendments but can still address the policy intentions
<b>Outcomes</b>	The joint terms and conditions negotiated by the non-union group of employees will be enforced as IEAs (not as a collective agreement)	<p>Greater awareness of the ability to engage in "group-based" bargaining</p> <p>This agreement will be enforced as IEAs</p>

## **C Assessment of policy options**

### ***Policy options assessment criteria***

- 34 The following criteria have been used to assess policy options. Any new bargaining arrangement must:
- a be permissive, not be prescriptive, be flexible and fairly informal
  - b not undermine the status and operation of unions
  - c benefit both employers and employees
  - d avoid re-introducing the problems that arose in practice under previous legislative provision
  - e be consistent with relevant ILO obligations
  - f be consistent with objectives of the Act, and
  - g ideally enhances, but at least does not reduce, workplace productivity and productive employment relationships.

#### Option A: Legislative option for joint bargaining

- 35 When assessed against the criteria, we consider that it would be possible to design a new bargaining arrangement in a manner that is permissive, not prescriptive, flexible and fairly informal. The model would need to be designed in such a way

that parties would use it with confidence, and be clear about the nature of the resulting agreement. Parties who would prefer this bargaining option would benefit by its express availability. Importantly, however, we do not consider that the legislative option is consistent with one of the two core objectives of the Act. In spite of any features designed to maintain the special role of unions in collective bargaining, it is unlikely to be regarded positively by unions or by the ILO (as it formally provides for alternative representatives to the authorised representatives of employees).

- 36 The impact on workplace productivity will depend on the uptake of the new model; whether transaction costs increase or decrease (they could do either depending on the proportion of the workforce involved in groups); and may change over time as practices and expertise develop and become established.
- 37 There is a high risk that unions are likely to perceive this option as an attempt to undermine collective bargaining and the union movement. They are likely to view the proposed model for joint bargaining as an attempt to weaken union coverage and reduce employment costs during the current recession. This could especially be pertinent to the State Sector as it currently has high union coverage.
- 38 There may be a risk for employers (particularly for the low-unionised private sector and SMEs) of a potential proliferation of bargaining groups in the workplace, raising the possibility of increased transaction costs for employers and fragmentation of bargaining. The proposed model for joint bargaining could also be perceived by employers as giving employees greater negotiating strength.

#### *Consistency of the new legislative model with the objectives of the Act*

- 39 The new model appears to be largely consistent with the first objective (good faith obligations) of the Act (section 3(a)(i, ii, iv, v and vi). That is, it appears to be consistent with objectives around good faith behaviours; acknowledging the inherent inequality of power in employment relationship; promoting the integrity of individual choice; and is not inconsistent with promoting mediation or reducing the need of judicial intervention.
- 40 The new model is unlikely to be viewed as being consistent with the second objective of the Act (section 3(b) which is "to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively", or subsection 3(a)(iii) which is "to promote collective bargaining" (as defined in the Act).

#### *Consistency with ILO conventions*

- 41 ILO Conventions 87 and 98, and the associated jurisprudence of the ILO's Committee of Experts on Freedom of Association Committee ("the Committee") emphasise the primacy of promoting and protecting collective bargaining by representative organisations of workers and employers as the preferred way of determining terms and conditions of employment. In its current form, the Act defines and allocates these roles and rights through its provisions on unions and collective bargaining.
- 42 This option would change the Act to formally recognise, in some way, alternative groupings who would engage in group-based bargaining resulting in a quasi-collective outcome. Given that the Act already expressly enables employees to form collective groupings in the form of unions and through them, bargain collectively, this is likely to be viewed negatively by the ILO as undermining the

role and status of unions and collective bargaining under the Act, and in terms of New Zealand's adherence to Conventions 87 and 98.

#### Option B: Awareness raising for "group-based bargaining"

- 43 This option meets most of the listed criteria and may enhance bargaining choice. It may not be viewed, however, as a significant change to current arrangements.
- 44 This option may help to encourage a greater uptake of "group-based bargaining" by non-union employees in a workplace. This may benefit groups who would prefer such an option but are unaware of this possibility under current arrangements.
- 45 As with any change, the potential uptake of "group-based bargaining" may take time to settle down, with court precedent and accepted work practices taking time to develop and become established. This option may yield uncertainty initially and it could increase employment relationship problems (this may occur particularly amongst SMEs as opposed to larger organisations).
- 46 The Act does not currently preclude non-union employees from engaging in "group-based bargaining" therefore the awareness raising and information provision of employee rights for this option would not be viewed as being in breach of ILO Conventions or undermining the role and status of unions.

#### **Impact on other related policy work - union access to workplaces by consent**

- 47 You asked us to report back to you as to how options around collective bargaining would impact on your policy intent with regard to union access ("retain union access to workplaces, but with the consent of the employer which may not be unreasonably withheld"). Option A is the only option that has any implications for workplace access. In this instance, if the person engaged to negotiate on behalf of the group is not an employee of the employer, the right of this person to access the workplace once engaged, for the purpose of bargaining only, would need to be provided for in the Act. Any wider changes to workplace access (such as a consent requirement) would also then need to apply to this person.

#### **Consultation**

- 48 Feedback from social partners on the pre-election policy statement relating to collective bargaining was received at the same time as when we received feedback relating to the pre-election policy statement on union access to workplaces by consent. Business NZ and NZCTU have not been consulted on or seen this paper (appendix C summarises views of the social partners from earlier consultation).
- 49 Following any feedback from you and the Prime Minister on this paper, we will consider further consultation with social partners, if you agree. The Department has not consulted with other government agencies at this stage but would do so for the preparation of any Cabinet paper on this matter. These agencies would include: Treasury, Ministry of Economic Development, Ministry of Health, Ministry of Justice, Department of Prime Minister and Cabinet and the State Services Commission.

#### **D Conclusion**

- 50 Opening collective bargaining to non-union groups is theoretically possible but the costs and benefits of this initiative need to be weighed against what is already

possible under current arrangements, the demand for such a bargaining option, and the reaction of unions and the ILO.

- 51 The Act establishes a bargaining framework that promotes both collective bargaining and the integrity of individual choice. The result of collective bargaining is a collective contract that is 'owned' by the union (on behalf of its members) and the employer, and it is enforced on a collective basis. The result of individual bargaining is an individual contract 'owned' by the employee and employer. The Act does not preclude groups of employees who wish to bargain together for common terms and conditions within their individual employment agreements, but it does not expressly provide for this arrangement. The result of such bargaining is individual agreements that are owned by individual employees and their employer, and would be enforced on an individual basis.
- 52 The option of developing a model of bargaining that results in an 'alternative' collective agreement enforceable as a common contract has not been progressed as you have indicated that a new model ought not to undermine unions, and providing for 'alternative' collective agreements would not meet this test. Expressly providing for a model whereby groups of employee bargaining for individual agreements that share most terms and conditions (except pay) would establish a 'hybrid' system that is not consistent with one of the two primary objectives of the Act. In addition, it risks both achieving nothing new (because the Act does not preclude this in practice) while antagonising unions (as legislative provision for any alternative form of joint bargaining would be perceived as undermining their special role). The ILO is also likely to respond negatively to any new model that could be viewed as undermining the status of the recognised representatives of employees (unions in New Zealand).
- 53 Alternatively, achieving your policy intentions can be addressed in a cost-effective and non-legislative approach through awareness raising and information provision of employee rights under the Act, which they may not have been aware of previously. The outcome of this option would be the same as what would be achieved through a legislative approach but with fewer implications. This option is unlikely to get an adverse reaction from the unions as the ability to bargain in "group-based" fashion already exists for non-union employees but there is a lack of knowledge of these rights. It is also unlikely to get an adverse reaction from the ILO as this option does not appear to be in breach of Conventions 87 and 98.
- 54 There is a risk, however, that raising awareness may lead to an increase in uptake of "group-based" bargaining through a proliferation of bargaining groups and a fragmentation of bargaining activity in the workplace. This could be a problem for employers, particularly in SMEs, as they may be faced with multiple bargaining groups increasing the time spent on negotiations and transaction costs related to bargaining. An increase in uptake of "group-based bargaining" may also take time to settle down, with court precedent and accepted work practices taking time to develop. This option may yield uncertainty initially and it could increase employment relationship problems if agreement is not reached.

### ***Department's view***

- 55 It is the Department's view that it is inadvisable to expressly provide for a new model of bargaining when such provision is contrary to one of the two primary objects of the Act. This is particularly so when the Act does not preclude employees informally applying such a model in practice should they wish to do so now. The Department considers that there is likely to be limited demand for such a bargaining option, and the marginal benefits for employees need to be weighed against the likely hostile reaction such provision is likely to receive domestically from unions and internationally from the ILO.

### **Next steps**

- 56 Following the Prime Minister's and your consideration of these options, we will draft a paper for submission to Cabinet to give effect to the decisions on these matters and on related policy work currently underway on union access to workplaces by consent.

### **Recommendations**

I recommend that you:

1 **either**

- 1.1 **agree** to a legislative approach in progressing the pre-election policy statement on collective bargaining, through a proposed three-tier model which includes "joint bargaining"

**agree / do not agree**

**or**

- 1.2 **agree** to a non-legislative approach of awareness raising of employees' employment rights and responsibilities to promote the uptake of "group-based bargaining" under the Employment Relations Act 2000

**agree / do not agree**

- 2 if you agree to recommendation 1.1, **agree** to instruct the Department to develop a bargaining framework with the intention of not undermining collective bargaining on a unionised basis but would expressly enable non-union employees within a workplace to bargain for joint terms and conditions

**agree / do not agree**

- 3 if you agree to recommendation 1.1, **discuss** how you would prefer the extent of the change to be signalled (either as a clarification within the context of bargaining for individual employment agreements [our recommendation], or as a variation to collective bargaining)

**discuss / do not discuss**

- 4 if you agree to recommendation 1.2, **agree** to instruct the Department to develop proposals for your consideration to promote awareness raising of "group-based bargaining"

**agree / do not agree**

- 5 **instruct** the Department of Labour to develop a paper (in consultation with relevant government agencies) to reflect your decisions on this paper, for submission to Cabinet

**instructed**

- 6 **instruct** the Department on a consultation process with social partners in relation to policy options and issues expressed in this paper.

**Instructed**

Craig Armitage  
Deputy Secretary  
Workplace  
for Secretary of Labour

..... / ..... / .....

Hon Kate Wilkinson  
Minister of Labour

..... / ..... / .....

## **APPENDIX A: FURTHER DETAIL ON PAST AND EXISTING BARGAINING PROVISIONS**

Your policy intention broadly seeks to restore rights that existed under the previous employment relations framework. For the purposes of this paper it is important to consider how the bargaining rights were previously provided under law and how this worked in practice.

### ***Collective bargaining under the Employment Contracts Act 1991***

#### The Model

- 1 The Employment Contracts Act 1991 (ECA), was designed to create an efficient labour market, while providing for freedom of choice in the workplace. It aimed to give employees and employers the opportunity to negotiate at the level that suited them, allowed them to choose how they associated, who they would associate with, and the type of contracts they would negotiate.
- 2 The ECA was established to eliminate rigidities in the bargaining process which were thought to have prevailed under previous legislation. The previous system under the Labour Relations Act 1987 allowed bargaining outcomes to apply across an industry or occupation through blanket coverage of awards, which gave unions an exclusive right to represent workers covered by their membership rule. Under the ECA the outcomes of bargaining applied only to the parties who had been actively involved in their negotiation.
- 3 Other elements of the regulatory framework, however, remained largely intact or were enhanced. These elements included the personal grievance provisions, specialist employment institutions, the Minimum Wage 1983 and the Holidays Act 1981.

#### Provisions for bargaining under the ECA

- 4 Provisions relating to the structure of bargaining ensured that the parties themselves were actively involved and responsible for both the negotiations and the outcomes. The ECA provided for certain minimum conditions, primarily in relation to dispute resolution, which had to be provided for in every employment contract. All employment contracts had to contain an effective procedure for the settlement of personal grievances and disputes about the interpretation, application or operation of employment contracts.
- 5 The ECA prescribed that all employees must directly authorise their chosen representative, and must have an agreement with that representative about the ratification procedure for any proposed settlement. The ECA gave employees as well as employers a free choice of representation in bargaining. With Freedom of Association, the question of whether employees establish or belong to an organisation to represent them was dependent on their choice.
- 6 The parties could freely choose bargaining processes within the framework of the ECA. While, the ECA required the employees and their representative to agree on a ratification procedure for settlements, it was the responsibility of the parties to decide what the ratification procedure would be.
- 7 The ECA recognised the right of the parties to use legitimate bargaining tactics to persuade the other party of their point of view. The ECA provided a right to strike and to lockout within prescribed limits. Strikes and lockouts were lawful in relation to the negotiation of a collective contract, but were restricted in relation to multi-employer contracts.

- 8 In order to minimise the need for the parties to resort to formal proceedings, information provision was available on the rights and obligations for parties under the ECA. Pamphlets setting out the employment rights and obligations, information provision on accessing employment institutions, and Department of Labour seminars to inform people about these rights and obligations around New Zealand helped raise awareness and an understanding of the provisions under the ECA.

#### Extent of change under ECA bargaining provisions

- 9 The most apparent result of the ECA was a significant change in the structure of bargaining. The changed bargaining structure reflected the purpose of the ECA, which was to enable parties to choose the form of contract they wished to negotiate.
- 10 The removal of the awards system prompted a shift away from that structure, in particular through the loss of blanket coverage awards. There was a substantial decline in union membership (due to decentralisation) which affected all enterprises and at different rates across enterprises.
- 11 The Freedom of Association provisions led to an increased prevalence of individual contracts. These individual contracts were largely determined by employers (due to a lack of union representation which led to a perception of an increase in employer bargaining power).
- 12 Evidence from literature research and surveys on labour market adjustment during the period of the ECA suggest that many employers and employees chose enterprise-based bargaining. The removal of the award system, the removal of the right to strike in support of multi-employer agreements and the removal of supports for collective bargaining contributed to the prevalence of enterprise-based bargaining.
- 13 Although, initially the introduction of the ECA brought dramatic and immediate changes to bargaining arrangements compared to previous law and union membership, by the mid-1990s workplace stability had returned as parties to the employment relationship became familiar with the ECA. Towards the end of the 1990s (and the era of the ECA), unions continued to represent most employees in most negotiations for collective employment contracts. Non-union bargaining agents represented less than ten percent of employees, with employee representatives being the most preferred non-union bargaining agent<sup>2</sup>.

#### Bargaining issues to emerge from the ECA

- 14 Issues to arise from the bargaining structure under ECA included:
- a onerous provisions prevented unions establishing their authority for workers they represented in negotiations for collective bargaining (impediment to the right of a workers' organisations)
  - b permissive provisions and minimalist regulation allowed for a wide range of conduct by employers in the bargaining process

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<sup>2</sup> *Contract – The Report on Current Industrial Relations New Zealand*, Industrial Relations Service, Department of Labour, Volume 22, August 1997

- c perceptions of unfairness and a balance of bargaining power in favour of employers, particularly in situations where employers could exercise undue influence, including through designated bargaining agents (lack of independence of parties)
  - d uncertainty around rules relating to communication between employers and employees during negotiations, with a risk of increased transaction costs
  - e conflict between bargaining groups in the workplace
  - f insufficient protections against interference and discrimination by employers
  - g rights of workers' organisations – some employers refused/bypassed to recognise worker representation groups (i.e. unions) in collective bargaining including for rights related to access to workplaces, and
  - h authorisation of representatives – some employers exerted undue influence on workers to withdraw their authorisation of unions as their bargaining agents (undermining the position of unions).
- 15 Workers in low-skilled occupations, on lower incomes or working part-time most frequently had little choice about bargaining and representation, had little or no negotiation options and were unlikely to secure changes if any negotiation occurred.

***NZCTU complaint to the ILO***

- 16 In 1993, a complaint was taken to the ILO by the NZCTU in relation to the ECA. The substance of the complaint was that it did not accord with the principles adopted by the ILO in relation to Convention 87 (Freedom of Association) and Convention 98 (Collective Bargaining). The complaint stated these conventions were breached in three ways:
- a The ECA did not promote collective bargaining. For example, the collective agreements were not collective in the sense envisaged by the ILO, but simply an aggregation of individual agreements
  - b The ECA was contrary to the principle that the parties should bargain in good faith and make every effort to reach an agreement. Furthermore ratification and authorisation procedures were barriers to collective bargaining and the right to organise, and
  - c The ECA restricted the right to strike.
- 17 In its final conclusions on the complaint, issued in November 1994, the ILO's Committee of Experts on Freedom of Association (the Committee) found that the ECA did not encourage and promote collective bargaining. The Committee requested the Government take appropriate steps to ensure that legislation encouraged and promoted the development and utilisation of machinery of voluntary negotiation between employers or employer's organisations and worker's organisations with a view to the regulation of terms and conditions of employment, and means of collective agreements.

## **The bargaining framework under the Employment Relations Act 2000**

### ***The Framework***

- 18 The Employment Relations Act 2000 ("the Act") establishes a bargaining framework that promotes both collective bargaining and the integrity of individual choice. Promotion of collective bargaining forms one of the key pillars of the Act (the third of six overarching objectives). The framework for collective bargaining set up under the Act includes:
  - a recognition that employment relationships must be built on good faith behaviour
  - b acknowledgement of the inherent inequality of bargaining in employment relationships, and
  - c promoting collective bargaining, while protecting individual choice.
- 19 These features of the legislation were intended by Parliament to address problems that emerged in bargaining under the ECA. For these reasons, collective bargaining conducted in good faith was considered to be the most effective way of redressing the imbalance of power in employment relationships and for enabling employees to have a genuine voice in setting the conditions that govern their employment relationship. The Act went further than the ECA, which required employers to recognise only employees' bargaining agents, by requiring employers to recognise and bargain in good faith with unions to secure collective agreements.
- 20 The essence of the Act can be identified through three interrelated collective rights of employees:
  - a the right to associate with other employees (this right enables the formation of employees' organisations to address inequality of bargaining power)
  - b the right to bargain collectively with employers, and
  - c the right to take direct action in the course of collective bargaining.
- 21 In particular, the Act makes it clear that the practice of conducting strikes and lockouts to gain advantage in collective bargaining is not inconsistent with the overriding obligation of good faith between the parties.
- 22 Lessons from the ECA showed that certain conditions are needed to ensure that collective bargaining is viable. The Act prohibits employers from bargaining directly with employees for a collective agreement, or from bargaining collectively with anyone other than a registered union. Only employers and unions are able to negotiate and be parties to collective agreements. Unions are recognised and given appropriate status to act as the representatives of employees. They are registered and are required to be democratic, independent of employers and financially accountable to their members.

### ***Bargaining provisions under the Employment Relations Act 2000***

#### Collective bargaining

- 23 Specific provisions for collective bargaining are covered by Part 5 of the Act. Under the Act, only registered unions can bargain for a collective agreement. Employees

who choose not to belong to a union cannot bargain for a collective agreement. Collective bargaining can occur:

- a between a single union and a single employer (most common)
  - b between a single union and a number of employers
  - c between a single employer and more than one union, and
  - d between any number of unions and employers.
- 24 Under the Act any group of employees can set up and register as a union. To be a union, a group of employees must first become an incorporated society (under the Incorporated Societies Act 1908) and register as a union under the Employment Relations Act 2000. An objective of the society is to promote its members' collective interests in the workplace. To become an incorporated society and to register as a union the group requires at least fifteen members and the group must be independent of employers. Unions are recognised and given appropriate status to act as the representatives of employees. They are required to be: democratic; not contrary to law; its rules must not be unreasonable; not unfairly discriminatory; or unfairly prejudicial. In addition, unions are financially accountable to their members.
- 25 A number of enterprise-based unions have been established for the sole purpose of bargaining for a collective agreement for the employees of that enterprise, e.g. the Warehouse People Union (formerly People First Union). A collective agreement can cover as few as two employees.
- 26 The Act sets out a process for negotiations over a collective agreement. Collective bargaining commences by the issuing of an initiating notice by either a union(s) or an employer(s). Although the duty to bargain in good faith sets out certain minimum requirements, e.g. the obligation to meet and consider and respond to proposals made by each party, the duty does not compel agreement on any particular term or the settlement of a collective agreement. Where parties are unable to settle a collective agreement, assistance is available through mediation services and the Employment Relations Authority. The only employees who can lawfully strike or be locked out are those who will be bound by the collective agreement being bargained for (individual employees can also strike/be locked out for health and safety reasons). Employers may not discriminate against employees for taking part in a lawful strike.
- 27 Collective agreements must contain a "coverage clause" which describes the type of work being done to which the agreement applies. Only union members doing that type of work will be covered by the agreement.
- 28 In a workplace where a collective employment agreement is in place, individual employment agreements may be negotiated for employees who are not members of the union. When an employee who is not a union member first starts work, the employer must notify the employee about the collective agreement, and employ that person on the terms and conditions of the agreement for the first 30 days of employment. At the end of the 30 days, if the employee does not join the union the employee is covered by an IEA with the same terms and conditions of the collective agreement. Employers and employees can, however, negotiate variations to that employment agreement if they decide not to join the union.

- 29 In a workplace where there is no collective agreement in place, individual employment agreements can be negotiated by both union members and employees who are not members of the union.

Individual employment agreements – negotiated by a group (“group-based bargaining”)

- 30 The Act does not currently preclude groups of employees who wish to bargain together for common terms and conditions within their individual employment agreements (as they could under the ECA) but it does not expressly provide for this arrangement.
- 31 Employees who do so, bargain as a group of individuals outside the scope of collective bargaining as defined in the Act. The result of such bargaining is that a group of employees and their employer enter into a series of identical or very similar individual employment agreements. Such a group does not have the ability to enter into a collective agreement as set out by the Act or the right to take industrial action in pursuit of an agreement. The Act does not preclude these groups from nominating a workplace-based representative or external bargaining representatives to negotiate on their behalf.
- 32 The individual agreements that are owned by individual employees and their employer are enforced on an individual basis, thus employees remain on an individual employment agreement even though they have jointly negotiated the same terms and conditions, it is not a collective agreement.
- 33 Anecdotal evidence suggests there is currently a low uptake of “group-based bargaining” by non-union employees. This was also the case when it was legislated for under the ECA. This may be due to a lack of awareness of employees of their rights or a lack of incentive to do so.

## **APPENDIX B: Policy Options**

### ***Legislative change***

#### Option A: "Joint Bargaining" model

- 1 The Act could be amended to introduce a "joint bargaining" framework to the Act which enables "joint bargaining" by non-union employees. This "joint bargaining" model would expressly enable non-union employees within a workplace to bargain with their employer for a joint terms and conditions. The introduction of a "joint bargaining" model would establish a new third tier of bargaining into the current framework for collective bargaining and individual bargaining. This proposal avoids changing existing provisions for individual agreements and collective bargaining and ensures that these provisions would remain intact for unions in the collective bargaining process (i.e. union status, rights, responsibilities and operation would not be affected). The working term "joint bargaining" is used in this paper to distinguish the model from collective bargaining.
- 2 This model could be introduced either as a variation on collective bargaining, or as a variation of individual bargaining, depending on the strength of the message you wish to convey.

#### Features of a joint bargaining model

- 3 The proposed model for joint bargaining would enable employees who are not currently union members to engage in bargaining for joint terms and conditions with other non-union employees in the workplace. Employees bargaining under this model would not have access to the same rights that apply to unions for negotiating a collective agreement under the Act, but it would aim to encourage joint agreement of terms and conditions in a workplace within a minimum set of legislative requirements. The goal is to design a model that is informal, flexible, easy for employers and employees to apply, and largely determined by the parties themselves ("permissive").
- 4 At a minimum, legislative requirements would need to include provisions already set for individual bargaining and good faith principles. Clarity would also need to be given around the right for employees to meet to discuss the bargaining, and access by worker representatives to the workplace, and to ensure mechanisms exist to protect both parties.
- 5 The Department considers that processes and procedures of joint bargaining should be, as far as possible, left to the discretion of the parties for joint bargaining reflecting the non-prescriptive nature of the model. The discretionary nature of the model would include matters such as confidentiality of employment agreements (e.g. pay), pass-ons to those who are not members to the joint terms and conditions and the nature of bargaining issues to be negotiated.

#### *Role of "joint bargaining" group*

- 6 The approach that the Department suggests in order to avoid undermining the role of unions, is to design a model that does not give rights that are currently the preserve of collective bargaining to the new model. The new joint bargaining model would not have rights additional to those available to employees bargaining for an IEA. The proposed joint bargaining model would not include provisions related to multi-employer collective agreements or a requirement to lodge joint bargaining agreements with the Department, or the right to strike or lockout.

- 7 The proposed arrangement is limited to joint bargaining for joint terms and conditions within a workplace (enforced as IEAs) – unlike unions (which are legal entities, independent and have appropriate rules governing the body), the group of non-union employees would not be able to engage in bargaining for a collective agreement or engage in matters other than that of bargaining for joint terms and conditions as they will not be unionised.

#### *Bargaining representative*

- 8 A person negotiating on behalf of the group would not, therefore, have the specific authority in law to promote the group's collective interests. His or her mandate would be limited to the purpose of bargaining terms and conditions for joint terms and conditions (i.e. no on-going role or representative function). The representative would be independent of the employer (as would be stipulated in the Act) so as to ensure a fair outcome and to minimise the risk of undue influence from the employer.
- 9 The person doing the negotiating would be either a member of the group or engaged by the group.

#### *Redress Mechanisms*

- 10 Joint negotiated terms and conditions would need to be enforced as individual employment agreements. This includes the ability to access mediation services, the Employment Relations Authority and the Employment Court for the purposes of resolving employment relationship problems.

#### ***Non-legislative option***

##### Option B: Awareness raising for "group-based bargaining"

- 11 Raising awareness about and promoting employees' existing rights to bargain as a group for joint terms and conditions of their IEAs would meet your policy intention and seeks the same outcome as option A without the need for legislative change.
- 12 The Act does not currently preclude non-union employees from coming together and bargaining for joint terms and conditions with their employer or from engaging with a workplace-based representative or non-union representative in bargaining negotiations. The Department has little evidence, however, that there has been much uptake of "group-based bargaining" by non-union employees. There may be a lack of awareness of employee rights and obligations in relation to "group-based bargaining" under the Act.
- 13 Raising awareness of employees' rights and obligations in relation to "group-based bargaining" (including the use of bargaining representatives in negotiations) could be implemented through resource materials and communication channels at either a workplace or industry level.

## **APPENDIX C: INDICATIVE VIEWS OF SOCIAL PARTNERS**

The Department consulted the social partners in the context of earlier work and have not since consulted them on the draft policy options in this paper.

### Business NZ

- 1 Business NZ indicated they would support the 2008 National Party's pre-election policy statement regarding collective bargaining if it were to proceed. They view practical issues at the front-end of the collective bargaining process as the key barrier to achieving positive outcomes for all parties. Some of these practical issues for a joint bargaining model include: clarification of pass-ons, exit strategies for employers for strikes and lockouts, clarification for initiation of bargaining (particularly if many agreements are being initiated at the same time within an organisation) and strengthening consolidation of bargaining. Business NZ is not supportive of multi-employer collective agreements (MECAs) if a new model of bargaining is introduced. They consider current bargaining process arrangements for MECAs as problematic for employers, e.g. length of time of bargaining process and high compliance costs have a negative impact in the workplace and this will only be further compounded in a proposed new model for bargaining. They consider that any proposed changes to collective bargaining should have a focus on improving workplace productivity and business growth.

### New Zealand Council of Trade Unions (NZCTU)

- 2 The NZCTU strongly opposes any change to current arrangements for collective bargaining. They consider that if collective bargaining is opened to non-union groups, some union rights will inevitably be passed onto non-union groups, effectively diminishing unions' status and ultimately resulting in a reduction of union membership.
- 3 They consider the outcomes being sought in relation to the policy intent of the pre-election policy statement on collective bargaining, as having a significant impact on other closely related policy work currently underway on union access to workplaces. There is considerable concern in regards to the role independent bargaining representatives will have in relation to workplace access and their role in employee representation. They consider the policy intent is a signal for a return to the Employment Contracts Act 1991, in which the status and operation of unions in workplaces was greatly reduced.
- 4 They suggest that there may be a lack of knowledge on the low barrier to entry for collective bargaining by employees who are not union members and are seeking to engage in collective bargaining (the current threshold to establish a registered union is fifteen members). The NZCTU views the role of a collective organisation with recognised worker representation on employment matters such as collective bargaining as being more beneficial to the workplace and developing healthier employment relations than a non-collectivised group. The NZCTU is willing to assist the Department of Labour on administrative functions for union registration if there is an option addressing registration requirements for non-union employees who may wish to do this. The NZCTU suggests that if there are issues arising from the policy intention for collective bargaining, a tri-partite forum involving Business NZ, NZCTU, and the Government may be useful in facilitating discussion and a feasible outcome in this area.