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Structural change in New Zealand: Some implications for the labour market regime

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In the developed world generally, the 1980s marked the final collapse of the Keynesian consensus which had underwritten the 30-year boom. Economic stagnation, social turbulence and groping structural innovation provided multiplier effects for a concurrent ideological revolution. The period of the 1980s is aptly characterized, in Schumpeter's phrase, as "a process of creative destruction". In the beginning, storms buffeting the institutional stabilities gained tended to be seen as a transient disturbance; they are recognized in hindsight as messengers of permanent climatic change.

Labour market arrangements were variably vulnerable to these perturbations. Even where policies of domestic defence modulated the impact, technological innovation, occupational diversification and changing public perceptions of work imposed unfamiliar strains and fresh imperatives upon organized labour. Especially in smaller economies, colonization by international capital and management eroded institutional particularism and frustrated possibilities of wage-based compensation in respect of the distributional consequences of change. Exogenous factors relating to the globalization of financial and product markets further undermined national labour market autonomy. The unexpected emergence of mass unemployment unbalanced relative bargaining power and projected organized labour into a culture of diminished expectations.

The article that follows summarizes the course and effects of transformation of the New Zealand economy after 1984 to the time when industry and employment collapse provided an opportune foundation for radical restructuring of the labour market under the Employment Contracts Act 1991. That legislation occasioned a complaint to the ILO Committee on Freedom of Association. The article concludes by suggesting revision of the Act to achieve greater consistency with ILO Conventions Nos. 87 and 98 and more satisfactory operational equity.

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Demise of a welfare state

Before the 1980s, New Zealand already confronted substantial structural difficulties. For some generations, the country had flourished as a major producer of temperate agricultural commodities. Staple exports had enjoyed preferential and guaranteed access to United Kingdom markets, an advantage which more than compensated for the constraints of a dependent economy. A liberal-humanitarian ethos deriving from nineteenth century populism provided the ideological foundation for institutions of social protection and full employment in a wage-based welfare state. A broad consensus existed as to distributional ethics and the purposes and ambit of government.

From the 1960s, however, productivity growth was low by OECD standards (Gould, 1982; Treasury, 1984; Dalziel and Lattimore, 1991; NZBR, 1992; Margaritis et al, 1992). Industrial development, originally conceived as a buffer against international instability, failed in general to generate internationally competitive industries. Hard on the heels of United Kingdom accession to the European Community (and its implications for New Zealand markets), New Zealand suffered disproportionately as a non-producer from the oil price shocks of the 1970s.

Within established parameters, reaction was not wanting. Production incentives and supports, increased financial regulation and ambitious investment in energy-related projects had ambiguous immediate effects and aggravated problems of government overload. By the beginning of the 1980s, New Zealand was one of the most highly regulated of all OECD economies. The worldwide contagion of the 1970s, inflation, looked like becoming chronic (Gould, 1982; OECD, 1989). Public debt (previously at very manageable levels) was approaching the zone of concern (Corfield and Rae, 1992). Crudely calculated interventions threatened the credibility of the traditional political paradigm without arresting economic decline. In 1950, New Zealand's GDP per capita had been 26 per cent above the OECD average; 40 years later, it had fallen to 27 per cent below the average (Bollard, 1993).

A watershed was reached with a change of government (apparently to the Labour left) in 1984. At the outset, the new administration had no dramatic reformist agenda. Very quickly, however, Treasury thinking and corporate influence (in particular from the New Zealand Business Roundtable) converted core personalities in the Cabinet to the view that there was no alternative to a programme – and ideology – of fundamental change (Oliver, 1989). The objective was to transform the architecture of the State on the foundation of economic rationalism. The country must adjust to the emerging international environment by overcoming long-run structural problems. Financial (including price) stability must be achieved. Macroeconomic adjustment must be supported by microeconomic reforms. A better balance between wage rates and marginal productivity had to be achieved. Market choice, not bureaucratic intervention, must become the

engine of economic activity (Treasury, 1984; NZBR, 1992a). Appropriate setting of these fundamentals would create an environment of growth and New Zealand would be poised for an export-led recovery.

Against expectation, therefore, linear or incremental remedies were abandoned. In a blitzkrieg of change, financial and foreign exchange markets were liberalized, factor and product markets were largely deregulated, incentives and supports were removed, public entities were corporatized and often privatized, and substantial revamping of provision for health, education and welfare took place (Easton, 1989; Holland and Boston, 1990; Boston et al, 1991; Kelsey, 1993). Supply-side thinking replaced demand emphasis. Monetarist techniques supplanted fiscal weapons. Elegant theoretical constructs relating to public choice, managerialism and agency theory crowded out conventional administrative wisdom (Boston, 1991; Sharp, 1994). New Zealand embarked on the most radical programme of monetarist market-oriented structural adjustment of any developed country (OECD, 1991; Margaritis et al, 1992).

In one sense, this agenda was quaintly consonant with national precedent in earlier phases of economic depression, when crisis administrations had adopted transformational solutions (James, 1992). Within the constitutional structure, there were few obstacles to that kind of great leap forward. There was no written constitution and no second chamber. In a unitary system, there were none of the checks inherent in a federation. In a political spectrum effectively confined to two broadly compatible parties, a first-past-the-post electoral system assured uncompromised governments. The Parliament lacked adequate machinery to harness the executive. The civil service was shallow-rooted and thus vulnerable to political or bureaucratic capture. Modest media capacities and weak trade union organization did not constitute effective braking mechanisms.

These factors thus set the scene for a fundamental departure from the consensual, populist, corporatist and substantially responsive approach which had characterized the formation of New Zealand policy. In that approach, the election manifesto and electoral mandate had been important elements. By convention, an aspiring party announced a programme and was assumed, if elected, to be bound by it and restricted to it. The convention was quite often honoured in the breach but regarded notwithstanding as basic to the integrity of the governmental process (Mulgan, 1990).

After 1984, technocratic elitism overshadowed that approach. On the Treasury side, key officers were attracted by the excitements and apparent merits of the new analytical framework. They were keen to try it out. The term of government, however, was a maximum of three years – and the chances of re-election were not rated highly. The strategy, therefore, was to dispense with conventional consultation and accelerate the pace. At the political level, the Minister of Finance elevated such activism to something like a methodology, repeatedly intoning the theme that the search for consensus would stultify the process of change and compromise the quality

of decisions (Douglas, 1992; Douglas, 1992a; Boston et al, 1991; Boston, 1993). Corporatism gave way to *dirigisme*.

Implementation of the programme was carried out with a degree of political acumen. The earliest "large package" reforms were of a kind to create losers whose basic advantage or attitudes were such that they might be enlisted to support subsequent change. For example, farmers who had lost agricultural supports were persuaded not to look backward but to orchestrate demands for reduction of their inputs. Consistently with policy intentions, that focused attention on matters such as tariff reform and taxation. Labour market restructuring was one of those matters but was not among the easier options. Radical action was postponed. In the event, sequencing of structural adjustment in New Zealand defied the current orthodoxy that product and labour markets should be deregulated before financial markets to ensure that commodity flows and not capital movements determined the real exchange rate (Bollard, 1993).

In default of accurate anticipation of its consequences, blitzkrieg restructuring could scarcely have failed to produce massive dislocation. The sequencing anomaly, for all that, was a key factor in the ensuing difficulties (Whitwell, 1990; Duncan, Lattimore and Bollard, 1992). With liberalization of the financial sector, an apparently insatiable appetite for credit developed. In less than two years from 1985, the volume of credit in the economy doubled. Sharp rises in interest rates failed to suppress demand but attracted a huge inflow of foreign funds which fed a speculative frenzy. Inflation – and inflationary wage settlements – gained fresh momentum. The foreign exchange rate became, and long remained, unrealistically high. Before the stock market crash of 1987, the distortions created by the high-flying financial programme of the Government already ensured a hard landing (Margaritis et al, 1992; Bayliss, 1994). New Zealand was more severely affected by the 1987 crash than any other OECD country.

Producers had not even enjoyed the febrile stimulus of the boom. Until 1984, cheap credit and state assistance had favoured expansion of the tradable sector. From 1985, goals and process seemed to be reversed. Most agricultural supports and industry incentives were precipitately withdrawn. Deprived of the special treatment on which output maximization depended and exposed to an interest rate regime that escalated capital and working costs, producers had compelling incentives to contract output. Financial liberalization and the reform of product markets added up to an anti-production and anti-employment policy (Shirley et al, 1990; Dalziel, 1992). That had serious consequences for export earnings just at a time when improved terms of trade opened a window of opportunity for the pastoral sector (Bayliss, 1994). Flagging export performance contributed to contraction within the domestic market.

The Labour administration was re-elected a short time before the 1987 crash. Neither that event nor the scathing criticisms of a Royal Commission on Social Policy (Royal Commission, 1988) wholly suppressed the appetite for further structural change. Already, some 20 state enterprises had been

identified as involved in market operations and not essential to central policy. These were corporatized and geared to the profit motive. Progressively, the most eligible were privatized. Consequential re-organization involved the loss of about 40,000 jobs between 1987 and 1992. Concurrently, high priority was given to slimming core state functions. Between 1986 and 1990, the number of public servants was reduced from 90,000 to 50,000 (Martin, 1990; Mascarenhas, 1991; Boston, 1991a).

Since the economy as a whole was now shrinking, the aggregate effect of farm contraction, deindustrialization and remoulding of state entities was a *débâcle* in the employment market. Between 1987 and 1992, the official number of the jobless rose from 115,000 to the unprecedented total of 279,834 – despite the safety valve of substantial migration to Australia. Welfare costs rose commensurately. Accordingly, asset sales (ultimately amounting to more than $NZ11 billion) and reductions in government outlays were cancelled out by the escalating burden of social expenditure. To the euphoria of the early days of "Rogernomics", public disillusion succeeded (Labour Dept., 1993; Bollard and Duncan, 1992; Collins, 1989). In 1990, the Labour administration was defeated in one of the largest landslides in New Zealand electoral history.

The promised land of "a more efficient economy and a more just society" (Douglas, 1987) seemed much more distant than at the beginning of the Long March from the welfare state. Treasury and its corporate allies were unrepentant. In the conventional wisdom of structural adjustment, unemployment was dismissed as the last indicator to adjust. A key Treasury paper of 1989 (Treasury, 1989) placed much of the responsibility for unemployment on labour market rigidities and the high wage outcomes of the mid-1980s. The Business Roundtable called for radically different employment arrangements "which would reflect actual supply and demand conditions" (NZBR, 1990). In the 1990 brief to the incoming government, Treasury emphasized the importance of labour market reform and real wage reduction to restore international competitiveness, increase flexibility in the continuing process of structural adjustment and reduce the numbers of the unemployed (Treasury, 1990). The labour market – the only important factor market not so far reconstituted – thus became the scapegoat for the *débâcle*. Radical deregulation of industrial bargaining was an obvious implication.

The timing was now ideal. By 1990, the Treasury-corporate axis had widespread support from farmers and small business in pressing for labour market reform. And the unions were an easier target. As in other Western countries, their constituency had been haemorrhaging steadily. Between 1984 and 1990, New Zealand unions lost 25 per cent of their membership.[1] Moreover, mass unemployment and demoralization of the workforce had

[1] Union membership data are maintained officially by the Registrar of Unions, Department of Labour, Wellington, and kept also by the Industrial Relations Centre, Victoria University, Wellington. On union membership trends after the enactment of the Employment Contracts Act, see Maloney, 1993, 1994; Harbridge, Hince and Honeybone, 1994; Kelsey, 1995. On unionization trends generally, see OECD, 1991.

evident implications for union power. Decisive resistance to radical measures was not to be expected and general workforce reaction was likely to be manageable. In addition, the incoming government had a mandate – a detailed plan for restructuring of the labour market had been announced by the National Party as part of the 1990 election platform. Finally, it was generally agreed that the existing system had outlived its usefulness. Consensus on that point powerfully reinforced the constituency for root and branch change.

The rise and fall of centralized wage-fixing

The existing system had been introduced in a phase of transformational reform aptly characterized as involving the democratization of the State. In 1894, New Zealand enacted the first compulsory system of state arbitration in the world. The practical objective was to equalize bargaining power by encouraging and protecting (registered) unions. To transfer economic conflict from the shopfloor to purlieus of adjudication and to eliminate the rationale of class struggle was an underlying vision. Sometimes shaken but never broken, the Conciliation and Arbitration Act survived more than three score years and ten and was a decisive influence in moulding New Zealand society (Sinclair, 1980).

This centralized, collectivist and interventionist system nurtured the corporatist state but was Janus-like in its operation. The wage-fixing jurisdiction was restricted (always excluding, for example, implications of new technology); the Act, however, was a potent instrument of social policy, fundamentally concerned with relativities and comparative wage justice. The mandate usually included setting the basic wage. Beginning as a *bête noire* of enterprising Victorians, the system later provided employers with a protective mantle against extremists hostile to workplace compromise and to class convergence. During the depression of the 1930s, the pendulum swung further: employer-inspired amendments strangled union influence. That imbalance was corrected and compulsory arbitration was restored by a reforming Labour government after 1935, but an equilibrium of mutual satisfaction was never quite achieved.

By the 1960s, the Arbitration Court was declining in status; the industrial regime was becoming unstable and the unions were relying increasingly on direct bargaining. By that time, the traditional system rested on the following principles:

- registered unions enjoyed a monopoly bargaining position;
- conciliation and arbitration were compulsory for unresolved disputes;
- awards prescribing minimum wages and conditions extended to all workers and employers in the relevant occupation (less often industry) and area by a blanket coverage effect;
- unions negotiated in terms of "unqualified preference", thus in effect drawing in all affected workers;

- awards were enforced by the State through the Department of Labour.

The interlocking nature of the regime and the emphasis on relativities imposed obstacles to differentiation of outcomes, as did the fact that settlements for particular periods usually followed trend-setting awards closely. As trend-setters, stronger unions tended to make the pace. From the 1970s, second-tier bargaining (for agreements supplementary to awards) was conducted on an enterprise basis and had some effect in responding to diversity of circumstances. But the award system still had official and union blessing, especially in relation to small business, where workers were more likely to be vulnerable to intimidation.

The Labour Relations Act of 1987 maintained basic features of the traditional system but opened the way to greater flexibility and also heralded larger ambitions. Despite pressures from Treasury and the Business Roundtable, the Department of Labour managed for a time to retain control of the agenda (Walsh, 1989). That Department supported a collective approach and the entrenched ideal of distributive justice. Any wholesale shift to individual contracting or enterprise bargaining was resisted as inviting (or threatening) exploitation and inefficiency. The Department supported the retention of the award system which in fact had quite broad support in the business community. Awards insulated management from the stresses of direct competition in the market place, largely off-loaded possibilities of confrontation and spared executives the legalistic drudgery which fragmentation of agreements would entail. Vigorous Roundtable exhortation ultimately wore down this comfortable complaisance, but not yet.

In the event, the changes effected were practically significant but ideologically modest. The unions were not disestablished and union preference remained. And so did the award regime, though the criteria for its operation were revised. Rather than relativities, supply and demand factors and productivity (in conjunction with "fairness and equity") were emphasized. Two quite large steps were taken. Arbitration would be voluntary, not compulsory. And the 1987 Act expressly opened the way to enterprise-level bargaining. As long as it lasted, this legislation appears to have worked quite well. Awards became more responsive to the circumstances of particular enterprises and the bargaining process became more flexible.

At official and expert level, the policy community saw no real need for a further hue and cry. New Zealand was now in the lower half of OECD countries for unionization and in the upper half for wage flexibility (OECD, 1991). Wages as a percentage of cost were about average for the OECD and the correlation between wages and value added was better than for most industrial countries (Kriegsmann, 1992). Nominal wage rates were low. In that respect, New Zealand enjoyed a comparative advantage over Australia amounting to more than 20 per cent – a matter of some significance since markets in that country had been opened up by the Closer Economic

Relationship Agreement (with Australia). Nor was wage escalation holding the country to ransom. In the four years to December 1988, real wage rates in New Zealand actually fell by about 5 per cent (Bayliss, 1994). Ideological positions rather than objective data impelled insistent clamour for more radical labour market reform.

The new industrial relations paradigm

Radical industrial relations reform really began in the public sector with the State Services Act of 1988. Deriving from Whitehall and Weberian models, the New Zealand public service had been merit-based, non-political and largely insulated from private sector intrusion and from political interference. Departments functioned under the overall control and leadership of the State Services Commission. The concept of lifelong career and the ideal of professional devotion to the public interest, though somewhat eroded in practice, were still animating principles. Wage fixing mainly took the form of general adjustments supplemented by sectoral occupational claims, with an emphasis on relativities (Walsh, 1991). The service was not mandarin in texture or public estimation and had been generally recruited, historically, from the children of the poor. In recent times, it was a fairly common perception that it was not abreast of state of the art management methods and lacked the dynamism and entrepreneurial spirit changing conditions were said to call for.

Reform drew significantly on recent institutional ideas which were largely untamed by application to realities – managerial and agency theory and public choice. The State Services Act was substantially concerned with management reform, accountability and responsiveness to political and public preference. Underlying but also declared objectives were to break the traditional culture, entrench private sector approaches and erode the solidarity and influence of employee associations (Deane, 1989; Martin, 1990; Lister et al, 1991). The Act was consistent with the Labour Relations Act (and functioned in tandem) but dealt with an environment in which it was possible to go further.

The main features of the State Services Act may be summarized as follows:

- contractual agreements largely replaced permanent tenure;
- Chief Executives became accountable to Ministers in accordance with negotiated performance criteria;
- Ministers now had a role in the most senior appointments;
- the umbrella functions of the State Services Commission were largely abolished; Departments became substantially autonomous, with the Chief Executives as employing authorities;
- a Senior Executive Service was created "to constitute a unifying force" but did not perpetuate a service-wide career structure or relieve SES officers of direct subordination to their Chief Executive.

There were concurrent functional reforms. Policy and operations were separated, partly to counter the allegation of ideological capture. The authority of Ministers in policy fields was greatly enhanced and their offices received an influx of contractual advisers from outside the service. The State Services Commission still represented the State in wage-fixing negotiations, as sectoral bargaining replaced the global approach, and also influenced outcomes by directives. Thus customary ideas of the professional independence and parallelism of official cadres were swept away and collectivist assumptions in industrial relations as well.

The Employment Contracts Act 1991 consummated Treasury-corporate objectives for labour market reform. Private sector arrangements entered uncharted territory. The following are the main features of the Act:

- the award system was scrapped; employment relations would be determined by individual or collective contracts; decentralization of bargaining to enterprise level (or lower) was implied;
- membership of workforce organizations would be entirely voluntary and devices such as union preference were prohibited;
- the privileged position of unions was abolished; an employee might be represented by any bargaining agent or none at all;
- bargaining agents (no registration procedures were provided) would be "recognized" by employers on production of authorization in respect of each employee represented;
- the Minister and Department of Labour were excluded from any role in industrial relations processes;
- provision for voluntary mediation and adjudication was retained by way of an Employment Tribunal and an Employment Court.

In the words of Goddard C. J. in *Adams* v. *Alliance Textiles Ltd.* [1992] 1 ERNZ 982 at 1003, the Act "promotes the concept of an efficient labour market rather than the ideal of harmony enshrined in previous legislation". However that may be, it found a warm welcome in the radical establishment. When the ink was barely dry (and despite the very broad coverage of transitional arrangements), the Chairman of the Business Roundtable claimed dramatic results for productivity and lauded the Act as "the greatest single breakthrough" in the whole programme of restructuring (Myers, 1991). In response to fears as to wage outcomes, the Executive Director of the same body directed attention to the workplace implications of globalization and erosion of national sovereignty (Kerr, 1993):

> Increasingly returns to labour as well as capital are being set in world markets. There is no way New Zealand can escape competitive influence.

Did it suggest accelerating momentum of the constituency for a radical version of the market economy that sections of the business community were still dissatisfied? The Employers Federation described the Act as a traditional evolutionary link between the interventionist labour laws of the past and a future with no specialist labour laws at all.

Did it suggest declining New Zealand faith in the ideals of the welfare state – as well as the declining fortunes of organized labour – that workforce reaction to the Act was muted and ineffective? The labour movement was certainly not sanguine as to the implications of the new regime. From that point of view, the Act shifted the balance of power decisively to the employer. That in itself, the indictment began,[2] undermined the easygoing sense of basic equality and common purpose which many local enterprises had achieved. Polemic to the effect that enterprise bargaining would exorcise the bogey of union interference and foster cosy relationships between management and worker was disingenuous. Legalistic obsession with the contractual nexus was leading to formalism and adversarial attitudes. In relation to strategically disadvantaged workers, especially in small business, there was considerable anecdotal evidence of employer dictation and exploitation. The secondary labour market was especially vulnerable to downward pressures which were likely to flow on to permanent employment. To speak of statutory minimum standards was not an answer. First, the minimum weekly adult wage, at 45 per cent of the average weekly wage, was well below the accepted international target of two-thirds. Secondly, the most vigorous attacks on wage equity were being directed to supplementary questions such as clock hours and penal rates – for which very few mandatory standards or external controls existed.

The very terms of the Act, in this view, were defective, biased and uncertain – it had not been developed by a genuine consultative process. Most interested parties had been accorded no more opportunity for input than to comment on an established and conceptually final draft – which was at least consistent with the new paradigm that relegated consultation to a procedural routine. As an example of anomalies, the right to strike was circumscribed in two particularly contentious ways. Withdrawal of service as a lever to obtain multi-employer contracts, and also in relation to social and economic issues of general concern to the workforce, was exposed to severe civil law penalties.

In addition, it was suggested, the lack of enforcement machinery meant that employers could disregard provisions they found unwelcome. Anecdotal evidence yielded a litany of abuses:

- some bargaining agents (especially unions) were being vetoed;
- authorization and recognition of bargaining agents (especially unions) was being obstructed;
- authorized and "recognized" bargaining agents (especially unions) were being bypassed;
- individual contracts were being imposed or pressed strenuously at the expense of collective arrangements;

[2] Many of the criticisms that follow have been argued extensively in the New Zealand courts, and they are fully reflected in NZCTU, 1993. For material on the Act and its operational consequences, see Harbridge and McCaw, 1991; Hince and Vrancken, 1991; Walsh, 1992; Harbridge, 1993; Labour Department, 1993a; Hince and Harbridge, 1994.

- collective contracts, in many cases, were not collectively arrived at;
- in default of specific legislative obligation, numbers of employers were not bargaining in good faith;
- workplace access of authorized bargaining agents was being curtailed and excluded;
- some bargaining agents were fostered and dominated by employers;
- terms sought by employers were being embedded by well-calculated bribes relating to employment terms;
- the choice (or no choice) of a bargaining agent sometimes determined whether an applicant got a job.

Complaint against the Government of New Zealand

Dissatisfactions of the kind described culminated in the filing of a complaint to the ILO by the New Zealand Council of Trade Unions in respect of the Employment Contracts Act.[3] The complaint alleged serious violation of the principle of freedom of association contained in the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and of the right to organize and bargain collectively contained in the Right to Organize and Collective Bargaining Convention, 1949 (No. 98). New Zealand had not in fact ratified either Convention, but that was not taken to exclude jurisdiction. In the words of relevant ILO precedent (ILO Conditions of Work Digest, 1985; FOA Report, 1994):

> Each member State is bound to respect a certain number of principles, including the principles of freedom of association which have become rules above the Conventions – complaints may be presented whether or not the country concerned has ratified the freedom of association Conventions.

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[3] Case No. 1698. The principal documents are as follows:

- Complaint against the Government of New Zealand by the New Zealand Council of Trade Unions, 8 February 1993 (NZCTU, 1993);
- New Zealand Government Response to the NZCTU Complaint to the ILO;
- Tentative Working Paper: Committee on Freedom of Association, November 1993;
- NZCTU Complaint to the ILO Freedom of Association Committee: Comments (by New Zealand Government) on the Tentative Working Paper;
- Interim Report of the Committee on Freedom of Association, March 1994 (FOA Interim, 1994);
- New Zealand Government's Response to the Interim Conclusions of the Freedom of Association Committee, October 1994;
- Final Report of the Committee on Freedom of Association on Case No. 1698 (FOA Report, 1994), including as Annex: Report of the direct contacts mission to New Zealand by the representative of the Director-General of the ILO (ILO Mission, 1994) (ILO *Official Bulletin*, 1994).

The New Zealand Government responded to the complaint on the basis that the competence of the ILO's Committee on Freedom of Association (FOA) should be accepted.

The sequel may be told briefly. Following the New Zealand response, a Tentative Working Paper was prepared for the FOA Committee as an internal document – but leaked to the New Zealand media only a few days before a general election in November 1993. In this exceptional situation, the paper was released officially to the New Zealand Government, which expressed "serious concerns" and conveyed a further response. In March 1994, the ILO Governing Body approved 15 recommendations based on the FOA Committee's interim conclusions (FOA Interim, 1994). The recommendations took account only of information received up to November 1993, with the result that the further New Zealand response was not considered. In all these circumstances, later consideration of the case proceeded in an atmosphere of considerable tension.

The last of the recommendations was to the effect that, in view of the "enormous complexity" of the case, a direct contacts mission would be very useful. Accordingly, a representative of the Director-General of the ILO visited New Zealand in September 1994. His report took account of previous documentation and embodied information, views and opinions gathered during the mission (ILO Mission, 1994). The representative expressly disavowed any objective of formulating conclusions or recommendations. In the circumstances, that course may have been inescapable. It may be thought, notwithstanding, that it resulted in an oddly cautious and anodyne report which mainly restated the arguments of the parties and glossed over crucial issues on which the FOA Committee needed penetrating independent analysis. The mission claimed to have met with an atmosphere of much goodwill and warmth and concluded with the thought that if "a modicum of compromise on a limited number of issues ... could be reflected in a degree of legislative change, a workable solution might be found."

The mission report would appear to have toned down the final conclusions of the FOA Committee (FOA Report, 1994). The following points emerge:

(1) the suggested contribution of the Act to economic strategy, and the situation of New Zealand trade unions, were not really relevant; the question was whether the legislation was compatible with ILO principles;

(2) since the filing of the complaint, important court decisions had clarified a number of issues and appeared to have improved protection for employees and bargaining agents;

(3) anecdotal evidence could not be dismissed that "a significant number of collective bargaining problems have arisen and continue to arise" from the point of view of compliance with ILO principles;

(4) problems of incompatibility arose in large part from the philosophy of the Act, which put collective and individual arrangements on the same footing;

(5) emphasis needed to be placed on the principle that employers and trade unions should be free to call for industrial action to achieve multi-employer contracts;

(6) the parties should be free to decide on the means to achieve bargaining objectives; thus a workers' organization should be free to call for industrial action to achieve multi-employer contracts;

(7) the New Zealand Government might now initiate tripartite discussions with a view to ensuring compatibility of the Act with the ILO principles.

At this stage, the approach of the Committee was even more muted. Of four final recommendations (reduced from the provisional 15), one only was specific (following 6 above) and the others did not bear directly on the subject matter of the complaint. Having regard to the ILO's paramount function of standard-setting, that outcome was debatable.

The Employment Contracts Act in the courts

By the time the complaint was concluded, various provisions of the Act had "gained meaning when tested in the crucible of judicial decision-making" (ILO Mission, 1994). The issues may be presented summarily.

Transitional (s. 176)

Under s. 176 of the Act, an unexpired award was carried over as a collective employment contract. On expiry, that kind of arrangement was deemed to continue as an individual employment contract for each relevant employee until a fresh contract under the Act was entered into.

In *New Zealand Resident Doctors' Association* v. *Otago Area Health Board* [1991] 1 ERNZ 1206, the question was whether a deemed collective employment contract must exactly mirror the preceding award. It was held that a new professional employee could not be required to assent to a variation of a collective employment contract translated from an award with blanket coverage and express rights of adherence.

United Food and Chemical Workers' Union of New Zealand v. *Talley* [1992] 1 ERNZ 756 (LC), [1992] 3 ERNZ 423 (EC), [1993] 2 ERNZ 360 (CA) concerned the status of union-related clauses regarding an individual employment contract originating in an award. The clauses provided, among other things, for union access. Talley's was seeking to terminate all union associations. In the view of the lower courts (upheld by the Court of

Appeal), the collective provisions continued to apply *mutatis mutandis*. Action that would have been in breach of the award was in breach of the individual employment contracts.

Access by bargaining agent as representative (s. 14)

National Distribution Union (Inc.) v. *Foodstuffs (Ak) Ltd.* [1995] 2 NZLR 280 arose when a union organizer arrived at a warehouse without appointment to see the local union organizer and was refused entry by the manager on the grounds that the visit was "not convenient". (The criterion is in fact "reasonable".) The Employment Tribunal held the manager was the sole judge of what was reasonable. In the Employment Court and on appeal, the following points emerged:

- access might be unreasonable in some circumstances; here, however, the time chosen was a usual one and the workplace situation was normal;
- a potential for some downgrading of work would not make a visit unreasonable *per se*;
- the Act imposed no requirement to get consent but reasonableness implied discussion and agreement;
- subs. 14 (1) did not imply either a restriction to one-to-one discussion or unrestricted meetings; the controlling factor was reasonableness.

In *Service Workers' Union of Aotearoa Inc.* v. *Southern Pacific Hotel Corporation (NZ) Ltd.* [1993] 2 ERNZ 513, the contention was that rights under s. 14 could never be exercised in major hotels (especially in relation to the actual workplace) because no time would ever be reasonable. There was evidence of pressure to exclude the union, which one manager had referred to at a staff meeting as "an interfering mother-in-law".

In the Employment Court, Goddard C.J. pointed out that, unlike previous awards, s. 14 did not specify access arrangements in detail. "Reasonable" must be construed in terms of the factual situation at the time and in accordance with the principle that freedom of association could not be satisfactorily exercised without fully free access during working hours and at the actual workplace. He added that what was said was a matter solely between employees and their representatives; an employer could not sit in and police the ambit of the discussion. Nor was it material whether discussion concerned one employee or several. The employer could not impose limitations.

Undue influence (s. 8) and bypassing (see s. 12)

In *Adams* v. *Alliance Textiles Ltd.* [1992] 1 ERNZ 982, anti-union pressures at more than one worksite achieved the result that most workers

who had authorized the relevant union as their representative dismissed it and individually signed a "collective employment contract". A Full Court of the Employment Court held (by majority) that such pressure would not be contrary to the Act unless there was undue influence *on the union* (s. 8) or the pressure amounted to harsh and oppressive conduct (s. 57). Acts of hostility in fact evidenced that the employer had "recognized" the union as representative (s. 12). Unless s. 57 applied, there was nothing to prevent the employer from going behind the representative's back and negotiating directly with employees.

That case went to the Court of Appeal sub nom *Eketone* v. *Alliance Textiles Ltd.* [1993] 2 ERNZ 783 and was heard only insofar as the court had to assure itself that the matter was no longer a live issue (the arrangements in dispute had expired). Although comment must be taken as *obiter*, the case is important in the evolution of doctrine on the Act. With support from all four other judges, Cooke P. delivered the following opinion (at 787):

> I am disposed to think that once a union has established its authority to represent certain employees – then the employer fails to recognize the authority of the union if the employer attempts to negotiate directly with those employees. To go behind the union's back does not seem consistent with recognizing its authority. The contrary argument advanced for the employer here is that authority can be recognized by trying to persuade the giver of the authority to revoke it. That seems to me a rather cynical argument not necessarily in accordance with the true intent, meaning and spirit of the enactment.

In *New Zealand Medical Laboratory Workers' Union Inc.* v. *Capital Coast Health Ltd.* [1994] 2 ERNZ 93, a Full Court of the Employment Court followed this lead. After a spate of manoeuvres by the employer calculated to split the staff from their union, staff sought an injunction to restrain direct communication with them by the employer and also a related declaration.

Generally speaking, the Court held, undermining and bypassing the representative would constitute a breach of s. 12 and could not be considered a genuine exercise of freedom of expression (in which case the protection of the Bill of Rights Act 1990 would have been relevant). The Court held also that the common law in New Zealand imported a basic relationship of confidence and trust between employer and employee. That should likewise be upheld by the courts. The injunction and declaration were granted.

Lawful lockout (s. 64)

Mineworkers' Union of New Zealand v. *Dunollie Coal Mines Ltd.* [1994] 1 ERNZ 78 related to contractual negotiations in circumstances where the mine management refused to deal with the union which was the authorized representative of the workers. An individual and subsequently a collective

contract were prepared by the employer and presented directly to them. On their refusal to meet the "requirement" to sign, the workers were stood down. The Employment Court held that the conduct of the company disregarded the right of freedom of association (s. 5) and arguably brought to bear undue influence on the union (s. 8). Because the company refused to negotiate with the authorized bargaining agent, moreover, the lockout was not covered by s. 64 and was accordingly invalid.

In *Witehira* v. *Presbyterian Support Services (Northern)* [1994] 1 ERNZ 578, a Full Court of the Employment Court considered the situation where a social service organization (under pressure because of funding cuts) sought to renew and homogenize various employment contracts. When a group held out, the employer withheld penal rates and some other benefits while still requiring work as before. It was held that the expedient adopted (in reality a kind of "lock-in") could not constitute a lawful lockout because the element of shutdown or withholding of work was not present.

Some suggestions for the employment contracts regime

Radical transformation of an established industrial relations regime could not be expected to escape persistent debate on issues of principle, controversy over supposed schematic defects and apprehensions as to practical implications. The territory is not simply new to New Zealand but also in some respects uncharted elsewhere. ILO analysis was directed to important but essentially limited areas; other commentary has ranged more widely, focusing also on matters not within the perspective of the Conventions. The report of a Select Committee of the Parliament (Select Committee, 1993) on a review of the Employment Contracts Act, for example, felt its way to conclusions on the human factors. It referred to intimidation effects among numbers of workers and to increasing stress levels apparently caused by extravagant productivity demands.

From that whole spectrum of discussion and the ILO complaint, reservations as to various features of the Act do emerge. They must be seen in the context that no substantial political or industrial group in New Zealand would now advocate a return to a regime of centralized wage fixing, national awards, trade union privilege and state paternalism. If the Employment Contracts Act is to be aligned squarely with the freedom of association Conventions, if equality of bargaining power, fair dealing and equity are to be enhanced, the practicable route is by way of incremental adjustment. The suggestions that follow acknowledge that context. They are anchored for the most part only in broad principle and presented only in condensed form. Special reference is made, notwithstanding, to the

provisions and legal lore of the Wagner systems[4] – an appropriate touchstone for New Zealand experiment.

Freedom of association

This principle inheres in the suggestions generally but emerges particularly in the following issues.

As the Act stands, an employee may choose as his or her representative any bargaining agent or none at all (s. 10). But a representative is not bound to act for any employee who so wishes. Also, there is no limit on the number of representatives that may operate in a bargaining unit. If representatives proliferate, vexatious fragmentation of the regime may follow. Further, there is no obligation on the employer to offer consistent outcomes as between all representatives in respect of similarly situated employee groups. If some employees are shut out by a powerful bargaining agent, the results may be discriminatory and freedom of association will be frustrated. Finally, the Act gives no guidance as to how the bargaining unit is to be determined. As a tactical weapon, the employer may split up the original unit or consolidate units (see *Capital Coast Health*).

Wagner systems avoid this potential anarchy. First, a representative that establishes a majority following is given exclusive coverage. Secondly, the ambit of the bargaining unit is subject to independent approval (for example by the National Labour Relations Board). These arrangements[5] do not imply compulsory unionism because coverage does not compel membership of the bargaining organization, though it may involve a compulsory contribution to bargaining expenses.

At the collective level, Wagner thus has a solution which may detract from liberty of choice but would certainly foster the New Zealand Act's objective of promoting an efficient labour market. That solution might be adapted as follows:

- disagreement over the ambit of the bargaining unit to be referred for decision to a mediator of the Employment Tribunal;
- designation of bargaining unit (whether by agreement or Tribunal) to be final unless the parties consent to variation;

[4] "Wagner systems" comprehends those legal regimes that follow the landmark labour legislation of the US Wagner Act (1935). For purposes of illustration and discussion in this article, they are taken to be epitomized by the US National Labor Relations Act, 29 USCA, together with cases deriving from that enactment, and by the Labour Relations Act 1980 of Ontario, as amended. A useful survey of the Canadian situation appears in Reid, 1993. For an indulgent legal view of the Employment Contracts Act in relation to ILO Conventions Nos. 87 and 98, see Howard, 1994.

[5] 29 USCA 159 (a) and (b); Ontario ss. 5 and 6. See also *Gilpin* v. *American Federation of State, County and Municipal Employees, AFL-CIO* 875 F.2d 1310 cert. denied (1989) – (inclusive duty of bargaining representative); *St. Agnes Medical Center* v. *NLRB* 871 F.2d 137, 276 US App. DC 340 (1989) – (duty only within appropriate unit and where majority support); *North Bay Development Disabilities Services Inc.* v. *NLRB* 905 F.2d 476, 284 US App.DC 371 (1990) – (duty limited to mandatory subjects under the Act).

- bargaining agent recognized in respect of a majority of the employees in a unit to be given exclusive coverage, subject to rights of conscientious objection;
- representative not permitted to require membership of relevant organization but entitled to reasonable contribution to bargaining costs;
- every representative in respect of 20 or more employees to give notification to Department of Labour, stating whether by majority;
- establishment of exclusive coverage by majority to create a presumption of authority for two years.

It would support this structure at the individual level, and enhance freedom of association, to provide (possibly subject to safeguards) that any employee within a bargaining unit might elect for coverage by a representative recognized by the employer.

In relation to the issues just outlined, the loose texture of the present Act suggests a need to reinforce protection against employer-dominated employee organizations. Inconclusive argument as to such a tendency took place in the course of the ILO complaint. Having regard to the potential of "company unions" for destabilizing bargaining parity and subverting real freedom of association, that argument does not dispel the preference for statutory safeguards. A Wagner formula (29 USCA 158 and 186) is again helpful. The New Zealand Act could usefully incorporate a provision to prohibit any measures or attempts to dominate, sponsor, form or interfere with the formation or administration of any employees' organization or to contribute finance or other support to it.

Fundamental issues relating to freedom of association are raised by provisions on the right to strike. The scheme under Part V of the Act must be explained briefly. The right to strike is recognized, subject to constraints. In some circumstances (e.g. where a collective employment contract is current – para. 60 (b)) strikes are expressly constrained and in some circumstances expressly made lawful (e.g. in relation to the negotiation of a collective employment contract – para. 60 (d)). There is a third category: a strike that is "not lawful" – para. 60 (c), in respect of which an action for an injunction or damages will lie or a compliance order may be sought.

Two major problems were identified in the ILO complaint. The first is that a strike "concerned with the issue of whether a collective employment contract will bind more than one employer" is expressly constrained – para. 60 (c). The FOA Committee took that to be contrary to principles of freedom of association, but employer groups support the provision strenuously on the ground that one employer should not be at risk of economic loss by being connected with, or bound to arrangements with, another (perhaps a competitor).

Both views merit consideration. Is it possible to relax the ban but also maintain adequate employer protection? The key is to marry the Act's emphasis on *enterprise* bargaining and the American criterion of "community of interest". In the result, the relaxation would apply for

common occupations or functions where the employers could be characterized as within one enterprise. In the American cases, tests such as functional integration, common ownership and centralization of management and/or labour relations control are specified.[6] It is common in New Zealand at present to separate various worksites of an enterprise for bargaining purposes. In the light of the prohibition, that unfairly weakens the position of employees. It would be less wasteful and inefficient, as well as consistent with the Conventions, to provide the workforce with a legitimate means of challenge. Artificial division of enterprises (there is already such division in both public and private sectors) could be overcome by scheduling specified worksites for the purposes of the Act as one enterprise (public hospitals would be an inviting target).

The second major problem is in the "not lawful" category attracting civil law penalties, which would include a strike relating to the economic and social policy of the Government. In world-historical perspective, that kind of industrial action has been regarded as fundamental and jealously defended. The employers' argument is that they should be protected against incurring losses in relation to matters over which they have no control. The New Zealand result is, however, that workers would confront a formidable deterrent to strike action even in relation to matters that directly affected their employment conditions – e.g. repeal of the Trade Unions Act of 1908 or a discriminatory wage freeze in their industry. The deterrent, in short, is too broad in its reach. It would restore balance in an important aspect of freedom of association to designate as lawful industrial action in relation to economic and social policy having direct effects over and above any effects on the public generally. The right to industrial action might be made subject to a period of notice and to the possibility of injunctive proceedings as to the validity of the action in terms of the statutory criteria.

Authorization and recognition of representative (s. 12)

The Act provides no mechanism by which a bargaining agent is to establish authority to represent employees. A number of employers have feasted on the defect, requiring elaborate evidence and purporting to exercise a right of confirmation with each individual. As familiarity with the Act increases, obstruction and vexatious stratagems may become less common. It is desirable, nevertheless, to codify a formula – presumably to the effect that a list of names in a document tendered to establish authority is evidence that the authority has been duly conferred by each employee whose name is included.

Section 12 of the Act speaks of the authority in relation to "negotiations for an employment contract". That has led to two problems:

[6] See *NLRB* v. *Aaron's Office Furniture Co. Inc.* 825 F.2d 1167 (1987) – (considerations rebutting presumption as to single store unit); *NLRB* v. *Great Western Produce Inc.* 839 F.2d. 555 (1988) – (test of community of interest); *NLRB* v. *Carson Cable TV* 795 F.2d 879 (1986) – (unit determined on balance of factors).

first, the contention that each authority is confined to current negotiations, and secondly, the allegation that an authority may relate only to "negotiations" (narrowly construed). Judicial dicta on these matters (e.g. in *Capital Coast Health*) need to be reinforced. The reasonable solution is to insert provision that an authority is not limited in duration except as agreed by employee and representative at the time of appointment. Further, it should be made clear that, for the purposes of representation, "negotiation" is to be taken to include any action, communication or representation concerning the employee's employment relationship with the employer.

A larger question arises from subs. 12 (2). What is implied by "recognition" of a representative and what obligations does it impose? As the case review has indicated, these questions have been vigorously debated and the New Zealand Court of Appeal has given *obiter* guidance in *Eketone*. But that progress is insecure and needs a statutory foundation.

As the President of the Court has suggested, recognition should entail genuine acceptance of, and a readiness to conduct negotiation (if any) with, the representative. In principle, that would seem to exclude bypassing by direct negotiations with employees and any attempt to subvert the employee's relationship with the representative. But one difficulty is that there is no standard of conduct written into the Act. The New Zealand courts have held consistently that contractual relationships involve a common law obligation of trust and confidence.[7] In state sector legislation, the obligation to behave as a "good employer" is regularly specified. These are vague propositions, however, not immediately referable to the bargaining process. As against the Wagner systems, there is no commitment to "good faith" bargaining. For the protection of *all* parties, the New Zealand regime needs such a formula.

Other limitations should be canvassed. To begin with, the endorsement in *Eketone* of a kind of good faith approach is stated to be relevant only when bargaining is in progress. Otherwise, subversion (or persuasion) short of "undue influence" is taken to be acceptable. That demarcation does seem reasonable, and may be inescapable in view of the New Zealand Bill of Rights Act 1990. That legally overarching Act guarantees (s. 14) freedom of expression and the transmission of information, subject only to such "reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society" (s. 5). In the light of *Eketone*, it is a fair guess that good faith type limits would be upheld for the duration of a bargaining round but not otherwise.

Even during a bargaining round, the limitation would have to be confined. To muzzle any general comment critical of the role of bargaining organizations or of the bargaining process would doubtless be taken as

[7] In relation to various public agencies, such an obligation has been inferred from the statutory requirement to be a "good employer". See e.g. Health and Disability Services Act 1993, para. 11 (2) (c). Also *Auckland Electric Power Board* v. *Auckland Local Authorities Officers IUOW* [1994] 2 NZLR 415 at 419 per Cooke P. (following *Woods* v. *W.M. Car Services (Peterborough) Ltd.* [1981] ICR 666); *Unkovich* v. *Air New Zealand* [1993] 1 ERNZ 526 at 589.

excessive. With a nod to the US National Labour Relations Act (s. 158 (c)), the solution might look rather as follows:

> The expression or dissemination of any views, argument or opinion in relation to matters under this Act, whether in written, printed or any other form, is to be taken as reinforcing freedom of association unless:
>
> (a) in relation to bargaining negotiations in progress, the expression or dissemination constitutes interference, or pressure on employees or a representative having the object or likely effect of bringing about the termination of the representative relationship;
>
> (b) the expression or dissemination contains a threat of force or reprisal or a promise of benefit; or
>
> (c) the expression or dissemination is actionable under, or in contravention of, any other law.

As the final step, it would simply be necessary to provide that an expression or dissemination referred to in paragraph (a) or (b) would attract a penalty under the Act.

Except as discussed, the New Zealand courts would appear to countenance the possibility of pressure to dismiss a representative short of "undue influence" (s. 8). The meaning attributed is a settled legal meaning and is not in contention.[8] There is a gap, however, in the s. 8 scheme. Undue influence to induce a person to cease to be a member of an organization is fully covered; such influence in relation to bargaining negotiations *only* is not. Thus paragraph 8 (1) (d) targets only "an individual who is authorized to act — not to act or to cease to act". The more evident contingency of undue influence on *employees* to discard a representative is not covered. It has been advanced (e.g. in *Adams* and *Dunollie*) that undue influence on the employees has the consequential effect of undue influence on the representative and is therefore within the ambit of the paragraph, but that is not convincing. A prohibition against undue influence directly on employees with intent to induce them to dismiss a representative should be inserted.

Contract choices and the bargaining process

Collective bargaining has venerable and respectable antecedents in the aspiration of workers to compensate for unbalanced negotiating strength by organization. Employers may prefer, understandably, to deal with small groups only or to make individual arrangements. In face of the (typically) collective strength of a corporate employer, the isolated employee is vulnerable. Even in these latter days, therefore, the commitment to collective organization and bargaining embodied in ILO Conventions Nos. 87 and 98 has an important and possibly indispensable role in the protection of fundamental rights. As the FOA Committee has recently reminded, the commitment is not simply to acceptance but to encouragement and promotion of the collective approach to labour relations.

[8] See *Eketone* [1993] 2 ERNZ 783 at 786 per Cooke P. and at 795 per Gault J. Also *Nichols* v. *Jessup* [1986] 1 NZLR 226.

The New Zealand legislation contemplates two kinds of employment contracts – collective and individual. Both, in that sense, are "encouraged", but the reality is more ambiguous. Presentation may be a guide to policy preference – in every reference to both, the individual contract is mentioned first. There is another pointer. Where a collective contract expires, each relevant employee is taken to be bound by an *individual* contract based on the expired agreement (subs. 19 (4)). Since there is no practical reason for the change, the suspicion is that it was introduced deliberately to weight the scales toward the individual option during the next bargaining round. As for the operation of the Act, extreme pressures for individual contracts are known to have been applied. The State Services Commission issued directives, in part pursuant to legal authority, that individual contracts only were available for certain classes of senior officials (Walsh, 1991; FOA Report, 1994).

It is not the present purpose to applaud or lament these trends. The object is rather to strengthen legislative protection of the status of the Conventions and against prospective practical pressures on the collective approach. The first step is not merely cosmetic – where individual and collective contracts are mentioned together, the order should be transposed. Secondly, and logically, an expired collective contract should be taken to continue under subs. 19 (4) as such a contract on the same terms.

The larger issue is that the collective contract should not be at risk of remaining in the Act on sufferance, but manifestly encouraged and promoted. By way of comparison, Wagner systems (e.g. 29 USCA 158 (c)) typically provide that it is an unfair labour practice to refuse to bargain collectively. That direction might be transmuted into the New Zealand situation as follows:

- ensure that the type of contract is genuinely a matter for negotiation by making it an offence for any directive, draft or communication to purport to pre-empt the matter by excluding negotiation for a collective contract; and
- where a majority of the bargaining unit decides for a collective contract, provide that the employer must respect that decision.

As the legislation is framed, such guarantees would still be insufficient. The reason is emphasized in *Eketone*. Where a representative is recognized, any negotiation must have regard to that fact. But the Act imposes no obligation to bargain at all. An employer or a labour organization is at liberty to sit tight and obstruct the process – in effect holding out for a particular result. A refusal to bargain may thus have the character of denial of the right to bargain collectively. To say the least, this strange feature of the Act does not foster the object of promoting an efficient labour market. If bargaining is denied, it is a standing invitation to strikes and lockouts.

The perspective of the Wagner systems is quite different. Bargaining, where appropriate, is declared to be a mutual obligation. The Labour Relations Act of Ontario (s. 15) epitomizes this approach: "The parties shall

meet within 15 days from the giving of the notice (of desire to bargain) or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement." It is a fair qualification that mandatory bargaining is typically limited to the appropriate bargaining unit and to mandatory subjects as specified in the relevant enactment. As will be evident, the obligation to negotiate presupposes sincerity of purpose but entails no obligation to reach agreement.

In relation to statutory objects and for practical purposes, a scheme of this kind would greatly improve the Employment Contracts Act. Different legislative approaches in other aspects provide no real obstacles to carrying over the Wagner solutions pretty much as they stand. Just one additional provision might be necessary to meet New Zealand requirements. Where possibilities of negotiation were exhausted without agreement, the parties should be free to approach each other directly.

Miscellaneous issues

Under earlier New Zealand regimes, awards and legislation contained specific provision for access by (trade union) representatives and the holding of meetings. On this issue, the Act is general and vague. Under s. 13, a person seeking to represent employees may have access to any relevant workplace only with the agreement of the employer. Since a term narrower than "premises" is used, the assumption is that there is no intention to deny access to areas of a worksite normally open to the public. But the matter is not beyond doubt.

Section 14 confers a broad right of access for a representative:

(1) to *premises* where the employee is employed;

(2) for the purpose of *negotiations* for an employment contract;

(3) at any *reasonable time* (in working hours).

As the earlier case review has indicated, the terms in italics are causing difficulty, despite elucidation by the courts. A suggested construction of "negotiations" has been canvassed in this analysis, but it could be too broad in the s. 14 context. The general lack of specificity is deliberate, but in the result the section is insufficiently sensitive to genuine dilemmas as between fair rights of access and the right of employers to conduct business without undue interference. Further judicial refinement is not the appropriate answer; some degree of codification through consultation needs to be attempted.

One principal object of the Act is to establish a framework for the negotiating relationship between employer and employee. The representative of either operates within that framework and is affected by any standards it encompasses. In respect of the representative's connection with the employer or employee, however, the Act is silent. Is something more needed? The Wagner systems are again suggestive, including as a

standard provision (e.g. in Ontario, subs. 68 (2)) a duty of fair representation. A breach of the duty is created by action that is outside the range of reasonableness or arbitrary, discriminatory or in bad faith. To fix independent obligations and standards vis-à-vis their principals upon representatives is a useful safeguard and should foster integrity in the conduct of business under the Act.

For the purposes of the Act, who is an employee? The question is basic and the answer is not fully reassuring. Section 2 provides a definition, which includes "a person intending to work". But that is not quite what it may seem, for "person intending to work" means "a person who has been offered, and accepted, work." Accordingly, a person not in work who is only negotiating for an employment contract is denied all the protections extended to employees. That situation is unconscionable, implying the creation of an employers' charter. The facile remedy would be simply to broaden the definition, but a drafter would need to be cautious, for that could have unintended consequences.

Some mitigation would be afforded by arming applicants with appropriate information. Where a person not already an employee of the prospective employer entered into contract negotiations, the Act might reasonably require that the prospective employer provide a standard statement (prepared, possibly, by the Department of Labour) setting out the basic concepts of the bargaining process and the rights of a person involved in it. Foremost among them should be the right to genuine negotiation, the right to representation and the availability of protection against undue pressures or discrimination.

That thought puts the spotlight on the structural weakness of the Act in respect of procedures. The policy, put simply, is to establish a regime within which industrial relations arrangements may be settled as independently as possible of external intervention. Except for health and safety matters (not strictly under the Act), there is no mechanism for supervision of compliance short of court-like processes. The minor exception is that the Employment Tribunal may offer mediation or parties to a contract may invite it by agreement (s. 78). As cases such as *Capital Coast Health* make clear, even an informed professional group may be exposed to unconscionable procedural abuses – as could be a strategically weak employer. The position of a non-working applicant, as outlined, is especially vulnerable. If concern for integrity of process is to count for anything, a straightforward complaints mechanism is an evident priority.

Any such mechanism implies external decision-making or arbitration at a low level. The ground of jurisdiction is different from that of the existing mediation, as is the nature of the process. One difference is that penalties and means of enforcement would have to be supplied; for those purposes, assimilation to the jurisdiction of the Tribunal and Court would be the expedient solution. In the context, it is of interest to recall the Wagner emphasis (e.g. in Ontario, s. 38) on arbitration. Where the parties agree to it, all other settlement provisions are suspended. For the time being, arbitration

of bargaining outcomes might seem to raise ghosts in the New Zealand setting. Procedural arbitration could have more hopeful prospects.

Revision of legislation such as the Employment Contracts Act must take account of an intractable question. How is the possible gap between legislative prescription and workforce practice to be narrowed? In the current situation in New Zealand, it is a relevant question. In large and flourishing enterprises, adequate industrial balance is usually preserved and the enterprise bargaining regime has the potential to work quite well. But the average industrial workforce is no more than seven persons. In that kind of setting, the advantages – in terms of equity and harmony – of awards and union coverage were not negligible. Current arrangements provide much feebler safeguards against industrial dictation and unfair pressures on wage levels and conditions. The workforce in small business is most in need of the protections the Act may confer. If those protections are paper tigers, the last resort is to shore up the foundations of the basic wage. Whatever balance may be contrived by legislation, there is no easy road to reconciling the demands imposed in the competitive and profit-oriented environment of latter-day capitalism with deserving claims for human justice.

References

Bayliss, Len. 1994. *Prosperity mislaid: Economic failure in New Zealand.* Wellington, GP Books.

Bollard, Alan. 1984. *The political economy of liberalization in New Zealand.* Auckland, Oxford University Press.

—; Duncan, Ian. 1992. *Corporatisation and privatisation: Lessons from New Zealand.* Auckland, Oxford University Press.

Boston, Jonathan. 1991. "Theoretical underpinnings of public sector restructuring in New Zealand", in Boston et al.

—. 1993. "Reshaping social policy in New Zealand" in *Fiscal Studies* (Folkestone, UK), Vol. 14, No. 3.

Boston, J.; Martin, J.; Pallot, J.; Walsh, P. (eds.). 1991. *Reshaping the State: New Zealand's bureaucratic revolution.* Auckland, Oxford University Press.

Collins, Simon. 1989. "Rogernomics, the economic aftermath" in Easton.

Corfield, Ian R.; Rae, David A. 1992. *Inflation.* Wellington, Reserve Bank of New Zealand Discussion Paper G92/4.

Dalziel, Paul. 1992. *Is there a fiscal crisis?* Paper given at Massey University Economic and Social Policy Conference, Wellington, 17-19 July 1992.

Dalziel, Paul; Lattimore, R. G. 1991. *A briefing on the New Zealand macroeconomy, 1960-1990.* Auckland, Oxford University Press.

Deane, R. L. 1989. "Reforming the public sector" in S. Walker (ed.): *Rogernomics: Reshaping New Zealand's economy.* Wellington, GP Books/Centre for Independent Studies.

Douglas, Roger. 1987. *Toward prosperity.* Auckland, David Bateman.

Douglas, Sir Roger. 1993. *Unfinished business.* Auckland, Random House.

—. 1992a. Lecture given at Massey University on 10 July 1992.

Duncan, Ian; Lattimore, R. G.; Bollard, A. 1992. *Dismantling the barriers: Tariff policy in New Zealand.* Wellington, New Zealand Institute of Economic Research.

Easton, Brian (ed.). 1989. *The making of Rogernomics.* Auckland, Auckland University Press.

FOA Interim. 1994. *Interim report of the Committee on Freedom of Association on Case No. 1698.* Geneva, ILO.

FOA Report. 1994. *Final report of the Committee on Freedom of Association on Case No. 1698.* Geneva, ILO; see ILO, 1994.

Gould, J. D. 1982. *The rake's progress: The New Zealand economy since 1945.* Auckland, Hodder and Stoughton.

—. 1985. *The Muldoon years: An essay on New Zealand's recent economic growth.* Auckland, Hodder and Stoughton.

Harbridge, R. 1993. *Employment contracts. New Zealand experiences.* Wellington, Victoria University Press.

Harbridge, R.; McCaw, S. 1991. "The Employment Contracts Act 1991: New bargaining arrangements in New Zealand" in *Asia Pacific Human Resource Management* (Millgrave North, Victoria), Vol. 5, No. 26.

Harbridge, R.; Hince, K.; Honeybone, A. 1994. *Unions and union membership in New Zealand: Annual review for 1993.* Wellington, working paper, Industrial Relations Centre, Victoria University.

Hince, K.; Harbridge, R. 1994. "The ECA: An interim assessment", in *New Zealand Journal of Industrial Relations* (Kaikohe, New Zealand), Vol. 19, No. 3.

Hince, K.; Vrancken, M. 1991. "A controversial reform of New Zealand labour law: The Employment Contracts Act 1991", in *International Labour Review* (Geneva), Vol. 130, No. 4. ILO.

Holland, M.; Boston, J. 1990. *The 4th Labour Government: Politics and policy in New Zealand* (2nd ed.). Auckland, Oxford University Press.

Howard, Colin. 1994. *The NZCTU's complaint to the ILO on the Employment Contracts Act: Opinion.* Wellington. Unpublished for NZBR.

ILO. 1985. Conditions of Work Digest: *Digest of the decisions and principles of the Freedom of Association Committee.* Geneva, ILO.

ILO Mission. 1994. *Report of the direct contacts mission to New Zealand by the representative of the Director-General of the ILO*, annexed to FOA Report, 1994; see ILO, 1994.

ILO. 1994. *Official Bulletin.* Vol. 77, Series B, No. 3, pp. 39-112.

James, Colin. 1992. *New territory: The transformation of New Zealand.* Wellington, Bridget Williams Books.

Kelsey, Jane (ed.). 1993. *Rolling back the State: Privatisation of power in Aotearoa, New Zealand.* Wellington, Bridget Williams Books.

Kelsey, Jane; O'Brien, Mike. 1995. *Setting the record straight: Social development in Aotearoa-New Zealand.* Wellington, Association of Non-Government Organisations of Aotearoa.

Kerr, Roger. 1993. *Sharing the gains.* Address to Nelson Chamber of Commerce, 19 March 1993.

Kriegsmann, Klaus-Peter. 1992. *Strategic planning study.* Wellington. (Internal paper.)

Labour Department. 1993. *Monthly employment statistics.* Wellington, Department of Labour.

—. 1993a. *Contract: The report on current industrial relations in New Zealand. Special December Edition.* Wellington, Department of Labour.

Lister, Paul; Rivers, Mary-Jane; Wilkinson, Alistair. 1991. "The management of change – the social and personnel perspective", in Boston et al.

Maloney, Tim. 1993. *Estimating the effects of the Employment Contracts Act on employment and wages in New Zealand.* University of Auckland, working paper in economics.

—. 1994. *Has New Zealand's Employment Contracts Act increased employment and reduced wages?* University of Auckland, working paper in economics.

Margaritis, Dimitri; Hyslop, Dean R.; Rae, David. A. 1992. *Financial policy reform in New Zealand.* Wellington, Reserve Bank of New Zealand. (Discussion Paper G92/2).

Martin, John. 1990. "Remaking the state services", in Holland and Boston.

Mascarenhas, R. C. 1991. "State-owned enterprises", in Boston et al.

Mulgan, Richard. 1990. "The changing electoral mandate", in Holland and Boston.

Myers, Douglas. 1992. *Rejoining the world.* Address to the West Australian Chamber of Commerce and Industry, 25 November 1992.

NZ Business Roundtable. 1990. *Choice in the workplace: A better framework for labour law.* Wellington, NZBR.

—. 1992. *Budgetary stress*. Wellington, NZBR.

—. 1992a. *The public benefit of private ownership*. Wellington, NZBR.

New Zealand Council of Trade Unions. 1993. *Complaint against the Government of New Zealand by the New Zealand Council of Trade Unions*. Wellington, NZCTU.

OECD. 1989. *OECD Economic Survey*. Paris, OECD.

—. 1991. *OECD Economic Survey of New Zealand, 1990-1991*. Paris, OECD.

—. 1991a. *OECD Employment Outlook*. Paris, OECD.

Oliver, W. Hugh. 1989. "The labour caucus and economic policy formation 1981-1984", in Easton.

Reid, Frank. 1993. "An assessment of enterprise bargaining in Canada", in *Enterprise bargaining systems: International case studies*. EPAC background paper No. 33. Canberra, AGPS.

Royal Commission on Social Policy. 1988. *Towards a fair and just society*. Wellington, Royal Commission on Social Policy.

Select Committee. 1993. Report of the Labour Select Committee on the inquiry into the effects of the Employment Contracts Act 1991 on the New Zealand labour market. Wellington, New Zealand House of Representatives.

Sharp, Andrew (ed.). 1994. *Leap into the dark: The changing role of the State in New Zealand since 1984*. Auckland, Auckland University Press.

Shirley, Ian; Easton, B.; Briar, C.; Chatterjee, S. 1990. *Unemployment in New Zealand*. Palmerston North, Dunmore Press.

Sinclair, Keith. 1980. *A history of New Zealand*. London, Penguin.

Treasury. 1984. *Economic management*. Wellington, The Treasury.

—. 1989. *Putting it simply: An explanatory guide to financial management reform*. Wellington, The Treasury.

—. 1990. *Briefing to the incoming Government*. Wellington, The Treasury.

Walsh, Pat. 1989. "A family fight: Industrial relations reform under the fourth Labour Government", in Easton.

—. 1991. "The State Sector Act" and "Industrial relations and personnel policies under the State Sector Act", in Boston et al.

—. 1992. "The Employment Contracts Act", in Boston, J. and Dalziel, Paul (eds.) *The decent society: Essays in response to National's economic and social policies*. Auckland, Oxford University Press.

Whitwell, Jan L. 1990. "The Rogernomics monetarist experiment", in Holland and Boston.