INDUSTRIAL RELATIONS REFORM IN NEW ZEALAND — COMMENTS ON THE INDUSTRIAL RELATIONS ACT, 1973*[1]

INTRODUCTION

New Zealand has traditionally been cited by labour lawyers and commentators as a country fully committed to a system of compulsory conciliation and arbitration. Its industrial legislation has been dominated for over seventy-five years by coercive and penalty clauses.[2] In recent years, however, this policy has come under considerable attack from several distinguished writers,[3] both on the grounds that coercion is not the best way to foster good industrial relations, and that the system is totally ineffective since neither the procedures nor the penalties have been enforced to any great extent.[4] Nor could the penalty provisions be regarded as inhibitive in effect — illegal strikes have greatly increased in number over the last decade.[5]

The Industrial Relations Act, 1973, and its predecessor in 1972,[6] therefore assume great importance as the first major efforts to restructure New Zealand's industrial legislation since William Pember Reeves' Act of 1894.[7] As attempts to provide the means of remedying labour problems in this country, they are both worth studying by anyone interested in industrial relations.

When in October, 1972, following the presentation of 'Joint Proposals' from the Federation of Labour and the Employers' Federation, the National Government announced its new Bill, the writer hoped that some attempt would have been made to review the role of law in industrial relations and recognise the changes that had taken place in the pattern of industrial activity since 1894. Instead, while several minor advances were made, the Bill presented for the most part a reaffirmation of the nineteenth century principle that industrial peace can be achieved through restriction. With the change of Govern-

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1. Industrial Relations Act 1973, repealing Industrial Conciliation and Arbitration Act 1954 and subsequent amendments; Labour Disputes Investigation Act 1913; Industrial Relations Act 1949; hereinafter referred to as I.R.A.; I.C. & A. Act; L.D.I. Act; I.R.A. 1949 respectively.
2. See in particular I.C. & A. Act, ss. 189-198.
3. For example, Woods, *Report on Industrial Relations Legislation* (1968); Woods, *Industrial Conciliation and Arbitration in New Zealand* (1963), 180-181; Tyndall, *The Settlement of Labour Disputes in New Zealand* (1953).
4. Post, n. 70.
5. The figures for the last five complete years for which such figures are available are 1968—153; 1969—169; 1970—330; 1971—313; 1972—281; the first six months of 1973 realised 236 stoppages. Cf. 1958—49.
6. Industrial Relations Bill, 1972, hereinafter: I.R. Bill.
7. I.C. & A Act, 1894.

ment late in 1972, however, it was returned to a select committee of the House of Representatives. Over six months later, in August, 1973, there emerged therefrom a new Bill which was to become the Industrial Relations Act, 1973.

It would be impossible in this article to discuss the two pieces of legislation at length. Many of the provisions relating to the registration of unions are reproduced from the 1954 Act[8] and any discussion would be repetitious of earlier commentaries.[9] Moreover, dependant as they are on the comprehensive system of registration of unions which is perhaps unique to Australia and New Zealand, an analysis of these sections would be of limited interest to numerous readers. It is intended, therefore, to limit this paper to comments on the major innovations in the 1973 Act. Particular reference will be made to procedures for the settlement of disputes, unjustifiable industrial action and its consequences and the protection of the employee from arbitrary dismissal. Where, however, substantial differences are to be found in the form of the 1972 and 1973 legislation, some comparison and assessment will be attempted. In this way, the reader may be able to appreciate just how wide ranging the views of what constitutes effective industrial legislation can be, even in such a small and politically consistent country as New Zealand.

THE INDUSTRIAL RELATIONS COUNCIL

The establishment of a national advisory body comprising representatives of employers' and employees' organisations and government is one of the major new features of the Act. Aimed at fulfilling the need for some permanent institution for consultation on industrial matters, the Act provides[10] for a 22 man council, with a tenure of three years. The members are to advise and make recommendations to government on, inter alia, the formulation and implementation of manpower policies, means of improving industrial welfare, industrial relations and organisations, and to recommend any appropriate changes in legislation in these fields.[11] Similar in form and intent, although far more encompassing, to the English National Joint Councils, the Industrial Relations Council in theory offers much. One would expect, after all, that regular consultation would lead to greater co-operation.

There must be doubts, however ,as to whether the body will be effective in practice. The New Zealand experience with this sort of institution has certainly not been encouraging. The Industrial Relations Council though appearing as one of the innovations compared to the 1954 Act would seem on closer analysis to be no more than an updated and enlarged version of the old Industrial Advisory

8. See generally I.R.A. ss. 163-174. Note ,however, the developments in s. 168.
9. See Mathieson, *Industrial Law in New Zealand,* (1970), Ch. 2.
10. I.R.A., ss. 10, 11.
11. I.R.A., s. 16.

Council.[12] The latter was quite effective in the early fifties but then faded out. The apparent reason for this decline was that both employers and employees found it a mere forum for discussion with no power at all and totally ineffective. It is worth noting that once again, the body has been given only the power to recommend policies and changes.

Two other points should be made. Firstly, the Council may well prove too large[13] to function effectively. One wonders whether a country the size of New Zealand really needs a twenty-two member council. The danger is, of course, that the larger the constitutency the greater the likelihood of sectional interests being represented rather than the interests of the industrial system as a whole.[14] Secondly, and more importantly, it is suggested that the new council's success will not depend ultimately on its real worth as an institution, but rather on the acceptance by the parties of the basic philosophy of the Act as a whole. The two central organisations must accept a responsible and long term attitude to industrial relations. There must be a conscious effort to make the philosophies evidenced in the Act work. If this response is not forthcoming, then one suspects that co-operation, which is the prerequisite for the success of the council, may not be frequently found over the next few years. The joint advisory body was a suggestion made in the 'Joint Proposals'. It will be a matter of some interest to see whether the parties maintain their determination to make the concept work.

DISPUTES OF INTEREST AND DISPUTES OF RIGHT[15]

Since the original Act of 1894, the Court of Arbitration has exercised under statutory authorisation, both a judicial and arbitral role.[16] However, it would be incorrect to suggest that the Court of late has played a dominant part in either of these fields. With approximately 90% of awards being settled in Conciliation Councils, the Court's role, with respect to new instruments or the renewal of expired awards, has been limited to the ratification of conciliated settlements for the most part. Moreover, the occasions on which the Court has had cause to exercise its judicial functions have become increasingly infrequent owing to the growth of direct bargaining and negotiating outside the structure of the Industrial Conciliation and Arbitration Act and the use of informal procedures, provided in the legislation. The result is, of course, that many parties now settle their differences themselves without having recourse to the ultimate jurisdiction of the Court.[17]

12. I.R.A., 1949, ss. 3, 4.
13. It should be noted that the number has been increased from 15 in the 1972 Bill.
14. On the other hand, it must be admitted that at the other extreme there is the danger of a labour/management conspiracy if membership is too small and consistent.
15. See I.R.A., s. 2 for the respective definitions.
16. For an excellent summary of the roles of the Court of Arbitration see Mathieson, *op. cit.* Ch. 5, 6, 7.
17. In 1971 there was a voluntary return to work in 95 out of 313 stoppages.

In the new Act, in response to a suggestion made in the Joint Proposals, the functions of the Court of Arbitration have been divided. The body which exercises a purely judicial and legal role has been separated from that which carries out arbitral functions.[18] Apart from this basic change, the legislation appears to have retained the *essence* of the former system. There are, nevertheless, some general comments which should be made, and several developments which might prove of interest to readers.

There are some who disclaim the necessity for any such division between disputes of interest and disputes of right. It is submitted that, on the contrary, as a general principle, the separation of the bodies dealing with the provision of distinct procedures for the settlement of such disputes has substantial advantages and is above all, logical.

In the first place, it does not increase lay respect for the judiciary and the judicial process to have a Court of law ruling on economic as opposed to legal matters. Secondly, it is suggested that a tribunal of laymen who are associated with the problems and basic issues of union and employer negotiations is a far more appropriate forum for deciding the validity of a particular claim for increased wages or improved conditions.

More important, it is submitted that there is a fundamental distinction to be drawn between the two types of dispute. It is quite true that industrial action flowing from a dispute of right may be identical with that arising out of a dispute of interest. There is, nevertheless, a difference in the nature of the dispute giving rise to respective action. If one accepts that in New Zealand an award or collective agreement is a binding instrument, then one must agree with the premise that failure to act within the terms of that instrument constitutes a breach of contract.[19] A dispute of right is, therefore, essentially legal in nature; the legal rule in the form of the instrument is the paramount consideration. The problem, if it cannot be settled peacefully by the parties concerned, should be referred to the competent body and ultimately to the Industrial Court for an assessment of responsibility for the cause of the breach. The parties have reduced their position to writing and the question is essentially one of interpretation.

A dispute of interest, on the other hand, is plainly economic, social and political in nature. The final intent of the parties has yet to be determined and there is a place here for collective bargaining. Any intermediary body below the Industrial Commission does not have jurisdiction to make any rulings as to the rights of the parties. Their job is to conciliate within the protagonists' demands and to attempt to achieve a settlement. There is indeed a fundamental

18. I.R.A., ss. 17, 32.
19. I.R.A., s. 65 (5); *True* v. *Amalgamated Colleries of W.A. Ltd.* [1940]. A.C. 537, 544 per Lord Russell of Killowen.

distinction between the two processes; one is *legal*, the other is essentially *non-legal*. It is the writer's firm opinion that the differences should be recognised and maintained.[20]

(a) Disputes of Interest

The Act acknowledges that perhaps the greatest cause of industrial unrest in New Zealand, as no doubt elsewhere, is the breakdown in communications between parties.[21] Thus the Government has chosen to retain the Industrial Mediation Service which was instituted in 1971 and has operated with conspicuous success up to date.[22]

Similarly, the Act recognises a second salient feature of our industrial arena; namely that parties are increasingly negotiating their agreements on a voluntary basis, without resorting to arbitration.[23] Thus, emphasis continues to be placed upon conciliation procedures. In particular, the Industrial Conciliation Service will still be available to assist the parties. It would, however, be ignoring the realities of the situation to call such conciliation voluntary in the English sense; either party may force the other to negotiate.[24] Indeed, the Commissioners appointed under the Act may call conferences of the parties if they feel it to be necessary.[25] The Commissioners' powers are, however, limited in that they may arbitrate only with the consent of the parties.

The Act, in line with recommendations made in the joint proposals, also recognizes the rights of the parties to a dispute to arrive at a voluntary settlement. These settlements are to be registered as collective agreements and are binding on the parties.[26] In substance section 65 is no different from the situation which existed under the 1954 Act. Industrial agreements could formerly be filed with the Clerk of Awards and were similarly of binding effect.[27] Nor were they restricted to agreements arising out of conciliated proceedings. The formulators of the Act have chosen, however, to *emphasize* the concept of voluntary settlements. It is made quite clear that all

20. It is rather surprising, therefore, to find that two of the members of the Industrial Court are also members of the Industrial Commission. I.R.A., s. 40 (2). It is true that the Industrial Commission is a quasi-judicial body. But this is only with respect to procedure that it is generally subject to jurisdictional limitations and the law of the land. The determination of the Commission is essentially an administrative act based on social and economic questions and public policy. There is a minimum of judicial considerations as generally understood.
21. Or even within the one party, e.g. union members and their executive.
22. Up until September, 1972, the Industrial Mediator had a 100% success rate.
23. In 1971, 160 out of 313 stoppages were settled by private negotiations between the parties.
24. I.R.A., s. 68 (1).
25. Although it appears that these are not compulsory. See the terminology of I.R.A., s. 122. Cf. I.R.A., s. 120 post.
26. I.R.A.,s. 65 (5).
27. I.C. & A. Act, ss. 103 (6), 105.

agreements reached between the parties, whether they be voluntary or conciliated are to have exactly the same effect; they are all to be registered collective agreements.[28] In that the new formulations are clearly a recognition of the fact that much bargaining today is done outside the formal institutions of the Act, they are to be applauded. Any encouragement of such practices, be it only psychological in nature, is to be welcomed as introducing a desirable degree of flexibility into negotiating procedures.[29]

The 1973 Act substantially re-enacted the provisions of the earlier Bill in this field. There is however, one omission which the writer finds rather surprising. A worthwhile attempt was made in the 1972 Bill[30] to aid collective bargaining by requiring the employer to produce a cost analysis of any proposals or counter proposals, and of the consequence to the industry concerned of implementing the union's claims. It is difficult to understand why this provision was omitted from the 1973 legislation. It is true that raw profit figures give in themselves no assessment of union claims. Certainly, the writer does not subscribe to the view that union wage increases should be linked to the profitability of their employer. The issue goes much deeper than that. The rejected provision did not, however, so decree although it must be admitted that there was a danger that such a practice might develop. The concept, nevertheless, did give some incentive to the parties to conduct their bargaining on a sound and realistic basis right from the outset of negotiations. The figures would represent, as it were, a basis for negotiation. This idea was an innovation.[31] As such, it is suggested that, even admitting possible dangers, it was worthy of at least a trial period until its practical effects could be evaluated.

The major development with respect to disputes of interest is the establishment of an Industrial Commission to take over the arbitral functions of the Court of Aribtration. The jurisdiction and powers of this body are similar to those of the former court[32] with respect to disputes of interest and need not be enlarged upon. The constitution of the Commission, on the other hand, is worthy of further comment.

28. I.R.A., ss. 65 (3), 82 (3). See also s. 141 which permits an unregistered society of workers and their employer to enter into a binding agreement which gives substantially the same effect as if it had been made by a registered union. It is especially important to note that the 'blanket' provisions of the I.C. & A. Act, s. 154 relating to parties to awards did not formerly apply to voluntary agreements as only *conciliated* agreements could be incorporated into an award. (ibid., s. 130). This advantage now applies to *all* collective agreements and awards entered into by registered unions, I.R.A., ss. 83, 89, and is a laudable incentive to voluntary negotiation.
29. It should not be forgotten, nevertheless, that the procedures for conciliation and arbitration still remain an important part of the legislative scheme. I.R.A., ss. 67-90.
30. I.R. Bill, cl. 65 (3).
31. At least in such wide terms. Cf. Industrial Relations Act (U.K.), 1971, ss. 56, 57, 158.
32. I.C. & A. Act, ss. 32, 33, 36.

Whereas the Court of Arbitration had only three members,[33] two of whom were members of the Central Employer and Employee Organizations, the new Act provides for a membership of five, three of whom shall not represent any sectional interest.[34] The Act itself provides few criteria for the appointment of the latter, save that they have 'appropriate qualifications and experience'.

It is difficult at first sight to appreciate the rationale behind this increase in the number of members. Clearly, the decision will not be made more acceptable to the losing party by virtue of it being made by a larger body. There will often be feelings that the conclusion of the Commission was unjust to one of the competing parties. Nor can the change be justified by the claim that the more representative membership will enable the public attitude to a particular dispute of interests to be taken into accounts in any settlement. In the writer's opinion, public attitudes should play no part in the formulation of awards and agreements outside of the natural and satisfactory limitations imposed by specific government economic measures.

On closer analysis of the practice of the Court of Arbitration, in recent years, however, the main purpose becomes clearer. Sitting between two members representing opposing interests, the single Judge appeared to be always siding with one or the other. In the majority of cases he would have to exercise what was in effect a casting vote as the other two members usually cancelled each other out. With the addition of two neutral members the President of the Industrial Commission will be placed in a less vulnerable position since the division of the votes will frequently change. The pressures of being solely responsible for almost every decision will thus be considerably reduced. The increase in numbers should, therefore, result in the Court giving, or equally important, appearing to give, a more considered and balanced decision than was previously the case.

(b) Disputes of Right

The procedures for the settlement of disputes of right include Disputes Committees, Personal Grievance Procedures and ultimately recourse to the Industrial Court. These are basically the same as existed under the 1954 legislation.[35] In every award and collective agreement there is deemed to be included a 'disputes clause' which provides for the final and conclusive settlement, without any stoppage of work, of any difference that might arise over the interpretation, application or operation of that instrument, and of any other rights dispute not being a personal grievance.[36] The procedure may be invoked by either party and involves reference of the dispute to a 'Disputes Committee' consisting of representatives of the employer and employees plus an independent chairman. A majority decision

33. I.C. & A. Act, s. 14 (2).
34. I.R.A., s. 17 (2), (3) (a).
35. I.C. & A. Amendment Act, 1970. ss. 3, 4.
36. I.R.A., ss. 115, 116.

is binding, subject to the right of appeal to the Industrial Court.[37] While a standard compulsory clause is provided, the Act does permit the parties to establish their own disputes procedure provided it is approved by the Commission.

The success of these provisions is difficult to predict. Any attempt to bring the parties together certainly must be supported as encouraging co-operation and tending towards a better understanding of the basic issues behind any conflict. It is also true that similar procedures provided for in the 1954 Act generally have been regarded as successful. At the same time it is apparent from the nature of much of the industrial unrest that they were not being followed in a great many cases. The parties have always been aware that any penalty flowing from action in breach of an award will not be enforced. Consequently, valuable time is often lost before the parties can be brought together. The point, however, is not so much that the procedures are *compulsory;* in many cases this may be the only means of bringing the parties together. The vital issue is that it is questionable whether the *penalties* which result from breach of a disputes clause[38] encourage, in any way at all, the speedy and peaceful settlement of industrial disputes.

It is submitted that the increasing number of strikes over disputes of right will never be reduced by the levying of penalties for the mere failure to follow a set procedure. The justification for such penalties is presumably based on the contractual nature of the instrument governing the relationship of employer and employee or union. It must be remembered, however, that the strike is really the only effective weapon employees have against employer abuse. If they do not think they are getting a 'fair deal' from the latter, and such sentiments are not infrequently quite justifiable, then collective action is a predictable and natural result. Legal restraints, be they based on legislation or the common law, will not cause a halt. This is particularly so when any available penalties are not enforced. Nor does this analysis apply only to unions. There have been many instances where an employer has refused to take a dispute before an independent arbitrator. What use, either as a deterrent or penalty, is a $400 fine in these circumstances?[39]

It is strongly suggested that in such areas of conflict, the legislature can take no more effective step than to provide the facilities

37. I.R.A., s. 116 (4), (5), (6).
38. I.R.A., ss. 116 (7) and 148 which combine to give rise to a penalty of $400 for a union or employer and $40 for a worker.
39. In December, 1972, a dispute at the Whakatu Freezing Works disrupted production for eighteen days despite an actual *decision* on the facts by the relevant Disputes Committee. The Freezing Works, moreover, have had for a number of years a well developed disputes procedure which by and large works very effectively. One thousand men were laid off as a result of this stoppage which was perpetuated by the failure of the parties to resort to arbitration. Nothing illustrates more strikingly than this example how, ultimately, penalties are no more likely to prevent a total breakdown in communications and conciliation than the parties' appreciation of their own financial losses.

and make sure that the opportunities for negotiation are always available. The time for penalties, if they are at all useful or necessary, is when, *after* an independent inquiry, either party shows an unreasonable refusal to return to work and adopt a more conciliatory attitude. One tends to agree with Woods[40] that such provisions would be more acceptable to the Trade Union movement. It gives them an initial right to take collective action, but more important, merely places prima facie limitations on that right since such an approach allows for the assessment of responsibility for the breakdown in the disputes procedure. It is by these means that the question of who *'realistically'* breached the agreement can be determined. Sanctions, if they are felt to be necessary, can be imposed at this stage in the event of a continuing failure to honour the agreement.

On the bright side, however, the extension of the provisions for the settlement of personal grievances does offer some hope for a reduction in the current number of stoppages. Some of the most serious inadequacies of the previous legislation were the sections dealing with demotions, refusals to engage and the dismissal of employees.[41] There was provision for penalties to be levied on the employer who dismissed an employee on the grounds of union activity.[42] Very few successful prosecutions were ever made under the section, however, owing to the ease with which the employer could show other grounds for dismissal.[43] Moreover, the penalties provided in the Act were too small to have any deterrent effect.

More important, the personal grievance section[44] covered only 'wrongful' dismissals, ignoring the multitude of cases which could be termed unfair or unjustifiable.

The 1973 Act has gone some way towards remedying these defects. The procedures now cover 'unjustifiable' dismissals.[45] In an equally important move, the Act extends the remedy of reinstatement as one of the alternatives open to an employee in the case where he has been dismissed for trade union activities.[46] Indeed, the entire personal grievance procedures are made available in such situations, a position that was doubtful under the former legislation.[47] Reinstatement is, accordingly, available in all cases of unjustifiable dismissal.

40. Woods, *Report on Industrial Relations Legislation* (1968).
41. In some years stoppages caused by alleged wrongful dismissals, victimization or discrimination accounted for up to 40% of loss of time through industrial problems. See Parsonage, *Industrial Conciliation and Arbitration* (unpublished paper presented to trade unionists in 1965); Green, *Procedures to Settle Disputes Over Alleged Wrongful Dismissal* (Occasional Papers in Industrial Relations No. 1, Industrial Relations Centre, V.U.W. 1966); Gunderson, *Action on Unfair Dismissals,* (1971) 6 V.U.W.L.R. 53.
42. I.C. & A. Act, s. 167.
43. For an example of the application of the section see *I/A.* v. *Tractor Supplies Limited* [1966] N.Z.L.R. 792, 794-5.
44. I.C. & A. Amendment Act, 1970, s. 4.
45. I.R.A., s. 117 (1).
46. I.R.A., s. 150 (4), (3).
47. Idem. Cf. I.C. & A. Act, s. 167.

There are, nevertheless, criticisms that can be made of the current position. The employer still has a relatively easy job to take himself outside the application of the union activities section. In this respect, it may well have been worth adopting the approach of the Nova Scotia Trade Union Act [48] which places the burden of proof on the employer in such circumstances.[49] The effect of this statutory reversal has been to make it rather more difficult to justify the dismissal of any employee who is involved in trade union activities. Moreover, perhaps through an error in drafting, the remedy of reinstatement is available in differing degrees depending on whether the union activities or normal unjustified dismissal provision is applicable. Thus, in the case of the former, an employee may not only be reinstated to his former position if he is dismissed, but also if his position has been altered by the employer to his prejudice without termination of the contract.[50] With respect to the latter, on the other hand, reinstatement is limited to cases of actual dismissal.[51] There would appear to be no sound basis for this distinction. The personal grievance section clearly covers[52] more than dismissals and it is hoped that this matter will be clarified in the near future.

A more important omission is the lack of any definition of 'unjustifiable'. It appears that this will ultimately be a matter for the decision of the Industrial Court but the term is capable of so many interpretations that some attempt at definition should have been attempted. Is the word to be given its frequently used meaning of being synonomous with 'legally wrongful'? Or will it be interpreted to mean simply any dismissal not occasioned by an employee's misconduct, qualifications or redundancy? The other possibility is to go one step further and adopt the approach of the English Industrial Relations Act.[53] Here, the employer has two obstacles to overcome.[54] He must initially show that the substantial reason for dismissal was basically either the employee's misconduct, qualifications or redundancy[55] as above. This is not the only consideration, however, as the Industrial Tribunal, in determining whether the dismissal was 'unfair', must have regard to whether "*in the circumstances* [the employer] *acted reasonably or unreasonably in treating it as sufficient reason* for dismissing the employee; and that question shall be deter-

48. Trade Union Act, R.S.N.S. 1972.
49. Ibid., s. 54 (3).
50. I.R.A., s. 150 (1), (4).
51. I.R.A., s. 117 (7).
52. I.R.A., s. 117 (1).
53. Industrial Relations Act (U.K.), 1971, ss. 22, 23, 24.
54. See also I.L.O. Recommendation No. 119, *Recommendation Concerning Termination of Employment at the Initiative of the Employer,* 26 June, 1963. For a discussion of the recommendation see Szakats, *Recent Changes in Industrial Law,* (Occasional Paper No. 5, Industrial Relations Centre, V.U.W., 1971).
55. Industrial Relations Act, (U.K.), 1971, s. 24 (2).

mined in accordance with *equity and the substantial merits of the case.*"[56]

This approach has the great advantage of flexibility and applied liberally might provide the means for minimising problems which have become part and parcel of the modern industrial society. Thus, the legal termination of an employee's contract by a large and profitable corporation might be 'unjustifiable' even if the dismissal is on grounds of redundancy. Unless the employee is able to secure a new job immediately he may suffer substantial social and economic dislocation.[57] In this situation, is it not 'reasonable' and 'equitable' that the employer should bear any intermediate losses? The same conclusion should not, however, necessarily be reached in the case of an employer whose margin of profit is slim and whose own economic survival and the welfare of whose family might well depend on the dismissal of all employees. The import of 'justifiable' will therefore, on this analysis, vary according to the circumstances.

It is quite clear that such effect has yet to be given to the English provision by the Industrial Tribunals or Industrial Court. It is suggested nevertheless, that the words are wide enough to be capable of such application. On balance it is hoped that the latter interpretation is adopted. This would recognise the replacement of 'wrongful' in the new Act and at the same time the fact that the section must be permitted to have both an equitable and flexible effect. In the absence of legislative instruction, however, the second suggestion might be a more realistic expectation. It is unfortunate that the opportunity was not taken to use the term with more precision.

In the same context, it should be noted that once more, the legislature has failed to recognise the need for a national policy on redundancy and its related problems. Many European countries, perhaps because they have already experienced the full effects of the technological revolution, have developed legislation to counter the problems.[58] It is time it was realised that in the very near future the consequences of automation, etc., are going to become very important in New Zealand. What principles are to be followed, for example, in the dismissal of redundant employees? Is seniority to have priority, or will an evaluation be made of the social needs of the individual workers on the basis of age, marital status, number of dependants and other similar considerations? Is there any obligation on the employer to compensate or retrain those dismissed? It would appear that the employers and unions are being left to settle such

56. Industrial Relations Act, (U.K.), 1971, s. 24 (6). (Emphasis supplied). Note the onus is on the *employer* to show for example that misconduct justified the dismissal.
57. For a detailed discussion of this problem see Szakats, *The Law and Industrial Relations in New Zealand: Legal and Social Problems of the Employer/Employee Relationship.* (1971) 2 Otago Law Review 313, 328-331.
58. Amongst others, Germany, France, Italy, Sweden. For a summary of the legislation in these countries see Szakats, supra., n. 57.

matters themselves. Perhaps the appropriate comment might be that both these groups are finding enough trouble facing their day to day problems without looking five years into the future. Experience overseas indicates that this is a problem in which the Government must take the lead.

Finally in this section, some reference must be made to another innovation in the Act; that is, the development of a special procedure for the settlement of demarcation disputes. While New Zealand has for the most part been spared the agonies of inter-union rivalry over membership which is so common in North America, disputes as the assignment of work between competing groups of workers have become 'currently' popular.[59] In an attempt to resolve such problems the new Act permits any union or employer who is a party to the award or agreement relating to the industry involved in the dispute to apply to the Industrial Court for a ruling on the matter.[60] The legislation also provides guidelines for the Court's determination. In deciding which membership rule governs the work in question the Court shall have regard to the membership rules of each of the unions, the work done by the workers whose union coverage is the subject of the dispute, the substantial nature of the calling or occupation of those workers in terms of their membership rules, any relevant provisions of the awards or collective agreements operating in the industry or industries, any relevant decisions of the Court, and long established practice.[61]

Procedures for the settlement of jurisdictional disputes are not unknown in the Western world.[62] To the writer's knowledge, however, the 1973 Act is the first to provide guidelines for the Court's determination in such detail. Thus, an immediate problem arises as to whether criteria are restrictive or descriptive in nature. It is to be hoped that the latter is the case. In disputes of this nature there are innumerable considerations in any given case and it is impossible to be exhaustive in providing criteria. It would be unfortunate if the Industrial Court's 'judicial discretion' was to be so limited by legislation.

This comment aside, the only criticism of section 119 relates not to the sentiments behind its inclusion in the Act; jurisdictional disputes are an important part of industrial relations and deserve special treatment, but rather the effect of its operation. It is suggested that by their very nature jurisdictional disputes are more suitably settled in

59. Particularly of late in the highly industrialised pulp and paper factories and in the wake of increasing capital intensive work methods in the waterfront industry.
60. I.R.A., s. 119 (1).
61. I.R.A., s. 119 (2). The decision of the Court is final and binding both on the actual parties to the application and for purposes of the award or collective agreement; ibid., s. 119 (3).
62. *Labour Relations Act* R.S.O. 1970, c. 232, s. 81. (Ontario); *Trade Union Act* R.S.N.S. 1972, c. 19, s. 49. (Nova Scotia); "Taft-Hartley Act", 1947, s. 10. (U.S.A.).

private negotiation between the parties involved. This is especially so where the dispute is between workers of 'specified callings' within the same union. Yet the Act permits either union or employer to put the matter before the Industrial Court for a ruling. There is, accordingly, no incentive for unions, and such disputes are essentially their problem, to develop informal procedures either on the individual branch or national level for disposing of questions relating to work allocation.

This situation should be compared to the Ontario Labour Relations Act, 1972, which provides initially in demarcation disputes in the construction industry for a *compulsory conference* of the parties once the matter has been referred to the Labour Relations Board by an interested party. Only if a settlement is not forthcoming does the Board give a final and binding ruling. There is power, however, for an interim order to be given if the dispute appears likely to result in or has occasioned a strike.[63] Nor, may *any* complaint be enquired into where the parties have agreed in a collective agreement to a procedure by way of reference of the dispute to a mutually selected tribunal. They are, however, bound by the decision of that body.[64]

The approach adopted in the 1973 Act is not, therefore, in the writer's opinion particularly effective in view of long term needs. If there is one thing that would appear impossible to legislate against, it is inter-union rivalry. This is something that must be settled by the parties themselves, whether by development of the necessary procedures or by elimination of multifarious unions and consolidation into fewer and larger groups. Some consideration might well have been given to the compulsory designation of jurisdictional or demarcation representatives by all registered unions who would initially act in any such disputes.[65] This might provide the basis for a comprehensive private procedure. As indicated by the following passage, on the other hand, this may also not be the ultimate solution:[66]

> "Perhaps the ultimate solution to the jurisdictional dispute lies with the unions themselves. Instead of attempting to eliminate *disputes*, the solution may be to eliminate *jurisdiction*. Government intrusion into the institutional fabric of a free labour movement is unthinkable, but if the pattern of union organisation could progressively adapt to changing patterns of industrial organisation, there would be no real problem.

63. *Labour Relations Act*, 1970. R.S.O., s. 81 (1), (3), (4), (5), (7), (8). See also "Taft-Harley Act", 1947, s. 10 (k), which empowers and directs the National Labour Relations Board to hear complaints and determine jurisdictional disputes "unless within ten days . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon the method for the voluntary adjustment of the dispute." See generally Crispo and Arthurs, *Jurisdictional Disputes in Canada: A study in Frustration* (1963) 3 Current Law and Social Problems 14.
64. Labour Relations Act, R.S.O. 1970, s. 81 (14).
65. Cf. Labour Relations Act, R.S.O. 1970, s. 124. (Construction Industry).
66. Crispo and Arthurs, *op. cit.*, 60.

Merger of the Carpenters' and Lathers' unions, for example, would eliminate controversy over the installation of acoustic tiles. The ability of the labour movement to create internal order may not only be the sole means of resolving jurisdictional disputes; it may be the measure of the movements' ability to survive as a viable force in the labour market."

UNJUSTIFIED INDUSTRIAL ACTION

Undoubtedly the section of the new Industrial Relations Act which has claimed most public interest is that dealing with the limitations on collective action by trade unions.[67] It is also the area in which the most substantial alterations to the 1972 Bill were made. However, a true assessment of the two approaches can really only be made against the legislative background.

Under the 1954 Act it was correct to say that with two exceptions[68] any union registered under the I.C. & A. Act which went on strike would be committing a breach of that statute and liable to the corresponding penalties. This was due to the fact that under the Act no union or individual member could stop work while they were subject to an award or agreement.[69] Since an award was deemed to remain in force until a new instrument was registered, trade unions were continually covered and their freedom to take collective action in support of claims almost totally restricted. Needless to say, these penalty provisions were rarely invoked. The last occasion on which an Inspector of Awards prosecuted a union for an illegal strike was in 1955. Even since 1962, when the Act was amended to allow unions and associations of employers and employees to initiate an action, on only two occasions has an employer's union done so.[70] Significant inferences can be drawn from these figures; the chief one being that the penalty provisions were a mere surplusage in the legislation.

The 1972 Bill *prima facie* extended the rights of the unions to resort to strike action. It drew a distinction between industrial action taken in pursuance of, on the one hand, disputes of right, and on the

67. I.R.A., ss. 123-136. Also ss. 81, 116, 117, 120-122. The emphasis on strikes in this section does not mean that there are no provisions regulating the use of lockout as a weapon by the employer. It is simply an admission that currently strikes are considered as being the more important subject Generally, the following comments apply equally to any collective action by the employer. More particularly, see the sections cited infra.
68. These were (a) if the award or industrial agreement had been cancelled by the Minister in so far as it related to that union and (b) where, after registration, but before an award or agreement was made, the union took strike action. To the writer's knowledge, neither of these situations ever assumed any importance in practice.
69. I.C. & A. Act, s. 193 (4).
70. Ironically, the 1962 amendment was introduced because of the volume of criticism of the Minister of Labour and the Department by employers for not taking action against unions and their officials when strikes did occur.

other, disputes of interest. With respect to the former, the essence of the provisions was that any failure to follow the disputes procedure in the registered instrument constituted unjustifiable industrial action if any person became a party to, incited, etc., a strike or lockout concerning a matter within that procedure.[71] What is meant, having regard to the continued wide definition of strike in the Bill[72] was that virtually any change in work tempo or method in these circumstances amounted to an offence.

With respect to disputes of interest the Bill did recognise a right to strike at the time of negotiation or renegotiation of a collective agreement or award. In reality, however, the right to strike, at first glance greatly extended, was severely limited by several clauses which, given a literal interpretation, made the right as non-existent as ever. There is not available space to discuss these restraints fully. Moreover, since they did not become law, any detailed analysis could be dismissed as superfluous. Nevertheless, some indication of the nature of the clauses is necessary to appreciate the substantial changes made in the 1973 Act.

Perhaps the most obnoxious of the clauses from the union point of view were clauses 124-126. The first of these created automatic criminal liability and also *deemed* the union to be liable in tort for any damage resulting from a strike in respect of a non-industrial matter.'[73] Clause 125 authorised the insertion of an 'uninterrupted work' clause in the award of any strike prone industry. Finally, clause 126 prohibited the continuance of strikes which affected the 'public interest'. This criterion was defined as being satisfied where, *inter alia*, the economy of New Zealand or of a particular industry or industries was *seriously affected or likely to be so.*

Such clauses were totally unacceptable. The concepts of 'public interest' and 'non-industrial matter' were nebulous. The wording of the

71. I.R. Bill, cl. 123.
72. I.R. Bill, cl. 121. This definition was even wider than under the 1954 Act since the 'intent' provisions were removed from the section. Note, however, that under the 1973 Act the 'intent' requirement has been restored. I.R.A., s. 123 (1) (e)-(g).
73. The definition of 'industrial matter" in I.R.A., s. 2, would appear at first sight to be very wide and possibly include political strikes in some circumstances. These were clearly what clause 124 was designed to attack. The courts, however, have placed a narrow interpretation on the term. Generally speaking, if the relationship of employer/employee is not *directly* involved in the dispute, it is not in respect of an industrial matter. An *indirect* involvement is not sufficient: *Ex Parte the Melbourne and Metropolitan Tramways Board* (1966) 115 C.L.R. 443, 450. Thus, for example, a strike aimed at boycotting the South African rugby team would not be in respect of an industrial matter since the employment relationship would only be indirectly involved. The dispute essentially must involve the worker/employer relationship and the 'management' itself is not the subject of an industrial dispute. (ibid., 451). See also, *Magner* v. *Gohns* [1916] N.Z.L.R. 529; *R. v. Wallis* (1949) 78 C.L.R. 529, 545 *per* Latham C. J.; *Clancy* v. *Butchers Shop Employes' Union* (1904) 1 C.L.R. 181; Cf. *Taylor & Oakley* v. *Mr. Justice Edwards* (1900) 18 N.Z.L.R. 876, 885 *per* Stout C. J. (C.A.).

various clauses was too wide and left far too much for judicial interpretation. Moreover, they had the basic failure that they were unenforceable. No union was going to accept the restraints and regard need only be had to recent Australian and English experience to see the futility of the use of a court order in these circumstances. The ludicrous situation was very likely to be reached where a union was striking against a 'no strike' clause or court order. Generally then, the strike legislation in the 1972 Bill was ill considered and impractical. As an indication of the amount of thought that went into the provisions, it need only be pointed out that automatic liability under an 'uninterrupted work' clause, which was copied from the Australian practice, was abolished for all intents and purposes in that country in 1970![74] It is interesting that the National Government did not find their neighbour's experience relevant.

The 1973 Act omits the clauses discussed above. It has on occasion, in fact, been accepted as removing the prospect of liability on the part of a union for any strike. The situation is not, however, quite as straight forward as this and there are several points that should be elaborated upon.

There are, it appears, basically three categories of collective action by registered unions for the purpose of the Act.[75] The most important point to note is that the position of the union has not changed greatly with respect to *disputes of right*. While breach of the disputes procedure no longer constitutes unjustifiable industrial action, it remains a breach of the award or collective agreement.[76] This gives rise to a potential penalty of $400 for the union concerned and $40 in the case of individuals. This is *exactly the same* penalty as provided under the 1972 Bill for similar action. The only difference is that under the latter the penalties accrued on a day to day basis so long as the breach continued.[77] Accordingly, legislative restraints and penalties are still very much a part of the 1973 legislation and the right to strike is non-existent in this area.

Secondly, while it was generally thought that there was to be an absolute right to strike in respect of *disputes of interest*, several restrictions are also found here. The most effective restraint is that strikes are prohibited once a dispute is before a Conciliation Council or the Industrial Commission.[78] As either party may refer a dispute to the Commission,[79] it would seem that the right to strike during

74. Conciliation and Arbitration Act, 1970, (Cth.), s. 119.
75. See also the position of non-registered unions, post.
76. I.R.A., s. 116 (7). Since a dispute of right constitutes, inter alia, any industrial dispute that is not a dispute of interest and any dispute arising during the currency of a collective agreement or award, this restriction is extremely important. I.R.A., s. 2.
77. I.R. Bill, cl. 123. Quaere whether a new breach occurs every day the workers refuse to return to work? In the writer's view, the answer is no. A strike, no matter how long it lasts, constitutes a single breach.
78. I.R.A., s. 81 (a). The penalty provided for a breach is a fine not exceeding $100. I.R.A., s. 81 (b).
79. I.R.A., s. 68 (1).

renegotiation of an instrument, while no longer forbidden initially by the Act, is still at the discretion of the employer.[80] Mention should also be made of section 125 which provides a special procedure for certain 'essential' industries. No lawful collective action can be commenced by employees engaged in such industries unless within one month before so striking, no less than fourteen days' notice of an intention to strike has been given to the employer.[81] This limitation is, it is suggested, neither unreasonable nor unrealistic.

The third category of strikes really deserves mention for the fact that it does *not* appear to be covered in the Act. This group is what can in general terms be described as *political strikes* or perhaps more accurately as 'collective action in respect of non-industrial matters'. Under the 1954 Act it was generally assumed that such action was not prohibited by the terms of the statute. In the first place, the definition of strike in section 189, although very wide, required a certain *'intent'* on the part of the workers. Generally speaking, the intent required was either to compel their employer to agree to terms of employment or to the strikers' demands,[82] or to cause loss or inconvenience to any such employer.[83] This intent was not, it was felt, present in the case of a political strike; the object of a strike would usually be some third party.[84] Secondly, for such a dispute to be brought before a Conciliation Council it had to be a dispute in respect of an 'industrial matter'. As has been indicated, the Government of the day clearly thought a political strike could not be so categorised.[85]

The statutory position would not appear to have changed under the 1973 Act. The definition of strike remains substantially the same[86]

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80. For practical purposes, however, it seems that some time will elapse before a dispute comes 'before' a Conciliation Council, after the original notice is given. See I.R.A., s. 75. A dispute is deemed to be *referred* to a Conciliation Council once the latter is fully constituted in accordance with the Act.
81. I.R.A., s. 125. See the First Schedule to the Act. Note that in the definition of strike in s. 123 the subsection involving the reduction of normal output has been removed from the equivalent provision in the 1954 Act, but this situation would still seem to be covered by s. 123 (1) (a) or (b). Also see supra, n. 72. There are no penalties prescribed for breach of Part IX of the Act. Consider the power of the Industrial Court to make enforcement order, I.R.A., s. 47 (2), (d) (e), and the power to impose fines for contempt both under s. 145 and its inherent authority as a court of record. (s. 32 (1)).
82. I.C. & A Act, s. 189 (1) (f).
83. I.C. & A. Act, s. 189 (1) (g).
84. To the writer's knowledge, this was the attitude of the Crown Law Office to the boycotts during the French Nuclear Tests.
85. Supra, n. 73.
86. See supra, nn. 72, 81. The other, at first sight minor but potentially vital, change is that the 'intent to cause loss or inconvenience' subsection has been dropped from the definition. This change should minimise the effect of the recent decision of the Court of Arbitration in *Re New Zealand Engineering etc. I.U.W. and Shortland Freezing Co. Ltd.* [1973] 1 N.Z.L.R. 326. In this case the Court gave a very liberal interpretation

and 'dispute' is still defined as being in respect of an 'industrial matter.'[87] Accordingly, it is suggested that in the absence of specific words to the contrary, the legitimacy of political strikes is to be determined solely by the common law,[88] and is quite outside the scope of any statutory prohibition.

Further general restrictions on the union's right to take collective action are to be found in sections 120-122. By virtue of section 121 the Minister may appoint a Commission of Inquiry with power to inquire into existing or threatened strikes. This may prove to be a useful device. Although the report will not generally be available until after the strike has ceased, where this is not the case the publication of the results of an independent investigation of the dispute may often have a conciliatory effect on the parties. It should be noted ,however, that results favourable to the union could increase their determination not to give up or compromise their claims.[89]

The effect of section 120 is equally difficult to predict. This authorizes the Minister to call a compulsory conference of the parties in an attempt to obtain a settlement of any existing or threatened strike. The principle behind this provision is, it is suggested, laudable. There are many occasions in which the major obstacle to a settlement is the refusal of the parties to come together and discuss the matter. Forcing the parties to communicate may, accordingly, have the result of at least beginning the process of settlement. The one doubt the writer has with respect to the section is the power given to the Chairman of the Conference *at the discretion of the Minister,* to impose a binding settlement on unwilling parties. One wonders in the first place how such an order can be enforced,[90] and secondly, whether this is an appropriate power to be placed in the hands of a politician.

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to the word 'intent' and commented that a man is usually able to *foresee* the *natural consequences* of his acts and so it is generally reasonable to infer that he did foresee and intend them. (ibid., 329). This approach has obvious application to the political strike.

87. Supra, n. 73. There are some slight alterations to the definition of industrial matter but these are unimportant in the present context.

88. The most important point here will be what constitutes the legitimate objects of a trade union for the purposes of the defence of justification. See particularly *Scala Ballroom (Wolverhampton) Ltd.* v. *Ratcliffe* [1958] 1 W.L.R. 1057, 1063 *per* Morris L. J. whose dicta allow for legitimate political strikes. Also *Mosley Publications* v. *Morrison* (1947). *The Times,* February 22, cited to the same effect in *Clerk & Lindsell* on Torts (13th ed.) 809, and *P.T.Y. Homes Ltd.* v. *Shand* [1968] N.Z.L.R. 105. Cf. Kahn-Freund, (1959) 22 M.L.R. 71 and generally Heydon, *The Defence of Justification in Cases of Intentionally Caused Economic Loss* (1970) 20 Univ. of Tor. L.J. 139.

89. Cf., for example, the effect of the publication of the results of the enquiry into the U.K. miners strike in 1971.

90. The concept of compulsory conferences is taken from the I.R.A., 1949, where however there was no power to *arbitrate* but only to *promote settlements;* (ibid., ss. 8, 8A). Similar powers are given to conciliators *except* that any conference is not compulsory and there is no power to arbitrate. I.R.A., s. 122. As to powers of enforcement see supra, n. 81.

The Minister already has substantial discretionary powers with the right to deregister unions.[91].

There are three other sections in the Act which should be mentioned. Firstly, provision is made for dealing with employees not actually involved in, but affected by, collective action. Section 128 provides that where, due to a strike, the employer is unable to provide work for those not involved in the strike, he may suspend their employment until the strike is concluded. This novel concept is aimed at reducing the expenses of employers whose production is already being harmed by the stoppage. Administratively, the section does have definite advantages; it relieves the employer of the necessity of laying off staff in the event of a prolonged strike and all the technical and administrative procedure upon rehiring. In addition, the express provision for the continuance of employment for purposes of any rights or duties dependent on continuous service may remove some of the emotional backlash and certainly does resolve the many theoretical legal problems which occur when employees are laid off in such circumstances at present. It must be remembered, moreover, that the section does provide protection to the innocent employer affected by a strike in another industry upon which he is dependent for materials; his position is no less enviable than that of his employees.

While some reaction on the part of employees is understandable, it must be noted that the concept is now more palatable than under the 1972 Bill. While the latter gave an employer an absolute right to suspend, section 128 provides for a 'waiting period' of one week before any such action is taken. Nevertheless, despite the practical[92] nature of this innovation, it means in fact that the economic risk of a strike is being thrown on the innocent tax or ratepayer. One wonders whether this will be acceptable.

The second point concerns the use of the secret ballot. By section 126 various persons are given the discretion to conduct a secret ballot amongst workers directly concerned with the strike on the question of a return to work. It is difficult to appreciate the retention of such a provision.[93] Similar legislation in other countries has been conspicuous only for its apparent lack of success. Under the Taft-Hartley Act in the United States, for example, the secret ballot has been called for on twenty-nine occasions. There has not been, however, a single case in which the employees have voted to discontinue the strike.[94] As a result, the government's, management's

91. Post.
92. It was no doubt introduced in order to provide a legal basis and machinery for an already existing practice. It was relatively common for employers to lay off staff in these circumstances, especially in the freezing works, without section 128.
93. See I.R. Bill, cl. 129.
94. See Kahn-Freund, *Labour and the Law* (1972) 243. The experience under both English and Canadian legislation has been similar. See Anton, *The Role of Government in the Settlement of Labour Disputes,* 201 *passim;* Anton, *Government Supervised Strike Votes,* (1962).

and conciliator's position was considerably weakened. Did those who included section 126 really believe workers would vote against their union leaders?

There is, however, a far more important danger in the use of secret ballots . Under the 1954 Act there was considerable pressure put on unions to take a secret ballot before commencing an illegal strike.[95] This experience should have demonstrated that the almost inevitable result of a majority in favour of strike action often became a serious obstacle in getting an early return to work. This is due to the fact that union officials, once they have been given a large mandate by their members, may find it difficult to override the express wishes of the rank and file and accept a compromise settlement. Surely everything should be done to assist union leaders who are working towards a negotiated settlement and not restrict their efforts? The ultimate fallacy of the secret ballot is that it assumes unions leaders are more militant than the rank and file. This is an assumption that may not be justified in New Zealand.

The final provision to be noted, is that dealing with the power of the Minister to deregister a union if he is satisfied that a discontinuance of employment has caused or is likely to cause serious loss or inconvenience and that it has been brought about wholly or partially by a union of employers or workers registered under the Act.[96]

There can be no doubt that section 130 is very important. The definition of 'discontinuance of employment' is extremely wide[97] and would appear to include within its scope collective action in respect of non-industrial matters such as the French nuclear tests and the proposed South African rugby tour of 1973. It is interesting to note that it was the specific 'non-industrial matter' clause in the 1972 Bill which was the particular subject of attack by the Labour Government before the 1973 Act was introduced to Parliament. Moreover, because of the advantages of being registered under the Industrial Relations Act, very serious consequences flow from the deregistration of a union.[98] The power must accordingly be viewed as a major restriction on the right of a union to take collective action. The mere fact that it has been used only infrequently in the past[99] and has become important as a threat rather than a weapon, is not sufficient to guarantee protection for unions in the future. This is particularly so as the power has been made far more effective in the 1973 Act by giving the government the power to seize and in certain circumstances dispose of the assets of any deregistered union.

95. The penalties for an illegal strike were greatly increased if the ballot was not taken. I.C. & A. Act, s. 195.
96. I.R.A., s. 130.
97. I.R.A., s. 130 (6).
98. This is perhaps more so now whereby under Part X of the 1973 Act unregistered unions may still be subject to some of the disadvantages of being registered while not enjoying the benefits.
99. The power has been used against less than 20 unions since 1939. Unfortunately where used it has often been tainted through political implications; this is particularly so during the 1951 waterfront strike.

Notwithstanding, it is suggested that the power of deregistration should be retained, *albeit* with modifications. In the first place, with the advantages that a union enjoys under the Act, there is some rationalization for the existence of a power to cancel the registration of any group that abuses its position. There is a second practical argument, however, in favour of retention which is often overlooked. The power of deregistration acts as a tremendous curb on the more extreme aspects of trade union activity. In the writer's opinion, the presence of this single disciplinary power should, if exercised with skill, render the presence of any further provisions restricting collective bargaining inappropriate and unnecessary.

The problem is that as the section stands at present, there is nothing to prevent the Minister's power being exercised in an arbitrary and capricious fashion. The Minister's discretion, as an Executive act, is virtually unfettered and it is indeed significant that no provision is made for an appeal from his decision. Whether he is satisfied or not, is a matter for the Minister and the Court cannot review the exercise of the discretion. Some restriction is therefore desirable. It has been argued on occasion, that deregistration should be a function of the Industrial Court. This, it is suggested, would tend to nullify the most important factor in its effectiveness, i.e. the speed with which it may be used. The answer would appear to lie in providing a right to appeal to the Industrial Court from the exercise of the discretion. The difficulty with this approach, of course, is to provide much clearer criteria to the Court so that the issue can be made justiciable. This would appear, nevertheless, to be a problem that could be overcome with intelligent drafting and should be, it is suggested, the direction in which the Government should move in amending section 130.

This then concludes a general analysis of the provisions relating to collective action in the 1973 Labour Relations Act. However, no review of the right to strike in New Zealand would be complete without brief reference to the effect of the common law on such action.

TRADE UNIONS AND THE COMMON LAW — RESTRICTION ON THE RIGHT TO STRIKE[100]

For some inexplicable reason very few people appreciate the potential effect of the common law on trade union activity in New Zealand. Because of the absence of legislation equivalent to the British Trade Disputes Acts (1906 and 1915)[1] the torts of conspiracy,

100. The best analysis of the economic torts is to be found in Clark & Lindsell, *Torts* (13th ed.) Ch. 11. (Wedderburn). For a discussion thereon in a context similar to that found in New Zealand see Christie, *The Liability of Strikers in the Law of Tort* (1967); Carrothers, *Collective Bargaining Law in Canada* (1965) Part III; Arthurs, *Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship,* (1960) 38 Canadian Bar Review 346.

1. Now incorporated with some modifications in the Industrial Relations Act (U.K.) 1971, s. 132.

intimidation and inducing breach of contract apply with all their common law force.

Moreover, under the 1954 Act, owing to the presence of provisions making any strike illegal, much of the protection a trade union would have against the application of the 'economic torts' was removed. This was due to the fact that a union was immediately open to an action in 'conspiracy by unlawful means',[2] the significance of which is that the wide defence of justification has no application.[3] Similarly, the tort of intimidation[4] had considerable potential in New Zealand. It appeared that any threat to strike would constitute the threat of an unlawful act[5] and accordingly an action would lie against the union if the employer acquiesced in the pressure and suffered loss.[6]

Consequently, the New Zealand trade union was in a rather invidious position so far as its potential liability for industrial action was concerned. It was subject both to penalties under the I.C. & A. Act and to a rather large award of damages in a tortious action.[7]

The position under the 1973 Act is, in the writer's opinion, by no means as clear cut. A strike is still illegal under the statute once a dispute of interest is before a Conciliation Council or the Industrial Commission.[8] Furthermore, there are special procedures to be followed by unions in essential industries before a lawful strike can be commenced.[9] In these areas, it would seem the position under the old Act continues.

More important, however, although the act of striking no longer results in an inevitable breach of the statute, with respect to a dispute of rights it still constitutes a breach of the award or collective agreement.[10] The latter would appear to represent an unlawful act for

2. *Williams* v. *Hursey* (1959) 103 C.L.R. 30; *Gagnon and Alia* v. *Foundation Maritime Ltd.* (1961) 28 D.L.R. (2d) 174.
3. Idem. For examples of the application of the tort of conspiracy in the Australasian industrial context see *Coal Miners' Union of Workers of Western Australia, Collie* v. *True* (1959) 33 A.L.J.R. 224; *Ruddock* v. *Sinclair* [1925] N.Z.L.R. 677; *Hughes* v. *Northern Coal-Miners Workers' I.U.W.* [1936] N.Z.L.R. 781; *Blanche* v. *McGinley* (1912) 31 N.Z.L.R. 807.
4. For the basis of the tort in trade union matters see *Rookes* v. *Barnard* [1964] A.C. 1129.
5. *Hughes* v. *Northern Coal-Miners Workers' I.U.W.*, supra; *Blanche* v. *McGinley supra; Southan* v. *Grounds* (1916) 16 S.R. (N.S.W.) 274; *McKernan* v. *Fraser* (1931) 46 C.L.R. 343.
6. *Morgan* v. *Fry* [1968] 2 Q.B. 710, 724 *per* Lord Denning M. R.; *Stratford* v. *Lindley* [1965] A.C. 269, 283, *per* Lord Denning.
7. Cf. *Pete's Tow Services* v. *N.I.U.W.* [1970] N.Z.L.R. 32 where Speight J. expressed the opinion that not all strikes were illegal under the New Zealand Act. There can be no doubt that the learned judge's dicta were incorrect.
8. I.R.A.,s. 81.
9. I.R.A., s. 125. Note also the restrictions placed on unregistered unions in Part X discussed post. Also quaere the effect of a strike after arbitration by the Chairman of a Ministerial Conference, s. 120 (4), and after an unfavourable strike ballot, s. 126.
10. Also probably a breach of the statute. I.R.A., s. 149; (although it is deemed to be a breach of the award.)

the purposes of a tortious action.[11] For such action to be successful, however, it must be proved that the unlawful act was committed. In the writer's view it can be strongly argued that this step is now beyond the power of the Supreme Court.

Under the Act, the Industrial Court *has full and exclusive jurisdiction to determine all matters before it.*[12] Perhaps the most important of matters that will be before the Court are questions relating to the breach of an award.[13] It is suggested that if the words 'matters before it' are construed widely to read inter alia any question of law or fact before the Court, it follows that once the issue is before that body, no other Court could use the breach of an award[14] as the basis for an action in tort. When the breach has been determined by the Industrial Court an action could presumably be commenced but by this time the atmosphere in most cases would be less tense and the likelihood of a damages claim substantially reduced.

To the students of tort this might seem an outrageous suggestion. The right to determine the legality of the purpose and means of a strike lies at the very basis of the tortious action. To some extent, however, this would seem to be begging the question since it is the writer's contention that the legislature *intended,* and quite rightly so, that a union's liability in tort was to be so limited. The obvious argument against the above analysis is that section 47 (4) refer only to *proceedings* before the Industrial Court and that the latter's jurisdiction does not extend to issues arising in those before the Supreme Court.[15] Certainly, this approach has some force, as it is clear that to limit the jurisdiction of general courts a very clear indication of such intent is needed in the legislation. Nevertheless, on balance it is suggested that this intent is expressed in the 1973 Act.

In the first place the whole trend of the legislation is to provide independence for the Industrial Court. There is no right of appeal

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11. *Ruddock* v. *Sinclair supra;* see also *Pacific Western Planing Mills* v. *International Woodworkers* [1955] 1 D.L.R. 652.
12. I.R.A., s. 47 (4).
13. I.R.A., s. 47 (2) (a).
14. Nor, it is suggested, could they use the possible breach of contract. Since the award becomes part of the contract of every employee, it follows that any consideration of the breach of an award must also involve a breach of contract. It would appear the same situation existed under the I.C. & A. Act; see ss. 32, 33, 36. However, while the general question of whether a tort action can be based on a breach of the statute has been discussed, the issue of the power of the Supreme Court to decide questions *already before* the Industrial Court does not seem to have arisen. As to the general question of tortious actions and a breach of of the Act see *New Zealand Dairy Factories Etc. I.U.W.* v. *New Zealand Co-op. Dairy Co. Ltd.* [1959] N.Z.L.R. 910 and *Pete's Tow Services* v. *N.I.U.W.* n. 7, and the cases cited therein.
15. A colleague has suggested that a question arising for determination of the Supreme Court in a tortious action is *beyond* the jurisdiction of the Industrial Court and *a fortiori* within the jurisdiction of the former. In that this would constitute an unjustified limitation on the jurisdiction of the Industrial Court the writer cannot agree with this analysis.

from a decision of the latter except on grounds of lack of jurisdiction.[16] Moreover, the Industrial Court is *prohibited* from referring a question of law relating to the construction of an award or collective agreement to the Court of Appeal for consideration.[17] Secondly, the Act establishes procedures for the settlement of disputes which are especially designed for the industrial law context. It can be argued that these procedures, once instituted, are to be the sole means of determining the illegality of action under the legislation.[18] Thus, the Industrial Court is given the power to dismiss an action of it is of the opinion that an established breach is trivial or excusable.[19] Surely, it could not have been intended that such a breach could at the same time serve as the basis for an action in tort?

Finally, and perhaps most importantly, if the suggested analysis is not correct, there is a great danger of a conflict of decisions between the Industrial Court and the courts of general jurisdiction. There may be, for example, a divergence in the opinions of the Supreme and Industrial courts as to whether a work to rule constitutes a breach of the procedure for disputes of right. It is suggested that the presumption must be against such a result ever being intended.

There is no simple or definite answer to this question. The matter will have to await determination by the courts themselves. The courts of general jurisdiction are traditionally reluctant to limit their own authority and the conclusion may well depend on the approach of the particular Judge before whom the question arises or perhaps even the nature of the case involved. There is also no doubt that those who do not support the above analysis have strong arguments in support of their case. It is submitted, however, that the question is not as clear cut as many would have it and that it is well worthy of judicial consideration if the occasion arises.

Collective action by registered unions[20] in New Zealand has traditionally been governed by statute, as has, therefore, the question of any illegality. Under the 1973 Act, however, there are areas of industrial action which remain untouched by statute.[21] These are basically disputes of interest not before any conciliation body and politically motivated industrial action.[22] In such cases, it would appear at first sight that the legality of any collective action is governed by the common law. More particularly, the question will generally fall to be determined on the basis of the contract of employment; has

16. I.R.A., s. 47 (6).
17. I.R.A., s. 51. Cf. I.C. & A Act, s. 38.
18. Cf. the reasoning in the Supreme Court decision of *New Zealand Dairy Factories Etc. I.U.W.* v. *New Zealand Co-op. Dairy Co. Ltd.*, supra.
19. I.R.A., s. 152.
20. Also to a lesser extent non registered unions, post. There was no necessity to prove a breach of contract. See *In re Canterbury Slaughtermen* (1907) 8 B.A. 118; *I/A.* v. *Petone Woollen Mills I.U.W.* (1916) 17 B.A. 776.
21. Supra.
22. See also the position of unregistered unions, post.

there been a breach of contact by the striking workers? Thus, a threat to breach one's contract would constitute the tort of intimidation;[23] an inducement to breach a contract is an actionable tort; and most important, as a 'breach of contract' constitutes an unlawful act,[24] any agreement to go on strike in such circumstances could well amount to the tort of conspiracy by unlawful means. It should be clear that if a 'liberal' application of these actions were sanctioned by New Zealand courts the supposed right of trade unions to strike would be judicially legislated out of existence. The most important consequence of this is that such action by a trade union could well give rise to ex parte injunction proceedings before the Supreme Court[25] in an attempt by the employer to secure a return to work or prohibit the withdrawal.[26] This would seem a rather easy way to limit 'legitimate' union activity.

Each of the above torts is worthy of independent analysis in the local context. Such a discussion is neither possible nor appropriate in the present article. Several caveats to the above general statements should, however, be noted. Most important, there must be a certain amount of speculation as to whether the common law even applies to 'legitimate' collective action. Can it not be argued that by laying down a procedure which, if satisfied, permits industrial action, the legislature has intended such strikes to be lawful for all purposes and unrestricted by statute *or* common law, at least in so far as liability is based on a breach of contract?[27] Or, on the other hand, does the statute forbid certain strikes which would otherwise be lawful at common law but leave to the latter the question of whether collective action generally is lawful? It is true that the right to strike is not expressly given in the Act. Nevertheless, the legislation implicitly recognises that employees may lawfully strike by restricting that right during the currency of collective agreements and awards and while

23. *Rookes* v. *Barnard,* supra. Compare the judgments of the English Court of Appeal in *Morgan* v. *Fry,* supra, which suggest that a breach only has sufficient coerciveness to constitute an unlawful act for the purposes of intimidation where it is a breach of a specific clause as in *Rookes* v. *Barnard* itself.
24. Idem., but cf. post., n. 30.
25. Under the 1954 Act the Supreme Court would not grant an interlocutory injunction where procedures for the enforcement of the illegal act were found in the Act: *New Zealand Dairy Factories Etc. I.U.W.* case. Where this is not the case, however, there appears no reason why such an application should be precluded if the prima facie commission of the tort is proved.
26. For a discussion of the use of the labour injunction see, Frankfurter and Green, *The Labour Injunction* (1963 ed.); Wedderburn, *The Worker and the Law* (2nd ed.) 379 *passim;* Davies and Anderman, *Injunction Procedures in Labour Disputes — I,* (1973) 2 I.L.J. 213; Farmer, *Law and Industrial Relations: The Influence of the Courts* (1971) 2 Otago Law Review 275, 289.
27. This limitation would mean that strikes which were unlawful on another basis, for example, as being for illegitimate or unjustifiable purposes, or by the use of criminally unlawful means would be still actionable at common law.

the dispute is subject to conciliation or arbitration procedures. Has the common law, therefore, been limited by the Industrial Relations Act? In the writer's opinion this matter remains quite open.[28]

If the courts do regard the torts as still being of general application in New Zealand, there are two other points which may limit their potential effect. Firstly, there is some doubt as to whether the tort of intimidation applies to the two party situation where union members threaten their employer that they will strike in breach of their contact and the latter is the damaged party. It has been said that the more appropriate remedy for the employer lies in the law of contract.[29] Similarly, it is uncertain whether a breach of contract is an 'unlawful act' for all purposes or merely for the tort of intimidation.[30] Secondly, the position as to the validating nature of a strike notice which, while not specifically intended to terminate the employer/employee relationship, is of a length equivalent to or greater than that required to terminate the contract of employment is uncertain.[31] Does such notice constitute termination, suspension or anticipatory breach of the

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28. The latter appears to be the position in Canada which has a system *essentially* the same as New Zealand now possesses. See the conflicting dicta of the Supreme Court in *C.P.R.* v. *Zambri (Royal York Case)* (1962) 34 D.L.R. 654; *Merloni* v. *Acme Construction* [1959] C.C.H. Labour Reports, para. 11,675: "If, after compliance with the procedure set out in the Labour Relation Act, a strike is called it must, in the absence of evidence to the contrary, be presumed the predominant interest of the strike is to further the legitimate interests of the employees engaged in the strike . . . *Such a strike is clearly lawful.*" See also Arthurs, n. 100, 372. The rationale in Canada appears to be that when the collective agreement ends there is, so to speak, a 'statutory suspension' of the employment contract so there can be no breach. *(Royal York* case, *ibid.,* 666 *per* Judson J.) .The position in New Zealand is more complex since a collective agreement or award runs until renegotiation. (I.R.A., s. 92). The policy considerations to be balanced remain, however, the same. If the Court felt inclined to exclude tortious liability in such circumstances they would either have to rest their conclusion on legislative intent or read into the collective agreement an implied term that a strike in breach of contract is not actionable *solely* on this basis at common law *if it is lawful under statute.* This might be too much to expect. Unions, however, would be well advised to try to incorporate such a term in their agreements.

29. See Winfield, *Torts,* (8th ed.) 550-551; *Stratford* v. *Lindley* [1965] A.C. 269, 325 *per Lord Reid.* Cf., however, *Rookes* v. *Barnard* [1964] A.C. 1125, 1129 *per* Lord Devlin; *Stratford* v. *Lindley* [1965] A.C. 269, 285 *per Lord Denning,* 302 *per* Salmond L. J.; and Clerk & Lindsell, *op. cit.,* 802-803. Also *Pete's Tow Services* v. *N.I.U.W.* [1970] N.Z.L.R. 32, 42 *per* Speight J.

30. The point was left open by Lord Devlin in *Rookes* v. *Barnard* supra. 1210. Cf. Report of the Donovan Royal Commission, (Cmnd. 3623) para. 854, and *Torquay Hotel Co.* v. *Cousins* [1969] 2 Ch. 106 where breaches of contract appeared to constitute unlawful means for the purpose of the tort of interference with economic interests.

31. See Foster, *Strikes and Employment Contracts* 34 M.L.R. 275; England, *Strikes and Individual Employment Interests* (unpublished L.L.M. thesis, Dalhousie University, 1973-74.)

contract?[32] Until the point is finally determined unions would be well advised to ensure that a proper period of notice is given before going on strike. While it may eventuate that such action would not legalise the strike it will at least provide them with the basis of a defence.[33]

The above discussion has of necessity been brief. Three conclusions can, however, be drawn therefrom. Firstly, it is very apparent that generally employers have not felt inclined to make great use of the economic torts to restrict trade union activity in New Zealand. This should not, however, be taken as a guarantee that this will always be the case in the future. Secondly, there is today some uncertainty as to the application of the common law to strikes in New Zealand which, it is suggested, should be clarified immediately. Thirdly, it has been suggested that the effect of the 1973 Act is to reduce drastically the opportunity for tortious actions against registered unions. Even so, there is still a great need for legislation with the effect of the English Trade Disputes Acts. Until this need is realised, the right to strike in New Zealand may for practical purposes be as non-existent as ever.

SOCIETIES NOT REGISTERED UNDER THE ACT

Registration under the I.C. & A. Act was never compulsory.[34] There have always been unions which have preferred to remain outside the Acts and the position is no different in 1973.[35] The new Act, however, abolishes the Labour Disputes Investigation Act, 1913, which previously governed the activities of unregistered unions and replaces it with the provisions of Part X which deals with such organizations.

In substance the position of unregistered unions is not radically altered. Provision is made,[36] as in the 1913 Act,[37] for the filing of a voluntary agreement with the Registrar. This is binding on the parties specified therein[38] and any breach thereof has the same results as flow from the breach of a collective agreement.[39] There is, however,

32. The main dicta are as follows: *Rookes* v. *Barnard* [1963] 1 Q.B. 623, 676 *per* Donovan L. J.; *Stratford* v. *Lindley* supra, 285 *per* Lord Denning; *Morgan* v. *Fry* [1968] 1 Q.B. 521, 546 *per* Widgery J.; [1968] 2 Q.B. 710, 734 *per* Russell L. J. (anticipatory breach). *Morgan* v. *Fry* supra, 731 *per* Davies L. J. (termination). *Morgan v. Fry* supra, 728 *per* Lord Denning M. R. (suspension).
33. Once again, New Zealand unions would be wise to clarify the position in their award or collective agreement.
34. Unions could also register under the Incorporated Societies Act, 1908; Trade Union Act, 1908; or the Friendly Societies Act, 1909. For practical purposes, however, such statutes are unimportant.
35. At the end of 1972 there appears to have been only seven unregistered unions. Szakats, *Recent Developments in New Zealand Industrial Relations* (1972) 14 The Journal of Industrial Relations 379, 380.
36. I.R.A., s. 141.
37. L.D.I. Act, s. 8.
38. I.R.A., s. 141 (2).
39. I.R.A., s. 141 (4), (5).

no compulsion to file such agreements. Nor, is there any change in the status of unregistered unions. Nevertheless, it is suggested that any unfiled agreement will constitute, in the New Zealand context, a binding contract and be enforceable at common law.[40]

Some changes have been made, on the other hand, as to the right of unregistered unions to strike. To participate in a lawful strike under the 1913 Act, a union had to give notice of any dispute.[41] If settlement of the dispute[42] was not reached within fourteen days a secret ballot of the workers involved was taken.[43] Seven days after the results of the latter were published the union could strike lawfully.[44] Unfortunately, the time allowed for the appointment of a Labour Disputes Committee, investigation and settlement of the dispute was far too short. As might be expected, the procedure did not work.[45]

This 'compulsory cooling off' period has not been incorporated in the 1973 Act. There are certain restrictions on the industrial activities of such unions. For example, where an unregistered union *files* a voluntary agreement the provisions of the Act relating to disputes of right apply, *mutatis mutandis,* to the relationship between employer and employee.[46] Unregistered unions as a class are also subject to the 'unjustifiable industrial action' provisions in Part IX.[47]

These comments aside, it would seem that the provisions of Part X are designed to assist the settlement of disputes rather than to provide legal restraints on collective action. Thus, provision is made for notice of any dispute relating to conditions of employment to be given to the Commission.[48] The latter must then refer the matter to a conciliator who will attempt to get a settlement of the matter.[49] It is not compulsory, however, for such notice to be given and the legality of any collective action is not dependent thereon; nor is the conciliator

40. Cf. *Ford Motor Co. Ltd.* v. *Amalgamated Union of Engineering and Foundry Workers* [1969] 2 Q.B. 303, [1968] 1 W.L.R. 339. It is suggested that having regard to the setting and different attitudes to industrial relations in New Zealand the same conclusion would not be reached by a local Court today. For a full discussion of the authorities see Harrison, *Collective Agreements and the Industrial Conciliation and Arbitration Amendment Act, 1970.* [1971] N.Z.L.J., 180.
41. L.D.I. Act, ss. 4, 9 (a). A strike was unlawful also if it occurred before the expiration of any *filed* agreement, (ibid., s. 9 (b)). It also appears that it was unlawful if it was in breach of the statutory procedure for disputes of right even if there was *no* agreement filed. See Harrison, *op. cit.* The position has been altered under the new Act. See I.R.A., s. 115.
42. L.D.I. Act, ss. 5, 6.
43. L.D.I. Act, s. 7.
44. L.D.I. Act, s. 9 (b). The choices available to workers in the secret ballot were extremely narrow; either to strike or to adopt any recommendation made. (ibid., s. 7 (1) (a), (b)).
45. Szakats, *Trade Unions and the Law,* (1968), 61; Woods, *Report on Industrial Relations Legislation.*
46. I.R.A., s. 141 (3). Cf. supra, n. 41.
47. I.R.A., s. 143.
48. I.R.A, s 139
49 I.R.A., s. 140.

authorized to arbitrate in the dispute. A conciliator also has power, where there are reasonable grounds for believing that a dispute as to conditions of employment exists or is threatened, to intervene and attempt to get the parties to reach a *voluntary* settlement.[50] Once again, therefore, the emphasis is on conciliation.

Subject to the provisions of Part IX of the Act and Part XIII where a voluntary agreement is filed, it would appear that unregistered unions have an unfettered statutory right to strike under the 1973 Act. The legality of such action will, accordingly, fall to be determined by the common law.[51] It is submitted that this is a vast improvement over the previous system. If nothing else, the procedure appears workable and it will be interesting to see if the emphasis on responsible voluntary negiotiation is reflected in the attitudes of the parties.

CONCLUSION

It will be apparent from the foregoing that the writer has mixed views as to the contents of the new Act. It is disappointing to find that there is still a great deal of reliance on penalty clauses in the field of disputes of right and that the opportunity has not been taken in some instances, for example, the deregistration provisions, to improve already existing provisions. The Act also leaves one great area of concern untouched. The position of the individual union member vis-a-vis the union remains quite unchanged even though the former is almost totally unprotected from arbitrary rulings and expulsion by the majority.[52] The significance of union membership is paramount in New Zealand and, while evidence of abuse is not frequently found, it is suggested that this is one area that deserved a close look.

Notwithstanding the above comments, there is much of value in this Act; particular regard should be had to those provisions governing the dismissal of employees, and those aimed at encouraging and improving extra statutory bargaining. Certainly, the overall impression is that it is far superior to the 1972 Bill. It is a more considered and well thought out piece of legislation which, on balance, takes a positive step towards the fostering of a good industrial relations system. Most thankfully, it is a step away from the nineteenth century environment which had been with us seventy-five years and in which the 1972 Bill threatened to keep us. At a time when many western countries have moved or are moving from a free bargaining system to one approaching the former New Zealand situation the Labour Government has chosen to take a step in the opposite direction.

The foregoing analysis has been essentially legalistic in nature. The writer would not, however, like to leave the impression that he

50. I.R.A., s. 142. Cf. I.R.A., s. 120 (4).
51. Supra. Unless unions which file agreements could be regarded as 'quasi-registered'. Their position might be somewhat doubtful; see supra., n. 28.
52. See generally Mathieson, *op. cit.*, 165, 186 *passim.*

believes that *any* legislation can be a god-sent answer to New Zealand's industrial problems. Nor, it is suggested, can the issues be tackled and *completely* solved by the parties themselves. While much can be achieved by a responsible approach both at the grass roots level and that of the Central Organizations, ultimate industrial peace is, in the writer's opinion, an impossible dream. 'Industrial relations' cannot be isolated from the daily social and economic life of the country and as such it is often beyond the practical control of the parties. We must learn, then, to live with a certain amount of unrest. Nevertheless, a more realistic and mature assessment of the basic issues involved was long overdue. As one of the most perceptive of the local commentators recently stated:

> "The issue is industrial relations, industrial unrest and the law. What is your definition of industrial relations? To me this term is a 'catch-all' phrase encompassing far more than union-management relations in a given factory. Wages, salaries, prices, access to consumer goods, the health and stability of our national life, social, political and economic, are all elements of the national system of industrial relations. As Dr. Szakats has observed, all these elements are fluid and need a stable container to give them form. This container is the law. But today in New Zealand too much attention is given to the container, and too little attention paid to the contents.
>
> What we seem to be witnessing is a growing gap between the precepts of the law and industrial reality. In other words, a gap between legal reality and social reality and in a search for the relationship between law and industrial relations we are facing the question of the relationship between legal change and social change."[53]

This comment was made while the 1954 Act was still in force. It may be some time before the atmosphere of responsibility and good faith generally advocated in the new Act becomes reality. At the same time, the 1973 Industrial Relations Act has to some extent attempted to provide a new solution for New Zealand's problems, and is perhaps a start towards the approach advocated by Mr. Brooks. No doubt, changes will need to be made over the years. In the final analysis, however, it is a useful long term investment.

B. G. HANSEN*

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53. Brooks, *The System of Industrial Relations in New Zealand*, [1973] N.Z.L.J. 407, 413. Recommended as the outstanding analysis of 'current' problems in industrial relations and industrial law in New Zealand.

* L.L.B.(Hons.).