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International Labour Organisation Conventions 87 and 98 and the Employment Relations Act

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One of the two principal aims of the Employment Relations Act (ERA) as set out in s.3(b) is:

> "to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively."

The relevant International Labour Organisation (ILO) principles are therefore important in elucidating the purpose behind certain provisions in the legislation and aiding in their interpretation and application.[1] Accordingly, the ability to identify, understand, and deploy these ILO principles will be essential under the new labour law regime.

Freedom of association

The right to freedom of association in the workplace emerged after a centuries-old legal prohibition against worker combinations and strikes. Workers' organisations began to shed their status as unlawful conspiracies only in the second half of the nineteenth century. Pope Leo XIII's 1891 encyclical *Rerum novarum*, which affirmed the right of workers to form and join associations, was an important step in establishing the legitimacy of the right to freedom of association, as was Part XIII of the Versailles Treaty of 1919, which created the International Labour Organisation.

There are two principal connotations to the concept of "freedom of association."[2] Although it began as a freedom to associate, more recent libertarian ideology has placed emphasis

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1 See, for example, Chief Judge Goddard at para 61 of *Attorney-General (on behalf of the Director-General of the Ministry of Agriculture & Forestry) v National Union of Public Employees (NUPE)*, WC 3A/01, 13 February 2001: "I am entitled, of course, to have regard to the development and articulation of these principles".

2 In general, see Ferdinand von Prondzynski, *Freedom of Association and Industrial Relations* (London, 1987).

on it as a right to disassociate, so that it denotes a right not to be compelled to associate. Although the latter is somewhat different from the original conception of the right, it was a prominent feature of the Employment Contracts Act 1991.

Freedom of association also applies to the right of employers to organise collectively, but this aspect of the right has declined in importance with the demise of political and economic systems where free enterprise was not the norm.

Freedom of association is promoted in four fundamental ILO instruments:

> Part XIII of the Versailles Treaty of 1919, which declared that the right of association was "of special and urgent importance" for both workers and employers[3].
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> Article I(b) of the 1944 Declaration of Philadelphia,[4] which was incorporated into the ILO Constitution in 1946. This reaffirmed freedom of association as one of the "fundamental principles" upon which the ILO was based.
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> The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87), which sets out the basic principles underlying freedom of association.
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> The Right to Organise and Collective Bargaining Convention, 1949 (No.98), which deals with two important aspects of freedom of association.

Article 23(4) of the Universal Declaration on Human Rights, which was adopted by the United Nations a few months after Convention No.87 in 1948, and which was based on it, provides that "Everyone has the right to form and to join trade unions for the protection of his interests."[5] Article 22 of the International Covenant on Civil and Political Rights, 1966 substantially restates the right as set out in the Universal Declaration, and recognises the primacy of ILO Convention No.87 in this area.[6] The right is more fleshed out in article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966,[7] which provides as follows:

> 1. The States Parties to the present Covenant undertake to ensure:
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> (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the

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3 The right was somewhat limited, however, in that article 427 of the Treaty circularly referred to the enjoyment of the right "for all lawful purposes". That issue was resolved, however, by article 8(2) of Convention No.87, which provides that the law "shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention."

4 Declaration concerning the aims and purposes of the International Labour Organisation.

5 Article 20 declares a more general right of "freedom of assembly and association".

6 See article 8(3) of the 1966 International Covenant on Economic, Social and Cultural rights, quoted below, which is couched in identical terms.

7 Both Covenants entered into force in 1976. New Zealand ratified them in 1978.

promotion and protection of his economic and social interests. No restriction may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of a particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorise the State Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as to prejudice the guarantees provided in that Convention.

ILO Conventions 87 and 98

In a nutshell, Convention 87 provides that workers have the right to establish and join organisations of their own choice without governmental interference; they have the right to draw up their own rules, choose their own representatives, organise their own administration, and decide upon their own programmes; and government administrative authorities may not dissolve or suspend these organisations.

Convention 98 deals with two particular aspects of freedom of association. Firstly, it provides that workers must be protected against all forms of discrimination on the grounds of their union membership or union activities, and that organisations of workers and employers must be protected against acts of interference, in particular the domination of workers' organisations by an employer or employers' organisation. Secondly, it seeks to ensure the promotion of collective bargaining through "the autonomy of the parties and voluntary nature of negotiations."[8]

These two conventions have long been regarded as belonging to the handful of "core" ILO standards. This point was recently reiterated by the ILO in its 1998 Declaration on Fundamental Principles and Rights at Work, article 2 of which states that:

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8 *Freedom of Association and collective bargaining: General Survey of the reports on the Freedom of Association and the Right to Organise Convention (No.87), 1948, and the Right to Organise and Collective Bargaining Convention (No.98), 1949*, Report III (Part 4B), International Labour Conference, 81st Session, 1994, International Labour Organisation, Geneva, (hereafter referred to as *General Survey*), para 199.

> ". . . all members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective right of collective bargaining . . ."

Freedom of association is of fundamental importance for the structural integrity of the ILO. As a tripartite organisation comprised of representatives from governments, employers' organisations, and workers' organisations, one third of the ILO's constituency is comprised of workers' organisations. When a country becomes a member of the ILO, therefore, it implicitly accepts the obligations connected with the right to freedom of association. Thus, in the 1993 complaint against it by the New Zealand Council of Trade Unions (CTU), New Zealand was held to account for non-compliance with ILO Conventions 87 and 98 even though New Zealand had not ratified them. The Committee on Freedom of Association claimed to be competent to entertain such a complaint because it considered that by virtue of her membership in the ILO, New Zealand was bound to respect a number of fundamental principles, among which were the principles of freedom of association. As the Freedom of Association Committee has stated:

> "When a State decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association."[9]

Convention No.87 has been ratified by 134 countries, and Convention No.98 has been ratified by 150 countries.

As will be immediately appreciated from a perusal of the few substantive provisions of ILO Conventions 87 and 98, the conventions themselves are fairly concise instruments. The conventions are fleshed out by (1) the "case law" of the ILO Committee on Freedom of Association, which deals with complaints; and (2) the reports of the Committee of Experts on the Application of Conventions and Recommendations, which supervises compliance with the conventions through its consideration of and comments upon the periodic reports submitted to it by ILO member countries. These two ILO committees have produced a significant amount of primary source material for the principles underlying the two conventions, and each committee pays heed to the work of the other so that there is a consistency of approach in relation to the principles underlying freedom of association. Thus, the Committee of Experts has remarked:

> "When a legislative problem arises and the country concerned has ratified the Conventions to which the complaint refers, the Committee on Freedom of Association can – and, in fact, often does – draw the attention of the Committee of Experts to these aspects of the case, thus enabling the latter to follow the development of the situation during the regular examination of the reports submitted by the government concerned in relation to the Convention in

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9 *Freedom of Association: Digest of Decisions and principles of the Freedom of Association*, Committee of the Governing Body of the ILO, Fourth (revised) edition, 1996, International Labour Office, Geneva, 238 pp (hereafter referred to as *Digest*), para 10.

> question . . . . While the Committee on Freedom of Association and Committee of Experts differ in terms of their composition, the nature of their functions and their procedure, they apply the same principles, which are universal and cannot be applied selectively."[10]

While the 2,000 or so decisions of the Committee on Freedom of Association could be sifted through by the curious, this would obviously be a time-consuming task. Accordingly, the Committee on Freedom of Association periodically publishes a digest of its decisions which conveniently collects together the relevant principles of general application. The latest edition of this digest was published in 1996.[11]

Likewise, sifting through the annual reports of the Committee of Experts would be a tedious exercise. However, each year it publishes a "General Survey" of its comments in relation to a particular convention or series of conventions. The most recent General Survey on Conventions 87 and 98 was published in 1994[12]. This General Survey is based on country reports submitted under articles 19,[13] 22,[14] and 35[15] of the ILO Constitution.

Enforcement of ILO freedom of association standards

ILO conventions are enforced through a variety of supervisory mechanisms. Where a country has ratified a convention, the government concerned must submit at regular intervals a report on its compliance with it. Organisations of workers and employers may make submissions on the government report. The reports and submissions are dealt with by the ILO's Committee of Experts, which produces a public report concerning the country's compliance with the particular convention in question. Where a situation raises serious problems, it is referred to the tripartite Conference Committee on the Application of Standards during the annual International Labour Conference (the ILO's plenary body). In addition to the periodic reporting process, there are two complaints procedures under the ILO Constitution for breach of a ratified convention. There is the representation

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10 *General Survey*, para 20.

11 See above, note 9.

12 See above, note 8.

13 Article 19(5)(e) of the ILO Constitution requires countries that have not ratified an ILO convention (like New Zealand in the case of Conventions 87 and 98) to report periodically as to "the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention."

14 Article 22 requires each member state to provide the ILO with an annual report on the measures it has taken to give effect to the conventions it has ratified.

15 Article 35 deals with the same matters as article 22, but in relation to the non-metropolitan and trust territories administered by a ratifying state.

procedure under article 24 of the Constitution, whereby an organisation of workers or employers can make a representation to the ILO Governing Body (the ILO's executive) that a state party has breached a convention; and there is the complaint procedure under article 26, under which one state party can complain to the Governing Body of a breach of a convention by another state party.

There are two ILO procedures for dealing with complaints where a country (such as New Zealand) has not ratified Convention 87 or 98.

In 1950, the Governing Body of the ILO, by agreement with the United Nations Economic and Social Council, established the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC). It is comprised of nine independent members appointed by the Governing Body. As is not uncommon at international law, it operates within a consensual jurisdiction. That is, cases may be examined by the FFCC only if the government concerned agrees to participate in the process. It was not until 1964, however, that a government actually agreed to be subjected to the process, and in its existence the FFCC has examined only six cases.[16] Since governments were not giving their consent to the fact-finding procedure of the FFCC, the Committee on Freedom of Association was established in November 1951. This tripartite body, consisting of nine members of the Governing Body itself, did not need a country's consent in order to deal with a complaint against it. Since its establishment, it has investigated about 2,000 complaints.[17]

Thus, for example, in 1993, the CTU lodged a complaint with the Committee on Freedom of Association over the Employment Contracts Act (Case No.1698). Although both sides claimed vindication (the Government mainly on the ground that the ILO's final report in November 1994 was less critical than its interim report of March 1994), the Committee did find that the legislation should have promoted collective bargaining rather than merely allowed it, and that it should have allowed strikes in support of multi-employer contracts. New Zealand has been called to account each year since then by the Committee for failing to remedy the shortcomings found in the Committee's 1994 report.

More recently, in April 1999 the New Zealand Trade Union Federation (TUF) lodged a complaint with the Committee on Freedom of Association concerning the "work for the dole" Community Wage scheme (provided for under the Social Security (Work Test) Amendment Act 1998 and the Social Security Amendment (No.5) Act 1998). The TUF alleged that the Community Wage scheme compelled beneficiaries to work for the benefit while denying them the status of employees in terms of employment legislation. In

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16 These cases involved Japan, Greece, Lesotho, Chile, the United States/Puerto Rico, and South Africa.

17 Six of these cases involved New Zealand: Case Nos 21, 936, 956, 1334, 1385, and 1698.

particular, it denied them the right to freedom of association as workers, and did not allow for bargaining with their "employers", access to grievance procedures, and other employment law rights.[18]

Ultimately, the sanction for non-compliance with ILO standards is bad publicity and possibly international pressure. If the country concerned has not remedied a situation, it will be reminded of its failure in subsequent ILO country reports, and its failure will be likely to be echoed in respect of the periodic reports considered under the two major United Nations covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights.[19] It becomes part of the record concerning a country's human rights compliance.

The Employment Relations Act and the ILO principles

The International Labour Office informed the New Zealand Government on 31 January 2001 that, in terms of an unofficial analysis of the legislation, "[t]he Employment Relations Act, as a whole, appears to be compatible with" Conventions 87 and 98.[20] Nevertheless, there are several areas where there remains some inconsistency, and therefore the ILO was careful to state that the Act "represents an important step in New Zealand legislation towards fuller recognition" of the relevant ILO standards. The reason why the ILO could provide merely an "unofficial analysis" of the legislation is because this particular competency belongs to the relevant ILO supervisory bodies, namely, the Committee of Experts (in the case of periodic reports submitted by New Zealand under article 19(5)(e) of the ILO Constitution), the Committee on Freedom of Association (upon a complaint), and the Fact-Finding and Conciliation Commission on Freedom of Association.

The remainder of this article will canvass those features that render the ERA consistent with ILO principles, and the few aspects of the ERA that diverge from them.

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18 This matter has since been remedied by the enactment of the Social Security Amendment Act 2001, which abolished the Community Wage scheme.

19 See, for example, the Concluding observations on New Zealand by the United Nations Committee on Economic, Social and Cultural Rights (4 January 1994, E/C12/1993/13), para 13: "The Committee expresses its concern that recent extensive reforms in the social security and labour relations system may negatively affect the enjoyment of economic, social and cultural rights. In particular, the Committee notes that reforms introduced by the Employment Contracts Act of 1991, raise questions of compatibility in relation to the rights recognized in articles 7 and 8 of the Covenant."

20 This was by correspondence from the Director of the ILO's International Labour Standards Department. Comments on the Employment Relations Bill had been solicited earlier by the Minister of Labour, and were provided by the International Labour Standards Department on 12 June 2000. All correspondence has been made available under the Official Information Act.

Unions

Formalities of union registration

The ILO principles provide that the formalities of union registration should not pose an obstacle to the exercise of the right to freedom of association, and that there should be no delay in registering a union. The Committee on Freedom of Association has stated that:

> "The *formalities* prescribed by law for the establishment of a trade union should not be applied in such a manner *as to delay* or prevent the establishment of trade union organizations. Any delay caused by authorities in registering a trade union constitutes an infringement of Article 2 of Convention No.87."[21]

Accordingly, any delay by the Registrar of Unions in registering a union would breach ILO principles.

Minimum number of members to found a union

Unlike the Labour Relations Act 1987, which required unions to have at least 1,000 members, s.13(1) of the ERA requires a minimum of only 15. This is compatible with ILO freedom of association principles. Article 2 of Convention 87 requires that workers "shall have the right to establish and . . . to join organisations of their own choosing." The principle, as expressed by the Committee of Experts, is that the minimum number of workers required to found a union should not be so excessive as to constitute an obstacle to its creation.[22]

New Zealand's former 1,000 member rule had been criticised by the Committee on Freedom of Association.[23] The Committee had found in other cases that requiring a minimum of 50 founding members is "obviously too high a figure" to comply with article 2, but that a legal requirement of 20 "does not seem excessive."[24]

Union rules

Section 14(1)(c)(i) of the ERA provides that "A society is entitled to be registered as a union

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21 *Digest*, para 251.

22 *General Survey*, paras 81 and 82.

23 *Digest*, para 832: "A minimum membership requirement of 1,000 set out in the law for the granting of exclusive bargaining rights might be liable to deprive workers in small bargaining units or who are dispersed over wide geographical areas of the right to form organizations capable of fully exercising trade union activities, contrary to the principles of freedom of association."

24 *Digest*, paras 255 and 256.

if . . . the society's rules are . . . not unreasonable." This provision could potentially confer a wide discretion on the Registrar of Unions, and in turn the specialised employment law institutions. The principles underlying Convention 87, however, closely circumscribe the exercise of such a discretion.

Article 2 of Convention 87 provides that workers should be able to establish their organisations "without previous authorisation",[25] and the right is further developed in articles 3, 4, and 7. The underlying principle is that a government administrative authority should not have undue discretionary powers in relation to the registration or deregistration of a union.

Section 17 of the ERA provides that the Registrar of Unions may only cancel a union's registration if the union itself applies for cancellation, or where the Employment Relations Authority makes an order directing cancellation. ILO principles provide that the deregistration or dissolution of unions should be left in the hands of judicial rather than administrative authorities.[26] Section 17 of the ERA therefore complies with ILO principles in that only the Authority, not the Registrar of Unions, can deregister a union for non-compliance with the registration requirements in s.14(1).

Union independence from employer

Section 14(1)(d) of the ERA provides that a society is entitled to union registration if it "is independent of, and is constituted and operates at arm's length from, any employer." This is in contrast with the position under the Employment Contracts Act where such organisations as the "Mosgiel Independent Thought Society" (see *Adams v Alliance Textiles* [1992] 1 ERNZ 982) were able to represent employees.

Section 14(1)(d) is consistent with article 2(2) of ILO Convention 98, which deems as an act of interference with a workers' organisation any act "which [is] designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations."

Since the introduction of the Employment Relations Bill, a number of workers' organisations have been established in New Zealand that have connections with major employers, including one involving The Warehouse Group ("People First"), and another at Ports of

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25 The Committee on Freedom of Association (*Digest*, para 244) and the Committee of Experts (*General Survey*, para 74) have stated that the power to refuse registration is tantamount to a power of prior authorisation.

26 *Digest*, paras 664-666, 670, 678.

Auckland at Marsden Point. A case involving a meat workers' union in Te Kuiti is currently before the Employment Court for determination of the proper test of whether or not a society is independent of employer influence.[27]

Workers' organisations supported by employers (termed "solidarist" organisations by the ILO) are apparently common in Central American countries.[28] Section 110 of the ERA seems to recognise that such organisations may exist, but prohibits duress in relation to membership or non-membership in them. Such workers' organisations are not unions in terms of the ERA, and they are therefore unable to engage in collective bargaining. They may, however, represent workers for other purposes, such as personal grievances and disputes, since s.236 ("Representation") only requires that the representative have the employee's authority to act in that capacity. Despite the apparent conflict of interest, so long as membership is voluntary, and such organisations do not deal with workers' collective employment interests, there would appear to be no breach of the ILO principles.

No disqualification on basis of criminal record

Section 11 of the Employment Contracts Act provided that a party could object to the appointed representative of the other party where that person had been convicted within the previous 10 years of an offence punishable by a prison term of five years or more. Where such an objection was made on valid grounds, the authorised representative could not act in that capacity.

In *Sidebotham and Powell v Capital Coast Health Ltd* [1994] 2 ERNZ 431, Chief Judge Goddard acknowledged that this was somewhat of a blunt instrument:

> "The provision . . . is arbitrary in that Parliament has settled on a cut-off point of liability to exactly five years' imprisonment, irrespective of the nature or gravity of the actual offending and irrespective of the fact that far more reprehensible conduct could amount to an offence punishable by a lesser maximum term of imprisonment than five years."

This provision has not been carried over into the ERA. This is consistent with ILO freedom of association principles.[29] Thus, for example, the Committee on Freedom of Association has stated that:

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27 In the Employment Relations Authority case of *Meat & Related Trades Workers of Aotearoa v Te Kuiti Beef Workers Union Inc* (27 April 2001, AA 37/01), the applicant sought to cancel the union registration of the respondent on the basis that it was not independent of the employer and was in receipt of employer financial assistance. The Authority of its own volition referred the issue to the Employment Court under s 178 of the ERA (and, in the alternative, under s.177) on the basis that the matter raised an important question of law.

28 *General Survey*, para 233.

29 *Digest*, paras 383 - 387.

> "A conviction for an act which is not, by its nature, such as to constitute a real risk for the proper exercise of trade union functions should not constitute grounds for disqualification for trade union office, and any legislation providing for such disqualification for any type of criminal offence may be regarded as inconsistent with the principles of freedom of association."[30]

Access to workplaces

Section 20 of the ERA provides for union access to workplaces for a wide variety of purposes, including recruitment. In contrast, the Employment Contracts Act provided for access in only two situations: where, subject to the employer's permission, a representative was seeking access for obtaining authority to represent employees (s.13); and where the authorised bargaining representative wished to discuss matters relating to negotiations with the relevant employees (s.14).

The right of union access to workplaces is considered to be implicit in articles 2 and 3 of Convention 87.[31] Accordingly, the Committee on Freedom of Association has stated:

> "Governments should guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionization."[32]

ILO principles relating to the right of union access are potentially relevant to negotiations regarding the collection of union fees. Section 55(1) of the ERA provides that collective agreements are deemed to include a provision whereby the employer agrees to deduct union fees from union members' salary or wages and pay them over to the union. Section 55(2), however, provides that this can be a matter for negotiation between the parties. Thus, an employer may wish to levy an administrative charge for the collection of such fees. If the union concerned does not wish to pay such a charge and collect fees itself, s 20(1)(b) of the ERA provides that a union is entitled to enter a workplace "for purposes related to the union's business". The collection of union fees would undoubtedly be for such a purpose. In this connection, the Committee on Freedom of Association has stated:

> "The Committee has drawn attention to the ILO Workers' Representatives Recommendation, 1971 (No.143), which provides that, in the absence of other arrangements for the collection of trade union dues, workers' representatives authorized to do so by the trade union should be permitted to collect such dues regularly on the premises of the undertaking."[33]

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30 *Digest*, para 386; see also *General Survey*, para 120.

31 The matter is also covered in the Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, 1971 (No.135) and the Workers' Representatives Recommendation, 1971 (No.143).

32 *Digest*, para 954.

33 *Digest*, para 436.

Therefore, it may ultimately be more costly in terms of time and disruption for an employer to accommodate a union's right to collect union dues regularly in the workplace than to carry the administrative cost itself.

Most representative union

At first sight, s.62(3) of the ERA would seem to offend against the principles underlying article 2 of Convention 87, which provides that workers should have the right "to join organisations of their own choosing without previous authorisation". Section 62(3) provides that where a new employee does work that falls within the coverage clause of more than one collective agreement in the workplace, the employer must comply with the requirements of subs (2) in relation to the agreement that binds more of the employees than any other collective agreement,[34] but must at least inform the employee of the existence of the other agreement(s).

There are a number of ILO principles that address the situation where the law favours a majority union over minority unions.[35] However, s.62(3) should pass muster, as it allows new employees to make a free choice as to which union to join. The provision recognises the existence of minority unions, does not confer exclusive rights on the majority union, and does not compel employees to join the majority union (although inertia may well affect the employee's eventual choice).

Sanctions for employer interference with unions

Article 2(1) of Convention 98 provides that workers' organisations "shall enjoy adequate protection against any acts of interference . . . in their establishment, functioning or administration." The Committee on Freedom of Association has stated that:

> "Legislation must . . . establish *sufficiently dissuasive sanctions* against acts of interference by employers against workers and workers' organizations to ensure the practical application of Article 2 of Convention No.98."[36]

The ERA makes specific provision against employer interference in so far as it requires unions to be constituted and operated at arm's length from an employer (s.14(1)(d)), and that the functioning of a union may not be undermined in collective bargaining (s.

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34 Section 62(2) requires employers to inform employees at the time they enter into an individual agreement of a number of matters, including that the collective agreement exists and covers their work, and how to contact the union; employers must give employees a copy of the collective agreement; and, with the employees' agreement, the employer must inform the union that the employee has entered into an individual agreement with the employer.

35 *Digest*, paras 309-310.

36 *Digest*, para 764.

32(1)(d)(iii)). The remedy for the former is union deregistration, and the remedy for the latter is a compliance order. While it is arguable whether these alone constitute "sufficiently dissuasive sanctions", there are penalties for undue influence in relation to union membership or authorisation to act on behalf of employees (s.11); for obstructing union access to workplaces (s.25); and for misleading the Registrar of Unions (s.30).

Onus of proof in anti-union discrimination cases

Section 119 of the ERA provides that the employer bears the onus of proof in cases concerning discrimination on the grounds of involvement in union activities. This is consistent with ILO principles. For example, the Committee of Experts has stated:

> "The onus placed on the employer to prove that alleged anti-union discrimination measures are connected with questions other than trade union matters, or presumptions established in the worker's favour are additional means of ensuring effective protection of the right to organize guaranteed by the Convention."[37]

Promotion of collective bargaining

The main difference between the ERA and the Employment Contracts Act is that the latter did nothing to promote collective bargaining. This was contrary to ILO principles. Thus, the Committee on Freedom of Association has stated that:

> "Measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements."[38]

In relation to the Employment Contracts Act in particular, the Committee stated that it found:

> ". . . it difficult to reconcile the equal status given in the law to individual and collective contracts with the ILO principles on collective bargaining, according to which the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations should be encouraged and promoted, with a view to the regulation of terms and conditions of employment by means of collective agreements. In effect, it seemed that the Act *allowed* collective bargaining by means of collective agreements, along with other alternatives, rather than *promoting and encouraging* it."[39]

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37 *General Survey*, para 224; see also paras 217-218, and *Digest*, paras 736, 740, and 752.

38 *Digest*, para 781.

39 *Digest*, para 912.

Good faith

Privacy of union communications

The ILO principles uphold the civil and political right of privacy in relation to correspondence and communications.[40] By extension, employers could be viewed as breaching their good faith obligations under the ERA were they to tamper with or intercept union-related communications. This area raises potential issues with regard to employer monitoring of e-mail communications where union affairs are the subject of employees' electronic communications.[41]

Freedom of expression

While there is undoubtedly a tension between s.4(3)[42] and s.32(1)(d)(iii)[43] in relation to what one can and cannot communicate, a further complication is added by the ILO principles. The Committee on Freedom of Association considers that:

> "The full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end, workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities."[44]

It has also stated that:

> "The right to express opinions through the press or otherwise is an essential aspect of trade union rights."[45]

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40 *Digest*, para 171; *General Survey*, para 171.

41 See *Australian Municipal, Administrative, Clerical & Services Union v Ansett Australia Ltd* [2000] FCA 441 (7 April 2000), and also, by analogy, the New Zealand case of *Howe v The Internet Group Limited (IHUG)* [1999] 1 ERNZ 879.

42 Section 4(3) provides that the duty of good faith "does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs."

43 Section 32(1)(d)(iii) provides that the duty of good faith in collective bargaining requires that the union and employer "must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining". The definition of "bargaining" in s.5 "means all the interactions between the parties to the bargaining that relate to the bargaining" and includes communications "before, during, or after negotiations" that relate to the bargaining.

44 *Digest*, para 152; see also *General Survey*, para 38.

45 *Digest*, para 153. This principle probably has greatest relevance to situations where a government has imposed press censorship.

This position is reinforced by article 2 of the 1970 ILO General Conference resolution Concerning Trade Union Rights and Their Relation to Civil Liberties, which states that the ILO's plenary body:

> "Places special emphasis on the following civil liberties, as defined in the Universal Declaration of Human Rights [1948], which are essential for the normal exercise of trade union rights:
>
> . . . (b) freedom of opinion and expression, and in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"

These principles could arguably relax the stringency of the application of s.32(1)(d)(iii) in respect to unions.

Employer neutrality in relation to union affairs

It would be a breach of the ILO principle of non-interference underlying article 2(1) of Convention 98 if an employer were to favour one group within a union over another. Thus, the Committee on Freedom of Association has stated that:

> "Respect for the principles of freedom of association requires that the public authorities exercise great restraint in relation to intervention in the internal affairs of trade unions. It is even more important that employers exercise restraint in this regard. They should not, for example, do anything which might seem to favour one group within a union at the expense of another."[46]

Where there is more than one union in the workplace, even collecting information from employees as to which union they belong may be construed as interference. Such actions will presumably depend on the particular context. The Committee on Freedom of Association has stated that:

> "The issue of circulars by a company requesting its employees to state to which trade union they belonged, even though this is not intended to interfere with the exercise of trade union rights, may not unnaturally be regarded as such an interference."[47]

Bargaining

In its emphasis on the notion of good faith in the employment relationship, the ERA satisfies ILO principles regarding bargaining in good faith. The Committee on Freedom of Association has stated that:

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46 *Digest*, para 761.

47 *Digest*, para 769.

> "It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties."[48]

One aspect of good faith bargaining is that neither side should delay negotiations. The Committee on Freedom of Association has stated that:

> "The principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided."[49]

Another aspect of good faith bargaining is that an employer may not offer any inducement for employees to abandon collective bargaining and enter into individual agreements instead. Thus, the Committee on Freedom of Association has stated:

> "When examining various cases in which workers who refused to give up the right to collective negotiation were denied a wage rise, the Committee considered that it raised significant problems of compatibility with the principles of freedom of association, in particular as regards Article 1(2)(b) of Convention No.98. In addition, such a provision can hardly be said to constitute a measure to 'encourage and promote the full development and utilization of machinery for voluntary negotiation ... with a view to the regulation of terms and conditions of employment by means of collective agreements', as provided in Article 4 of Convention No.98."[50]

Accordingly, offering an inducement to workers to abandon collective bargaining would undoubtedly be viewed as "undermining" collective bargaining in terms of s.32(1)(d)(iii) of the ERA.

Employers should also not attempt to persuade employees to withdraw their bargaining authorisations. The Committee on Freedom of Association has stated on this point:

> "Attempts by employers to persuade employees to withdraw authorizations given to a trade union could unduly influence the choice of workers and undermine the position of the trade union, thus making it more difficult to bargain collectively, which is contrary to the principle that collective bargaining should be promoted."[51]

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48 *Digest*, para 815.

49 *Digest*, para 816.

50 *Digest*, para 913.

51 *Digest*, para 766.

Industrial action

The right to strike

It will be noted that Convention 87 does not actually mention the right to strike. This right, however, is expressly recognised in the International Covenant on Economic, Social and Cultural Rights, 1966,[52] and the ILO Committee of Experts has noted that "the right to strike is an intrinsic corollary of the right of association protected by Convention No.87."[53] The basis for this principle is in articles 3, 8, and 10.

Right to strike restricted to trade unions

That the ERA restricts the negotiation of collective agreements to unions, and therefore only allows union members to strike lawfully, is not inconsistent with ILO principles. The Committee on Freedom of Association has stated that:

> "It does not appear that making a right to call a strike the sole preserve of trade union organizations is incompatible with the standards of Convention No.87. Workers, and especially their leaders in undertakings, should however be protected against any discrimination which might be exercised because of a strike and they should be able to form trade unions without being exposed to anti-union discrimination."[54]

Essential services

The ILO principles accept that the right to strike may be subject to limitations in relation to essential services. The Committee on Freedom of Association has found that the following constituted essential services:[55]

- the hospital sector
- electricity services
- water supply services
- the telephone service
- air traffic control

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52 Article 8(1)(d).

53 *General Survey*, para 179.

54 *Digest*, para 477.

55 *Digest*, para 544.

The following, *inter alia*, have not been found to constitute essential services (though to some extent they are treated as such in Schedule 1 to the ERA):[56]

- the petroleum sector and ports (loading and unloading)
- transport generally
- aircraft repairs, agricultural activities, the supply and distribution of foodstuffs

The Committee of Experts has noted that it would not be possible to compile a complete list of essential services. Moreover, it has stated that in some circumstances, what would otherwise be a non-essential service could, depending on the duration or extent of the strike, become an essential service. In such circumstances, the life, personal safety or health of the population would have to be endangered.[57]

Striking for multi-employer agreements

The ERA now complies with ILO principles in respect to industrial action in support of multi-employer agreements. The Committee on Freedom of Association, in response to the CTU complaint in 1993, had stated that strike action should be allowed in support of a multi-employer contract.[58]

Strikebreakers

Limitations on the use of strikebreakers, as provided for under s.97 of the ERA, are consistent with the ILO principles. The Committee on Freedom of Association has stated that:

> "The hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes may be forbidden, constitutes a serious violation of freedom of association."[59]

Picketing

Under s.9 of the ERA, the Employment Court has a new exclusive jurisdiction over torts arising out of a picket that relates to a strike. Where the strike is lawful, the Court must dismiss the tort proceedings.

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56 *Digest*, para 545.

57 *General Survey*, para 160; *Digest*, para 541. Cf. s.90(2)(a) of the ERA.

58 *Digest*, paras 490-491.

59 *Digest*, para 570.

The Employment Court has the power to issue an injunction in relation to a picket, however, even if the strike to which it relates is lawful (s.100). This is consistent with ILO principles. The Committee on Freedom of Association has stated that:

> "The Committee has considered legitimate a legal provision that prohibited pickets from disturbing public order and threatening workers who continued to work."[60]

ILO principles also provide that "the prohibition of strike pickets is justified only if the strike ceases to be peaceful."[61] Accordingly, the Employment Court would be entitled to issue an injunction on that basis. Picketing remains subject to criminal sanctions in the ordinary courts.

The Committee on Freedom of Association has also held that:

> "The requirement that strike pickets can only be set up near an enterprise does not infringe the principles of freedom of association.[62]

Applications for urgency

The ERA makes express provision for applications for urgency in the Employment Relations Authority (cl.17 of Schedule 2) and the Employment Court (cl.21 of Schedule 3). The ILO principles suggest that there are two types of case which ought to be accorded some priority as a matter of course.

The Committee on Freedom of Association has stated that cases involving discrimination on the grounds of involvement in union activities ought to be dealt with in a timely manner:

> "Cases concerning anti-union discrimination contrary to Convention No.98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned."[63]

In relation to disputes concerning the interpretation or application of collective agreements under a "social peace" system such as that in New Zealand, where industrial action is normally not permitted during the currency of a collective agreement, the Committee of Experts has stated that:

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60 *Digest*, para 585.

61 *Digest*, para 584; see also para 586; *General Survey*, para 174.

62 *Digest*, para 587.

63 *Digest*, para 749.

> "If legislation prohibits strikes during the term of collective agreements, this major restriction on a basic right of workers' organizations must be compensated by the right to have recourse to impartial and rapid arbitration machinery for individual or collective grievances concerning the interpretation or application of collective agreements. Such a procedure not only allows the inevitable difficulties of application and interpretation to be settled during
>
> the term of an agreement, but has the advantage of clearing the ground for subsequent bargaining rounds by identifying the problems which have arisen during the term of the agreement."[64]

Areas where the ERA is inconsistent with ILO principles

Denial of access to workplaces

Sections 23 and 24 of the ERA make provision for denying union representatives access to workplaces where none of the employees is a union member, there are no more than 20 workers in the workplace, and the employer is an individual and holds a current certificate of exemption from the Department of Labour on the grounds that "the employer is a practising member of a religious society or order whose doctrines or beliefs preclude membership of any organisation or body other than the religious society or order of which the employer is a member" (s.24(1)). In principle, it seems odd that an employer's religious beliefs should be imposed on employees in this way, and in any case it is likely that this provision runs counter to the Human Rights Act 1993.[65]

The Director of the ILO International Labour Standards Department noted in his letter of 31 January 2001 to the Minister of Labour that these provisions could run contrary to Convention 87.[66] He stated:

> "While access to the workplace as such is not covered by Convention No.87 but rather Convention No.135, the effect of any restrictions on access to certain workplaces could impede the right of workers without distinction whatsoever, to join the organization of their own choosing for furthering and defending their interests. If any such situations were the subject of complaint by workers in the workplaces declared exempt under section 23B or by unions attempting to organize such workers, the full guarantee of the principle set out in Article 2 of Convention 87 for these workers would have to be examined by the competent supervisory body."

The only thing that could be said in defense of the provisions concerned is that the exemption is so narrow it is unlikely to cause a problem.

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64 *General Survey*, para 167.

65 According to the report on the Employment Relations Bill from the Employment and Accident Insurance Legislation Committee, these provisions were added at the request of the Exclusive Brethren (Commentary, p.10). The amendment was supported by the Green Party, National, ACT, and New Zealand First.

66 For the background to this correspondence, see above, note 20.

Sympathy strikes and strikes over social and economic issues

A sympathy strike occurs where the employees concerned are taking action in support of another group of employees. In terms of the definition of a "strike" in s.81 of the ERA, a refusal by members of one union to cross a picket line set up by another union could constitute a sympathy strike. The Committee on Freedom of Association is of the view that sympathy strikes should be permitted, provided that the strike that is being supported is lawful[67]. Likewise, the Committee of Experts has remarked that:

> "Sympathy strikes, which are recognised as lawful in some countries, are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalisation of the economy and the delocalisation of work centres. While pointing out that a number of distinctions need to be drawn here (such as an exact definition of the concept of a sympathy strike; a relationship justifying recourse to this type of strike, etc.), the Committee considers that a *general* prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful."[68]

The Committee on Freedom of Association and the Committee of Experts have also taken the view that national and general strikes should be permitted where the objectives are economic or social (such as a strike for a higher minimum wage or a change in economic policy)[69]. Thus, for example, the Committee on Freedom of Association has stated that:

> "A declaration of the illegality of a national strike protesting against the social and labour consequences of the government's economic policy and the banning of the strike constitute a serious violation of freedom of association."[70]

The Committee on Freedom of Association and the Committee of Experts have, however, stated that strikes which are purely political in character do not fall within the ambit of the right to freedom of association.[71]

The Director of the ILO International Labour Standards Department noted in his letter of 31 January 2001 to the Minister of Labour that sympathy and protest strikes would not be lawful under the ERA. He remarked as follows:

> "Such action must be otherwise permissible and not subject to penalty (provided that, in the case of sympathy strike, the initial strike being supported is itself legal) for there to be full conformity with the principles of freedom of association and the right of workers'

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67 *Digest*, paras 486-487.

68 *General Survey*, para 168.

69 *Digest*, paras 479-484 and 492-494; *General Survey*, para 166.

70 *Digest*, para 493.

71 *Digest*, para 481; *General Survey*, para 165.

> organisations to organise their activities and formulate their programmes for the purposes of furthering and defending their members' interests under Articles 3 and 10 of Convention No.87."

He went on to observe that problems could arise if the Employment Court were to issue compliance orders in relation to such industrial action, and there was a failure to comply that attracted a fine or term of imprisonment. In that event, it would be likely that Convention No.87 and the principles of freedom of association would be breached.

Protection against discrimination for striking

Employees had been protected from discrimination on the grounds of having gone on strike under the Employment Contracts Act: *Tranz Rail v Rail & Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (C.A.). For some unexplained reason, the ERA has withdrawn that protection.

Section 107 of the ERA, unlike s.28(2) of the Employment Contracts Act, expressly sets out all of the activities that are intended to be covered by the grievance of discrimination on the grounds of "involvement in the activities of a union". These grounds do not include one form of involvement that had been included in the Bill as first introduced, which was that the employee "had been on strike, or had a notice of strike given on his or her behalf under this Act". Unless the intention was to include protection against such discrimination under the unjustifiable disadvantage grievance or else the s.4 duty of good faith (a view that would seem difficult to sustain in the face of s.107 and its background), the apparent aim here is to allow employers to treat striking and non-striking employees differently.

Under the ILO freedom of association principles, workers should be protected against discrimination on the grounds of having participated in lawful industrial action. The Committee on Freedom of Association has stated that: "No one should be penalized for carrying out or attempting to carry out a legitimate strike."[72]

Most of the ILO cases in this area deal with dismissals for engaging in industrial action. What if the strikers are not actually penalised, but non-strikers are effectively rewarded (as in the *Tranz Rail* case)? This too is regarded as a breach of ILO freedom of association principles. The Committee on Freedom of Association has stated that:

> "Concerning the measures applied by the ministry of education to compensate the teachers who did not participate in the strike by granting wage increments, the Committee considers that such discriminatory practices constitute a major obstacle to the right of trade unionists to organize their activities."[73]

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72 *Digest*, para 590.

73 *Digest*, para 605.

This matter was not the subject of any comment in the ILO letter of 31 January 2001 to the Minister of Labour.

Incompatibility arising from implementation in practice

The ILO cautioned that compatibility issues could still arise through the practical implementation of the ERA, but went on to remark that such matters could only be addressed if and when they arose. There were at least two areas where the ILO thought care needed to be taken, though "there also appear to be sufficient in-built safeguards to ensure that such abuses do not occur."

One area concerned the potential abuse of requests for consolidated bargaining under s 50 of the ERA. The ILO's earlier 12 June 2000 analysis of the Employment Relations Bill made the following observations:

> "This notion of consolidated bargaining is not in itself contrary to the principles of freedom of association and collective bargaining, but it is important that, where there is consolidated bargaining, the practical application of the notion of good faith takes into account the degrees of representativeness so that this practice does not result in a highly representative union being forced to bargain on terms established between the employer and a union of minimum representation. In this respect, section [32(3)(c)] which lists matters relevant to good faith and includes the proportion of the employer's employees who are members of the union and to whom the bargaining relates should be used to ensure that consolidated bargaining is not used in an abusive fashion."

Another area where a concern was raised involved the Employment Relations Authority's power to require mediation before proceeding to deal, or continuing to deal, with a case (s.159). The ILO remarked that "This would have to be applied in a restricted fashion so as not to effectively restrict the right to strike of workers in services not considered essential by the ILO."

Conclusion

The Committee on Freedom of Association and the Committee of Experts have formulated a large body of principles in relation to ILO Conventions 87 and 98. Many of these principles have been incorporated into the ERA so as to "promote observance" of them in terms of s.3(b) of the legislation. This paper has attempted to identify these, as well as others that may be useful for the interpretation and application of the ERA.

The ERA substantially complies with Conventions 87 and 98, as well as the ILO principles underlying them. New Zealand is undoubtedly now in a position to ratify these fundamental instruments, and it is currently engaged in an assessment process towards that end.

The most serious failing of the new legislation in this context would seem to be the backwards direction taken in relation to discrimination on the grounds of involvement in

union activities. The limits on sympathy and protest strike activity could probably be safely removed on the basis that such forms of action are likely to be rare, since organised industrial action now takes place largely on the enterprise rather than on the national level, and these particular forms of action require an unusual degree of commitment from workers. If New Zealand does choose to go down that route and legalise sympathy and protest strikes, however, it will have to decide whether to restrict the right to unions (as would be consistent with present law),[74] or extend it to any group of workers.

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[74] See *Digest* 477: "It does not appear that making a right to call a strike the sole preserve of trade union organizations is incompatible with the standards of Convention No.87."

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