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NEW ZEALAND'S HISTORY OF NON-COMPLIANCE WITH ILO CONVENTIONS 87 AND 98

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I ABSTRACT

This research paper provides an overview of New Zealand's position with respect to the ILO Conventions on freedom of association and collective bargaining, Conventions 87 and 98. New Zealand is a member of the ILO but has never ratified either Convention due to non-compliance.

Historically, New Zealand's industrial relations structures have not placed a high emphasis on the enforcement of the freedom of association, although collective bargaining was an implicit part of the framework until the enactment of the ECA in 1991. Even so, New Zealand could not ratify Convention 98 during this period because of the Government's administrative and controls over the bargaining framework, thus preventing tripartite participation as required by the Convention.

The ECA conferred on workers little more than the right to assembly, and completely disposed of the principles of collective bargaining. Legal freedom has no true value unless the individual has sufficient power to make use of it. Thus, legal freedom is contingent upon an individual's degree of social freedom. The ILO recognises this principle through the active promotion of freedom of association and the process of collective bargaining.

Compliance with international standards, as established by the ILO, required New Zealand to radically review the system under the Employment Contracts Act to promote the active enforcement of freedom of association in its broad context, as well as collective bargaining. The introduction of the Employment Relations Act fulfils these criteria. Freedom of association is protected under the ERA, and collective bargaining is reintroduced into the industrial relations environment, and encouraged as a means of redressing the inherent imbalance of bargaining power that exists between employers and employees.

It is submitted that under the new legislation, the barriers that previously prevented New Zealand from ratifying ILO Conventions 87 and 98 - are removed, and New Zealand may now entertain the possibility, for the first time since the inception of industrial law in New Zealand, that it affirms the principles and standards set out by the ILO.

II INTRODUCTION

The ILO was established in 1919 in response to the plight of increasing numbers of workers internationally who were being exploited without any regard to their health or welfare. The stated purpose of the ILO was to adopt International Labour Standards that would have a concrete impact on working conditions and practices in every country in the world.

ILO Standards are intended as a benchmark for employers' and workers' unions, both in their demands of government, and in ensuring that the unions' right to exist and represent their members' interests is affirmed. These Standards are also used by both non-governmental and inter-governmental agencies as checks on the provision of human rights and social justice, as well as by regional organisations that use the Standards as guides for developmental policies and structures.

There are two ILO Conventions that constitute the fundamental international labour standards on freedom of association. They are Convention 87, freedom of association and protection of the right to organise, and Convention 98, the right to organise and collective bargaining. The ILO regards Conventions 87 and 98 as "the most basic of all principles underlying the work of the ILO and the activities of those who toil for social justice".[1] It maintains that Conventions 87 and 98 embody those principles that are paramount to the work of the ILO, and the activities of those who strive for social justice. The intended effect of Conventions 87 is to establish the right for all workers[2] and employers to create and join organisations of their own choosing, without prior authorisation. Convention 98 goes beyond this to provide protection for workers against anti-union discrimination, for protection of workers' and employers' organisations against interference by each other, and for measures to promote and encourage collective bargaining. The Conventions also

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[1] ILO "Fundamental International Labour Standards on Freedom of Association" International Labour Standards, International Labour Organisation http://www.ILO.org/public/english/50normes/whatare/fundam/foa.htm (last modified 23 February 1999)

enact a set of guarantees to allow such organisations to operate without interference from the public authorities of that State.

Convention 87's function is to give all workers the right to create and join such organisations as they desire without the requirement of prior authorisation by the State or employer. The Convention also establishes guidelines designed to guarantee the performance and functioning of these organisations without interference by the respective State's public authorities.

Freedom of association is the ability to associate with whatever organisation a worker desires, free from recriminations, pressure or the need for approval by the worker's employer. Analogously, organisations are guaranteed under this Convention a right to exist and to operate free from pressure, intimidation or threat of cancellation by the State. Without the guarantee of protection of these rights, it would be impossible for trade unions and associated industrial organisations to exist permanently with any sense of security as they risked any amount of intimidation and pressure from State and employers, as well as employer or employer-biased organisations. Worse still, worker organisations may not have the ability to form at all in States without such protective measures afforded to them as by the Convention.

Convention 98 is the second fundamental protection of trade union rights in the ILO and addresses the right to organise and collective bargaining. It provides for protection against anti-union discrimination, protection of workers' and employers' organisations against interference by each other, as well as promoting and encouraging collective bargaining.

Collective bargaining describes the process of negotiations between employers and union officials, on behalf of those members who belong to the union concerned. Collective bargaining is a tool that can, when used effectively, address the inherent imbalance in

[2] Conventions 87 and 98 refer to both employer and worker organisations. It is intended for the purposes of this paper that where the word "worker" appears in relation to worker or employer organisations, such as

bargaining power between the individual worker and the individual employer. By standing together, workers have a greater chance of their demands for improved working conditions being met.

New Zealand has been a member State of the ILO since 1945. It has ratified neither of the Conventions discussed here, and therefore is not bound by them through ratification. However, as a member of the ILO, New Zealand is bound by the ILO Constitution, which contains the same principles that are expressed in Conventions 87 and 98.[3] Accordingly, New Zealand could be subjected to the ILO's special system of supervision as provided for the furtherance of the freedom of association Conventions. The only other OECD country that has ratified neither Convention is the United States.

New Zealand has ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Political Rights,[4] both of which contain provisions derived from Conventions 87 and 98. However, it must be noted that New Zealand has entered reservations in respect of the articles relating to trade union rights. The reservations were included primarily because New Zealand's industrial relations system at the time - compulsory unionism, union monopoly bargaining rights, and the ability to deregister unions[5] – did not meet the criteria set by the Covenants.

The characteristics of New Zealand's industrial relations system in the period 1894 through 1987 originate from the 1894 legislation, the Industrial Conciliation and Arbitration Act. These included compulsory arbitration and conciliation for the settlement of all industrial disputes. The national award system set legal minimum conditions of employment throughout the relevant industry or occupational level, was legally binding on all workers and employers regardless of whether they were a party to the award: so-called "blanket coverage".

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those in the nature of trade unions, for example, that word includes "employers".

[3] ILO, Constitution Annex: "Declaration Concerning the Aims and Purposes of the International Labour Organisation" III(e)

[4] Commonly referred to as the ICCPR and ICESPR respectively.

Unions enjoyed monopoly bargaining rights and, after 1936, further security and a greater membership base with the advent of compulsory union membership. However, they paid a high price for such protection, as they were severely restricted in the strike action they were able to take under the law. Another fetter on unions, the most serious, was the Minister of Labour's ability to deregister a union. The consequences of deregistration were not only the cancellation of the union's registration and loss of its legislatively protected position, but also the confiscation of its assets.

By the mid-1980s arbitration had become redundant for industrial dispute resolution. Most unions had move to direct negotiations with the industry employer organisations to settle disputes. The need for a new industrial relations framework had become very apparent.

The Labour Government that came to power in 1984 made several significant changes to the industrial relations system, one of the most significant being the Labour Relations Act 1987, which abolished the arbitration system. This Act retained the national award system, and acknowledged unions' need to strike effectively in a collective bargaining framework. It also gave more protection for strike action. The most significant change to the structure of trade unions was the introduction of a 1,000 minimum membership requirement for registered unions, intended to allow a more modern and effective labour movement to develop.

Labour's most radical change during this period was the abolition of the distinction between private and state sector industrial relations in the State Sector Act 1988.

Compulsory union membership, the limited ability to strike and monopoly bargaining powers prevented the New Zealand industrial relations framework from complying with Conventions 87 and 98 – freedom of association could not be facilitated under such a system.

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[5] Prior to the enactment of the ECA in 1991.

The Employment Contracts Act 1991 replaced the system of compulsory industrial conciliation and arbitration with what it refers to in the Long Title of the Act, as the promotion of an "efficient" labour market. Trade unions are completely ignored in the legislation. Individual bargaining is encouraged by the Act, and there is no acknowledgement of the disparity in power between the parties negotiating an employment contract. Instead, the ECA purports to give "freedom of choice" to the parties in terms of the nature of the contractual arrangement they wish to be governed by. However, "freedom of choice", as provided by the Act, cannot be effective where the parties desire different outcomes from the negotiating process and the outcome of such negotiations are determined by the relative power of the parties involved. There is also no obligation on the employer to negotiate with a worker's representative (union or otherwise), thus reinforcing the power imbalance between worker and employer.

The New Zealand Council of Trade Unions filed a complaint of violations of freedom of association with the ILO in 1993. The complaint alleged that the 1991 Act violated ILO principles of freedom of association, particularly in the collective bargaining process and by its restrictions on the right to strike. This complaint, the New Zealand Government's response, and the ILO's report on the New Zealand situation will be closely examined in this paper.

New Zealand, whilst the ECA is in force, breaches the requirements of Conventions 87 and 98. Freedom of association is not promoted under the current regime – under the "freedom of choice" regime under the ECA, workers' choice to belong to unions and have those unions recognised as their representatives is negated if the employer does not wish this to occur. The absence of any requirement for an employer to negotiate with the worker's appointed representative has a similar effect. Collective bargaining is not promoted by the ECA; it is not even required to be acknowledged.

The Employment Relations Act replaces the controversial ECA on 2 October this year. The new Act purports to facilitate greater union involvement in the workplace and in workplace negotiations. The introduction of "good faith bargaining" and the return of the

ability for unions to strike effectively will further enable unions to participate fully as representatives of their members. These benefits of the new legislation are not however without their controversies. Many, including the New Zealand Business Roundtable and the New Zealand Employers' Federation, are concerned that good faith bargaining will cause undue disruption to the 'negotiation' system as it currently exists. The same parties have expressed fears that the reintroduction of the right to strike will cause a return to the 'black days' of widespread sympathy strikes and industrial unrest. This paper will examine the changes to the current scheme, and discuss how these amendments will affect the New Zealand industrial relations system, and whether they will effectively address the ILO non-compliance position that is the current situation.

This research paper will provide a comprehensive overview of New Zealand's position with respect to the ILO Conventions on freedom of association and collective bargaining, Conventions 87 and 98. Part II will introduce the ILO and discuss its history, structure and objectives. It will also set out Conventions 87 and 98. It is intended that a chronological approach will highlight New Zealand's shift from positions of non-compliance, through to intended compliance under the new Employment Relations Act. This will be dealt with in Part III of the research paper, chronicling the 1894-1990 period and the Employment Contracts Act years of 1991 to 2000, including the New Zealand Council of Trade Union's complaint to the ILO alleging New Zealand's breach of the Conventions. Part III will also introduce the new era of industrial relations under the Employment Relations Act. At each stage of Part III, the legislative and judicial framework will be investigated and compared to the ILO Standards to see where they are compatible, are where New Zealand is in breach of the Standards set by the ILO in Conventions 87 and 98.

III THE INTERNATIONAL LABOUR ORGANISATION

A The Establishment of the ILO

1 The 1919 Paris Peace Conference

During the First World War trade union organisations of both camps demanded that the Peace Treaty include clauses for improving the plight of workers. The Allied Governments took these demands into consideration and established, as part of the Paris Peace Conference, a Commission on International Labour Legislation. The Commission was given the following terms of reference:

> That a Commission, composed of two representatives apiece from the five Great Powers, and five representatives to be elected by the other Powers represented at the Peace Conference, be appointed to enquire into the conditions of employment from the international aspect and to consider the international means necessary to secure common action on matters affecting conditions of employment, and to recommend the form of a permanent agency to continue such enquiry and consideration in cooperation with and under the direction of the League of Nations.

The Commission had to deal with the important question of whether it should propose that the Peace Treaty should include a full-fledged Constitution of a permanent international labour organisation, or whether it should simply recommend the inclusion of a general declaration of principles, a kind of Labour Charter.

Although during the course of its discussions the Commission dealt with many other important points, there is one that should be mentioned here. The original draft of the Preamble was worded as follows:

> Whereas the League of Nations has for its object the establishment of international peace, and such a peace can be established only if it is based on the prosperity and contentment of all classes in all nations.

The Commission decided to amend the second clause to read "and such a peace can be established only if it is based upon social justice." This second clause came to symbolise the main objective of the International Labour Organisation ("ILO"). It is also one of the main objectives of the ILO's Convention 87, the right to freedom of association.

The Commission's report contained two parts; Part I contained the Constitution of the proposed ILO, and Part II contained a list of general principles on labour matters. These texts were embodied in the Treaty of Versailles as Part XIII. [6]

Although the Paris Peace Conference is remembered mostly for its short-lived policies and decisions on economic and political affairs, its main decision in the field of social policy – the establishment of the ILO – continues to have a far-reaching impact on the world.

2 *The Declaration of Philadelphia*

The International Labour Conference has met at least once a year, except during the Second World War, since its inaugural meeting in Washington, in October 1919.

In May 1944, near the close of the Second World War, the International Labour Conference met in Philadelphia and adopted a Declaration that reaffirmed in particular that labour is not a commodity. The Declaration also maintained that "freedom of expression and of association are essential to sustained progress"[7]. The Declaration still constitutes the Charter of the aims and objectives of the ILO, and is annexed to the Constitution. As the ILO's Committee of Experts on the Application of Conventions and Recommendations stated in the report of its 1997 Session:[8]

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[6] For a more detailed account of the history of international labour law, see Follows and Shotwell.
[7] International Labour Organisation, Declaration of Philadelphia, I(b)
[8] ILO: *Report of the Committee of Experts on the Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 86th Session, 1998, Geneva, 16017, paras 56-58.

> The ILO's standards and practical activities on human rights are closely related to the universal values laid down in the Declaration...[T]he ILO's standards on human rights along with the instruments adopted by the UN and in other international organisations give practical application to the general expressions of human inspirations made in the Universal Declaration [of Human Rights], and have translated into binding terms the principles of that noble document."

The Universal Declaration of Human Rights proclaims in Article 23, paragraph 4, that "everyone has the right to form and to join trade unions for the protection of his interests." It is a more specific manifestation of the right expressed in Article 20 to "the right of freedom of peaceful assembly and association."

The inclusion in the Universal Declaration of the principle of freedom of association is preceded by its inclusion in three significant ILO instruments: the Constitution, the Declaration of Philadelphia, and the Freedom of Association and Protection of the Right to Organise Convention, 1948. The Constitution considered that the right of association is of "special and urgent importance" for both workers and employers.[9] The Declaration of Philadelphia reaffirmed freedom of association as one of the fundamental principles on which the ILO was based, and characterised it as "essential to sustained progress", one without which the ILO could not hope to achieve its goals. The third instrument, Convention 84, refers not only to the right of employers and workers to associate for any legal purpose, but also to collective agreements, consultations and the solution of labour conflicts.

Since 1948, the ILO and the United Nations have developed along parallel lines as far as freedom of association issues are concerned, and regional organisations have also developed both standards and supervisory capacity.

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[9] Prior to its removal following an amendment in 1946, the above quote from the ILO's Constitution was preceded by the phrase "for all lawful purposes".

B ILO's Definition of "Trade Union"

The ILO defines a trade union as "an organisation of employees, usually associated beyond the confines of one enterprise, established for protecting or improving, through collective action, the economic and social status of its members."[10]

This definition is different from the definitions of "trade union" as contained in the Employment Relations Act and its preceding legislation, the consequences of which will be discussed below.

C Convention 87: Freedom of Association and Protection of the Right to Organise

Freedom of association is accepted internationally as a fundamental human right.[11] In a labour law context, freedom of association is paramount to the collective bargaining process - it relates directly to workers' rights to organise and form trade unions to advance their employment interests. In its simplest sense, the principle may be reduced to an individual's right to do collectively what one is entitled to do individually.[12] Without this right, the role of trade unions is seriously impaired.

Freedom of association is usually given an expansive definition when used in a labour law context. The ILO Conventions 87 and 98 promote this interpretation. The right is most often interpreted in a positive sense as the protection of the workers' right to join a union to safeguard their rights and further advance their interests. There is however also a negative right attached to the freedom of association, that is, the right *not* to join a union or other association. It is this negative right that has grown increasingly prominent in recent years. There are two reasons for this: the first is the gradual recognition of such a

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[10] ILO, *ILO Thesaurus*, (3ed, Geneva, ILO, 1985) 384.
[11] David A Morse, *The Origin and Evolution of the ILO and Its Role in the World Community*, (ILR, Cornell, New York, 1969) 11.

right as a facet of individual liberty, and the second is the use of this right as a façade for anti-unionism, for example the *right to work* laws in parts of the USA.[13]

The Declaration of Philadelphia 1944 asserts that freedom of association is "essential to sustained progress".[14] Convention 87 is deemed to be binding on a member State by virtue of their membership of the ILO, regardless of ratification of that Convention. The position of the ILO is that "[b]y membership of the ILO itself, each member State is bound to respect a certain number of principles, including the principles of freedom of association which have become rules above Conventions".[15]

It should be noted that both membership of the ILO and compliance with its standards are voluntary. New Zealand cannot be forced to retain its membership of the ILO, or to comply with its standards. However, the weight of its recommendations is such that they should not be ignored.[16]

Article 11 of Convention 87 requires the government to "take all necessary and appropriate measures to ensure that workers…may freely exercise the right to organise." Thus, the Article not only confers the right to organise, but requires positive intervention for the promotion and protection of this right.

The presumption on all ILO member States that they are bound by the principles of freedom of association regardless of their ratification status, is backed by the assertion that complaints may also be presented to the Committee on Freedom of Association ("CFA") concerning alleged member States' behaviour without requiring that State to have ratified Convention 87.[17] It is this provision which enabled the New Zealand

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[12] S Leader, *Freedom of Association: A Study in Labour Law and Political Theory* (Yale University Press, New Haven, 1992)
[13] Charles Hansen, Sheila Jackson and Douglas Miller, The Closed Shop: A Comparative Study in Public Policy and Trade Union Security in Britain, the USA and West Germany (Gower, Aldershot, 1982)
[14] Declaration of Philadelphia 1944 I
[15] ILO, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (1995)
[16] Tonia Novitz, "New Zealand Industrial Relations and the International Labour Organisation: Resolving Contradictions Implicit in Freedom of Association" NZJIR 21(2) 119, 125.
[17] ILO above n15, para 53

Council of Trade Unions ("NZCTU") to lodge its complaint against the New Zealand Government with the ILO.[18]

D Convention 98: The Right to Organise and Collective Bargaining

The Right to Organise and Collective Bargaining Convention, 1949, provides firstly that "workers shall enjoy adequate protection against acts of anti-union discrimination in respects of their employment".[19] This provision aims to protect workers and trade union leaders from victimisation by their employers both at the time of taking up employment and during the course of the employment relationship. This protection applies especially to those acts designed to make the employment of a worker subject to the condition that the worker will not join a union, or will relinquish union membership.[20]

The Convention also provides that the protection shall apply equally to acts calculated to cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.[21]

Another aim of the Convention is protection, primarily of trade unions, against interference. According to Article 2, "workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each others' agents or members in their establishment, functioning or administration."[22] In particular, acts designed to promote the establishment of workers' organisations under the dominance of employers' organisations or to support workers' organisations by financial or other

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[18] Discussed at Part III(B)(3) below.
[19] Article 1. See more generally Bartolomei de la Cruz, *Protection against Anti-Union Discrimination*, (ILO, Geneva, 1976).
[20] Anne Boyd, "The Freedom of Association in the Employment Contracts Act 1991: What has it Meant for Trade Unions and the Process of Collective Bargaining in New Zealand?" 28 Cal. W. Int'l. L.J. 65, 70.
[21] Article 1(2)(a) & (b).
[22] Article 2(1).

means, with the object of placing such organisations under the control of employers or employers' organisations are described as constituting such acts of interference.[23]

Article 3 provides that machinery appropriate to national conditions shall be established where necessary to ensure respect for, and implementation of, the provisions discussed above.

To create conditions for successful voluntary negotiation between employers and workers, Article 4 provides that "measures appropriate to national conditions shall be established, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."[24] The voluntary nature of collective bargaining must be stressed. It is in accordance with this principle that the supervisory bodies of the ILO[25] have considered that the system of official approval by a government authority to make an agreement valid is contrary to the Convention. However,[26]

> If as part of its stabilisation policy, a government decides that wage rates cannot be settled freely through collective bargaining, such restriction should be imposed as an exceptional measure and only to the extent that it is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards.

E Structure of the ILO

1 Tripartite Structure

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[23] Article 2(2).
[24] Article 4.
[25] The Committee of Experts, and the Freedom of Association Committee.
[26] Prof N Valticos and Prof G von Potobsky, *International Labour Law*, (2ed, Kluwer Law & Taxation Publishers, Boston, 1995) 100.

A unique and essential characteristic of the ILO is the tripartite structure.[27] It is composed not only of government representatives, but also of representatives of employers' and workers' organisations. The principle of tripartism influences, in many respects, the characteristics as well as the content of the instruments adopted by the ILO. The principle is aimed at inspiring confidence among employers' and workers' representatives, to entrust them with responsibilities and associate, with a view to achieving social peace, these two parties – often opposed to each other – with governmental action.[28] Tripartism also ensures a democratic control of the activity of the ILO.

2 Membership

In keeping with its very objective, the ILO has always aimed at universality in its membership. An international labour organisation that did not aim at universality would indeed be a contradiction in terms! But universality does not mean uniformity. This was emphasised in a report to the 1954 Conference.[29]

> Paramount [in the concept universality] is the idea that the aims and purposes of the ILO and the action that it takes must correspond with the needs of all the peoples throughout the world, whatever social or economic regime exists in their countries. The principle of universality also means that the functioning of the ILO should not be designed solely to fit any given social system or to impose a pattern of social structure to be uniformly applied.

There are two ways for a State to be admitted to membership in the ILO.[30] First, any State Member of the United Nations may become a Member of the ILO by communicating its formal acceptance of the obligations of the Constitution of the ILO.

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[27] For more on the principle of tripartism see CW Jenks, "The Significance for International Law of the Tripartite Character of the International Labour Organisation", *Transactions of the Grotius Society*, Vol 22, (London, 1957) 45 –81 and the *International Protection of Trade Union Freedom* (London, 1957) 92-141; A Berenstein, *Les Organisations Ouvrières, leur compètence et leur rôle dans la SDN, notamment dans l'OIT,* (Paris, 1936); Bernard Béguin, "ILO and the Tripartite System", *International Conciliation*, No 523 (May, 1959)

[28] Valticos, above n 26, 35

[29] ILO, *Record of Proceedings*, International Labour Conference, 1954, 436.

[30] Art 1, paras 2 – 4 of the Constitution of the ILO.

Secondly, the Conference of the ILO may admit Members by a vote concurred in by two-thirds of the delegates attending the Session, including two—thirds of the government delegates present and voting. The majority of the admissions to membership are by way of the first procedure.

F International Labour Standards

1 Function

One of the ILO's most important and visible functions is the adoption of Conventions and Recommendations that set international standards. These Recommendations provide guidance on policy, legislation and practice. The general trend of these standards has been the constant broadening of their scope, including the fields covered, the categories of the persons protected and the framework within which the matters are treated. A number of these instruments go beyond the traditional field of labour law and touch on matters of civil liberties, such as freedom of association.[31] Freedom of association is regarded by the ILO as a cornerstone of social justice, necessary to secure the Organisation's objective of universal, permanent peace.

2 Purpose

International labour standards have several purposes. The three regarded as the most important are to mitigate the potentially adverse effects of international market competition, social justice and the consolidation of peace.

(a) International Market Competition:

The Director-General of the ILO observed in 1997 that the effects of international competition that have been argued as creating an obstacle to improved conditions of labour are a target of, and reason for, international labour standards;[32]

> Leaving aside the various interpretations which divide the specialists, it is highly likely that public opinion will continue to believe widely that globalisation (the complex

[31] Convention 87

> phenomenon of economic interdependency resulting from trade in goods and services and capital flows) inevitably implies a downward levelling of pay for jobs of equal (low) skills in a market in which goods and capital can freely circulate...[T]his liberalisation [of trade, as a part of globalisation] carries the risk, as the Preamble to the Constitution of the ILO warns us, that international competition, by inhibiting the will of certain members to introduce progress, might be 'an obstacle in the way of other nations which desire to improve the conditions in their own countries.'"

The Director-General went on to argue that the ILO's standard setting activities had to meet the challenge posed by globalisation by reaffirming the value of social justice and working with Member Stated to strive for it in the context of opportunities created by a vibrant world economy.[33]

Professors Valticos and von Potobsky, authors of *International Labour Law*[34] disagree with the Director-General's claims that globalisation necessarily prevents fair trade or fair working conditions. They purport that this argument has been given less prominence "since it has been steadily realised that costs and the competition value of products depend on many factors other than labour costs."[35]

However, the professors agree that the harmonisation of social policy may help to reduce the opportunities for unfair competition and thereby safeguard world markets and facilitate economic integration and the movement of capital, goods and manpower.[36]

(b) The Consolidation of Peace

At the end of the First World War it became apparent that injustice in the social field endangers peace in the world and that against such injustice therefore serves the cause of peace. As stated in the Preamble to the Constitution of the ILO "...universal and lasting peace can be established only if it is based on social justice".

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[32] Dr Michael Hansenne, *The ILO, Standards Setting and Globalisation*, (ILO, Geneva, 1997)
[33] http://www.ILO.org/public/english/standards/norm/whyneed/lbrcomp.htm
[34] Valticos, above n 26, 20-24.
[35] Valticos, above n26, 21.

Measures of social justice that provide, amongst other things, for trade union rights, are bound to strengthen democratic regimes, which are more likely than authoritarian governments to be peace loving. Stress has equally been laid on the positive and dynamic concept of peace, involving the establishment of stable, just and harmonious conditions both within individual countries and between different countries by eliminating, *inter alia*, rivalry on world markets arising out of too great a disparity between labour conditions;[37]

> It has also been claimed that the establishment of international labour standards aimed at improving the condition of mankind develops a common sense of solidarity internationally and fosters a climate of mutual collaboration and understanding transcending racial and national differences.

The cornerstone of the system of international labour standards is hope for "the defeat of social injustice, the cynicism which accepts it as an inevitable part of the human experience, and the possibility that lasting peace is incrementally easier to achieve with each and every defeat anywhere of social injustice."[38]

(c) Social Justice

The driving force behind the idea of international labour law was not the notion of social justice only as a factor of peace, but also for its own sake. Social justice is, in its own right, an objective of international labour law even if little emphasis was placed on it initially. The Preamble quoted above continues "...The High Contracting Parties moved by sentiments of justice and humanity, as well as by the desire to secure the permanent peace of the world, agree...etc".

The notion of social justice is constantly evolving to keep place with rapid technical and social change. A growing need for security and wellbeing is accompanied by a desire for

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[36] Valticos, above n26, 24.
[37] Valticos, above n26, 25.

greater freedom, more equality and a greater measure of participation in the management of society, as well as a better quality of life and a substantial improvement in working conditions. It embraces the general welfare of mankind in the broad sense, as defined by the Declaration of Philadelphia. The notion of social justice has developed to mean, at an international level, that "the world community is not responsible only for the maintenance of peace and good relations between States, but also for an active contribution to the welfare of mankind."[39]

3 Enforcement

The ILO's system of enforcement is based on the ratification of a labour standard and an obligation of regular, periodic reporting on measures taken to give effect to the provisions of the standard.

For specific allegations against a Member State, special systems of supervision have been established. However, Articles 24 and 26 of the ILO Constitution require that the Member State complained of has ratified the Convention concerned. An exception to this rule is any complaint concerning the Convention concerning the freedom of association, Convention 87. Allegations concerning the infringement of freedom of association principles may be brought against a Member State even if they have not ratified Convention 87.

In addition to the regular system of supervision, there are also special supervisory mechanisms for the enforcement of freedom of association principles, as espoused in Conventions 87 and 98. The need for additional supervisory bodies arose from the fact that under current provisions, if a State did not ratify these Conventions, there would be no means by which the International Labour Conference could supervise their application.

The Committee on Freedom of Association ("CFA") was established in 1951 to examine complaints made by governments, workers' and employers' organisations that member

[38] http://www.ILO.org/public/english/standards/norm/whyneed/peace.htm

States are not respecting the basic principles of freedom of association. The complaints may be examined whether or not the country concerned has ratified the ILO's Conventions on freedom of association, as the procedure of examination is based on constitutional principles.

The second mechanism is the Fact-Finding and Conciliation Commission on Freedom of Association ("FFCC"). The FFCC was established in 1950, and examines complaints of infringements on trade union rights that are referred to it by the ILO's Governing Body. These complaints may be in respect of both countries that have ratified the freedom of association Conventions and those that have not; although in the case of the latter, the referral cannot be made without the consent of the country concerned. The FFCC may also examine complaints of violations of freedom of association amongst non-member States of the ILO when such complaints are forwarded to it by the United Nations and the country consents to the examination.

G The ILO as an International Benchmark

The ILO is regarded as a "global model for workplace rights and responsibilities."[40] As such, it is regarded as the Member States' obligation to realise them as far as possible, and the ILO's mission to promote their realisation. International labour standards are used as a benchmark for the provisions of human rights, and are used as such by international no-governmental agencies as well as inter-governmental agencies. They are also used for guidance by regional organisation in the development of policies aimed at harmonising their labour and social policies.

After the Second World War, the influence of the standards was particularly noteworthy in the newly independent countries. As the Minister of Labour and Social Welfare of Malaya told the Conference in 1958: "whenever labour legislation is contemplated or any changes are considered, our first thought is always 'what do ILO Conventions say on the matter?'" Or, as the Secretary if Labour in the Philippines said in 1955, his government

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[39] EJ Phelan, *Yes and Albert Thomas*, (Cresset Press, London, 1949) 54.

was implementing a set of labour laws, "most of them patterned after ILO Conventions."[41]

IV NEW ZEALAND'S POSITION IN TERMS OF THE ILO

A The Pre-Employment Contracts Act Era

1 The Early Growth of Trade Unions:

The first industrial show of force to occur in New Zealand was a carpenter who refused to work unless his terms were met. Samuel Parnell, upon his arrival at Petone beach from England in 1840, was asked to build a storehouse for a local merchant. He agreed, but only on the condition that the working hours on this project not exceed eight hours per day. This was an unheard of and extravagant demand, especially when it was still commonplace for the English working day to be 14 to 16 hours long. The merchant of course refused, but Parnell remained firm on his conditions. There was a great shortage of skilled carpenters in the colony – only two others besides Parnell - and the merchant was forced to concede to Parnell's demands in order that his storehouse be built.[42]

Parnell's stand set the tone for industrial relations in New Zealand, and first trade union to be formed in New Zealand was dedicated to preserving the eight-hour day established by Parnell.[43] Other tradesmen followed Parnell's example, and met the incoming ships to tell the newly arrived tradesmen of the practised working day, with any offenders to be dunked in the harbour.[44]

The huge demand for labour and skills in colonial New Zealand meant that the working class held some power in the bargaining stakes, and did not hesitate to use their labour power as leverage to demand better treatment. The Colonial Government tried to

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[40] http://www.ILO.org/public/english/standards/norm/howused/index.htm
[41] GA Johnston, *The International Labour Organisation*, (Europa Publications, London, 1970) 104.
[42] Roth *Trade Unions in New Zealand* (Reed Education, Wellington, 1973) 3
[43] The Benevolent Society of Carpenters and Joiners, formed in 1842.
[44] Roth, above n42, 3

introduce cheaper Maori labour into the workforce as a means of redressing this balance of power, but this hope was short-lived as the Maori workers demanded equal treatment for equal work, and were prepared to fight for it. This is illustrated by the strike of 350 Maori employed on the railway lines in 1841, when told that they would have part of their income docked to cover the cost of rations.

Trade unions as they first appeared in the colony resembled craft unions and were composed of skilled tradesmen rather than industrial unions of oppressed workers. They formed for the purpose of fighting a particular issue, and usually collapsed upon their defeat, which was often. The issues were mostly attacks by employers attempting to reduce wages or worsen conditions, and seldom saw the demand of improved wages or conditions by workers. For example, the Bootmakers' Union struck approximately 50 times prior to 1895, and each time was in response to proposed wage cuts.[45]

Unions continued to develop very rapidly in New Zealand, although until the late 1880s, were short-lived bodies. The Trade Union Act 1878 gave trade unions legal legitimacy for the first time, but they continued for several years to exist on a temporary means-to-an-end basis, with little permanency or long-term structure. At this point the ILO had not yet been created, and there were no international bodies in existence with the objective of furthering the cause of trade union rights, and improving the plight of workers.

In October 1889 the Maritime Council of New Zealand was established after a surge in support for the socialist aims of trade unionism. The Council originated in Dunedin, with the seamen, watersiders and miners unions, and became the first national organisation of trade unions. The railways, clerical and manual workers, and storemen unions soon joined them.[46] New Zealand unionists began to see themselves as representatives of the *new* working class, and the universal notion of unionism took hold. The New Zealand unions were determined to move away from the English class system that had subjugated

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[45] Geare *The System of Industrial Relations in New Zealand* (Butterworths, Wellington, 1988) 29

[46] The unions were the Seamen's Union, Wharf Labourers' Union, the West Coast Miners, the Mercantile Marine Officers' Association, the Wharf Carters' Expressmen's and Storemen's Union, and the Amalgamated Society of Railway Servants.

workers and placed all control over wages and working conditions into the hands of the employers.

The purpose of the Maritime Council was to

> form a deliberative and representative body which is possessed of a special knowledge of the matters coming under its cognisance, and which by an aggregation of power can enforce the carrying out of legitimate and necessary reforms where a single Union might find the task beyond its individual strength.[47]

In early 1890 a Royal Commission was established to investigate the practise of "sweating" in factories – a euphemism for the extreme exploitation of workers, particularly women and children. The ensuing Report was strongly in favour of the presence of trade unions, which were seen as "a means of preventing both excessive hours of work and the sinking of wages to below subsistence levels."[48] During the course of the year unionism enjoyed a great increase, thanks at least in part, to the favourable report.

This boom phase in the development of trade unions ended with the 1890 Maritime strike. The strike had originated as a dispute in Australia between the Australian Maritime Council (with whom its New Zealand counterpart had links) and involved most major New Zealand unions, especially those involved in transport, mines and related industries.

The strike lasted from August until November 1890 when, decimated, the unions still involved – for many had withdrawn their active support before this point – were instructed by the Maritime Council to arrange what terms they could for their members to return to work. On 10 November the strike officially ended after 56 days when the Council called off the seamen's strike.

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[47] Maritime Labour Council of New Zealand, *Proposed Basis and Rules of the Maritime Council*, (Dunedin, 1889)
[48] Geare, above n45, 29

The effect of the strike was devastating on unions. Unions had invested all of their resources into the strike, and those who were not completely crushed by the end were severely weakened. Employers nationwide took advantage of the situation, giving preference to non-union workers, and forcing workers to sign undertakings that they would not join a union whilst employed. The Maritime Council disintegrated after the strike, and most of the new unions formed so quickly in 1889 and 1890 followed suit in the early 1890s. Attempts by workers to revive any of these unions were quickly suppressed by employers and the government.[49]

In 1890 there were reported to be some 200 trade unions in New Zealand comprising 63,000 members. By 1894, this figure dropped to a mere 70 unions and an estimated membership of 8,000.[50] Thus New Zealand was left with somewhat of a 'green-fields' situation by the mid-1890s where the playing field was largely empty of existing trade unions. This proved to be the perfect environment, from the new Liberal Government's perspective, into which to introduce a new framework of legislation that would redress the balance of power in favour of the unionists and improve the workers' bargaining power within the limits of the wage system. If successful, this would give trade unions legitimacy, without allowing them the extent of power they had almost acquired prior to the Maritime Strike.

2 *The Industrial Conciliation and Arbitration Act 1894:*

Section 91 of the Industrial Conciliation and Arbitration Act ("IC&AA") specified that the Public Sector did not come within the ambit of the Act. This separation remained until the passage of the Labour Relations Act in 1987. Accordingly, the Public and Private sectors will be dealt with separately in this section.

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[49] Roth, above n42, 17. Also JT Paul, *Labour and the Future* (Executive of the New Zealand Trades and Labour Council's Federation of Labour, Dunedin, 1911), 12.
[50] Roth, above n42, 21

3 *The Private Sector*

(a) The Industrial Conciliation and Arbitration Act

The objective of the IC&AA was to provide machinery for the peaceful settlement of industrial disputes, but the intention according to the title of the Act was also to "encourage the formation of industrial unions and associations". The encouragement came in the ability for trade unions to register with as few as seven members, and having registered, the trade unions then acquired sole bargaining and protection rights under the Act.

Under the IC&AA, trade unions were required to register, in order to gain access to the arbitration system, and if registered, were bound to comply with the conciliation and arbitration process as an alternative to strikes and lockouts if peaceful settlement was not reached in an industrial dispute. This situation continued until 1984, with the exception of a brief period during the depression when compulsory arbitration was repealed. The 1984 amendment to the Industrial Relations Act (IRA), provided that arbitration was available only if both disputing parties agreed to it.

The reaction by trade unions to the new legislation was split. The craft workers saw registration as a satisfactory price to pay for the foregoing of strike action, which was wholly outlawed under the IC&AA and replaced instead with a system of compulsory arbitration. The general workers however, which consisted mostly of unskilled workers in "industrial" unions such as those in transport and mining, were not satisfied with the IC&AA, as through it they lost a valuable leverage mechanism in negotiations – that of the strike, or threat thereof.

The IC&AA was based on the principle that the State "had a right and a duty to intervene in labour disputes and impose a settlement on the parties when they were unable to resolve their differences by peaceful negotiations."[51] It introduced a system of

[51] Holt *Compulsory Arbitration in New Zealand* (Auckland University Press, Auckland, 1986) 15

compulsory arbitration designed to operate within New Zealand. Trade unions were integral to the system as bargaining parties on behalf of their members in any industrial dispute.

Compulsory arbitration required unions to facilitate the representation of workers in conciliation and before the Arbitration Court. However, the type of unions envisaged by the legislation was undoubtedly somewhat different to that which traditional unionists may have desired. William Pember-Reeves revealed his political agenda in promoting the Act when he declared that it[52]

> deliberately encourages workmen to organise. When in obedience to the law, they renounce striking and register as industrial unions, it does not seem amiss that they should receive some special consideration…A union which may not strike, and may not shut out any decent workman in its trade who wishes to join it, is a union left with little power for mischief, however much it may do legally and peacefully for its members.

This steady growth of registered unions under the new regime continued throughout the first half of the Twentieth Century. Trade unionism had taken on an entirely new concept – the unions existed, and were protected by the State, but in return they were heavily restricted in their freedom and ability to act. For most of the trade unions, however, this was not a bad thing. The legislation offered them protection and guaranteed continued existence in relative industrial harmony. Trade unions registered and continued to exist within the new criteria, attempting where possible within the legislative constraints, to improve the conditions of their members.

It is arguable that some trade unions were formed precisely to take advantage of compulsory arbitration enforced by the state.[53] They took advantage of the ability to obtain a legally binding award under the system, regardless of their weakness as an

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[52] Reeves *State Experiments in Australia and New Zealand* (Allen & Unwin, London, 1902)

[53] Peter Sheldon has argued that the dependence of the Australian unions upon the protections offered by the system for their recovery has been considerably overstated. See Sheldon *Arbitration and Union Growth in Australia: A Historical Re-evaluation* University of Auckland, 1993) 315-331. It has been noted with

organisation, and of their capacity, or lack thereof, to threaten and sustain any consequential industrial action, such as a strike. The effect of this legislation was to withdraw the ultimate ability to settle a dispute from the disputants, and instead to place it in the hands of the Arbitration Court, an organ of the State. This meant that the IC&AA compensated for the bargaining weakness that resulted from unorganised or poorly organised workers in protecting their own wage rates.[54]

Unions could therefore provide adequate Award cover to their members, by virtue of being registered, without actually requiring the individual strength to personally demand such conditions from individual employers. As a result, several unions developed as "placid bureaucratic institutions, content to nestle safely within the arbitration system and to receive gratefully such benefits as it conferred on their members."[55] They remained in existence as small organisations, with limited financial resources and ability, restricted to representing their members on a narrow range of issues within the narrow parameters allowed by the system.

Unregistered trade unions could operate as unions with members, but they were not protected or assisted by the provisions of the statute,[56] and could not be a party to the conciliation or arbitration processes. Members of unregistered unions fell outside the jurisdiction of the Award and Industrial Agreements blanket provisions for the applicable industry or occupation.

Trade unions remained in a somewhat weakened position, and there were no strikes from 1894 until 1906, facts regarded simultaneously as both indicative of the benefits of the legislation, and of its detriments. Ramsey MacDonald, a British Labour leader suggested that "a trade union in New Zealand exists mainly to get an Award out of the Arbitration Court", and his American counterpart, VS Clark, accused trade unions of being "litigious

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interest that New Zealand has never mounted a similar argument: Nolan and Walsh *Labour's Leg-Iron? Assessing Trade Unions and Arbitration in New Zealand* (Dunmore Press, Palmerston North, 1994)

[54] Gross *The Condition of New Zealand Unions - an Environmental Approach* 1961) 30.

[55] Nolan and Walsh *Labour's Leg-Iron? Assessing Trade Unions and Arbitration in New Zealand* (Dunmore Press, Palmerston North, 1994) 16.

[56] See IV(A)(5).

rather than militant organisations, the creatures and instruments of state regulations."[57] By this stage however unions' strength had recovered somewhat, and the stronger unions were increasingly less dependant on the IC&AA.

The success of the Blackball strikers in 1908[58] rejuvenated the union movement. The leaders of the strike were among the inaugural members of the Federation of Miners. The Federation did not register under the IC&AA. The Federation changed its name in 1909 to the New Zealand Federation of Labor[59], and members soon became known as the 'Red Feds'. The Red Feds built up a substantial membership with their preaching of uncompromising conflict and strength. "The working class and the employing class have nothing in common…Between these two classes a struggle must go on until the workers of the world organise as a class, take possession of the earth and the machinery of production, and abolish the wage system."[60]

The outbreak of World War I intensified the problems of combining for trade unions, as well as exacerbating the shortage of labour. "Except amongst the few irreconcilables, militancy crumbled before the pressure of patriotism aroused during the First World War. The war united, where the Federation sought to divide. The cry of 'country not class' proved irresistible."[61]

The inter-war years saw the increased industrial power of employers. The IC&AA was amended in 1932 so that arbitration was available only when both unions and employers

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[57] Clark *The Labour Movement in Australasia* (Constable & Co, London, 1907) 64.

[58] Miners from the Blackball Mine on the West Coast struck over their demands for a 30 minute lunch break – they had been allowed a mere 15 minutes. The strike lasted a full three months before the employers relented and reinstated the miners, and 30 minutes for lunch. The strike received strong support throughout the country, even despite the union being prosecuted and fined in the Arbitration Court for striking.
The ringleader of the strike, Pat Hickey, later recounted that when the matter went to court reference was made to the allowance of 15 minutes for lunch being far too short. The judge "remarked with a frown that he thought 15 minutes ample time. He then glanced at the clock, noticed the time was 12:30 and stated the Court stood adjourned for lunch until 2pm." Hickey *Red Fed Memoirs* (Wellington Media Collective, Wellington, 1980) 12

[59] "Labor" was deliberately spelt in the American fashion.

[60] Hickey *Red Fed Memoirs* (Wellington Media Collective, Wellington, 1980) 17. These sentences occur in the Preamble of the American Industrial Workers of the World (as amended in 1908) which the New Zealand Federation of Labor adopted as its own Preamble in 1912.

agreed[62] in reaction to the problems of employment during the Depression. The Depression created for the first time in New Zealand a situation of overproduction of goods, and oversupply of labour. The high rates of unemployment resulted in the widespread rejection of arbitration by employers who could impose their preferred conditions on unions.

All these factors contributed to the election of a Labour Government in 1935. The new Government introduced compulsory unionism almost immediately. Seen as a benefit to unions and their members, the Labour Government maintained that their rationale behind this move was that it was inappropriate and unfair for non-members of unions to benefit from the improved conditions and rates of pay gained through union membership without contributing to the unions.

In April 1937 the New Zealand Federation of Labour ("FOL") was established with the help of the Government. This body, significant for its role in uniting the trade union movement, lasted for 50 years until it merged in 1987 with the Combined State Unions to form the New Zealand Council of Trade Unions.

The power to deregister a union, as a penalty for striking was first conferred on the Minister of Labour by the IC&A Amendment Act 1939. Deregistration denied the deregistered union access to the Arbitration Court as well as awards. It could also involve the seizure of the union's funds. This draconian power was invoked infrequently – most notably following the 1951 waterfront strike where six unions were deregistered. It was only in 1987, with the advent of the Labour Relations Act, that this power was revoked.[63]

Until the Second World War, award rates of pay and actual rates of pay were usually similar. National awards set the wages for most employees, and above award payments

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[61] Stone *The Unions and the Arbitration System, 1900-1937* (Paul's Book Arcade, Auckland, 1963) 207
[62] Women were not covered under this amendment.
[63] Peter Brosnan, David F Smith and Pat Walsh, *The Dynamics of New Zealand Industrial Relations* (John Wiley & Sons, Auckland, 1990)

negotiated on an individual industry basis were rare.[64] This began to change after the War, where increasingly unions would negotiate above-award payments with their employers. The practice was encouraged by the generally buoyant economic conditions at the time, and gathered momentum during the 1960s, in part due to a commonly held belief that the Arbitration Court had adopted an unreasonably conservative approach to wage rates. The result was that over the following decade, real wages did not match the rise in the Gross Domestic Product ("GDP").[65]

The failure of real wages to keep pace with the rise in real GDP, coupled with the growing willingness of unions to push their claims outside the formal machinery of conciliation and arbitration, and the abundance of labour shortages inevitably created an environment where it was possible for a rapid rise in wages to occur, given the necessary trigger. The trigger was not long in coming.

The 1968 wage dispute[66] can be seen from a trade union perspective as the climax of a process that spanned the 1950s and 1960s, and was the final nail in compulsory arbitration's coffin. New Zealand had developed a system of dispute resolution during this period that made use of the formal entrenched system of conciliation and arbitration as a means of obtaining basic wages and conditions, and the use of an informal, non-legislated system of collective bargaining to obtain actual wage rates and conditions. This two-tier system worked particularly well for those strong unions capable of negotiating directly with employers. The weaker unions that were not so well organised relied on the third tier of this system, the General Wage Order, to ensure the wages of their members kept pace with the cost of living.

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[64] Prichard *An Economic History of New Zealand to 1939* (Collins, Auckland, 1970)

[65] From March 1959 to March 1969 the real average weekly earnings of adult males grew at an annual average rate of about 1.5% while the real GDP per head rose on average by 2% per year. Over the ten year period, therefore, real GDP per head increased 24%, some 7% more than the growth in real average weekly wages. This was despite the fact that ruling rates moved substantially ahead of award rates during this period. Boston *Incomes Policy in New Zealand* (Victoria University Press, Wellington, 1984) 90, Council *Inflation Report* (New Zealand Monetary and Economic Council, Wellington, 1977) 32

[66] Wilson *Recent Developments in New Zealand's Industrial Relations System* 1981) 35.

The fact that trade unions could negotiate directly with the employer, and have some success at it, reflected the increase in strength and organisation of the trade union movement. It also revealed to the government that it was no longer possible to rely completely on the Arbitration Court to control wage increases. This was of concern to a government that was facing increasing inflation. Its answer was to enact several pieces of legislation over the next decade in an attempt to counter and control increases in remuneration that were made outside of the Arbitration Court. Among the first of these statutes were the General Wage Orders Act 1969[67] and the Stabilisation of Remuneration Act 1971.[68]

The success of these attempts by government is "a question for an economist"[69]. What is evident is the gradual but persistent breakdown of the traditional method of industrial dispute resolution. By the 1960s the notion of compulsory arbitration in dispute settlement had become a fallacy.

Control over wage rates was increasingly in the hands of individual employers and local union officials, as the wage-fixing system grew increasingly fragmented. The FOL and the Employers' Federation "could do little other than watch idly as wage rates escalated in an unprecedented manner and the number of working days lost through industrial stoppages reached their highest level since the 1951 waterfront strike."[70]

(b) The Industrial Relations Act 1973

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[67] This statute was based on an agreement reached between the employers' and workers' federations, and regulated the procedure for issuing any orders. Under the Act, changes in the cost of living were to be among the first criteria that the Court was required to take into account.

[68] This legislation was followed by the Stabilisation of Remuneration Regulations 1972, and then by the Wage Adjustment Regulations 1974, which remained in place until the advent of the ECA 1991, although the provisions relating the direct control of increases in remuneration were repealed in 1977. The measures undertaken by all three legislative bodies took the same form: a special tribunal was established with the responsibility of approving all increases in remuneration contained in an instrument. The tribunal also had jurisdiction to in most instances to make General Wage Orders, which became known as cost of living orders. The criteria for approval of increases in both types of orders were set out in the legislation.

[69] Wilson *Recent Developments in New Zealand's Industrial Relations System* 1981) 37.

[70] Boston *Incomes Policy in New Zealand* (Victoria University Press, Wellington, 1984) 93. See also tables – industrial stoppages in New Zealand

By the early 1970s New Zealand was once more experiencing a significant, if generally unexpected, acceleration in wage inflation. This trend coincided with an upsurge in the level of industrial unrest, and workers displaying a greater willingness to exploit their market power to obtain substantial real-wage gains than they had shown in the previous two decades.[71]

The Industrial Relations Act ("IRA") came into effect on 8 March 1984, ending 80 years of IC&AA rule. Despite the change in name from previous legislation, however, this Act constituted little more than a continuance of "compulsory conciliation and arbitration and the careful regulation of unions observed in New Zealand since 1894."[72] It continued the IC&AA system of wage determination, and reaffirmed the importance of formal award negotiations, and applied only to the Private Sector.

4 The Public Sector

Unionism in the Public Sector can be traced as far back as the establishment of the New Zealand Educational Institute in 1883. Not originally intended to deal with industrial matters, it later became union conscious with the aim to uphold and maintain the just claims of its members. It was soon joined by the Amalgamated Society of Railway Servants in 1886 and the Post and Telegraph Officers' Society in 1890. The Public Service Association was also formed in 1890 but collapsed within a few years having failed to achieve sufficient recruitment.

It is sufficient for the purposes of this paper to discuss the existence of trade unions in the Public Sector prior to the State Sector Act 1988 very briefly. JF Robertson comprehensively deals with this in his text, *Legislation and Industrial Relations in the Public Sector*.[73]

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[71] Boston, above n70, 89.
[72] Brooks *The Practice of Industrial Relations in New Zealand* (Commerce Clearing House, Auckland, 1978) 13
[73] Robertson *Legislation and Industrial Relations in the Public Sector* (Pitman Australia, 1974)

The service organisations operating prior to these changes under the LRA and State Sector Act 1988 were, in general, larger than their private sector counterparts, averaging 7,400 members as compared with 2,100 members. At the time of the introduction of the new laws, two very large service organisations dominated public sector unionism: the PSA covering 69,700 members and the Post Office Union covering 38,000 members.[74]

Public Sector unions, or "service organisations" as they were known, were not required to be registered until the State Sector Act 1988 and were not, with the exception of the postal/ telecommunications and railways unions, subject to the compulsory unionism provisions that existed from time to time for the private sector. Nevertheless, unionism prospered in the public sector and membership levels were high. The vertical spread of membership encompassed all levels of employees, including the most senior levels of the organisations. This situation changed in 1988 when the State Sector Act put state sector unions under the same provisions as the LRA and effectively allowed compulsory unionism for the public sector for the first time. However, many public sector unions elected not to adopt the system. The LRA provisions did not oblige public sector unions to have a union membership clause,[75] but for the first time since the State Sector Conditions of Employment Act 1977 provided them with that opportunity.

5 The Labour Relations Act 1987

The Labour Relations Act ("LRA") constituted a substantial departure from the previous regime. The impetus behind the legislation was a desire to create unions that were viable and not dependent on subsidies or other legislative props. A 1989 Department of Labour paper reaffirmed this intention:[76]

> The objective of the Labour Relations Act 1987 is to facilitate the formation of effective union and employer organisations which will be capable of negotiating awards and

[74] Paper *Industrial Relations: A Framework for Review* (Department of Labour, Wellington, 1985) 4.
[75] Similar to the preference clause in the private sector.

> agreements relevant to the conditions in the industry or workplace concerned. Participants in the industrial relations system are therefore encourage to conduct their affairs independently of legislative support.
> At the same time, the Act recognises that certain minimum levels of protection should be in place in order to ensure that society's preferences for equity are maintained...It is however, the responsibility of unions to negotiate remuneration and conditions of employment above the statutory minimums and to protect the rights of employees through the statutory procedures provided.

The new legislation created the potential for making agreements outside the national award system. Unions were now able to cite an employer to opt out of a national award where they wished to negotiate a separate agreement – the new agreement would then be binding on the parties. There was no corresponding provision for employers to opt out of the awards system.[77] This created flexibility for the unions within the negotiating framework, without the associated risk of employers opting out of awards as desired and enforcing oppressive conditions on the workers. The draconian ability for the Minister of Labour to deregister unions as penalty for striking was finally removed.

6 Registration

Registration was a central feature of the IC&AA, IRA and LRA. It bestowed upon the union three primary rights: the right to organise a specific category of workers; to be recognised as representatives of their members for bargaining purposes; and the right of access to compulsory conciliation and arbitration mechanisms to determine and enforce the settlement of industrial disputes on recalcitrant employers. The conferment of corporate status following registration is significant from a legal perspective in that it

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[76] Labour *Submission to the Commission of Inquiry into Industrial Democracy* (Department of Labour, Wellington, 1989) 1

[77] Provision was made for employers to opt out of awards in certain limited circumstances following the Labour Relations Amendment Act 1990.

granted trade unions legitimacy under the law, but is unlikely to have been seen as a major incentive by non-legal union members and officials.

7 *Membership*

Under the IC&AA any group of seven workers[78] in a trade could form a union and apply for registration. The membership requirement went largely unaltered until the passage of the LRA, which required 1,000 workers as the membership criteria for registration. Any group of 1,000 workers could register under the new Act regardless of whether or not they were already a society. This constituted a substantial departure from the IRA the group applicant was required to already be a society, associated for the purpose of furthering the interests of workers in any specified industry or related industries[79]. It also facilitated a continuing trend toward fewer trade unions, as the same union could represent more workers, and classes of workers.

Public sector unions, commonly referred to as "service organisations", operating outside the industrial relations legislation (prior to the changes under the LRA and the introduction of the State Sector Act 1988) were, in general, larger than their private sector counterparts, averaging 7,400 members as compared with 2,100 members. At the time of the introduction of the new laws, two very large service organisations dominated public sector unionism: the PSA covering 69,700 members and the Post Office Union covering 38,000 members.[80]

They were not required to register as trade unions until 1988 and were not, with the exception of the postal/ telecommunications and railways unions, subject to the compulsory unionism provisions that existed from time to time for the private sector. Nevertheless, unionism prospered in the public sector and membership levels were high. The vertical spread of membership encompassed all levels of employees, including the

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[78] This figure was lowered to five, and then increased to 15 during the course of the IC&AA regime.
[79] IRA 1973, s163.
[80] Paper *Industrial Relations: A Framework for Review* (Department of Labour, Wellington, 1985) 4.

most senior levels of the organisations. This changed in 1988 when the State Sector Act put state sector unions under the same provisions as the LRA and effectively introduced compulsory unionism for the public sector for the first time. Union membership clauses were not obligatory under the LRA, but for the first time since the State Sector Conditions of Employment Act 1977 public sector were given the opportunity.

One of the disadvantages of union membership guaranteed by law is that it removed one of the most important tasks of active leadership on the part of union officials: attracting and holding members by convincing them of the benefits of belonging. Under this system, the argument has been presented that the only clear reason members had for belonging to a union was because the law compelled them to.[81]

Exemption from union membership criteria was available on the satisfaction of s83 LRA, if they objected "on the grounds of conscience or other deeply held personal conviction". Religion was the most common reason for objection under the IC&AA and IRA – religious beliefs were the *only* justification under the IC&AA - but the LRA, did not actually refer to such beliefs.

The major growth area for unions since the Second World War was in "white collar" unions, due predominantly to two things. The first was the tremendous growth in the number of white-collar jobs and the increased proportion of these jobs to the total number of jobs in New Zealand; and the second was the increased proportion of people in white-collar jobs who began to join unions.

The award system that operated under compulsory arbitration was designed for blue-collar workers and not their white-collar counterparts. The intention behind the award system was to provide minimum conditions and wages applicable to all workers within the industry concerned. However, the system included a cut-off point in salaries for clerical awards, and the award did not apply to any salaries that fell above the cut-off point. Therefore, many clerical workers were not covered by the award scheme because

[81] Gross, above n55, 32.

they earned more than what was allowed by the system. This effectively denied many senior level clerical workers any direct award coverage or protection. Indirectly, however, clerical workers received protection from the very fact that their conditions were usually above the award level.

The impact of the "1,000 member rule" under the LRA was extreme. The dramatic changes in number and size of unions were brought about as the smaller unions had little choice but to amalgamate in order to survive. The number of trade unions continued to decline between September 1989 and May 1991, reaching 80 at the latter date, with the introduction of the Employment Contracts Act.

8 ILO Compliance

The signing of the Treaty of Versailles at the end of World War I signalled the beginnings of an international awareness of the plight of workers, and an understanding that international peace was not attainable until there was universal social justice. In turn, social justice could only exist where there were fair conditions of labour, and where workers were treated with respect and dignity. The establishment of the ILO at this juncture put these objectives into motion, but it was not until the close of World War II that the ILO began its 'active duty' as a crusader on behalf of workers' rights.

In 1946, after World War II had ended, the ILO adopted the 1944 Declaration of Philadelphia into its Constitution, thus reaffirming the freedom of association as one of the fundamental principles on which the ILO was based, and characterised it as "essential to sustained progress". Two years later, Convention 87, the Freedom of Association and Protection of the Right to Organise, 1948, was adopted by the ILO. Convention 98, the Right to Organise and Collective Bargaining Convention, was adopted the following year. New Zealand did not ratify either or these Conventions at the time, as the country's labour laws made it ineligible to do so. Compulsory arbitration and monopoly negotiation

rights as existed under the IC&AA[82] did not fit with the criteria set out by the ILO in these Conventions. Nor, for that matter, did the Government's ability to deregister unions from 1937 to 1987.[83] This power was a direct contravention of the ILO's stance that unions (both workers' and employers') should be able to exist independently of the State, and especially that the State had no power threaten, coerce or, in the case of New Zealand, deregister, a union.[84] The ability to deregister a union was especially effective as a means of controlling unions during the periods of compulsory unionism from 1936 onwards.

Similarly, Convention 87 holds that unions shall the right to "establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers."[85] New Zealand could not ratify this Convention under the IC&AA because until the 1936 amendment to the IC&AA,[86] the Registrar of trade unions was prohibited from registering a union on a national or multi-district basis. This had the effect of treating different branches of the same union as separate entities, and effectively split the union movement by removing the ability for unions which were previously multi-district or national to maintain any degree of consistency among the branches.[87]

The Industrial Relations Act that came into being in 1984 replaced the IC&AA but constituted little more than a continuance of "compulsory conciliation and arbitration and the careful regulation of unions observed in New Zealand since 1894."[88] It continued the IC&AA system of wage determination, and reaffirmed the importance of formal award negotiations, and applied only to the Private Sector. Accordingly, New Zealand's chosen legislation left the country failing to meet the criteria set for ratification of Conventions 87 and 98. This was mainly due to the protected position given to unions (both workers'

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[82] See below, IV(A)(5) & (6).
[83] See above, IV(A)(3)(a).
[84] Convention 87, Article 4: "workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority."
[85] Article 5
[86] Introduced and passed by New Zealand's first Labour Government.
[87] Roth, above n42, 20.
[88] Brooks, above n72, 13.

and employers' organisations) under the industrial conciliation and arbitration system that continued under the IRA. The then Minister of Labour (Hon J. Bolger) told the ILO in 1983 that "because of the protective nature of our industrial law New Zealand has yet to ratify the Freedom of Association Convention".[89]

It has been noted that New Zealand's official approach to ratifying ILO conventions is that "because of the obligations incumbent on ratifying countries, New Zealand ratifies a convention only when there is strict compliance of law and practice with all the provisions of the particular Convention".[90] Under this approach it is difficult for member states to ensure total compliance for the implementation of a convention by voluntary procedures, such as with collective bargaining. However, it is also inconsistent with a system of collective bargaining for the government to dictate the terms of a collective agreement, as the New Zealand Government was able to do under the IC&AA, the IRA and the LRA respectively. The New Zealand Government expressed these sentiments accordingly:[91]

> we believe that this particular matter is one in which cooperation from employers' and workers' organisations cannot be enforced, but is to be given voluntarily, and therefore cannot be ensured through legislative or other directive measures.

Consequently, it is likely that New Zealand will ratify only technical conventions as they can be implemented by government action alone, and require no outside assistance. Following the above quote, it would appear that New Zealand would feel unable to ratify any conventions requiring tripartite cooperation, unless universal agreement could be achieved.[92] Using this line of argument, New Zealand was patently against ratifying either Conventions 87 or 98 under the IC&AA, the IRA or the LRA because both conventions have broad applications and would affect New Zealand's domestic industrial relations system generally. They would also require tripartite cooperation for the

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[89] AJHR 19 Paper A7, 8.
[90] Gordon Anderson, "International Labour Standards and the Review of Industrial Law" 11(1) NZJIR, 27, 28.
[91] AJHR 1975, Paper A7A, 4.
[92] Anderson, above n90, 29.

objectives to be fulfilled, something the New Zealand Government seemed at pains to avoid.

By 1990, trade unions had endured a century of immense legislative coercion and dramatic social, economic and political unrest. Trade unions seemed at last to have access to a system of collective bargaining under the LRA that removed the direct participation of the government in wage and condition negotiations, and enabled stronger unions to utilise their industrial strength for its intended purpose – to facilitate better negotiations and improved conditions. Little did they realise in 1990 how dramatically the industrial relations arena was to change with the advent of the Employment Contracts Act 1991. Within twelve short months, all legislative reference to trade unions would be eradicated. The concept of individually negotiated contracts and individual bargaining between employer and employee would be paramount in a de-regulated labour market. Under the Employment Contracts Act trade unions were to be ousted from the industrial relations environment in which they been an integral part for the past 150 years in New Zealand. What chance would trade unions stand to exist in this hostile new environment?

B The Employment Contracts Act

Compared with its predecessors, the Employment Contracts Act has remarkably little to say about the issue of collective bargaining. Part I of the Act simply provides for freedom of association and gives employees the right to associate or not to associate with other employees for the purpose of advancing their collective employment interests. Membership of any employees' organisation is entirely voluntary, and discrimination in employment matters on the grounds of membership or non-membership of an employees' organisation is prohibited. There is no doubt that the Employment Contracts Act has both empowered and disempowered workers. It has empowered them individually, but disempowered them collectively.[93]

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[93] Ellen J Dannin, *Working Free: the Impact and Implications of the Employment Contracts Act in New Zealand*, (Auckland University Press, Auckland, 1997) 169.

Whilst the ECA acknowledges freedom of association and collective bargaining, and promotes freedom of association as an object of the Act, it fails to give true effect to that freedom. The "freedom of association" embodied in Part I of the Act is not the traditional protection or collective action but a freedom to disassociate.[94]

The ECA, as discussed in an earlier chapter, is founded on a liberal theory of contract, as suggested by the "New Right" ideology. This ideology endorses an idealised concept of freedom of association that is not realistically attainable or enforceable under the Act. It denies that there is unequal bargaining power between the parties to an employment contract and that this power imbalance can and is used by the stronger party (in all but very rare exceptions, the employer), to influence the negotiations. Thus, the "central failure of the ECA rests in the fact that conferring the right to freedom of association has little or no value unless employees have sufficient power to make use of this freedom."[95] The result of such treatment is that the employee in reality may *not* have the choice to join a collective employment contract when the employer is only prepared to offer an individual contract. By denying that the imbalance in bargaining power exists, the ECA can provide no means by which to remedy it.

New Zealand is the only member State of the ILO, with the exception of the USA, which has ratified neither Convention 87, the Freedom of Association and Protection of the Right to Organise Convention, nor Convention 98, the Right to Organise and Collective Bargaining Convention. It was unable to ratify these Conventions whilst the industrial conciliation and arbitration system was in force in New Zealand, because compulsory union membership and monopoly bargaining rights are contrary to the principles of the freedom of association as set out in Convention 87.[96]

1 Freedom of Association

Freedom of association is of paramount importance to New Zealand industrial relations, particularly under the Employment Contracts Act 1991. This section will discuss how the

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[94] Peter Churchman & Walter Grills, "Employment Contracts Act Revisited", (1992) 4.
[95] Anne Boyd, "The Freedom of Association in the Employment Contracts Act 1991: What Has it Meant for Trade Unions and the Process of Collective Bargaining in New Zealand?" (1997) 28 Cal W Int'l LJ 65, 65.

freedom of association is regarded in New Zealand, and the obstacles it has encountered in the New Zealand legislative and judicial arenas.

Freedom of association is of pivotal importance to the ECA. The Act lists the promotion of freedom of association as one of its objects, second only to the promotion of an "efficient labour market."[97] Part I of the Act is entirely concerned with the freedom to join or not join a union. It forbids the use of undue influence or any tactics that could result in the avoidance of freedom of choice, or in attempts to influence that choice.[98]

Part II of the Act is concerned with collective bargaining, but this is closely bound up with freedom of association. Freedom of association in an industrial context is not important in its own right, but only in the sense that it enables collective bargaining to occur.[99] To that end, section 12, which establishes the authority for a union to represent its members in negotiations, and the duty for an employer to recognise that authority (although there is no correlating duty to bargain with the representative) gives effect to the right to freedom of association.

The definition of freedom of association under the ECA creates a problem for its enforcement. The BORA also contains a definition for freedom of association, which is somewhat narrower and more restrictive than the definition afforded in the ECA. The BORA that is set out in s17 declares, "everyone has the right to freedom of association". It focuses on civil and political rights, public rights that are bestowed by the state to maintain democratic order, and that contain no affirmative action. Thus, freedom of association in the context of the BORA is merely the right for individuals to assemble.

Conversely, freedom of association in a labour law context has much more expansive definitions, particularly those set down by the various international human rights instruments. It requires affirmative action in the promotion of freedom of association and

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[96] Anderson, above n90.
[97] List of subsidiary objects, ECA 1991.
[98] ss5, 8 ECA 1991
[99] Boyd, above n95, 68.

collective bargaining. Justice Dickson asserted that "there is a clear consensus amongst the ILO adjudicative bodies that Convention 87 goes beyond merely protecting the formation of labour unions and provides protection of their essential activities – that is of collective bargaining and the right to strike."[100]

The problem of which definition is more appropriate for an employment context is not however unsolvable. Anne Boyd argues that the BORA standard is an unsuitable means of defining the freedom of association for three reasons:[101] the retention of a specialist employment jurisdiction under the ECA supports the notion that the employment relationship is incapable of being governed by ordinary principles of law. Freedom of association in relation to labour law therefore would be best defined in an employment law context. Secondly, the BORA definition defeats the purpose of Parts I and II of the ECA. Part I of the ECA confers the right of freedom of association, and Part II provides the machinery needed to use the freedom effectively through collective bargaining. Part II of the Act cannot be properly utilised under a BORA definition. Finally, freedom of association should be given a purposive definition, as asserted by Justice Dickson in the dissenting judgment in *Re Public Service Employee Relations Act*, where he declared that "[w]hile it is vital to protect the ability to form, join and maintain unions, unless workers are also protected in their pursuance of the objects for which they have associated, the freedom is meaningless".[102] Justice Gault echoed these sentiments in *Eketone v Alliance Textiles (NZ) LTD* where he held that "freedom of association is, of course, much broader than the rights to join or not join a trade union…It is not open to the Courts to depart from the plain meaning of the words of the statute but where it can be done (and the Bill of Rights requires it) the stature is to be given meaning consistent with the freedom of association as internationally recognised."[103]

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[100] R Doyle, The Industrial/Political Dichotomy: The Impact of Freedom of Communication Cases on Industrial Law (1995) 8 AJLR 91, 100 citing *RE Public Service Employee Relations Act* [1987] 1SCR 313, 355.
[101] Boyd, above n95, 68
[102] Above, n100, 355.
[103] [1993] 2 ERNZ 783, 795

Article 11 of Convention 87 requires the government to "take all necessary and appropriate measures to ensure that workers…may freely exercise the right to organise." Thus, the Article not only confers the right to organise, but requires positive intervention for the promotion and protection of this right. The ECA does not promote the positive right to organise, merely allows the right to exist. The Hon. Bill Birch, the Labour Minister at the time, argued that the ECA does conform to Article 11 because it gives workers the freedom to choose whether they want to organise, and in what form.[104] He referred to the Court of Appeal's interpretation of the Act as "union neutral" in *United Food and Chemical Workers Union of New Zealand v Talley*[105] to support his arguments. The Minister however incorrectly assumed that neutrality was equivalent to taking "all necessary and appropriate measures". The latter requires positive intervention in support of the freedom of association, and clearly the ECA does not conform to Convention 87 in this regard.

2 *Collective Bargaining*

(a) The New Bargaining Framework

The objective of the Employment Contracts Act 1991, as stated in its Long Title, is to promote efficiency in the labour market. Clearly, it is *economic* efficiency that is being promoted by the Act, as will be evidenced from the following discussion of the ECA. Other objectives stated in the Long Title are: to ensure the protection of the rights of individual workers and employers to be represented by the bargaining agent of their choice, to decide on the bargaining structure that best suits them, and to determine the scope of their agreements themselves. Thus, it is clear from the outset that the ECA constitutes a radical rejection of the collectivist tradition of New Zealand labour relations in favour of an individualistic one.[106]

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[104] G Anderson, Hon W Birch, *Correspondence*, (1992) Indus L Bull 7-9
[105] [1993] 1 ERNZ 360
[106] Anderson, above n90.

Under the Act, individuals are seen as holding equal power as their employers, and possessing the freedom of choice between negotiating individual employment contracts or collective employment contracts. The employer is given exactly the same freedom. The choice of contract then becomes an issue of relative power, and the critical issue, given that the bargaining advantage favours the employers by virtue of their superior economic power, is whether the ECA provides the support required to ensure that the employees are able to exercise fully the choices provided to them, and in particular the choice to bargain collectively through a union and to enter into collective contracts. It would seem obvious therefore that the *freedom* exercised in such negotiations is more likely not to be the freedom of choice of those party to the negotiations, but the freedom of choice of the party holding the greatest bargaining power, invariably the employer. Trade unions have no recognised legal status under the ECA, and are given a subordinate, largely unprotected role in bargaining as "employee organisations" under the Act.

The ECA's freedom of choice and association makes it difficult to resolve issues of representation. Employees have freedom only if they can freely designate their representative. Employers can only have freedom of choice and association if they are not forced to bargain with a representative. Yet if the employer can ignore the employee's choice, the employee's choice is meaningless.

The ECA's language gives the same rights to authorise a representative or not and to bargain or not equally to employers and employees. "The reason this does not meet the test of reality is that the theory ignored the context in which bargaining would occur. That context meant that paper equality was real inequality."[107] Workers are more likely to want to bargain with the employer's representative, because it is the only way to get the changes they want. In all but extreme labour shortages, the employer's power over the workplace allows it to force employees to accede its wishes, whether it bargains or not. Carol Shaw of Air New Zealand Workers explained what the ECA meant to an individual worker:[108]

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[107] Dannin, above n93, 195.
[108] Rebecca Macfie, "Air New Zealand Employs Vintage Approach", NBR, 04 October 1991, 3.

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

Section 9 sets out the objects for Part II of the Act, the bargaining provisions. The object is twofold. First, an employee or employer may conduct negotiations for an employment contract on their own, or may choose to be represented by another person, group or organisation. Secondly, two types of bargaining outcomes are available – individual employment contracts, and collective employment contracts, with the type of contract and its contents being a matter for negotiation in each case.

(i) Representation

s10(1) enables each party to the negotiations for an employment contract to determine whether they want to be represented by another person, group or organisation, and if so, who will represent them.[109]

A bargaining agent who has successfully negotiated an agreement on behalf of an individual or group will not automatically become a party to the contract as they would have under previous New Zealand law. They will do so only if both the employer and employees to the contract agree. In some cases it may be desirable for this to occur in order to simplify the process of contract enforcement, but the requirement for the both parties to agree before a representative may become a party to the agreement effectively gives the employer the ability to veto the employee's desire to have their representative party to the agreement, if the employer so desires.

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[109] s11 ECA 1991 constitutes a minor exclusion clause to this section, and allows the employer to object to the choice of representative, if the representative has been convicted of an offence punishable by a term of imprisonment of five years or greater. Commonly known as the "Black Power" rule, the exception exists

The authority to represent is dealt with in s12. This section is crucial to the implementation and practice of the ECA. A representative claiming to have the authority to represent any party to employment negotiations must establish that they possess the authority to represent the particular party in negotiations. The ECA does not specify how this is to be done, written authority is not strictly required, and many unions have amended their rules so that membership is deemed to constitute authorisation to negotiate.[110]

The only provision within the ECA that placed any, albeit very little, obligation on the employer to respect the employee's choice of bargaining representative was section 12(2), which provided that the employer shall "recognise the authority of that [representative] to represent the employee ...in those negotiations." Section 12(2) became the critical legal support for collective bargaining under the ECA by default, because although an employer was required to *recognise* the employee's authorised representative or union, they were not obligated to negotiate with said representative or trade union, never mind to do so in good faith!

Real and effective employee choice is undercut by the ECA so that it is only illusory. As long as the employers have the power to refuse to bargain with an employee's designated representative and to frustrate the employee's efforts to be a partner in workplace governance, the worker is likely to direct frustration at the union and to walk out, force a schism and ultimately weaken all unions.[111]

(ii) Collective Employment Contracts

Collective employment contracts ("CEC's") are defined in the ECA as being an employment contract that is binding on one or more employers and two or more

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primarily to prevent employees hiring gang members or the like to represent their interests in employment negotiations with the employer.

[110] John Deeks, Jane Parker, Rose Ryan, *Labour and Employment Relations in New* Zealand (Longman Paul, Auckland, 1994) 92.

[111] Dannin, above n93, 283.

employees.[112] Employers can negotiate with the employees directly, or with the employee's representative, on their behalf. A CEC applies only to those who have signed it, and must be in writing.[113] It must be supplied to any worker covered by it if they request a copy,[114] and a copy must be sent to the Secretary of Labour if it covers twenty or more people.[115] There is no lodgement or registration requirement for CEC's covering fewer than twenty employees. Any amendments to the CEC can be included only if agreed to by all parties to the contract. Under section 21, the ECA allows new employees to be included in a current CEC if the original parties to the CEC agree. This accommodates for labour turnover without undue disruption.

Finally, every CEC must include a specified expiry date.[116] When a CEC expires, an employee is covered by an individual employment contract ("IEC") that contains the terms and conditions of the expired CEC until a new CEC comes into force. It is illegal to strike during the currency of a CEC, or to strike over the issue of whether a CEC will cover more than one employer.[117] The ability for employees to strike under such conditions would dramatically increase the unions' pressure on employers to enter into multi-employer contracts. It was the Government's expectation that collective bargaining would decline and that individual employment contracts would replace much of the collective bargaining. Reliance on minimum legislative standards, as contained in the ECA, would have much greater importance in such an environment.[118]

(iii) Individual Employment Contracts

Individual Employment contracts, by contrast to the CEC's, are much more flexible and less rigid. It is an employment contract that is binding only on one employer and one employee, and is dealt with in section 19 of the Act. An individual contract can be oral or

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[112] s20 ECA 1991.
[113] s20(4) ECA 1991.
[114] s20(5) ECA 1991.
[115] s24 ECA 1991.
[116] s22 ECA 1991.
[117] s63(1)(a) ECA 1991.

in writing or a combination of both, and may consist of a mix of express, customary and implied terms. The ECA however requires that a copy of the IEC be put into writing and given to the employee if they request it at the time of negotiation.[119] Where there is an applicable CEC, each employer and employee may negotiate terms and conditions that are not inconsistent the terms and conditions of the CEC.[120]

(b) Conclusion

3 Judicial Interpretation of Freedom of Association and Collective Bargaining under the ECA

At the time of the Committee for Freedom of Association's decision concerning the ECA, a number of cases had been decided giving trade unions greater access to the workplace, and restricting employers' attempts to bypass employees' authorised bargaining representatives.

It was argued in *Adams v Alliance Textiles (NZ) Limited*[121] that the obligation to *recognise* a bargaining agent under section 12(2) involved a variety of duties. However the Court held that t he employer could engage in tactics designed to circumvent the authorised union and bargain directly with individual employees provided the conduct did not amount to duress or undue influence. If the employer used duress or undue influence, then their action could be challenged under section 8, which prohibits duress or undue influence in relation to union membership. A challenge could also be made under section 57, in which a contract obtained by *harsh and oppressive behaviour* or by *undue influence or distress* can be set aside.

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[118] Raymond Harbridge, "Bargaining and the Employment Contracts Act: an Overview" in Raymond Harbridge (ed), *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 44.
[119] s19(5) ECA 1991.
[120] s19(2) ECA 1991.
[121] [1992] 2ERNZ 982

The Court held that there was no exercise of undue influence or duress in the employer's actions.[122] It continued that, while an employer could not negotiate directly with an employee while an authority remained in place, it remained open for the employer to approach an employee directly to try and convince them to withdraw their authority. If the persuasion was successful and the pressure used was not undue, direct negotiations with the employee are held not to have breached section 12(2).[123]

The ECA drafters knew that letting employers choose whether to recognise their employee's agent would nullify workers' freedom of association and choice.[124] Despite this, they decided to allow the employer to "have the right to refuse to negotiate with any particular person or organisation or grouping of persons or organisations" and expected workers would then "change their choice of bargaining agent in order to gain agreement to negotiate and conclude a contract."[125]

The ECA's drafters accepted the idea that the employer could legitimately select its employees' representative,[126] because choosing a representative was nothing more than a cost-benefit analysis. They denied the workers had a legitimate right to be attached to their representative, and unwilling to change representatives to one "approved of" by the employer. As Joris de Bres, PSA president explained at the time:[127]

> We went to see the employer, said we were authorised to negotiate with you on a collective contract. They said, we don't want a collective contract. We recognise you as their representative, but we've got nothing to talk about, but we're perfectly happy for you to come along as the representative of each individual to assist in the negotiation of their individual contract.

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[122] *Adams*, above n105, 1039-1040.
[123] *Adams*, above n105, 1024.
[124] Memorandum from JA Stockdill, General Manager, Industrial Relations Service, Department of Labour, & DJ Martin, Assistant Commissioner for the State Services Commission, to Minister of Labour and Minister of State Services, 29 November 1990, 4-5, 9.
[125] Memorandum from JA Stockdill, General Manager, Industrial Relations Service, Department of Labour, to Bill Birch, Minister of Labour, 29 November 1990, 2.
[126] Patricia Greenfield and Robert Pleasure, "Representatives of Their Own Choosing: Finding Workers' Voice in the Legitimacy and Power of Their Unions", in Bruce Kaufman & Morris Kleiner (eds), *Employee Representation: Alternatives and Future Directions*, 1993.
[127] Dannin, above n93, 196

Adams v Alliance Textiles was appealed,[128] and the Court of Appeal partially overruled the earlier decision. The Court held that whilst Part I of the Act allowed an employer to attempt to persuade its employees concerning union membership, once a union was authorised to represent an employee under Part II the employee's choice must be respected and given effect by the employer as required by section 12(2).[129]

> To go behind the union's back does not seem consistent with recognising its authority. The contrary argument advanced for the employer here is that authority can be recognised by trying to persuade the giver of the authority to revoke it. That seems to me a rather cynical argument not in accord with the true intent, meaning and spirit of the enactment...Certainly an employer is free not to negotiate with anyone; but if he wishes to negotiate I doubt if he can bypass an authorised representative.

The Court's recognition of the union's authority to negotiate on behalf of their members, and their direction that employers too must recognise the union's authority, appeared to signal the desire on the part of the Court to promote freedom of association in its broad sense. The Court continued with the assertion that once employees had joined a union, the employer was bound to respect that decision and recognise the authority of the union as bargaining representative.

Justice Gault held that it was appropriate for the Court and the New Zealand judicial system to "have reference to the terms of, and decisions upon, international instruments dealing with fundamental rights when interpreting the scope of those rights under our Bill of Rights Act and other relevant legislation."[130] He stated that, while the right to bargain collectively was not a necessary element of freedom of association, it is a right conferred by Part II of the Act and "should be fully accorded, bearing in mind ILO Convention 98."[131]

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[128] *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2ERNZ 783.
[129] *Eketone*, above n128, 787 per Justice Cooke.
[130] Above n103 at 795.
[131] *Eketone*, above n128, 794.

Cooke P and Gault J's decisions in *Eketone* appear to be an attempt by the Court of Appeal to bring New Zealand decisions in line with the international standards. It would be tempting to suggest that the Court in *Eketone* was preparing the way for future decisions to develop an implicit duty to bargain in good faith. However, although the judiciary took steps in this direction in *Eketone* and in the later *Foodstuffs*[132] case, they seemed reluctant to recognise such duty in its entirety.

Subsequent decisions have fallen short of *Eketone's* far-reaching principles, despite the efforts of Goddard CJ in the Employment Court. In *Ford v Capital Trusts Ltd*[133] Goddard CJ granted an interim injunction against the employer citing a campaign of misinformation. The employer had sent a memorandum to the employees, that was critical of the union's handling of the dispute. Later that year, Colgan J refused to grant an interim injunction on a similar fact scenario in *Couling v Carter Holt Harvey.*[134] Colgan J held that communications about negotiations did not necessarily amount to negotiations themselves, and that s12(2) of the ECA did not constitute a blanket ban on such communications.

Goddard CJ responded to this issue in *New Zealand Airline Pilots Association v Airways Corporation of New Zealand Limited.*[135] He held that whilst it may be a question of fact whether a particular communication formed part of the negotiations, it was possible for communications that were deemed not to be part of the negotiations to constitute a failure by the employer to recognise the authority provided for in s12(2) and a failure to respect the employee's choice under s10. Goddard CJ added that a union's request to the employer not to communicate directly with employees would indicate that the union would perceive such communications to be tantamount to interference with the union's ability to communicate efficiently. Therefore by communicating directly, the employer risks that the union's perception will be held to be reasonable and the employer may be held responsible for this interference.

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[132] *Foodstuffs (Auckland) Ltd v National Distribution Union (Inc)* [1995] 2NZLR 280
[133] [1995] 2ERNZ 47
[134] [1995] 4NZELC 98, 363

The Employment Court decision in *New Zealand Medical Laboratory Workers Union v Capital Coast Health Ltd*,[136] held that, where an employer's actions were intended to disadvantage employees in their ability to negotiate, it would constitute a breach of section 12(2). The Court explained that "negotiations" were not confined to the formal aspects of the process, describing them as an "amorphous process" encompassing all stages from the initial offer and including the use of tactics to force the pace of the negotiations or to affect their shape.[137] Actions intended to "undermine the authority of the representative" were likely to be unlawful regardless of the motives of the employer.[138]

The Court of Appeal decision in *Capital Coast Health Ltd v New Zealand Medical Laboratory Workers Union Inc*[139] indicated that it was prepared to treat employer's communications more leniently than Goddard CJ had intended in *Ford and Airways Corporation*. The Court made it clear that it regarded its role as a practical one of balancing the competing rights of the parties – "those of the employer under s14 of the Bill of Rights Act, and those of the employee under s12 of the Employment Contracts Act."[140] The employer's communications in this case were held to be legitimate on the grounds that they were on the correct side of the fine line between communications by employers to workers that were " informing and warning (which are permissible), and threatening if a negotiating position is not available (which is not permissible)".[141]

Ultimately, the New Zealand courts have stopped short of imposing a duty on employers to bargain in good faith. Whilst the courts have been prepared to impose common law obligations of mutual trust and confidence on contractual relationships, following *Capital Coast Health* they seem unlikely to impose a requirement that the parties make every

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[135] WEC 72/95; Employment Court judgment given 14 November 1995.
[136] [1994] 2ERNZ 93.
[137] *Capital Coast Health*, above n136, 117.
[138] *Capital Coast Health*, above n136, 127-128.
[139] [1996] 1NZLR 7
[140] Above n139, at 18 per Hardie Boys J
[141] Above n139, at 19 per Hardie Boys J

effort to come to a collective agreement.[142] The subsequent Court of Appeal decision *New Zealand Fire Service Commission v Ivamy*[143] decided the treatment of this issue under the ECA.

The *Ivamy* decisions affirmed *Capital Coast Health's* comments concerning the need to 'strike a balance' between the competing interests of the parties.[144] The majority decision signalled a much more conservative approach to the interpretation of s12(2), particularly in Gault J's decision. Gault J interpreted "freedom of association" under the BORA narrowly, as referring only to the right to join a union, with no suggestion of an ability to associate with the union any further. He also narrowed the interpretation of freedom of association under the ECA to give priority to the freedom of expression (of employers) over the rights of employees to freely associate or negotiate for the purposes of collective bargaining. In allowing freedom of expression to trump freedom of association in an industrial relations context, the majority decision in Ivamy allows the employer to require its employees to receive information even if the employees do not wish to receive the information in that manner or format.

It is worth noting that Gault J's decision in *Ivamy* makes no reference to the international standards that he focussed so closely on in his findings in *Eketone*. In Gault J's narrow interpretation of the right to freedom of association, he failed to have to regard to s5(a) of the ECA which recognises freedom of association as a right for the purposes of advancing the employee's position. International obligations regard the right to freedom of association in the same light.

In his forceful dissenting judgment in *Ivamy*, Thomas J pointed to the overall effect of the majority decision as giving a clear indication that considerable power has been given to the employers:

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[142] Novitz, above n16, 135.
[143] [1996] 1ERNZ 85
[144] Above n143, at 99-100

> Whilst ostensibly proceeding in accordance with the format provided by the subsection, negotiations will be diverted from or subordinated to the objective of 'winning the hearts and minds' of the employees in a manner which is an affront to the requirements of that subsection. In the result, the statutory right – described by the Minister as a fundamental right – for employees 'to choose whether they bargain collectively' will be curtailed.

In taking such a conservative stance, the majority decision in Ivamy affirmed earlier Privy Council and Canadian Supreme Court decisions that a constitutional freedom of association amounts to nothing more than the freedom to join a union; the freedom to assemble. It need not involve the right to do anything in association.[145] In effect, the status of freedom of association has been downgraded and disassociated from the right to bargain collectively through a representative.[146] Whilst not referring to these cases directly in the Ivamy judgment, by adopting a narrow and restrictive view of freedom of association, the Court of Appeal has followed the line of reasoning advanced by these Privy Council and Canadian Supreme Court decisions.

There have been no significant New Zealand cases that deal with freedom of association in an industrial relations setting since the *Ivamy* decision. The right to freedom of association as conferred in the ECA represents an ongoing tension between legal and social freedom. Legal freedom has no true value unless the individual has sufficient power to make use of it. Thus, legal freedom is contingent upon an individual's degree of social freedom.[147] Many international human rights instruments recognise this principle through the active promotion of freedom of association and the process of collective bargaining. The ECA confers little more than the right to assembly, and by strengthening this position in the *Ivamy* decision, the Court of Appeal has effectively nullified any rights conferred by section 8 and 12.

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[145] See *Collymore v A-G of Trinidad* [1970] AC 538 (PC); *Reference Re Public Service Employee Relations Act* [1987] 1SCR 313; and *Retail, Wholesale and Department Store Union v Government of Saskatchewan* [1987] 1SCR 460.
[146] Gordon Anderson, "Recent Case and Comment" (1996) 4 ELB 64, 68.
[147] Boyd, above n20, 78.

Clearly, compliance with international standards, as established by the ILO, would require a substantial review of the current system to give rise to the active enforcement of freedom of association in its broad context, and the active promotion of collective bargaining. It is unlikely that these changes will occur within the framework of the current legislation, and it seems imminent that new industrial relations legislation that conforms to international standards would be required in order for New Zealand to fulfil such obligations.

4 NZCTU's Complaint to the ILO Concerning the Employment Contracts Act

In 1991 the NZCTU brought a complaint to the ILO on the grounds that it was in breach of two of the ILO's core Conventions, 87 and 98. Both Conventions are recognised as founding ILO conventions that all states are obliged to observe by membership of the ILO itself regardless of ratification.

The NZCTU's complaint comprised five parts, as detailed below.[148]

First, that the ECA did not promote collective bargaining, as set out by Article 4 of Convention 98. Under the ECA, collective agreements were not in fact "collective" in its true sense, but rather an aggregate of individual agreements.

Secondly, there was an inadequate consultation process when the Employment Contracts Bill was passed on two grounds. Firstly, the Bill was not amended even though the majority of submissions were critical of it, and secondly, that the process was contrary to the spirit of tripartism fundamental to the ILO.

The CTU also claimed that the ECA was contrary to the principle that parties should bargain in good faith and make every effort to reach agreement. There was no requirement under the ECA to bargain in good faith, and the possibility of good faith

bargaining was further eroded by employer interference in worker organisations, and discrimination against legitimate workers' organisations.

Fourthly, it was claimed that the ECA did not provide scope for multi-employer bargaining at any level, and finally, that the ECA unduly restricted the right to strike.[149]

The CFA expressed concern in its interim report "that the emphasis on individual responsibility for bargaining in the Act…can be detrimental to collective bargaining".[150] The CFA upheld almost all of the CTU's complaints, except in relation to the last two issues. Here the ILO concluded respectively that unions; rights of access to workplaces were adequate under the ECA, and secondly, that the New Zealand Government did not, on the evidence provided, intervene improperly in negotiations. The Interim Report concluded that "taken as a whole, the Act does not encourage and promote collective bargaining" and recommended that the Government take appropriate steps to ensure that the legislation comply with Convention 87 by promoting and encouraging collective bargaining.

The Committee later sent a mission to New Zealand to investigate the matter further and produce a final report after hearing further submissions from the Government and CTU.

The CFA's Final Report reiterated many of the Interim Report's sentiments, and rejected the New Zealand Government's argument that the ECA had led to an improvement in New Zealand's economic situation. Economic efficiency, according to the CFA, was not the issue. Rather, economic management should comply with the basic principles of freedom of association.[151] The CFA took note of recent New Zealand case law developments which suggested the courts would take action to protect workers from certain abuses, such as an employer's attempt to exercise undue influence or bypass a

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[148] Ross Wilson, "The Decade of Non-Compliance; the New Zealand Government record of non-compliance with international labour standards 1990-1998" 25(1) NZJIR, 79-94, 86.
[149] Nigel Haworth and Stephen Hughes, "Under Scrutiny: The ECA, the ILO, and the NZCTU Complaint 1993-1995" (1996) 20(2) NZJIR 143, 150.
[150] Case No 1698, 1994, 230 para 728
[151] Case No 1698, 1994, 278, paras 237-238

duly appointed bargaining agent.[152] However, the CFA was unsure "whether and to what extent the reasoning of the courts applies to other issues" that were raised by the NZCTU's complaint, such as employer interference and domination. Moreover, "from a general perspective, questions also arise concerning the existence and extent of a duty to bargain collectively".[153]

The CFA also looked to unequal bargaining power, and commented that most of problems found in the ECA originated in the Act's philosophy that individual and collective contracts, and individual and collective representation, were equivalent to each other. The Committee found it difficult to reconcile this with the ILO's principles on collective bargaining. The Committee doubted that, given the superior power of employers in an individual bargaining situation, employees would have the choice to engage in collective bargaining, until the government actively promoted collective bargaining.[154]

The Report stressed the importance of the duty to bargain in good faith, and commented that the ability to bypass authorised representatives may be "detrimental to the principle that negotiation between employers and organisations of workers should be encouraged and promoted".[155] The CFA regard the duty to bargain in good faith as the ideal compromise between the active promotion of collective bargaining the preservation of the freedom of choice.[156]

The CFA acknowledged that the ECA was intended to give effect to freedom of choice for the parties to a contract, but that the second aspect of the freedom of association, the promotion of collective bargaining, was absent, and therefore the Act did not actively promote freedom of association in its broad sense.[157] The CFA report concluded with a

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[152] *New Zealand Medical Laboratory Workers Union Inc v Capital Coast Health Ltd* [1994] 2ERNZ 93 upheld on appeal in *Capital Coast Health Ltd v New Zealand Medical Laboratory Workers Union Inc* [1996]1ERNZ 7

[153] *295th Report of the Committee on Freedom of Association*, Case No 1698, 1994, 80-83, paras 242-249.

[154] Case No 1698, 1994, 80-83, paras 255-258

[155] Case No 1698, 1994, p83, para253

[156] Novitz, above n16, 124.

[157] Novitz, above n16, 130.

recommendation to the New Zealand Government that it take active steps to promote and encourage collective bargaining.[158]

The outcome of this decision must take into account the purely advisory role of the ILO. There is no compulsion on the New Zealand Government to ensure the provisions of the ECA conform to the Committee's recommendations. The future of collective bargaining and trade union organisation under the ECA is in jeopardy because without the active promotion of collective bargaining, freedom of association under the Act conveys little more than the right to assemble. As we shall see in the next section, the 1996 Court of Appeal decision *New Zealand Fire Service Commission v Ivamy*[159] further extinguished any notion of the promotion of collective bargaining.

C The Future: The Employment Relations Act

The Employment Relations Act ("ERA") comes into effect on 2 October 2000, and is the implementation of the Labour Government's repeal of the ECA, enacted in 1991 under a National Government. It introduces a framework for the conduct of employment relations based on the understanding that employment is a human relationship involving issues of mutual trust, confidence and fair dealing. The employment relationship is not simply a contractual, economic exchange.

The primary objective of the ERA is to "build productive employment relations through the promotion of mutual trust and confidence in all aspects of the employment environment."[160] To achieve this objective the Act recognises that employment relationships must be built on good faith behaviour, and acknowledges and addresses the inherent inequality of bargaining power in employment relationships. It promotes collective bargaining whilst protecting the integrity of individual choice. The ERA also seeks to promote observance in New Zealand of the principles underlying ILO Conventions 87 and 98.

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[158] Case No 1698, 1994, 84 para 255
[159] [1996] 1ERNZ 85
[160] s3(1)(a) ERA 2000.

In order to address the issues presented, the Act promotes the voluntary organisation of workers through unions and collective bargaining as the best way to redress bargaining power imbalances, while giving individuals choice on how the terms and conditions are negotiated, either individually or collectively. It espouses that the employee relationship itself should be conducted in such a way so as to promote good faith, fair dealing and mutual trust and confidence between the parties.

1 Good Faith

The concept of good faith underpins the ERA in its entirety, extending beyond collective bargaining to include the ongoing relationships among employers, unions and employees. It will be required in any circumstance in which an employer is making business decisions that may impact upon its employees' employment interests.[161] This can include where the employer is considering a proposal to contract out work and in situations that may give rise to redundancies.[162]

The simple requirement of this good faith concept is that the parties to employment relationships – unions, employers and employees – deal with each other in good faith, and that those dealings are based on fair dealing and mutual trust and confidence. This includes, but is not limited to, not directly or indirectly misleading or deceiving each other. "Good faith" itself is not defined in the ERA, but *core* good faith duties for collective bargaining are.[163] These core duties include the parties using their best endeavours to agree on a process for conducting the bargaining in an effective and efficient manner; the parties meeting for the purpose of bargaining; and considering and responding to any proposals made by the other party. The role and authority of any representative must be recognised, and there is a duty not to bargain, negotiate or communicate directly about employment conditions with those for whom the representative acts.

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[161] s4(4) ERA 2000.
[162] Joanna Holden "The Brave New World of Employment Relations" *Chapman Tripp Counsel* 23 March 2000, 2. http://www.chapmantripp.co.New Zealand/publish/c230300.htm

Good faith bargaining under the ERA is directed to the *process* of bargaining, rather than the *outcome*, although of course the outcome is dealt with under the Act and must comply with good faith requirements. Good faith bargaining does not require the parties to agree on any matter, or to enter into a collective agreement.

2 *Freedom of Association*

The ERA balances collective and individual employment rights by retaining the freedom currently enjoyed under the ECA to join or not to join a union.[164] Any preference or undue influence in employment arrangements designed to influence the choice of whether or not to become, remain, or cease to be, a union member, is prohibited.[165]

3 *Unions*

The ERA makes provision for the lawful operation of unions, in recognition of the inherent imbalance in bargaining power that can be redressed through collective bargaining. It places the union movement at the centre of all collective bargaining. This is a radical shift from the position of unions under the ECA, where they were no legal recognition as representatives of employees' interests.

The Act recognises unions as the only lawful representative of employees' collective interests. It entitles unions to represent their members in relation to any matter involving their collective interests, and also allows unions to represent employees in relation to their individual rights, provided they have the employee's authorisation.

4 *Collective Bargaining*

Collective bargaining is a cornerstone of the new legislation. One of the objectives is to build "productive employment relationships through the promotion of collective bargaining."[166] Part V of the Act deals with collective bargaining, and how the objective

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[163] s35 ERA 2000.
[164] s8 ERA 2000.
[165] s9 ERA 2000.
[166] s3(1)(a) ERA 2000.

is to be achieved. This includes the introduction of the good faith concept into collective bargaining. Under the ERA, multi-party bargaining is encouraged.

Only employers and registered unions will be able to negotiate and be parties to collective agreements. The parties to collective bargaining must meet specific good faith obligations, but these do not require unions or employers to settle, or include particular matters in, agreements.[167]

All collective agreements must state the term and coverage of the agreement, the term not to exceed three years. It must make provision for variations to the agreement during its term, and must be in writing.

All collective agreements will contain an implied term that employees bound by it will continue to be employed by the employer for the term of the agreement. This provision is intended to provide employment security and certainty in situations where work or employees are contracted out, or where an employer sells the business. It does not limit the employer's right to dismiss an employee for just cause, and the implied term may be varied or excluded from the collective contract by mutual agreement.

5 The Act's Effect on New Zealand's Observance of ILO Conventions 87 and 98

The new legislation makes a significant effort to bring New Zealand's industrial relations environment within the standards set by the ILO Conventions 87 and 98. The ERA sets out in its founding section, the desire 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."[168] The details set out above concerning the provisions of the new legislation show that this effort is a genuine one on the part of the Labour Government. The ERA will pave the

[167] See Section V(C)(4) above.
[168] s3(1)(b) ERA 2000.

way for New Zealand to fulfil its international labour obligations in terms of the ILO conventions for the first time since the ILO came into being in 1919.

It is not possible at this stage to comment further on New Zealand's reception of the legislation, or on the judicial interpretation of it in industrial disputes. However, it will be interesting to see what impact the introduction of good faith bargaining and the re-introduction of collective bargaining has on industrial disputes generally, and on the judicial interpretation of disputes specifically.

V CONCLUSION

New Zealand's historical industrial relations structures have not placed a high emphasis on the enforcement of the freedom of association, although collective bargaining was an implicit part of the framework until the enactment of the ECA in 1991. Union membership in the New Zealand private sector was, for all practical purposes, compulsory from 1936 until the ECA in 1991, with the exception of a brief period in 1983-1984. Compulsory unionism is clearly contrary to international standards on freedom of association, and the legislative reforms of which the ECA was a part, reflected the need to give greater emphasis to this right.

The right to freedom of association as conferred in the ECA represents an ongoing tension between legal and social freedom. Legal freedom has no true value unless the individual has sufficient power to make use of it. Thus, legal freedom is contingent upon an individual's degree of social freedom.[169] Many international human rights instruments recognise this principle through the active promotion of freedom of association and the process of collective bargaining. The ECA confers little more than the right to assembly, and by strengthening this position in the *Ivamy* decision, the Court of Appeal has effectively nullified any rights conferred by section 8 and 12.

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[169] Boyd, above n20, 78.

Clearly, compliance with international standards, as established by the ILO, requires a substantial review of the current system to give rise to the active enforcement of freedom of association in its broad context, and the active promotion of collective bargaining. New industrial relations legislation that conforms to international standards is required in order for New Zealand to fulfil such obligations. The introduction of the Employment Relations Act, which comes into force on 2 October this year, fulfils these criteria. Freedom of association is protected under the ERA, and collective bargaining is reintroduced into the industrial relations environment, and encouraged to be used as a means of redressing the inherent imbalance of bargaining power that exists between employers and employees.

The introduction of the concept of *good faith* is intended by the Labour Government to encourage and to foster an industrial relations environment and employment relationships that are based on mutual trust and confidence.

It is submitted that under the new legislation, the barriers that previously prevented New Zealand from ratifying ILO Conventions 87 and 98 - are removed, and New Zealand may now entertain the possibility, for the first time since the inception of industrial law in New Zealand, that it affirms the principles and standards set out by the ILO.

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