

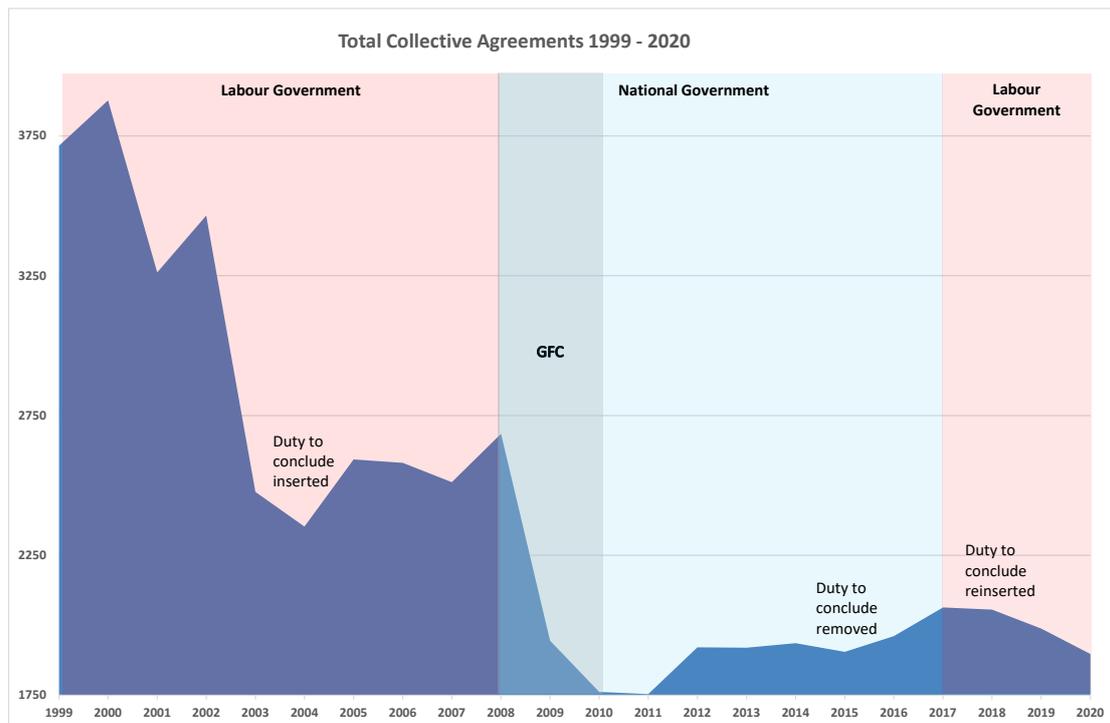
The duty to conclude a collective agreement is in breach of international labour law, but does it really make a difference?

By Paul Mackay¹

Employers argue that the reintroduction² of a duty to conclude a collective agreement into the Employment Relations Act on 11 December 2018 breached the principle of free and voluntary negotiation embodied in Article 4 of the Right to Organise and Collective Bargaining Convention 1949 (C98).

The question of breach of C98 has yet to be resolved. In the meantime, there is the question of whether or not the duty to conclude ever made a material difference to collective bargaining patterns in New Zealand. This article suggests it did not (and won't in the future).

The graph below illustrates the impact of the 2004 introduction of the duty to conclude collective agreements.



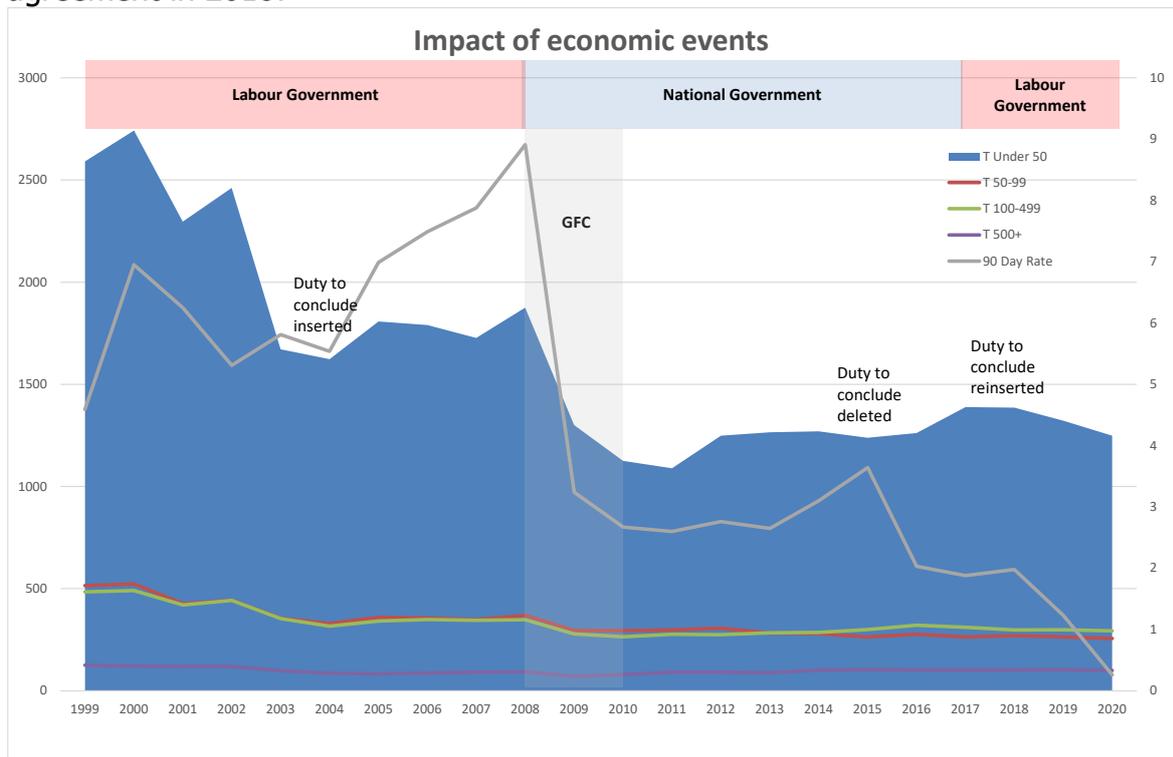
Following a dramatic decline in the number of settled collective agreements after the introduction of the ostensibly union friendly Employment Relations Act in 2000, there is a short but sharp upwards trend in the number of collective agreements settled following the 2004 introduction by the Labour government of a duty to conclude a collective agreement. However upwards movement ceased after just 12 months.

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² Contained in sections 31 and 33 of the Employment Relations Act 2000, the duty to conclude was first inserted in 2004 then repealed in 2015.

Numbers of collective agreements then declined in the latter years of the Labour government, rose slightly before the 2008 election then plummeted following the election of a conservative National led government. The drops in collective agreements all occurred *despite the existence of the duty to conclude a collective agreement*.

Numbers of collective agreements bottomed out during National's first term but rose again slightly upon their reelection in 2014. Paradoxically, the number of concluded collective agreements continued to rise slightly but steadily after the repeal of the duty to conclude a collective agreement in 2015 but has fallen steadily since Labour was reelected in 2017, despite the reintroduction of a duty to conclude a collective agreement in 2018!



The above graph of the total numbers of collective agreements shows that movement in numbers (T) occurred almost entirely in small organisations (T under 50 employees).

These typically are the organisations most likely to be outside a collective bargaining environment, and therefore the most fertile ground for establishing new ones.

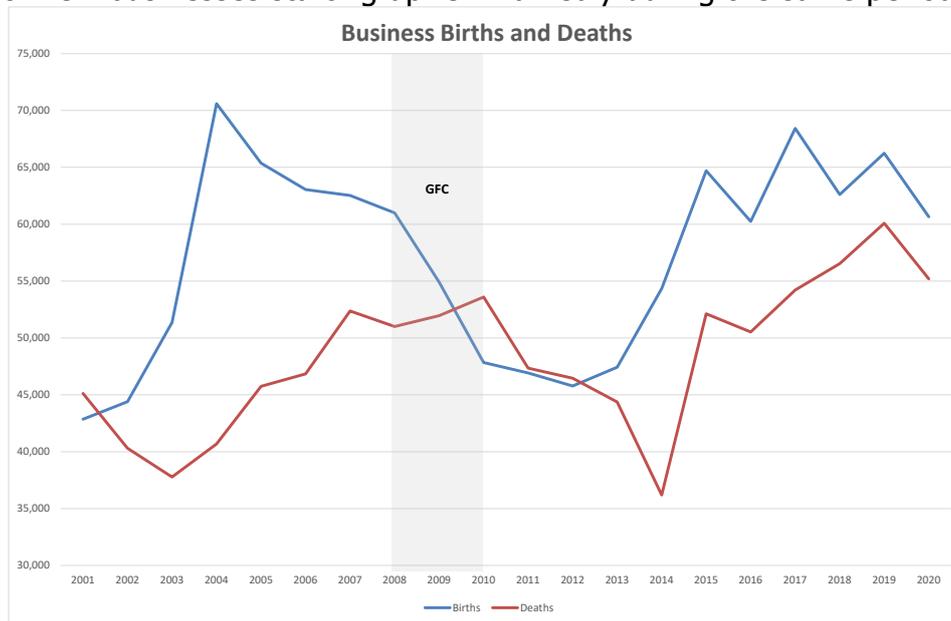
The graph suggests that small businesses left collective bargaining under a duty to conclude between 2004 and 2015 just as readily as they entered collective agreements without a duty to conclude before 2004 and since 2015.

It therefore seems that the duty to conclude a collective agreement is a relatively ineffective tool unless it is driven by other forces.

One possible cause is the state of the economy at any given time. Certainly, it appears that the Global Financial Crisis (GFC) in 2008-09 (characterised by the sharp

drop in the 90-day bank bill rate), correlates with a significant drop in collective agreements the small business sector.

However, business “deaths” did not increase markedly during the GFC, although the number of new businesses starting up fell markedly during the same period.



This suggests that, if the drop in collective agreements during the GFC was not caused by firms going out of business, it is much more likely to be firms simply not renewing them in the face of economic hardship.

This raises the possibility that collectivised small firms are less “agile” than their non collectivised counterparts, and therefore more vulnerable to economic shocks (this is not necessarily true of larger businesses, for whom the downturn in collective agreements was very slight). Businesses therefore may have elected to give themselves “wriggle room” by not renewing collective agreements.

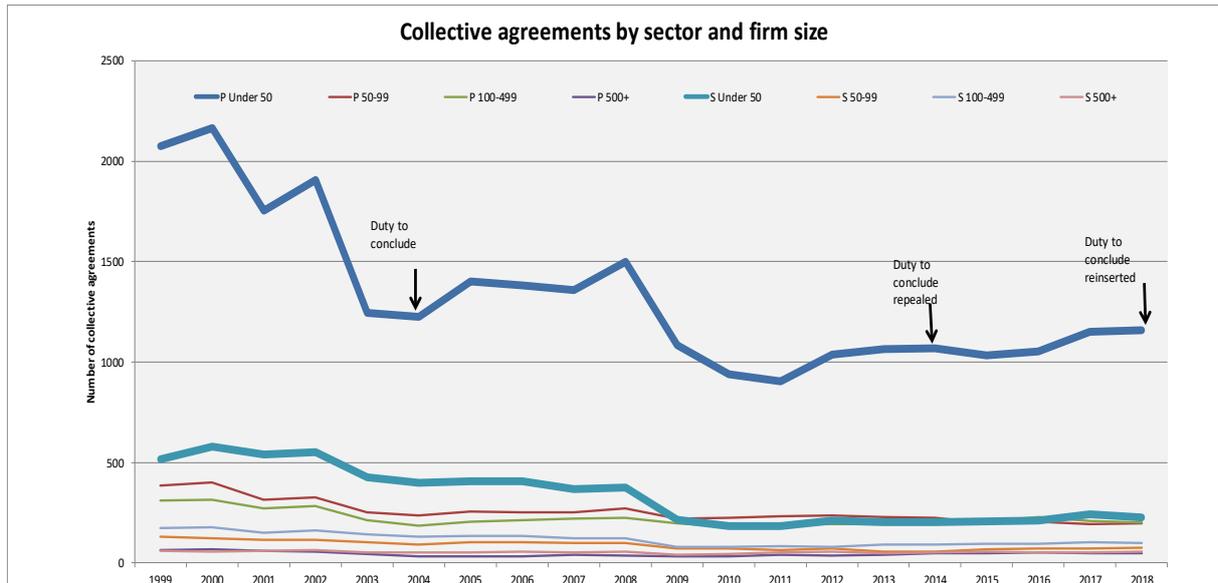
But, if economic conditions were the sole driver of collectivisation, there should be a closer correlation between economic activity and collectivisation than actually occurred before and since the GFC. This suggests that the economy is not the only factor at play.

While, on its face, the upwards trend since 2014 suggests a recovering economy may reflect a growing desire on the part of employees to be covered by collective agreements, and increased willingness on the part of employers to enter into them, a deeper look reveals another possible reason; that the increase is mainly the result of energetic organising activity by a small number of unions in private sector SMEs since 2014.

This energy seems to have been buoyed by the election of a union friendly Labour led government in 2017.

Is there any evidence of this?

All the upwards movement in concluded collective agreements appears to be in small private sector firms as illustrated in the graph below (P= Private Sector, S=State Sector).



And when we look at what unions have grown most in this period, the main contributors are:

| Union | Membership | Percentage Growth |
|-----------------------------------|------------|-------------------|
| No. One Manufacturing Association | 3289 | 96.8% |
| NZ Meat & Related Trades | 445 | 3.2% |
| UNITE | 335 | 5.0% |
| First | 276 | 1.0% |
| NZ Writers Guild | 208 | 78.5% |
| Sthn AWUNZ | 190 | 4.8% |
| NZ Assn of Prof and Exec Empl | 149 | 5.4% |

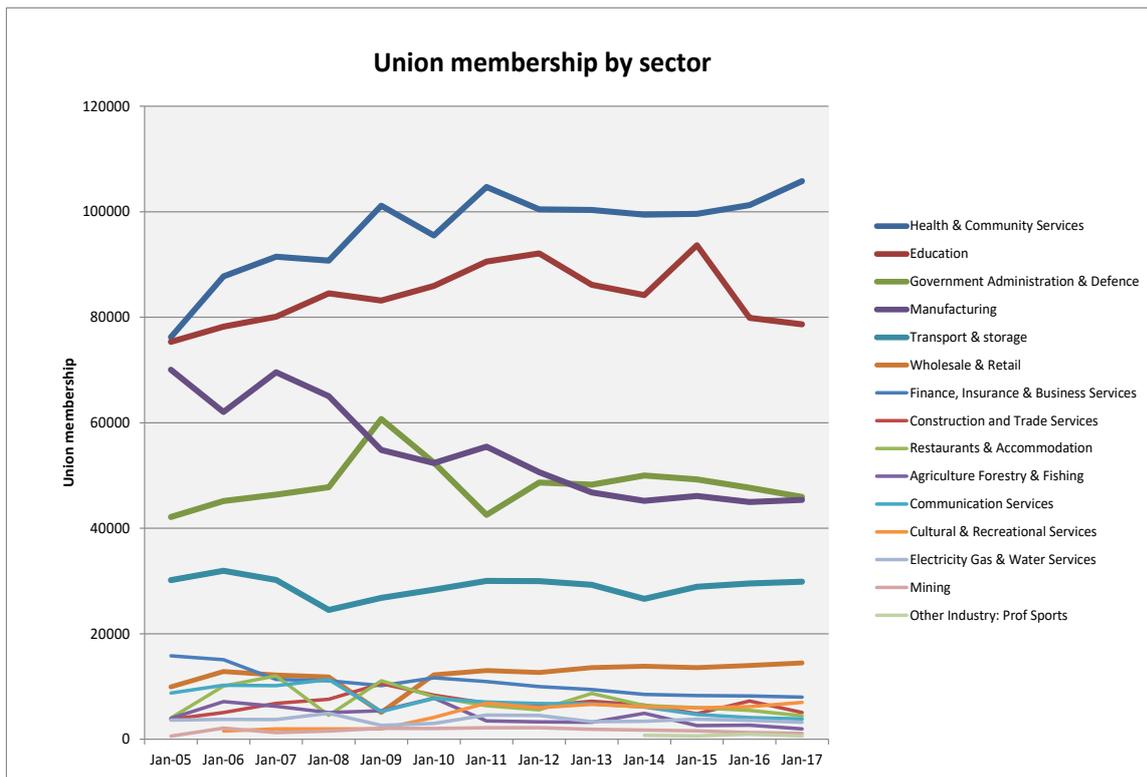
The largest increase is, paradoxically, the least meaningful. The Number One Manufacturing Association was registered as an incorporated society in 2000, to act as a bargaining agent for employees of Sanitarium.

Initially it was unable to register as a union because Sanitarium cited religious reasons under s23 of the ER Act 2000 (these were rejected). It finally registered as a trade union in 2015, and its first membership return was in 2016.

Being a "company union", it constitutes only 1 collective agreement and therefore is not a meaningful contributor to the overall upwards movement in private sector collective agreements.

The most movement in small private sector firms can be attributed to three unions; Meat & Related Trades, Unite and First. They are the primary union presence in the meat, transport and logistics and retail sectors.

This correlates with data showing union membership movement by sector³. The only two private sector groups with noticeable upwards trends are Retail and Transport and Logistics.



But, since the number of meat companies and therefore the number of collective agreements in the sector has not grown, the growth in collective agreements can be attributed (on the numbers at least) to First and Unite, who both have aggressive strategies for unionising and collectivising small businesses.

Outside of the state sector, these two unions are New Zealand's most energetic and militant unions as evidenced by strike activity since the 2017 election.

³ Union membership figures have not yet been published for the years 2018 -20.

| Business | Occupation | Sector | Industry | Union |
|---------------------|----------------------|---------|-------------------------|--------------|
| Ritchies Murphy | Bus drivers | Private | Transport | First |
| Pavlovich | Bus drivers | Private | Transport | First |
| Go Bus (Hamilton) | Bus drivers | Private | Transport | First |
| NZ Bus (Auckland) | Bus drivers | Private | Transport | First |
| Foodstuffs | Distribution workers | Private | Wholesale & Retail | First |
| Just Water | Process workers | Private | Manufacturing | First |
| Fletcher Building | Quarry workers | Private | Mining | First |
| Farmers Ltd | Retail staff | Private | Wholesale & Retail | First |
| Pak n Save | Retail workers | Private | Wholesale & Retail | First |
| St Johns Ambulance | Ambulance officers | Private | Health | First |
| Turners and Growers | Tomato Growers | Private | Agriculture | First |
| Infracore | Council workers | Private | Government | First, AWUNZ |
| Hoyts cinemas | Cinema workers | Private | Cultural & Recreational | Unite |
| Burger King | Fast food Workers | Private | Wholesale & Retail | Unite |
| Wendy's | Fast food workers | Private | Wholesale & Retail | Unite |

Conclusion

It is arguable that without increased union organising, the downwards trend evident since the election of National in 2008 would have continued. Today, the combined efforts of more militant unions and a union friendly government are effectively artificially increasing levels of collective bargaining from their natural levels.

It is equally arguable that, without any other changes a future change in government will release this artificial upwards pressure and a naturally occurring downwards trends will again manifest itself *whether or not a duty to conclude is in place*.

However, future changes are planned. Fair Pay Agreements (FPAs) as recommended by the Fair Pay Agreements Working Group (FPAWG), would relieve unions of the need to continuously organise "fragile" groups such as small private sector firms.

Information leaked ahead of the release of the FPAWG report raised alarm over the low thresholds required to trigger an FPA (the lesser of 1000 employees or 10% of the relevant workforce or an even more subjective and therefore weaker "public interest test). These criteria would enable unions with otherwise low membership to initiate bargaining that would result in an all-encompassing FPA, which would ultimately do their currently difficult organising job for them.

It may be then that the frenetic organising activity currently in train is designed to increase collective bargaining coverage to levels that make an eventual claim for an FPAs more defensible and even acceptable than simply relying on the proposed low threshold for initiation.