AMENDMENTS TO INDUSTRIAL LEGISLATION: THE INDUSTRIAL RELATIONS AMENDMENT ACTS AND THE COMMERCE AMENDMENT ACT

Introduction

Industrial relations in the past two years, like the sea, have been constantly in motion and frequently stormy. Legislation purporting to regulate them similarly has gone through a continuous process of changing, but without any visible success to placate the troubled waters. On the contrary, it may be a fair comment that the legislative measures themselves have generated, or at least substantially contributed to, much industrial unrest. The wage freeze regulations[1] lowered the effectiveness of the bargaining system to the point where direct action, or the threat of it, has come to be regarded as the sole method of achieving any success. The municipal bus drivers' claim was settled[2] to their satisfaction after a series of stoppages and the much publicised twin injunction-contempt proceedings.[3] The Shop Trading Hours Bill stirred up even the moderate and peaceful Shop Assistants Union to stage protest strikes.

The amendments to the Industrial Relations Act 1973, including the part disguised as the Commerce Act,[4] met hostile resistance by the trade union movement, both during the bill stage and after enactment. Ministerial power to order ballots on union membership and the further restrictions on strikes backed up by penalty sanctions were and are equally resented. As an attempt to counter this, on the bright side stands the lifting of the wage freeze[5] which may lead, perhaps, to an era of genuine free wage bargaining. Frosty economic winds turning the weathercock on Parliament Hill can, however, easily refreeze the thaw.

Paradoxically, the hope that industrial relations will eventually improve lies not in the legislative penalty sanctions, but in the curious dichotomy, a longstanding feature of New Zealand labour law, relegating statutory provisions by quiet non-observance to "dead letter", while elevating mutually accepted or tolerated practices and customs to "living law".[6] This process might blunt the sharp edges of legislation. The Shop

1 Wage Adjustment Regulations 1974 (S.R. 1974/143 reprinted with amendments 1976/198).
2 By Award dated 18 July 1977.
3 *Harder* v. *N.Z. Tramways and Public Passenger Transport Authorities Employees I.U.W.* (unreported, Supreme Court, Auckland, 28 April 1977).
4 Industrial Relations Amendment Acts 1976, No. 1 and No. 2; Commerce Amendment Act 1976, Part IVA (hereafter abbreviated as I.R. Am. Acts and C. Am. Act).
5 Wage Adjustment Regulations, Am. No. 13 (S.R. 1977/204).
6 Ehrlich would have found plenty of material in the New Zealand law relating to strikes to illustrate his thesis on the cleavage between the legal norm found in enacted legislation and the social norm, the living law, independently functioning in society; see in general E. Ehrlich, *Principles of the Sociology of Law* (translated by W. L. Moll, 1936). See also Sir Otto

Trading Hours Act 1977 after all the protests preceding its passage might prove to be a mere paper tiger, as most shops will probably remain closed and shop assistants will refuse to work on weekends.

The 1976 changes to industrial relations legislation present more complex problems. The new provisions, being partly of permissive and partly of penal character, need not necessarily be invoked and fully enforced. It may be questioned whether the intricate procedural machinery provided by them is at all capable of being effectively implemented. Or was the intention merely to create an ultimate threat?

The following comments proceed to examine these amendments.

Union Membership

Compulsory unionism in the strict sense existed in New Zealand only from 1936 to 1961 when a provision of the Industrial Conciliation and Arbitration Act itself imposed the duty of joining a union on all workers subject to an award or industrial agreement.[7] After the abolition of statutory compulsion, nevertheless, the necessity of union membership has remained, as nearly all industrial instruments[8] included a preference provision, usually an unqualified one.[9]

Qualified preference has now been abolished, though all such provisions will continue to have effect until the expiry of the current instrument.[10] An unqualified preference clause may be inserted in an award or collective agreement only if the Industrial Commission is satisfied that (a) all the assessors in conciliation council agree; (b) not less than fifty per cent of the adult workers who would be bound by the instrument desire such a provision; (c) in case of voluntary settlement the parties agreed; or (d) in case of composite agreement all parties agreed.[11] There is no change in paragraph (a) while paragraphs (c) and (d) are merely logical extensions to the different types of voluntary collective agreement. The alteration of the wording in the original paragraph (b) from "desire to become or remain members of a union that is a party to the award or agreement" to "desire the insertion in it of an unqualified preference provision" carries little significance. The important point is that until the amendment the parties

Kahn-Freund: "... in labour relations legal norms cannot be effective unless they are backed by social sanctions as well, that is by the countervailing power of trade unions and of the organised workers to withhold their labour"; also, "I regard law as a secondary force in human affairs, and especially in labour relations". *Labour and the Law* (London, 1972) 11 and 3 respectively. See further Comment, "Laws That Are Made To Be Broken: Adjusting for Anticipated Noncompliance" (1977) 75 Mich. L.R. 687; R. W. Rideout, "The Place of Legislation in Labour Law" (1974) Current Legal Problems 212.

7 S. 174 (the Act hereafter is abbreviated as I.C. and A. Act), originally inserted in the I.C. and A. Act 1925 by the I.C. and A. Amendment Act 1936, s. 6.

8 "Industrial instrument", "collective instrument" or "instrument" in this context are merely convenient expressions to denote awards and collective agreements.

9 I.C. and A. Amendment Act 1961, repealing s. 174 and replacing it with ss. 174 to 174H which provided for the insertion of unqualified or qualified preference provisions in instruments; an unqualified one provides that every worker employed in a position subject to an award or collective agreement must within 14 days after his engagement join the union and remain a member while so employed; noncompliance constitutes a breach of award both on his and on the employer's part and is punishable as such; in the case of a qualified clause this obligation arises only if there is a union member equally qualified and willing to perform the work.

10 I.R. Amendment Act 1976 No. 2, deleting its definition from s. 98 and repealing s. 102.

11 I.R. Act, s. 99 as amended by I.R. Am. Act 1976, s. 15.

directly affected by the requirement of union membership had the sole right to decide on the issue, either by agreement or by ballot among the workers. Now the Minister of Labour may disregard the parties' agreement and require a ballot.

The Minister has the power to give notice to the Registrar and request "a ballot to be conducted of the adult workers who will, if an unqualified preference provision is inserted or continues to be inserted . . . be bound to become or remain members of a union of workers bound by the award or collective agreement".[12] This power can be exercised "from time to time", not only when a new instrument is being made but during its currency, whenever the Minister has any reason for it. The provision does not set out criteria for the use of this sweeping discretionary power, the only restrictions being that the Minister must before issuing a notice (a) inform the Federation of Labour of his proposal and of his reasons for it, and (b) give the Federation a reasonable opportunity of consulting with him with regard to the issue of the notice.[13] Another limitation is that a ballot may not be conducted in less than three-yearly intervals.[14] Apart from this, the Minister may disregard the parties' agreement as to the insertion of the preference clause in compliance with section 99 as amended, even though the alternative procedure for a ballot would not otherwise be necessary. Claims of trade unions that reasons for a ballot would be subjective, politically motivated and retaliatory are difficult to refute. If a ballot results in a majority against preference, then the Commission "shall not insert such a provision", and where it is in a current instrument "shall amend the award or collective agreement by deleting that provision".[15]

A detailed procedure is provided for the conduct of the ballot. The union chosen by the Minister must at its own expense supply to the Registrar a list containing the names and addresses of all persons entitled to vote.[16] This means all "the adult workers who will, if an unqualified preference provision is inserted . . . be bound to become or remain members"[17] of the union; in other words, not only all the workers employed, but also those who in the future may be employed in the industry. The union can easily compile a list of its members in the occupational group covered by the instrument, but it may have difficulties in ascertaining other persons eligible to vote, even using its right of entry to the employer's premises. The statute does not impose any duty on the employer to assist the union in this task. The Registrar, however, has the powers of an Inspector to peruse the wages and time books kept by employers when checking the list, and he may amend it as he thinks fit. He also may advertise that the roll is being compiled, determine any questions regarding it, or refer such questions to the Industrial Court.[18] No right is reserved for the union to check the final list or even to receive advice on it. Failure by the union to supply the list when requested results in non-insertion or deletion of the preference clause, if the Commission is satisfied that there has been wilful and substantial failure in doing so.[19]

12 Ibid., s. 101A(1), as inserted by I.R. Am. Act 1976 (No. 2) s. 16.
13 Ibid., s. 101A(2).
14 Ibid., s. 101A(4).
15 Ibid., s. 101D(2).
16 Ibid., s. 101B(3).
17 Ibid., s. 101A(1).
18 Ibid., s. 101B(4), (5) and (6).
19 Ibid., s. 101C.

The actual manner of conducting the ballot is left to the Registrar's decision, save that it must be a postal one.[20] After the votes have been counted a certificate issued by him will constitute conclusive evidence of the result.[21] Offences committed in connection with a ballot make every person liable on a summary conviction to a maximum fine of $200.[22]

Further penal sanctions are intended to strengthen the practice of voluntary unionism by a penalty not exceeding $500 for discriminatory conduct on account of either union membership or non-membership as a condition of obtaining and retaining employment. The offence may be committed by an employer or a union, association or its official. Lawful insertion in an instrument of an unqualified preference clause constitutes the only exception.[23] While conscientious objectors may invoke the existing procedure, a new section automatically exempts holders of certain professional qualifications.[24]

The post-entry closed shop has been a feature of New Zealand industrial relations from the beginning of this century,[25] and apart from some critical comments, neither employers nor workers displayed serious objection to it. Unions negotiate and achieve better working conditions for all workers covered by an instrument, and it is not surprising that they dislike free-riders. It might be the result of union resistance to the new procedures that it has taken nearly a year to select a workers' organisation for the first ministerial ballot: the Golden Bay Cement Workers Union with less than 200 members.[26] Can such a ballot be accepted as an indication of the views of all workers in the country, especially those working in sensitive industries? Or is it to be regarded as a mere token ballot in an attempt to satisfy both the supporters and the opponents of the amendments? If more ballots are carried out, weak and moderate unions may lose members (perhaps even entirely disappear), while powerful and militant unions probably would gain further strength. A strong union can always impose a closed shop, and oust unorganised labour. Thus, unless the ministerial power is exercised with extreme prudence, the legislative changes will have contrary effects to those intended.

Strikes In Essential Industries

The title to Part IX of the Industrial Relations Act, "Unjustified Industrial Action", conveys the notion that an industrial action may be, and primarily is, justified. Upon further examination of the statute, however, justification appears to be the exception rather than the rule. The definition of "strike", as amended by adding another alternative criterion (the reduction of normal output or normal rate of work) includes "go slow" or

20 Ibid., s. 101B(8) and (9).
21 Ibid., s. 101B(10).
22 Ibid., s. 101E.
23 Ibid., s. 146A.
24 Ibid., s. 112A.
25 On compulsory unionism and forms of closed shop in other countries see F. J. L. Young, *Union Membership* (V.U.W. Ind. Rel. Centre, Wellington, 1976); Margaret Wilson, "Union Membership in New Zealand: An Assessment of Government Policy" (1976) 1 N.Z.J. Ind. Rel. 9; A. Szakats, "Compulsory Unionism: A Strength or Weakness? The New Zealand System Compared with Union Security Agreements in Great Britain and in the United States" (1972) 10 Alberta L.R. 313.
26 *Otago Daily Times*, September 1977.

"work to rule" situations, but at the same time omits any reference to intent.[27] Thus, purpose now is immaterial, and one can easily see the inter-connection with the provisions relating to non-industrial strikes.[28]

A strike, unless it affects an essential industry or falls within the category of non-industrial strikes, is prima facie justified in a dispute of interest after the breakdown of voluntary negotiations and before reference to conciliation.[29] As soon as the dispute has been referred to a conciliation council, however, section 81 prohibits any action in the nature of strike, lockout, suspension, dismissal or any discontinuance of employment or work under sanction of a maximum penalty of $100 on conviction by the Industrial Court. Although the section does not expressly provide for it, it follows by necessary implication that the prohibition applies to proceedings before the Industrial Commission. Prior to the amendment either party was able to frustrate conciliation by refusing to nominate assessors. Now in such a case the conciliator must inform the Commission, which may give directions as to the constitution of the council, call in a mediator, or deal with the matter without conciliation.[30] Whether or not a council is formed, the legal position now appears to be that as soon as either party has applied for conciliation, a prima facie legal and justified strike ipso facto changes its character into an illegal and unjustified one.

In essential industries a further requirement of giving advance notice must be complied with before the the strike can be legal. It must be presumed that upon giving such notice, the other party is debarred from applying for conciliation, as this would be a comfortable and too easy method of frustrating any direct action. The original section, however, remained largely commendatory as no sanction supported the prohibition of striking without notice.[31]

The substituted provision makes striking an offence unless the employer has been given "within one month before the date of commencement of the strike not less than 14 days notice in writing . . . of . . . intention to strike". Every worker must give this notice duly signed by him, though it is sufficient if his union does so on his behalf, as the notice by the union covers all its members without specifying their names.[32] Inciting, instigating, aiding and abetting a strike also constitutes an offence. The maximum fines on conviction by the Industrial Court are $150 for a worker, $700 for an officer or member of the management committee of a union, association or branch, or for a person acting on behalf of an employer, and $1500 for a union, association or employer.[33]

Proof that the action was justified on grounds of safety and health affords a defence.[34] Whether or not in fact any stoppage was justified for such reasons, however, depends on the subsequent finding of the Court. The strikers must prove on specific and objective grounds that there was no way

27 I.R. Act, s. 123 as amended by I.R. Am. Act 1976 (No. 1) s. 2.
28 See infra pp. 114-117.
29 I.R. Act, s. 68.
30 Ibid., s. 72A as inserted by I.R. Am. Act 1976 (No. 2) s. 9; see also s. 75.
31 I.R. Act, s. 125, as it was before the amendment.
32 Ibid., s. 125(1)(2) and (4), as inserted by I.R. Am. Act 1976 (No. 2) s. 21. The First Schedule to the Act lists essential industries; the Governor General may from time to time amend the Schedule: subs. (4).
33 Ibid., s. 125(3) and (5).
34 Ibid., s. 125(6).

of carrying on the work "without exposure to unreasonable danger". Genuine and sincere belief that danger existed in itself is no justification.[35] Corresponding provisions relate to lockouts.

Notwithstanding that full and exclusive jurisdiction is conferred on the Industrial Court to deal with all offences under the Act, the requirements of giving notice were first examined and interpreted by the Supreme Court in the much publicised case of *Harder* v. *Tramways Union.*[36] This brief examination does not intend to deal with the intricate problem of labour injunctions – it simply points out that they may cut through and bypass statutory processes. Despite the clear wording of section 144, Chilwell J., on the authority of *Attorney-General* v. *Chaundry*[37], held that the Supreme Court had power to enforce obedience to law by injunction, and he declined to follow the decision of Turner J. (as he then was) in *N.Z. Dairy Factories etc. Employees IUW* v. *N.Z. Coop. Dairy Co*[38] to the effect that in cases of industrial action remedy must be found in the relevant statute itself.[39]

The point at issue is that the penalty action before the Industrial Court was never invoked, and the Supreme Court made a decision on the validity of the strike notice. Though the union gave notice, it was held that the rolling strikes constituted not one, but a series of strikes, each requiring a separate notice. Analysing the definition of rolling strike as "the action of a number of workers acting in concert or pursuant to a common understanding, in striking in relay"[40] two interpretations are possible. Where a group of workers is "off" for a certain period while the others keep working (and when the first group resumes work another group stops, and so on in relays), the strike from the employer's point of view is a continuous, though not a total one. It is one action. From the individual worker's point of view, nevertheless, periods of stoppage are intercepted by periods of work. A relay of stopping work may last only for a few hours followed by another stoppage by the same workers a few days later. The individual worker's strike action, thus, is not a continuous one, and the view of Chilwell J. must be accepted as correct. It may be argued, however, that as the union has power to serve notice on behalf of all its members, as long as the relay strikes are within the prescribed time limits, one notice should be sufficient to cover intermittent stoppages.

Strikes In Export Slaughterhouses

Export slaughterhouses within the meaning of the Meat Act 1964 are singled out for special provisions in respect of notice to strike. Section 125A prescribes three days' notice in writing within fourteen days before the day

35 *National Coal Board* v. *Hughes* (1959) L.J. 526. For valuable comments on this and other points see also N. S. Woods, *The Industrial Relations Amending Legislation of 1976* (V.U.W. Ind. Rel. Centre, Wellington, 1976) esp. 18; see further same author, "Why Laws Like This?" (1977) N.Z.L.J. 352.

36 Unreported, Supreme Court, Auckland, 28 April 1977.

37 [1971] 3 All E.R. 938.

38 [1959] N.Z.L.R. 910.

39 It is beside the point for the present purposes that in granting an injunction and holding that Mr Harder could maintain an action in his own name without the fiat of the Attorney-General Chilwell J. followed "the more enlightened attitude" of the English Court of Appeal in *Gouriet* v. *Union of Post Office Workers* [1977] 2 W.L.R. 310. Soon after the learned Judge released his judgment the House of Lords unanimously reversed *Gouriet's* case: [1977]3 W.L.R. 300. See Comment, "Gouriet's Case in the House of Lords", supra p.87.

40 C. Act 1976, s. 119C(3) as inserted by the C. Am. Act. 1977, s. 36.

of commencement. The scale of penalties is the same as under section 125. Similarly, justification on safety and health grounds will be a defence.[41]

In some important respects, however, this section is different. First, a notice may be withdrawn at any time before its expiry. Where the notice has been withdrawn within twenty-four hours before its expiry, and, on the first working day following the expiry, work that is normally performed by the persons who gave the notice is not available, the employer will not be obliged to provide work or pay for that day. On the other hand, where the employer withdraws his notice of lockout within the same period, he must pay all workers who attend on the same working day following the expiry of the notice, regardless of whether or not he is able to provide work. If a worker does not attend on the first day, the employer must not dismiss, or take any disciplinary steps against him.[42]

"Slaughtering or supply of meat for domestic consumption" is one of the essential industries listed in the First Schedule. Freezing workers may process meat for both domestic and export purposes. At what stage will the destination be certain? It is possible that a consignment aimed for overseas markets ends up in local butcher shops. How should the workers who intend to strike, or their union, find out whether section 125 or 125A applies to the required notice?

Furthermore, the freezing industry is a seasonal one and, especially at the beginning of the season, many workers are unlikely to have complied with the preference clause. The union may give notice only on behalf of its members at the time of giving the notice. Non-members must do it individually, otherwise they each become liable to pay a fine of $150. It is unreasonable to expect them to be aware of the intricacies of strike law. Even the union itself would have considerable difficulties in ascertaining its exact membership, considering movement of workers and the necessity to transfer from one union to another. The purely non-political criticism that these statutory provisions are virtually impossible to implement cannot be easily refuted.[43] One may foresee the return of a situation similar to that under the Industrial Conciliation and Arbitration Act when the penalty sanctions were rarely enforced and were practically unenforceable.[44]

Strikes In Respect Of Rights Disputes

The existing provisions in the Act relating to disputes of right make it adequately clear that, pending settlement of the dispute, work must not be discontinued or impeded in any way.[45] Such an action amounts to a breach of award or collective agreement and is subject to the penalties as increased by the amendment: $500 for a workers' organisation or employer, $100 for an official of a union or a person acting on behalf of an employer, and $100 for individual workers.[46] The newly inserted section 124A carries penalty

41 I.R. Act, s. 125A(1), (2), (3) (4) and (5).
42 Ibid., s. 125A(6) (7) and (8).
43 See Woods, supra n. 35 at 15-19.
44 I.C. and A. Act, ss. 192-195; Szakats, *Trade Unions and the Law* (Wellington, 1968) esp. 116-117 and 193-195; it appears that even under the I.R. Act penalty provisions frequently were not invoked: Woods, supra n. 35 at 13-14.
45 I.R. Act, ss. 116(7) and 117(5) relating to dispute committee and grievance proceedings respectively.
46 Ibid., s. 148 as amended by I.R. Am. Act 1976 (No. 2), s. 27.

sanctions further. It provides that where there is a rights dispute settlement procedure in an award or collective agreement, or where the dispute has been duly settled under that procedure, every person who becomes a party to, or incites, instigates, aids or abets, a strike or lockout, commits a separate breach of award every day on which the action continues.[47] The union to which the striking workers belong is placed under a statutory presumption of having acted in contravention of the prohibition if any of its officers or management committee members (a) advocated or suggested or connived at non-compliance with the procedure or decision, (b) wilfully failed to inform persons bound by the instrument or any other union official that the strike would be a breach, or (c) incited, aided, instigated or abetted the strike. Such a person will also be personally liable if it is proved that he has acted in any manner as specified.[48]

Personal liability of an official, upon proof of the offence, can be regarded as a reasonable provision. The burden of proof necessarily must be on the prosecution. It seems, however, somewhat harsh that the union itself "shall be deemed to have acted in contravention" and "shall be liable accordingly", if any of its officers or committee members is found guilty. "Any" may be only one of a considerable number of persons acting against the majority. Should the union as an organisation be liable to pay a daily fine of $500, when the majority of officials advocates compliance with the procedure or with the settlement? Moreover, the meaning of "officer" is open to several interpretations. Is a shop steward an "officer"? Under section 124A a union may be penalised for wildcat strikes, if a dissenting "officer" acted against the wishes of his brother officials. Lockouts are governed by the same provisions. It is, however, difficult to envisage dissenting managers organising a wildcat lockout.

The jurisdiction clause on grounds of safety or health is also added to this section.[49]

Non-Industrial Strikes: The Commerce Act

Strikes not directly related to the employment situation have become a regular method of expressing disapproval and protest on matters of public interest. The characteristic feature of such a strike is not that it is connected with a dispute of interest or a dispute of right, but that it purports to demonstrate a political-moral view or an economic dissatisfaction. Strikes against nuclear power or apartheid are examples of the first kind, and the beer price case[50] represents the second type.

Apparently it was thought inappropriate to deal with non-industrial strikes in industrial legislation; therefore, provisions prohibiting and penalising them have been inserted in the Commerce Act. Despite this separation, for all intents and purposes Part IVA[51] of this statute forms an integral part of, and is closely related to, the Industrial Relations Act.[52]

47 Ibid., s. 124A(1) (2) and (3), as inserted by I.R. Am. Act 1976 (No. 2), s. 20.
48 Ibid., s. 124A(4).
49. Ibid., s. 124A(5).
50 *Flett* v. *Northern Drivers Union* [1970] N.Z.L.R. 1050.
51 C. Act 1975, Part IVA, ss. 119A-119E, inserted by the C. Am. Act 1976, s. 36.
52 Ibid., s. 119A referring to I.R. Act.

Any strike (or lockout) has been declared an offence in the following circumstances: where it concerns a non-industrial matter; where the parties have no power to settle by agreement; or where it is intended to coerce the New Zealand Government (in capacity other than that of employer) either directly or by inflicting inconvenience upon the community or any section of the community. On summary conviction, penalties may be imposed, up to maximum sums of $150, $700 and $1500 for the three categories of offenders.[53]

In addition to fines, civil remedies in tort "at the suit of any person suffering . . . or apprehending the suffering of any loss or damage" are expressly preserved.[54] One may question the necessity of such provision, as common law action has always been available. An award of damages may be made only against a workers' organisation, a body corporate, or an employer, and at first glance it would appear that an individual worker is specially protected against liability in tort. Such a mistaken notion, however, is quickly dispelled upon reading section 119B(4). Subsection (4) provides that if the union does not fully satisfy the amount of damages together with costs within two months after the date of the judgment, all persons who were its members at the commencement of the strike "shall be jointly and severally liable on the judgment in the same manner as if it had been obtained against them personally". Execution may be proceeded with against each of them, but no person will be liable for more than $200. Thus, it can be said that workers are protected to some extent against their joint and several liability.

The core of the problem lies in the words "a matter which is not an industrial matter". The Industrial Relations Act defines "industrial matters" most extensively as "all matters affecting or relating to work done or to be done" followed by more specific reference to privileges, rights and preferential employment.[55] Strike, by its very essence, involves discontinuation or at least disruption of work in employment situations, and emphasis that it affects or relates to work would be sheer tautology. In form, such a non-industrial strike is an industrial action, and it affects employers and employees equally, though it does not aim at changing the terms of collective instruments or individual service contracts. When does a non-industrial matter become an industrial one?

Furthermore, what is the exact meaning of the phrase that the parties "do not have the power to settle [the matter] by agreement between them"? Until the lifting of the wage freeze the parties clearly did not have the power to settle any wage claim exceeding the ceiling imposed, but nobody could say that the issue was not an industrial matter. To be sure, the parties cannot do anything about burning problems of world politics, but they can always agree on the resumption of work and thereby settle that particular strike. As far as coercing is concerned, a demonstrative stoppage intends to influence the Government, any government, but the word "coercion" implies more than that. "To coerce" means to compel by force, by violent means. This would go much further than the limits of a protest strike and would amount to civil disturbance. For such a case the criminal law has adequate sanctions.[56]

53 Ibid., s. 119B(1) and (2).
54 Ibid., s. 119B(3).
55 I.R. Act, s. 2.
56 As has the Public Safety Conservation Act 1957.

Jurisdiction is conferred on the Industrial Court to order resumption of all work upon proof to its satisfaction that the economy of the country, including the export trade, or of a particular industry or particular industries, is, or is likely to be seriously or substantially affected, or the life, safety or health of members of the community is endangered.[57] Application for such an order may be made by any Minister of the Crown, by any person who proves to have been directly affected by the stoppage, or by an organisation representing such a person.[58]

The Court must also determine the procedure for settling the issue and order the taking of necessary measures for the safety and health of workers. Where the stoppage relates to this very issue the Court before ordering resumption "shall ensure" that a competent authority has investigated the issue and has certified that it no longer exists.[59]

Non-compliance with a resumption order is punishable on summary conviction by a fine not exceeding $1,500 in the case of an employer, and $150 in the case of a worker. The provision of the Industrial Relations Act imposing a statutory presumption of guilt on the union itself because of the offence of one of its officials has been repeated almost word for word, providing for maximum penalties of $1500 and $700 applicable to the union and the official respectively. The comments previously made apply with equal force to this provision.[60]

The power of ordering resumption of work in effect amounts to mandatory injunction, a remedy which was, until the amendment discussed, exclusively within the inherent jurisdiction of the Supreme Court. Remedies available from a court of specialised jurisdiction, nevertheless, may remain merely on paper if the parties prefer to bypass the statutory procedure and resort to common law. Nothing prevents any person, instead of applying for a resumption order, to commence action in tort preceded by an application for injunction. It remains to be seen which action will be quicker, cheaper and more effective. The Industrial Court procedure has the definite advantage that it must deal with the very issue for the stoppage, and devise methods for settling it, while the Supreme Court, in the framework of the traditional injunction and economic tort process, is not equipped to grapple with industrial realities. Conferment of exclusive jurisdiction on the Industrial Court in all such matters, perhaps combined with the power of awarding damages, would have been a more forward-looking and far-reaching reform. Any step in this direction admittedly would result in an increased work load for the Industrial Court. At the same time, it would necessitate an enlargement of the Court and a slight curtailment in the role of the ordinary courts of law. Sooner or later, however, the increasing importance of the Industrial Court and the unsuitability of traditional court actions in settling labour disputes must be recognised.[61]

It deserves noting that the application of Part IVA is expressly extended to Crown corporations and to the Crown generally.[62]

57 C. Act, s. 119C(1) and (3).
58 Ibid., s. 119C(5) and (6).
59 Ibid., s. 119C(2)
60 Ibid., s. 119C(7) and (8).
61 See Szakats, *Law and Trade Unions, The Use of Injunctions* (V.U.W. Ind. Rel. Centre, Wellington, 1975) esp. Part IV.
62 C. Act, ss. 119D and 119E.

Conclusions

The narrow confines of this article do not permit a detailed examination of further amendments, but some of them warrant brief mention. Thus, the right to suspend non-striking workers, to whom the employer is unable as a result of the strike to supply normal work, can now be exercised without any notice at all, while under the original provision one week's notice was required.[63]

There is only one other point which calls for comment, and this refers to subsection (9), added to section 82 of the Industrial Relations Act, dealing with conciliated settlements. The effect of the amendment is that a conciliated collective agreement upon registration "shall be deemed to be and be known as an award". When one considers that the legal character of a conciliated collective agreement is (by virtue of the blanket clause) the same as that of an award, this nomenclature is logical. Voluntary collective agreements are of quite different nature – they result from a bilateral agreement. It is to be noted that the amendment clearly refers to conciliated settlements only.[64]

In any case, all the above comments may be water under the bridge. At the time of writing, there have been several reports concerning a proposed total restructuring of the present wage fixing system into one unified procedure that would include both the private and public sectors. The Industrial Commission and the Industrial Court may disappear and merge into a newly formed Tribunal or Authority with extensive powers. The reshaping of the legal framework of industrial relations would give a needed opportunity of remedying the defects of the existing legislation, and of jettisoning all its unrealistic, harsh and unenforceable provisions in order to create an infrastructure for more harmonious labour relations in the future. Will this occasion be used? Or will the law in the statute book and the social reality, the living law, continue to follow different paths?[65]

ALEXANDER SZAKATS

63 I.R. Act, s. 128(1) as amended by I.R. Am. Act 1976 (No. 1) s. 3; *N.Z. Engineering etc. I.U.W.* v. *Ford Motors Co. OF N.Z. Ltd.* (1976) 76. B.A. Ind. Ct. 201.

64 Ibid., s. 82(9) as added by I.R. Am. Act 1976 (No. 2) s. 10. As to the blanket application see ss. 83(1) and 89(2) referring to conciliated agreements and awards respectively; s. 65 dealing with voluntary agreements is not affected. The present writer holds in great respect, and generally agrees with, Woods, supra n. 35, but on this point strongly dissents from his view expressed at 24. As to the legal nature of different collective instruments see Szakats, *Introduction to the Law of Employment* (Wellington, 1975) para. 51, and "Collective 'Contracts' or Individual Status? Employment under Management-Union Agreements" (1977) 15 Alberta L.R. 243, 258-262.

65 Legislation introduced at the end of the 1977 parliamentary session holds out hope for a more realistic and constructive system of wage settlement, especially the Industrial Law Reform Act and the General Wage Orders Act which purport to re-establish the Arbitration Court as the central tribunal with both arbitral and judicial functions. The State Services Conditions of Employment Bill and the Higher Salaries Commission Bill intend to align the public sector remuneration-fixing procedures with those of the private sector. It is unfortunate that, in pursuing this objective, penal procedures for unjustified industrial action parallel to provisions in the I.R. Act have also been inserted.