Workers' participation at the workplace: some European experiences with reference to the New Zealand case

M. Vranken*

The New Zealand government has recently stimulated public debate about industrial relations by releasing a "Green Paper" on the subject. The paper ignores, however, the issue of worker participation, and the existing New Zealand provisions for works committees have been little used. In this article, the writer explores the experiences of a number of European countries and relates these to the New Zealand context. He argues that an exclusively adversarial approach to industrial relations fails to take into account the existence of common interests between management and labour. These interests can be encouraged by worker participation in the workplace.

I. INTRODUCTION

Conciliation and arbitration are the corner-stones of the New Zealand system of industrial relations. That system is based on the philosophy that both sides of industry represent different interests that are in opposition to each other. The apparent potential for disruption is perceived to be so great that the two parties must be compelled in the public interest to come together and negotiate under the aegis of the state.[1] This then represents an adversarial approach to industrial relations and is in direct contrast to the concept of workers' participation which is based on the assumption that there exist certain common interests between labour and management[2]. Now it is undoubtedly true that it is power relations that underlie labour relations. Indeed any system of industrial relations gives an ever evolving answer to the question who in the labour/management relationship has, in law and in fact, the power to make decisions.[3] And obviously, management decisions can be influenced by labour in many different ways or dimensions. Traditionally, this idea of industrial democracy has been predominantly expressed in the form of collective bargaining in most industrialised countries. The system

* Lecturer, Industrial Relations Centre, Victoria University of Wellington.

1 B. Brooks "Work Committees and Industrial Relations" [1976] N.Z.L.J. 89.
2 T. Hanami "Workers' Participation in the Workshop and the Enterprise" in R. Blanpain (ed.) *Comparative Labour Law and Industrial Relations* (Kluwer, Deventer, 1982) 245.
3 R. Blanpain "Information and Consultation" in *Comparative Labour Law and Industrial Relations,* ibid. 208.

of collective bargaining, or award negotiation as it evolved in New Zealand is however severely handicapped in establishing harmonious industrial relations in that it handles exclusively matters of conflicting interest between labour and management. The result is a paradoxical situation in which a formal system has been designed to eliminate conflict and yet hundreds of industrial conflicts are being generated each year.[4] In this paper it will be argued that, because of the function of workers' participation in stressing and even promoting commonality of interests, there is a good reason for its reception in New Zealand and the European experiences in this respect can be benefitted from.

For the last two decades workers' participation has been at the centre of most industrial relations developments. The over-all growth of workers' participation and the sheer dynamism of the process, combined with changes in the larger socio-economic context, have brought about a diversification of systems, as well as some adaptations in their scope, structure and functions.[5] Especially in Western Europe, participation at shop floor level, works councils and representation on company boards have been added to collective bargaining as the traditional form of industrial democracy. The most far-reaching and controversial forms of participation have originated in the Federal Republic of Germany and Yugoslavia. These two extreme cases may be of only limited practical relevance for the current New Zealand scene. In fact, both the ideas of participative management (as found in the Federal Republic of Germany), and self-management (as in Yugoslavia) will not be considered further.[6] Rather the emphasis in this article will be on the influence of labour on decision-making by management through rights of information, consultation and, to some extent, co-decision making as can be observed in the functioning of the works council in a number of industrial relations systems throughout Western Europe.

A legal basis for regulations with respect to works councils in New Zealand is already provided for in section 233 of the Industrial Relations Act 1973. This section allows the Governor-General to regulate for all or any of the following purposes:

(a) Providing for the establishment on a voluntary basis of works committees representative of workers and employers in relation to any industries or undertakings or branches thereof for the purpose of promoting and maintaining harmonious industrial relations, and for the purpose of improving and maintaining the welfare, safety, and health of workers;

(b) Prescribing the functions of any such works committees;

(c) Providing for the payment of workers by their employers for the time occupied in attending meetings of any such works committees or in attending to any matters arising out of the discussions of any such works committees.

4 B. Brooks, supra n.1, 89.

5 E. Cordova "Workers' Participation in Decisions within Enterprises: Recent Trends and Problems" (1982) 121 International Labour Review 125.

6 For a now somewhat dated account of the German model of participative management in this Review, see A. Frame "Worker Participation in Company Management: With Particular Reference to Co-determination in the Federal Republic of Germany" (1970) 5 V.U.W.L.R. 417.

It is submitted that at least this legislative provision be activated without any further delay.[7] For the sake of uniformity, there may even be compelling reasons for making the introduction of works councils compulsory. Also, if the desire for a more harmonious system of industrial relations is to be taken seriously, its introduction by statute must be preferred over delegated legislation. Here again, the European experience with workers' participation at the level of the workplace can be benefitted from.

II. COLLECTIVE BARGAINING AS A MAJOR BUT TOO LIMITED FORM OF INDUSTRIAL DEMOCRACY

Among the various ways of achieving industrial democracy, collective bargaining clearly stands out as the most widespread, the most vigorous and the most generally acceptable in both industrialised and developing countries. While it has prospered most in voluntaristic contexts of labour relations,[8] it has also been able to develop against a background of compulsory conciliation and arbitration. The shortcomings of collective bargaining have to be recognised, though, and they have been identified clearly by Cordova.[9] Firstly, it has a limited coverage, which is vividly illustrated by statistics on the size of the labour force and the number of workers covered by collective agreements. Secondly, as has already been indicated above, problems can arise because of the conflictual nature of collective bargaining in that it may have negative repercussions on industrial peace and productivity. A further limitation relates to its ex post facto nature, which means that it may sometimes come into the industrial relations picture too late, when matters of interest to the workers have already been decided by the management. And finally, negotiations are conducted through representatives in a periodic or sporadic fashion so that effective workers' representation on a continuing basis is not always feasible.

The limitations of collective bargaining cited above are clearly present on the New Zealand scene as well. Although sufficiently detailed and accurate figures are lacking, only something in excess of half a million workers in the private sector have their wages and conditions of employment fixed by negotiations

7 It appears that s.233 is basically a rephrasing of almost identical legislation in the Industrial Relations Act 1949, s.7, which also made provision for the establishment of works committees. The latter piece of legislation, enacted nearly 40 years ago, is said to have yielded but a token gesture towards the concept of workers' participation. See B. Brooks, supra n.1, 91.

8 See, for instance, the virtually exclusive reliance on collective bargaining to accommodate interest differences between management and labour in the industrial relations system of the U.S.A. as observed by A. Goldman *Labour Law and Industrial Relations in the United States of America* (Kluwer, Deventer, 1979), 21. See also the situation in Britain where trade unions have traditionally regarded collective bargaining as the primary way to extend collective control by workers of their work situation, even though the bargaining outcome is usually not a legally enforceable contract: B. Hepple "Great Britain" in R. Blanpain (ed.) *International Encyclopaedia for Labour Law and Industrial Relations* (Kluwer, Deventer, 1980) 175.

9 E. Cordova, supra n.5, 128.

between unions and employers.[10] Given that the estimated private and public sector labour force covered by private sector unions amounts to 818,921,[11] it follows that quite some workers, potentially as many as 300,000,[12] currently miss out on award protection. The reasons for this vary as will be shown below.

First of all, one has to be a "worker" as defined in section 2 of the 1973 Industrial Relations Act. This seems self-evident. However, it does imply that apprentices miss out on award coverage under the 1973 Act as they are deemed not to be in a master/servant relationship.[13]

It does not suffice to be labelled a worker. One has to be a worker "for purposes of award coverage". Here section 213 of the 1973 Industrial Relations Act comes into play which holds that, to be considered a worker for the purpose of award or agreement coverage, one has to be employed for the "direct or indirect pecuniary gain of the employer". The only but admittedly crucial exception to this prerequisite is when the employer is a body corporate.[14] Admittedly, the term "gain" is open to a broad interpretation and the Arbitration Court has refused to equate pecuniary gain with profit.[15] Even a "worker" employed by a "qualified" employer does not enjoy award coverage automatically. A further requirement is indeed that there be a union that negotiates an award or agreement on behalf of the workers it represents. This pre-supposes employment in a job covered by the membership rule of a registered union. And even then it may turn out that some workers are excluded from coverage by the award itself, in that they earn salaries in excess of the salary bar specified in the award which would otherwise apply to them. A typical example is the New Zealand Clerical Workers' Award, where the salary bar is $18,053.

Limitations as to the personal scope of award coverage are not the only ones. There are also limitations as to the subject-matter of the union and employer negotiations. The actual issues that can be bargained upon and inserted into an award or collective agreement are indeed constrained by the definition of industrial matters. The effect of the statutory definition, especially the court's interpretation

10 See the "Green Paper" *Industrial Relations: A Framework for Review* (Dept. of Labour, Wellington, 1985), Vol. 1, 6.

11 1983 figures. See the Green Paper, ibid. Vol. 2, 23 (table 1).

12 The lack of sufficiently accurate data makes it impossible to be more precise as to the actual number of New Zealand workers that are not covered by awards or collective agreements. Anyway, the consideration that the number of non-unionised persons in the private sector as well may equal 300,000 does, of course, not imply that both figures necessarily cover the same people in both instances.

13 The Green Paper, supra n.10, Vol. 1, 83.

14 Ibid. 82. The issue is of particular importance to people employed in voluntary welfare agencies.

15 *Canterbury Hotel, Hospital, Restaurant, Club and Related Trades Employees' Industrial Union of Workers* v. *Salvation Army, and Salvation Army Property (New Zealand) Trust Board* (1982) Arb. Ct. 535.

of it,[16] is to confine union activity within the formal disputes settlement system to a relatively narrow range of issues, leaving decisions regarding the introduction of new technology, the change of product lines, mergers or takeovers to the absolute discretion of management. The Government in its Green Paper claims to be aware of the problem and asks the question whether it may be desirable to leave unions and employers free in determining for themselves the scope of their negotiations.[17] It thus touches upon the broader notion of industrial democracy, but it is submitted that it fails to address the issue properly. More specifically, it fails to consider whether collective bargaining, because of its conflictual nature, is the most appropriate way of dealing with matters such as those that case law thus far refuses to interpret as being "industrial". Therefore it ignores the possibility of whether some decisions on matters that clearly affect the welfare of workers should be opened up for workers participation through other means than collective bargaining. Unfortunately, the chances of the issue being picked up in the Government's policy statement that will follow the release of its Green Paper are as yet (June 1986) rather limited.

III. WORKERS' PARTICIPATION AT THE WORKPLACE: FORMAL CHANNELS

A. Level of Co-operation

A fairly recent tendency towards decentralisation notwithstanding,[18] collective bargaining in most countries of the Western European Continent traditionally takes place at the national or industrial level. This means that the trade union role at the level of the actual workplace has always been rather limited. Instead institutions such as works councils, safety and health committees, or shop stewards have been set up, either by the legislature or through collective arrangements by the parties themselves. These formal channels of industrial democracy operate thus at a level which is as close to the worker as possible. This may be the level of the enterprise taken as a legal entity, or the level of what can be referred to as the establishment or technical unit of exploitation. The latter notion includes every entity which enjoys a certain degree of economic and/or social autonomy.

In practice, institutionalised workers' participation, primarily through works councils, can often be found at both levels (i.e. the legal and the technical entity) combined. In the Federal Republic of Germany, for instance, a works council is required in every establishment ("Betrieb") that normally employs five or more workers; if there are two or more works councils in one enterprise ("unternehmen"),

16 Two recent cases of importance in this area are: *NZ Bank Officers IUW* v. *Australia & NZ Banking Group Ltd.* (1977) Ind. Ct. 219 (held: staff lending policy is not an industrial matter) and *Re a Dispute of Interest Relating to the New Zealand (excluding Northern and Taranaki Industrial Districts) Law Practitioners Award* (1980) Arb. Ct. 267 (held: the introduction of new technology is not an industrial matter). For an in-depth discussion of "industrial matters", see Philip A. Joseph *The Judicial Perspective of Industrial Conciliation and Arbitration in New Zealand* (The Legal Research Foundation Inc., Auckland, 1980, No. 17).

17 Green Paper, supra n.10, 18 (question 13).

18 O. Clarke "Collective Bargaining and the Economic Recovery" (1984) 129 The OECD Observer 19.

a central works council must be set up.[19] In France as well, the establishment of an enterprise committee ("comité d'entreprise") is mandatory in any company employing at least fifty workers. If a company, as a legal entity, is composed of several geographically separated technical entities, an establishment committee ("comité d'établissement") must be created in each entity with five or more workers. In addition, the French Parliament adopted on 15 October 1982 new statutory rules requiring groups of companies to set up global "group councils" for the first time. Such groups of companies are defined under the new provisions with reference to French company law. Broadly, a group encompasses a dominant parent or holding company, with majority or wholly-owned subsidiaries as well as associate and other organisations in which the parent has a financial interest.[20] This development reflects a concern to let the workers' participation rights grow along with the growth of the enterprise. It also represents a response to recent E.E.C. preoccupations with such plans as the draft "Vredeling" directive on information and consultation in large national and multinational companies.[21]

B. Institutions of Workers' Participation

As will be outlined below, the major forms of workers' participation which operate on the Western European Continent today are information, consultation and co-decision making. The main institutions that cover these forms of participation at the plant level are works councils, committees for safety and health, and often in practice (as pointed out below), shop stewards or union delegates. For reasons of completeness the representation of workers on company boards would have to be added to this list. As indicated already, the latter represents an extreme and rather controversial type of participation, even on the European continent.[22] Therefore its feasibility for New Zealand is marginal, at least in today's climate of opinion and given that it would be such a big step to take all at once anyway. And it will therefore be left out of this discussion.

In principle, each of the above institutions has a specific and distinct role to play. Their respective functions (broadly described as having either a collaboratory or conflictual nature) are meant to supplement one another: on the one hand, works councils, committees for safety and health (as well as representatives on company boards) stand for workers' participation and, on the other hand, shop stewards and union delegates represent workers' interests in conflict situations (grievance handling, limited collective bargaining, etc.). In practice, however, these

19 See the German Works Constitution Act 1972, ss.1 and 47.

20 For an account in English, see "France: New Law on Employee Representation" (1982) 107 European Industrial Relations Rev. 22.

21 The "Vredeling" Directive will be commented on further at a later stage of this article.

22 Although participative management has already been introduced in a number of countries such as Austria, Luxembourg and, of course, Scandinavia and the F.R. Germany, the overall movement seems to have lost momentum. At the EEC level as well, the so-called proposal of the Fifth Directive concerning the structure of public limited companies has already been in the pipeline for some 14 years. The controversy has mostly to do with the fact that the European proposal contains rules for employee participation in the decision-making process of the company. The interested reader may be referred to R. Blanpain "Workers' Participation in the European Community. The Fifth Directive" (1984) 13 Bull. of Comp. Labour Relations 294.

functional divisions are often blurred and there is considerable overlapping with regard to the jurisdiction as well as the composition of the different bodies. That is bodies set up to deal with conflict situations often become involved in workers' participation and vice versa. The confusion is greatest in France where the institutionalised relations between employers and employees are embodied in enterprise and/or establishment committees, committees for health and safety, workers' representatives ("délégués du personnel"), the enterprise union section ("section syndicale") and the union delegates ("délégués syndicaux"). There, for purely pragmatic reasons, the same individual may legally be both a workers' representative and a member of the enterprise committee, or a workers' representative and a union representative to the enterprise committee. Also, if there is no health and safety committee, workers' representatives fulfil (some of) the functions of the members of the committee.[23] In Belgium as well, the same employees often find themselves to be simultaneously members of the union delegation, the works council and the committee for safety, health and embellishment of the workplace.[24] A recently enacted Social Recovery Act[25] contains provisions that aim at reducing the excess of instances for workers' representation. Traditionally, there is indeed a requirement to organise elections for the establishment of a works council in every company properly understood (i.e. technical entity) with an average workforce of at least 100 employees. With respect to safety and health committees, the threshold is 50. In both instances, regular elections are to take place every four years. However, under the old legislative provision, if the threshold of 100 or 50 was reached at any stage during this four-year period, by-elections were to be held. The new Act repeals this requirement of interim elections. Furthermore, it is no longer compulsory to organise an election in enterprises where a works council or safety and health committee has been (or was deemed to be) active in the past but the number of employees has fallen below the threshold since the previous election took place. From 1985 onwards, the functions of the works council in such companies will be carried out by the members of the safety and health committee. In those instances where the number of the workforce has fallen below 50, the safety and health committee is even abolished altogether.

This Social Recovery Act may be viewed as an attempt to rationalise as to the number of bodies for workers' representation. However, its primary concern is quite simply to bring down the overall number of employee representatives enjoying special protection against dismissal[26] and is part of a move towards more flexibility or deregulation in the social arena.[27]

23 M. Despax and J. Rojot "France" in *International Encyclopaedia for Labour Law and Industrial Relations,* supra n.8, 1979, 159 and 161.

24 R. Blanpain "Belgium" in *International Encyclopaedia for Labour Law and Industrial Relations,* supra n.8, 1985, 159.

25 Social Recovery Act containing Social Provisions, 22 January 1985, *Official Journal,* 24 January 1985.

26 Because of the special nature of their functions, workers' representatives throughout Western Europe quite commonly enjoy a special status so as to protect them against discriminatory treatment by their employer.

27 The issue of deregulation falls outside the scope of this article.

The remainder of this essay will focus primarily upon the works council. For not only is that one of the oldest and most widely spread forms of workers' participation in Europe, but the works council has also been regaining considerable attention and strength in the last few years.[28] Moreover, the concept of works councils comes closest to what has been referred to in section 233 of the New Zealand Industrial Relations Act 1973 as "works committees representative of workers and employers" with the clear indication that these bodies, when and if established by regulation of the Governor-General, will be charged with some form of joint problem-solving in order to promote and maintain harmonious industrial relations. As has been pointed out by Brooks,[29] these concerns are further reinforced by the provisions of section 16 of that same Industrial Relations Act 1973. In that section are enumerated the functions of the (now defunct) Industrial Relations Council which include recommending to the Government ways and means of improving industrial relations.

C. Degree of Workers' Participation

As indicated above, the major forms of workers' participation that operate in Western Europe are information, consultation, and to some extent, co-decision making. Each stands for a different dimension of influence that can be exercised in the decision-making process of management. All three degrees of workers' participation are represented in the functioning of the works council. They are also inter-related in that, according to the principle of *qui potest major, potest minor,* the greater degree of influence includes the lesser degree. The three notions have been outlined by Blanpain.[30] Disclosure of information means that the employer provides data which will possibly be discussed with the workers' representatives. By consultation is meant that, after acquiring information, an exchange of ideas takes place in order to formulate an advisory opinion to the employer. This advice does not require either unanimity or a majority vote. Consultation is indeed primarily designed to enable the employer to appreciate the different points of view. Because of its very nature, such an advisory opinion is not binding on the employer. Finally, co-decision is a form of decision-making whereby labour takes decisions jointly with the employer thus giving labour a right to veto management decisions.

The distinction between consultation and co-decision making is not always a clear cut one. The advisory powers of the works council have indeed been strengthened in a number of Western European countries recently so as to force the employer, at least in some instances, to take the opinions of the works council seriously. In the Netherlands, for instance, the Works Councils Act 1971 has been amended in 1979 to the effect that, if a works council contests an employer's planned decision in a prior consultation area, the employer is precluded from taking any action on the decision for at least one month. During this period,

28 E. Cordova "Workers' Participation in Decisions within Enterprises: Recent Trends and Problems", supra n.5, 129.
29 B. Brooks, supra n.1, 89-90.
30 R. Blanpain "The Influence of Labour on Management Decision-Making: a General Introduction" (1977) 8 Bull. of Comp. Labour Relations 10.

the works council can appeal to the Company Division of the Amsterdam High Court. If, after having weighed the interests involved, the employer's plans are found to be "clearly unreasonable", the court can force the employer to withdraw his decision, either partly or completely.[31] Although the rather short experience with the new statutory provisions thus far reveals that the court has been reluctant about effectively putting itself in management's position,[32] it is clear that the employer's duty of consultation under such circumstances involves more than to merely sit back, listen to whatever the works council may have to say on the issue at stake and next to "carry on business as usual". A similar system appears to operate in Austria where the works council, if it believes that a particular decision taken in spite of its advice is contrary to the economic welfare in general, has a right of appeal to the relevant authority which may result in a suspension of the employer's decision (e.g. a decision which would entail closure of the enterprise) for a period of four weeks.[33] In other countries such as France, the only legal requirement for management is to ask for advice without there being an obligation to follow that advice. However, if such advice is not sought, the management decision will be considered legally void and not enforceable.[34]

Consultation may entail the right to delay management decisions, whereas co-decision means that such decision can be blocked outright. The practical effect of either is that often negotiations will have to be entered into so as to reach a settlement or compromise that is mutually acceptable to both parties. Things are being complicated even further by the notion of "consultation with a view to reaching agreement" used in E.E.C. Social Directives on two occasions during the 1970's. One is the Directive of 17 February 1975 on the approximation of the laws of the member states relating to collective redundancies (Article 2) and the other a Directive of 14 February 1977 relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of businesses (Article 6, 2). The same notion can also be found in the "Vredeling" proposal for a Directive on procedures for informing and consulting employees dated 24 October 1980. Although the intention was not to introduce a right of co-determination — there is indeed no requirement of actually reaching an agreement —, it is clear to Blanpain[35] that this expression goes further than consultation in a strict sense. In short, the distinction between consultation and negotiation is not clear either.

31 Works Council Act of 5 July 1979, *Official Journal,* 1979, No. 449. For an account in English, see (1985), 1 L. L.E. (Labour Lines Europe) J.24ff.

32 In the period 1 September 1979 to 31 December 1983, 41 cases of referrals to the Amsterdam Court were heard. In 6 of these, the Court decided in favour of the works council the predominant ruling being that the employer had failed to comply fully with the prior consultation procedure (rather than challenging the planned decision itself). See *O.R.-blad,* September 1984, as cited in L.L.E.J., supra n.31.

33 R. Blanpain, supra n.3, 209.

34 Referral here is to the jurisdiction of the enterprise committee regarding social matters. See M. Despax and J. Rojot, "France", in *International Encyclopaedia for Labour Law and Industrial Relations,* supra n.8, 145.

35 R. Blanpain, supra n.3, 209.

The fact that the rights of works councils are being strengthened (and widened) may create problems as to how to co-ordinate their functions with those of collective bargaining bodies. This issue is of particular relevance to New Zealand where award negotiation and second tier bargaining remains the most important form of industrial democracy. As will be outlined below, several approaches are possible in tackling the problem.

Belgium may be illustrative for one approach. Under this first approach the legislator expressly denies works councils the right to enter into legally enforceable collective agreements, this right being reserved for the (most representative) trade union organisations exclusively. Works councils are independent bodies which do not represent the employer, the employees, the trade unions or the enterprise. Employees that are members of the works council, although they are nominated by the union and elected by the overall workforce, are therefore not considered to be delegates of the trade union for the purpose of concluding collective agreements within the meaning of the 1968 Act on collective bargaining agreements and joint committees.[36] Although the possibility that these members of the works council are, in fact, engaged in bargaining cannot be excluded, such agreements are not covered by the 1968 Act and are thus "legally ignored".

An alternative approach can be found in France. On the one hand, French workers have been given a direct (i.e. without intervention by a third party) right to collective expression on the content, organisation and conditions of work by an Act of 4 August 1982. This represents a break with the principle of delegation which underlies the procedures for both employee and union representation.[37] The overall success of this recognition by law of the right of expression, which may be viewed as an attempt to break with the existing model of employee representation,[38] is doubtful since workers, after taking an active interest initially, now seem to be growing indifferent to it.[39] On the other hand, an Act of 13 November 1982 strengthens the role of the union within the enterprise by introducing compulsory negotiations. Although the union could engage in collective bargaining at the level of the enterprise even before the 1982 reforms, it could traditionally not legally force the employer to start such negotiations. The new Act makes it mandatory for the employer (under the threat of penal sanctions) to take the initiative for negotiations each year. These negotiations must be undertaken with the view of reaching an agreement in three distinct areas: wages, hours of work and the organisation of working time. It is important to stress, though, that this right of collective bargaining has been given to the unions only. All proposed amendments to validate the negotiations between employer and enterprise committees ("comités d' entreprise") or workers' representatives (délégués du personnel") were rejected. The legislative intent was clearly to recognise solely

36 Act of 5 December 1968, *Official Journal*, 15 January 1969.
37 F. Eyrand and R. Tchobanian "The Auroux Reforms and Company Level Industrial Relations in France" (1985) Brit J. of Industrial Relations 241 ff.
38 Ibid. 247.
39 "The Auroux Laws: 2 years later", Social and Labour Bulletin, I.L.O., 1985, No. 3-4, 447.

the (representative) unions for the purpose of establishing collective agreements in the legal sense.[40]

Both approaches outlined above with respect to the problem as to how to co-ordinate the functions of the works council and the traditional role of the union in collective bargaining "solved" that problem by legally denying the works council's right to enter into binding collective agreements. A third approach, to be found in the Federal Republic of Germany and the Netherlands, addresses the issue in a more positive fashion. The German legislator, for instance, leaves management and works councils free to enter into so-called (voluntary) plant agreements on various matters relating to labour/management relations in the plant. However, since works councils are required by law to co-operate faithfully with management, strike as a means of resolving conflicts is expressly prohibited. This limits the power of the works council in inducing management to sign such an agreement. Yet another restriction is that plants agreements between works council and management can be made only in areas not already or normally covered by collective agreements. However, in matters where the works council has been given co-determination rights (most notably social matters), plant agreements between management and works council are compulsory. Here the relationship between collective and plant agreements becomes more complicated and conflicts between collective agreements and works council power are solved in a different manner. Briefly, although it is still the prerogative of the collective bargaining parties to regulate the matters themselves, this does not necessarily imply a complete loss of power for the works council. Firstly, the position of the works council is only affected if the plant is effectively covered by a collective agreement. Secondly, co-determination, as a practical matter, is only excluded if the collective agreement is sufficiently specific so as to cover all aspects of the matter.[41]

As in the Federal Republic of Germany, the Dutch 1971 Works Council Act did not turn the works councils into some kind of collective bargaining agents at the level of the workplace to the exclusion of the union. The Act does not in fact see the works council solely as a body to represent the workers' interests but sees it also as a consultative body, established to enhance a proper functioning of the enterprise as a whole. This may explain why the 1971 Act prevents competition between works council and union by stating that most of the advisory and co-decision powers of the works council do not apply to issues already covered by a collective agreement.[42]

40 J. Pelissier "La fonction syndicale dans l'entreprise après les lois Auroux" (1984) 1 Droit Social 41 ff.

41 M. Weiss, S. Simitis, and W. Rydzy *The Settlement of Labour Disputes in the Federal Republic of Germany* (Frankfurt am Main s.d., 116 p., unpublished). See also Th. Ramm "Federal Republic of Germany" in *International Encyclopaedia for Labour Law and Industrial Relations,* supra n.8, 168 ff.

42 H. L. Bakels "The Netherlands" in *International Encyclopaedia for Labour Law and Industrial Relations,* supra n.8, 70.

D. Scope of Participation: Its Content and Timing

In general, works councils enjoy information and consultation rights (possibly even rights of co-determination) mostly regarding social matters. The list is a quite impressive one in countries such as Belgium, where the works council has consultation rights (in a strict sense) in the areas of supervision of labour standards as laid down by social legislation for the protection of labour, vocational training and retraining, structural changes in the enterprise due to concentration,[43] general principles to be followed regarding recruitment and dismissal of employees, job classification, social rehabilitation of handicapped workers, destination of disciplinary fines imposed on employees and (quite typically for a country with three official languages) the use of language in the relationship between employer and workers.[44] These consultation rights are strengthened by the employer's duty to disclose to the works council information of a more economic and financial nature about such matters as the company rules, the competitive position of the enterprise in the market, production and productivity, the financial structure of the enterprise, budget and calculation of costs, personnel costs, scientific research, public assistance, and general prospects for the future.[45]

When examining the different matters on which information has to be given, one is struck by the wide diversity between the national systems. There is, however, a general trend for information to cover not only wages and conditions of work in a narrow sense, but also work organisation and economic/financial decisions. The Belgian case is illustrative in this respect. As the degree of participation increases, its scope or coverage tends to become more narrow. The subject matter of consultation is indeed usually not so wide as the subject matter of information. And as far as the real right of co-determination is concerned, the veto powers of even the German works council are restricted to twelve specified social matters thus excluding personnel matters (especially personnel planning) and everything having to do with the economic policy of management (be it investment, production, marketing, or whatever). This implies that there is still room for expansion, both as to the coverage and degree of workers' participation.

A crucial question is when information should be given and when consultation ought to take place. Obviously, if employees are to have an opportunity to influence certain management decisions which may affect them, they have to be approached in advance, i.e. before the actual decision is taken. On the other hand, it must be

43 Takeovers, mergers, closures, etc. The works council has to be informed about the economic, financial or technical reasons which cause those structural changes as well as about their economic, financial and social impact. Moreover, the works council must be consulted about:
— measures to avoid dismissals;
— plans of collective dismissals and transfers;
— "social measures" that can be taken, including vocational retraining and/or social re-adaptation of redundant workers.

44 The general framework can be found in an Act of 20 September 1948, *Official Journal,* 27-28 September 1948, as amended on several occasions.

45 See the Royal Decree of 27 November 1973 on the communication of economic and financial information to the works council, *Official Journal,* 28 November 1973.

appreciated that certain information, if disclosed, may come within easy reach of competitors on the economic market thus entailing the risk of substantially damaging the company's interests or leading to the failure of its plans. This raises the issue of confidentiality. In all industrial relations systems on the European Continent, employees' representatives are in one way or another bound to observe discretion or secrecy.[46] In Belgium, where extensive information has to be given — which makes it, along with Sweden, one of the most progressive countries in this area —, a distinction is made between the employer's duty to disclose information to the works council and the right of the employees' representatives in the works council to inform the workforce at large of the company on the basis of the information which they receive themselves. As to the first aspect of this confidentiality problem, the employer can be granted authorisation (to be obtained from a government official) to communicate parts of the required information after a certain delay rather than immediately. Also, when disclosing information to the works council, the employer can mention, when necessary, any confidential aspects of that information the diffusion of which would create problems for the company. Any written communication made by a member of the works council and addressed to the rank and file must be previously lodged with the secretary to the works council. Furthermore, the 1948 Act holds that penal sanctions apply to any member of a works council who improperly communicates or makes public any information of an individual nature which he has obtained by reason of duties or functions exercised under the provisions of the Act. Likewise, penalties are imposed upon any member of a works council who improperly communicates or makes public global information in such a way as to cause harm to the national economy, a branch thereof or an individual undertaking.[47] The proposed E.E.C. Directive on information and consultation approaches the issue of confidentiality in a similar fashion. Briefly, secret information does not need to be communicated. Disputes concerning the confidential character of information will be settled by a third party, e.g. the court. The fact that information is withheld on the grounds of secrecy does not release management from its obligation to consult with the employees. Such consultation must take place at least thirty days before putting into effect any decision directly affecting employment or working conditions of the employees.[48]

E. Participants in Participation: Composition of the Works Council

Some aspects of the question as to the role of trade unions in relation to the functioning of workers' participation have already been discussed.[49] The picture can be completed by addressing the issue of the composition of the works council.

Trade unions were born as protest organisations, conceived primarily to represent workers, to negotiate on their behalf and to engage, if necessary, in industrial action. These functions gradually conditioned a trade union mentality that was not easy

46 R. Blanpain, supra n.3, 216.
47 R. Blanpain, "Belgium", in *International Encyclopaedia for Labour Law and Industrial Relations,* supra n.8, 181 and 192.
48 For more details, see R. Blanpain *The Vredeling Proposal* (Kluwer, Deventer, 1983).
49 See infra, *C*: "Degree of workers' participation".

to accommodate to certain non-bargaining forms of workers' participation. Hence the lukewarm resolutions adopted in the past and some lingering reservations about works councils and, even more, board representation.[50] The slow and in any event, gradual acceptance of workers' participation by the union may be illustrated by retracing somewhat the origins of the system of employee representation on the plant level in the Federal Republic of Germany.[51] The German model as it exists today is not at all an invention of the organised labour movement. On the contrary, employers during the last century voluntarily established some form of employee participation. They had essentially two reasons in mind: to keep unions out of the plant (i.e. a reaction against the growth of the union movement) and to provide employer policies at the plant with a better legitimation. Union support for the idea of worker participation came only later, due to political change and change in the strategies of the labour movement. Their awareness slowly grew that the managerial powers could be limited by establishing democratic structures within the plant, especially if employee participation could be controlled by the union. When the first Works Council Act was enacted in 1920, a compromise had thus to be found. This explains why works councils were set up as separate institutions from the unions and were to represent all employees at the plant, both organised and non-organised. Since 1920 the unions have tried to do away with the institutional separation and in more recent years they have succeeded, both in Western Germany and elsewhere, in obtaining some right to actively support and control works council activities. Even if there is still — at least in principle — institutional separation between unions and works councils, there are close links too as will be shown below. In the Netherlands the 1979 Works Councils Act provides for the establishment of employee-only works councils in all industrial and commercial undertakings with at least 100 workers. The members are elected by and from their colleagues at the workplace, either from a list of trade union nominees or a list which may include non-union members as candidates. In this latter case, the list must be supported by at least thirty signatures. Currently, around 35 per cent of all works councils are believed to have a majority of members who also belong to the country's largest union confederation, F.N.V.[52] In the Federal Republic of Germany as well, a works council comprises employee representatives only and members are elected by the workforce from lists submitted by the unions or other groups of employees. Recently published results of works council elections held in 1984 show that, although non-unionised candidates are increasing their share of the vote slightly, candidates from the major D.G.B. confederation won 63.9 per cent of all seats.[53] In France, the head of the enterprise is a member of the enterprise committee in his/her own right and is also the president of the committee. Employee members are elected. The election is held in two ballots, with the unions enjoying the exclusive right to nominate candidates during the first round. If no (representative) union presents a list, only one ballot takes place with a freely presented list(s) of candi-

50 E. Cordova, supra n.5, 135.
51 The notes below are taken from M. Weiss, E. Simitis and W. Rydzy, supra n.41, 2 ff.
52 (1985) 1 L.L.E.J. 24-25.
53 (1985) 142 European Industrial Relations Rev. 14.

dates. Non-union candidates gained 37.2 per cent of all seats in the 1984 elections.[54] As in France, the Belgian works councils do not have an employee-only membership. The employer acts as chairperson. In addition, he is free to choose whoever he wants to represent him from amongst the managerial employees. He can appoint as many representatives as he wants provided that he does not exceed the number of employee representatives. The latter are elected by secret ballot from lists submitted by the (most representative) unions.

Generally, the managerial and executive staff are not represented by the works council. They tend to be excluded so as to avoid loyalty conflicts caused by their leadership function. In this respect important changes have been introduced by the Social Recovery Act of 1985 in Belgium. When an enterprise employs at least fifteen "cadres" a special electoral body has to be set up for this category of employees. The Act, which amended the 1948 Act, gives a rather broad definition of "cadres". They are white-collar workers who, although they do not belong to the "leading personnel" (managerial employees in the strict sense), perform a function in the enterprise which is generally reserved for "holders of a qualification of a given level or someone with equivalent job experience". As a practical matter, the employer will first publish a list of functions and qualifications, which he considers to be of the level of "cadre". Individual employees and/or unions can bring an action before the Labour Court if they think that the list is inappropriate. The employer next publishes a list with the names of those employees he considers to be "cadre". Here again, the Labour Court has the last word.[55]

IV. CONCLUSIONS

This article started off with the proposition that the New Zealand system of industrial relations is based on a philosophy that both sides of industry represent different interests which are in opposition to each other. Hence the emphasis in the Industrial Relations Act 1973 on conciliation and arbitration of industrial disputes. The above proposition was followed by some reflections on workers' participation in selected countries on the Western European Continent. These reflections constituted an attempt to illustrate that to take an exclusively adversarial attitude to industrial relations may be inappropriate in that it is too narrow and fails to take into account that certain common interests between management and labour do in fact exist, have to be accommodated, and even encouraged.

The New Zealand legislation has failed to result in more than a token step towards the concept of workers' participation.[56] The current Green Paper, presented by the Labour Government as a general framework for the review of industrial relations, does not even address the issue. Such lack of attention can only be regretted, especially if a more harmonious system of industrial relations is what is being aimed at. It may be felt that genuine co-operation and consultation

54 Idem.

55 Act of 20 September 1948, art. 14 para. 1, as amended by the Act of 22 January 1985, *Official Journal*, 24 January 1985.

56 See A. Szakats "Worker Participation in Management: German Experience" (1974) 16 J.I.R. 183, as cited by B. Brooks, supra n.1, 92.

cannot be imposed and that participation is ultimately the expression of a state of mind rather than of a legislative fiat.[57] However it must be clear that statutory implementation of the idea of workers' participation in New Zealand does not necessarily have to be an unacceptable or fruitless exercise if only there is a willingness to look beyond its most extreme form, i.e. participation in company boards. The crucial importance of certain basic rights of information and consultation cannot be stressed enough in this respect. After all, in Europe it was the shortcomings of collective bargaining as such, along with the implied limitations of having predominantly high level (national or industry-wide) negotiations, that accounted, at least in part, for the appearance of institutions for workers' participation at the plant level such as the works council. Moreover, it has been suggested that the current revival of the works council in Europe corresponds to a shift in emphasis away from the promotion of workers' participation through changes in the company or formal management structure towards the recognition of co-determination and consultation rights through various bodies outside that structure.[58] One of these bodies is of course the works council or, to use the terminology in section 233 of the New Zealand Industrial Relations Act 1973, a "works committee representative of workers and employers" charged with some form of joint problem-solving "for the purpose of promoting and maintaining harmonious industrial relations".

No single, all-comprehensive model of workers' participation through works councils immediately suggests itself for introduction in New Zealand. As the above overview may have made clear, no two national systems of workers' participation through works councils are identical in Europe either. The validity of this comment goes to the degree of participation as well as its scope. It even applies to the very composition of the works council. However, the European experiences also reveal that the kind of problems each national system faces upon the introduction of workers' participation can be remarkably similar. Reference is made here to the issue of the inter-relationship between collective bargaining by unions and workers' participation through works councils. In each system, the code of the union in relation to the operation of workers' participation had to be addressed. The lesson for New Zealand is then that the traditional monopoly of the union in representing the workers' interests was never a fundamental obstacle to the introduction of workers' participation. The functions of unions, councils, and for that matter also shop stewards or union delegates and workers' representatives in formal company structures, are to be perceived and effectively can be viewed as complementary elements of industrial democracy in its full sense. As such, the introduction of workers' participation in New Zealand would not be contradictory to any contemplated move to expand the traditionally limited scope of collective bargaining.[59]

57 E. Cordova "Workers' Participation in Decisions within Enterprises: Recent Trends and Problems", supra n.5, 133. A reluctance to impose something for which the industrial relations parties themselves are believed not to be ready yet may explain why s.233 is limited to allowing for the establishment of works committees on a voluntary basis only.

58 Ibid. 130.

59 See Question 13 of the Green Paper where it is asked whether unions and employers should be left free to determine for themselves the scope of their negotiations.