128. The Committee emphasises that collective agreements which are in force should be applied fully (unless otherwise agreed by the parties). As for future negotiations, it considers that the only government interference acceptable must comply with the following principle which it has often stated in past cases: "If, as part of its stabilisation policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards." [See Digest of decisions and principles of the Freedom of Association Committee, 3rd edition, 1985, para. 641.] In any case, any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organisations in an effort to obtain their agreement.

129. Taking into account the foregoing conclusions, the Committee must regret that contrary to the principle of collective bargaining enshrined in Convention No. 98, some provisions of the Decrees adopted by the Government (in force between 1 August and 31 December 1990) within the framework of its Economic Stabilisation Programme have resulted in the non-observance of collective agreements in force, mostly in the public sector, and particularly as regards wages, advance payments and loans. It also regrets that limitations on future bargaining have been imposed by decree without consultation with the workers' and employers' organisations in an effort to obtain their agreement.

The Committee's recommendations

130. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

(a) The Committee must express its regret that contrary to the principle of collective bargaining enshrined in Convention No. 98, some provisions of the Decrees adopted by the Government (in force between 1 August and 31 December 1990) within the framework of its Economic Stabilisation Programme have resulted in the non-observance of collective agreements in force, particularly as regards remuneration, advance payments and loans, without the approval of the parties being obtained and without them even being consulted.

(b) The Committee also regrets that limitations on future bargaining have been imposed by decree without consultation with workers' and employers' organisations in an effort to obtain their agreement.

(c) The Committee asks the Government to take full account in the future of the principles set forth in its preceding conclusions regarding economic stabilisation programmes which result in restrictions on collective bargaining.

ANNEX

Text of the Supreme Decrees objected to by the complainants

Supreme Decree No. 057-90-TR

Section 1. Undertakings covered by Act No. 24948 dated 2 December 1988 (an Act respecting state workers as well as workers employed in state bodies subject to the labour regulations of the private sector) may not grant wage increases until 31 December 1990 irrespective of their amount, system, form or periodicity which may have been adopted or whether they have been fixed by a unilateral decision of the employer or by collective agreement. The State shall have the power to regulate any increases which may be necessary during this period.

Section 2. The National Development Corporation (CONADE) shall be required to supervise compliance with the standards to which the preceding section refers, within the sphere of its competence.

Supreme Decree No. 107-90-PCM

Section 1. From 1 August 1990 undertakings and bodies to which Supreme Decree No. 057-90-TR refers shall grant their workers whether or not they are covered by collective agreements a wage increase which shall be equal to 100 per cent of the ordinary remuneration and collateral payments which they received on 31 July 1990. The increase shall not exceed I/. 75,000,000 a month. The ordinary reference wage excludes the July bonus.

Section 2. The increase to which the previous section refers shall be an integral part of any increase, increment or anticipated payment made from 1 August 1990.

...

Section 5. In any new collective negotiations initiated during the period of application established by Supreme Decree No. 057-90-TR, undertakings or bodies covered by the above-mentioned Decree shall give strict observance to the limits established in the Supreme Decree as regards bargaining, under the responsibility of their managers, representatives and directors. CONADE or CONAFI, as the case may be, shall issue the corresponding regulations in accordance with the law.

...

Section 7. It should be noted that the third transitional provision of Supreme Decree No. 056-90-TR dated 17 August 1990 is of a general scope and that it applies equally to the state undertakings and bodies to which Supreme Decree No. 057-90-TR refers.

Supreme Decree No. 056-90-TR

Section 1. From 1 August 1990 workers subject to the labour regulations of the private sector whose remuneration is regulated by collective agreement and holding a valid contract of employment on 31 July 1990 and who continue to provide their services on the date of the publication of the present Supreme Decree shall be entitled to receive an "advance wage increment" which shall be established by the employer and which in no case shall be less than 100 per cent of the remuneration received by the worker on 31 July 1990.

Section 2. The advance payment to which this Supreme Decree refers is an integral part of the general increase and of any additional wage increments to which the worker may be entitled from 1 August 1990 under a collective agreement, administrative resolution or arbitration award.

Section 3. The increases or advance payments which may have been granted on a general basis from 1 July 1990 by the employer in a unilateral decision or under a collective agreement shall be part of the sum of the advance payment stipulated by this Supreme Decree.

Transitional provisions

One. Up until 31 December 1990 employers may grant their workers voluntary advance wage payments to be deducted from future additional increments or the next general increase and in which case it shall be sufficient to communicate such payment to the administrative labour authorities for authorisation.

Two. The provisions of this Supreme Decree shall not cover undertakings subject to Act No. 24948 dated 2 December 1988 respecting state workers or workers employed in state bodies subject to the labour regulations of the private sector. The State shall issue the regulations which it considers necessary in the cases to which this provision refers.

Three. Until 30 December 1990 the granting of advance payments, loans or credits to be deducted from length of service payments or a compensation fund as provided by legislation or collective agreement, shall be suspended with the exception of those payments specifically made for housing purposes in accordance with the legal regulations in force in this respect.

Supreme Decree No. 105-90-PCM

Section 2(n). The provisions approved and/or implemented by undertakings which would have resulted in a modification of the organic and/or wage structures in force on 1 July of the current year shall become null and void. This provision does not apply to promotions, wage increases and/or re-classifications made in accordance with the legal provisions in force.

Supreme Decree No. 058-90-TR

Section 1. In the collective agreements which come into force on 1 August 1990, workers and their employers may freely negotiate wage increases, wage compensation clauses and working conditions.

Section 2. When the administrative labour authorities are called upon to settle cases where the parties have failed to reach an agreement, account shall be taken of the criteria established in the economic and labour report issued by the Directorate General of Labour Economy and Productivity.

This report, which is issued on the basis of documentation which undertakings are obliged to present and studies carried out shall form part of the file and be communicated to the parties.

Final transitional provisions

...

Three. The provisions of Supreme Decrees Nos. 025-88-TR and 005-90-TR and other complementary provisions shall apply only to collective agreements and administrative resolutions in force.

III. CASES IN WHICH THE COMMITTEE REQUESTS TO BE KEPT INFORMED OF DEVELOPMENTS

Cases Nos. 1435, 1446 and 1519

COMPLAINTS AGAINST THE GOVERNMENT OF PARAGUAY PRESENTED BY
- THE INTERNATIONAL UNION OF FOOD AND ALLIED WORKERS ASSOCIATIONS (UITA)
- THE LATIN AMERICAN CENTRAL OF WORKERS (CLAT)
- THE WORLD CONFEDERATION OF ORGANISATIONS OF THE TEACHING PROFESSION (WCOTP)
- THE INTERNATIONAL FEDERATION OF PLANTATION, AGRICULTURAL AND ALLIED WORKERS (IFPAAW) AND
- THE TRADE UNION OF THE ALGODONERA PARAGUAYA S.A. ENTERPRISE (SITRACAPSA)

131. The Committee has examined Case No. 1435, submitted by the International Union of Food and Allied Workers Associations (IUF) and the Latin American Central of Workers (CLAT), on two occasions and presented interim reports [see 256th and 268th Reports, paras. 401-418 and 379-396, respectively, approved by the Governing Body at its 240th (May-June 1988) and 244th (November 1989) Sessions].

132. As regards Case No. 1446, submitted by the World Confederation of Organisations of the Teaching Profession (WCOTP), the Committee examined this case at its November 1989 meeting and presented an interim report to the Governing Body [see 268th Report, paras. 397-409, approved by the Governing Body at its 244th Session (November 1989)]. Subsequently the WCOTP submitted new allegations in communications of 28 June and 15 September 1990.

133. The complaint in Case No. 1519 was presented in a communication from the International Federation of Plantation, Agricultural and Allied Workers (IFPAAW), dated 23 November 1989.

134. At its meeting of November 1990, the Committee addressed an urgent appeal to the Government for its observations on Cases Nos. 1435, 1446 and 1519 [see 275th Report, para. 9]. Specifically, the Committee noted that, despite the time which had elapsed since the presentation of the complaints and the seriousness of the allegations contained therein, the Government had not transmitted the observations or information which had been requested. The Committee drew the attention of the Government to the fact that, in accordance with the procedural rules set out in paragraph 17 of the Committee's 127th Report, approved by the Governing Body, it would present a report on the substance of these cases at its next meeting, even if the observations requested from the Government had not been received in due time. Consequently, the Committee urged the Government to transmit its observations as soon as possible.

135. The Committee has not received the observations and information which it had requested from the Government concerning these three cases.

136. Paraguay has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Case No. 1435

137. The allegations in this case concern the existence of two executive committees for the trade union of the Algodonera Paraguaya S.A. (Paraguay Cotton Company, CAPSA) (one of which, according to the complainant, was set up and is influenced and directed by the enterprise, and has been recognised by the Labour Directorate); the dismissal of several trade union leaders, including Pedro Salcedo; police interference in several meetings called by Mr. Salcedo and the declaration that a strike called by the executive committee headed by Mr. Salcedo was illegal. According to the Government, the Labour Directorate was awaiting a court decision regarding the legitimacy of one of the two executive committees, for the purpose of registering it. Nevertheless, the refusal to register the executive committee headed by Mr. Salcedo dated back to 1987 and, according to the complainant, it was in that year that the Labour Directorate recognised the other executive committee. The Conciliation and Arbitration Board of the Ministry of Labour ordered the negotiation of a new collective agreement and specified that the other executive committee was to represent workers in the negotiations. More specifically, as concerns the strike that began during the harvest on 30 August 1989 and was followed by 95 per cent of workers in the CAPSA enterprise, the complainant reports that the strike was suspended at the request of the enterprise on 4 September when the Conciliation and Arbitration Board declared the strike illegal.

138. In its previous examination of this case, the Committee formulated the following recommendations [see 268th Report, para. 396]:

(b) The Committee requests the Government rapidly to inform it of the outcome of the current legal proceedings concerning the recognition of the executive committee headed by Mr. Salcedo, the reinstatement of dismissed union leaders, the refund of trade union contributions retained by the employer since 1987 and the recognition of the other executive committee by the Labour Directorate. It recalls that justice delayed is justice denied.

(c) The Committee draws the Government's attention to the fact that it has stated on numerous occasions that the right to strike is one of the essential means through which workers and their organisations may promote and defend their

occupational interests. Consequently, the Committee requests the Government to supply information and its observations on the application concerning the banning of the strike by workers in the CAPSA company, together with any information on developments in the labour dispute within this company.

B. Case No. 1446

1. Previous examination of the case

139. At its meeting of November 1989, the Committee formulated the following recommendations concerning outstanding allegations [see 268th Report, para. 409]:

(c) As regards the transfer and reclassification of the General Secretary of the OTEP, Mr. Juan Gabriel Espínola, and the dismissal of teachers Antonia Jara Paredes and Canuta Ozuna de Ledesma owing to their trade union activities, the Committee urges the Government once more to send its observations on these allegations, and in particular to state whether administrative resolution No. 168 concerning Mr. Espínola has been revoked or reviewed in the light of the written objections presented by Mr. Espínola before the Ministry of Education and Culture. It also requests the Government to inform the Committee of the reasons which led to the dismissal of trade unionists Antonia Jara Paredes and Canuta Ozuna de Ledesma.

(d) The Committee deeply regrets the detention, psychological pressures and threats against trade unionist Cira Novara and her subsequent dismissal and requests the Government to inform it of the specific events and acts on which the charges are based, to state whether a judicial hearing has been instituted, and if so, to specify its outcome.

2. Subsequent developments in the case

140. Following the Committee's examination of this case in November 1989, the WCOTP sent a communication dated 28 June 1990 alleging that the "National Teachers' Co-ordinating Committee" (which brings together the Paraguyan teachers' organisations) called on teachers to strike throughout the nation on 2 July 1990 in support of wage demands, in a context in which teachers are denied freedom of association and the right to engage in collective bargaining and to strike. In response, the Ministry of Education and Culture threatened to dismiss and disqualify teachers participating in such a strike, in violation of Convention No. 87. The text of the communication by the Ministry of Education and Culture was as follows:

The Ministry of Education and Culture informs all teachers, heads of households and the population at large that, in response to the concerns expressed by the country's teachers, and in particular to their wish for an overall improvement in their conditions of life, as well as the progress of education in the country, it is working to reach such objectives through the appropriate legal channels.

However, at the same time, it reminds the petitioners of the provisions contained in article 55 of the national Constitution, which states that: "All Paraguyan citizens have the right to hold public office and employment with no conditions other than fitness for the position in question. Public officials and employees are prohibited from engaging in work stoppages and strikes, as well as from collectively leaving their posts." Furthermore, article 123 states that: "All residents are required to comply with and obey this Constitution and the laws, decrees, resolutions and other provisions which the public authorities may issue in accordance with their mandate."

Likewise, the Ministry recalls the provisions of Act No. 200 on the status of public officials, and in particular the following sections: "Section 36: Public officials may not adopt collective resolutions against provisions issued by the competent authorities." "Section 37: Public officials are prohibited from engaging in work stoppages and strikes. For the purposes of this Act, a work stoppage is considered as a collective suspension of services, and a strike as a collective absence from work. Strikes shall also include the collective refusal of public officials, or individual refusals which take place within an interval of ten days by more than five officials in the same unit." "Section 38: Public officials who infringe the provisions of the foregoing section will be disqualified from holding public employment for a period of two to five years. Public officials who are found guilty of threatening work stoppages or strikes will be subject to dismissal." "Section 39: Public officials are prohibited from using the premises or property of the administration for any purpose other than the performance of their specific tasks."

Thus, given the rule of law, the Ministry warns those concerned that the above-mentioned sanctions and legal provisions will be applied in the event of any transgressions of said provisions.

141. In its communication of 15 September 1990 the WCOTP alleges that the Caaguazú regional branch of the Teachers' Organisation of Paraguay (OTEP) has been persecuted and harassed. The secretary of the Organisation, Hilda Montiel de Ríos, has been suspended from the Francisco Solano López School for having defended the OTEP before the school's students and teachers against accusations made by the school's director. In spite of the fact that these explanations were well received by the students and teachers, on 20 August 1990 the

school's director relieved this teacher of her functions accusing her of insubordination and rebellion, and requested the Ministry of Education and Culture to fill the vacancy. According to the allegations, this dismissal is unacceptable, inasmuch as the school's director has neither the authority nor the competence to act in this manner, since such procedures fall to the competence of the Ministry. According to the complainant, this case must be viewed against the background of administrative corruption, warnings and the suspensions of certain members of the OTEP. On 23 August 1990 a delegation composed of teachers from the region, students, heads of households and the attorney for the Organisation's regional branch presented a formal complaint before the Ministry of Education. They were assured that a solution would be found to the problem of the teacher, Mrs. Hilda Montiel de Ríos.

C. Case No. 1519

142. The International Federation of Plantation, Agricultural and Allied Workers (IFPAAW) alleges in its communication of 23 November 1989 that three members of the "ONONDIVEPA" National Peasants' Union, Messrs. Arcadio Flores, José Melgarejo and Aurelio Pereira had been detained without a warrant on 14 November 1989 by members of the armed forces in Colonia Torybeté, and that their current whereabouts are unknown.

143. Moreover, IFPAAW alleges that on 7 November members of the third cavalry division in Curuguaty, Department of Canendiyú, brutally beat a group of 200 peasants. On 12 November some 150 members of the army fired on a group of 40 peasants in Tava-I and Almeida, Guauauvi district, Department of San Pedro, and imprisoned most of them in the Curuguaty post. These are armed assaults on groups of peasants who have peacefully occupied uncultivated land in order to draw the Government's attention to the growing problems of over 250,000 peasants who still have no land, in spite of the Government's creation of the Rural Development Co-ordinating Committee.

D. The Committee's conclusions

144. The Committee deeply deplores the fact that the Government has not sent any of the information requested by the Committee and that, owing to the time elapsed, the Committee has been forced to examine the cases without the benefit of the Government's replies to the allegations in question. The Committee must recall the considerations presented in its First Report [para. 31, approved by the Governing Body in March 1952], which it has had to repeat on several occasions: the purpose of the whole procedure is to promote respect for trade union rights in law and in fact, and the Committee

is confident that, as the procedure protects governments against unreasonable accusations, governments on their side should recognise the importance of formulating, so as to allow objective examination, detailed factual replies to such detailed factual charges as may be brought against them.

145. Given the seriousness of the allegations in these cases which concern, inter alia, the detention of trade unionists, various acts of anti-union discrimination and serious legal restrictions on the trade union rights of public officials and employees, the Committee deplores the Government's absence of co-operation with the Committee's procedures. The Committee urges the Government in the future to send detailed replies to allegations without delay.

146. As regards Case No. 1435, the Committee reiterates the conclusions which it formulated at its November 1989 meeting, namely, that the lengthy delay in concluding the proceedings concerning the recognition of the executive committee of the trade union of Algodonera Paraguaya S.A. and the reinstatement of the trade union leaders dismissed by that enterprise constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned. Bearing in mind that the authorities' refusal to register the executive committee headed by Mr. Salcedo dates back to 1987, the Committee requests the Government to take measures with a view to ensuring that legislation will facilitate the expeditious disposition of proceedings involving labour-related matters. Moreover, since the Government has provided no information concerning the declaration of illegality of the strike which, according to the complainants, was followed by 95 per cent of the workers of the Algodonera Paraguaya S.A. enterprise, the Committee again emphasises that the right to strike constitutes an essential means for workers and their organisations to promote and defend their occupational interests, and that limitations on, or the prohibition of strikes may only apply in the case of essential services in the strict sense of the term (those where an interruption could endanger the life, personal safety or health of the whole or part of the population). It considers that this definition does not cover this present case.

147. As regards Case No. 1446, the Committee emphasises that the complainant organisation has alleged that teachers were dismissed or otherwise persecuted owing to their trade union activities. Consequently, given the Government's failure to reply, the Committee draws its attention to Article 1 of Convention No. 98, which states that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment", and emphasises the importance of taking remedial action against acts of anti-union discrimination.

148. In addition, the Committee deplores that the Ministry of Education and Culture reacted to the call for a national strike on 2 July 1990 by the National Teachers' Co-ordinating Body to obtain wage increases, by threatening dismissals and disqualifications. In general, on the question of restrictions which may be imposed by

legislation on the trade union rights of teachers who are also public officials, the Committee emphasises that workers in the education sector should enjoy the right to establish trade union organisations, to bargain collectively and to resort to strikes [see 226th Report, Case No. 1166 (Honduras), paras. 343 and 344; see also the Digest of decisions and principles of the Freedom of Association Committee, 3rd edition, 1985, paras. 394, 404 and 601]. The Committee requests the Government to take the necessary measures to ensure that the legislation guarantees these rights to workers in the education sector.

149. Lastly, as regards Case No. 1519 concerning the detention and violent assaults by the armed forces on groups of peasants who, according to allegations, were peacefully occupying uncultivated lands, and concerning the detention, without warrant, of Messrs. Arcadio Flores, José Melgarejo and Aurelio Pereira, members of the National Peasants' Union, the Committee regrets this climate of violence. It requests the Government to confirm whether Messrs. Flores, Melgarejo and Pereira have been released and requests all parties involved to seek to resolve peacefully disputes arising from agrarian reform and rural development.

The Committee's recommendations

150. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

(a) The Committee deplores the fact that since November 1989 the Government has failed to provide any of the information requested in these three cases. The Committee deplores the Government's lack of co-operation and urges it in the future to submit detailed replies without delay.

(b) As regards the proceedings for the recognition of the executive committee of the trade union of the Algodonera Paraguaya S.A. (Paraguay Cotton Company), and the reinstatement of trade union leaders dismissed since 1987, the Committee again emphasises that the absence of a court ruling over such a long period of time constitutes a denial of justice, and therefore a denial of trade union rights. The Committee requests the Government to take measures to ensure that the legislation will facilitate labour-related judicial proceedings.

(c) The Committee draws the Government's attention to the fact that workers in cotton companies do not provide an essential service in the strict sense of the term, and consequently that their right to strike should not be subject to serious restrictions or prohibitions, either in law or in practice.

(d) The Committee requests the Government to take the necessary measures to ensure that the legislation guarantees to workers in

the education sector the right to establish trade unions, to bargain collectively and to strike.

(e) The Committee draws the Government's attention to Article 1 of Convention No. 98, which states that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment". It emphasises the importance of taking remedial action against acts of anti-union discrimination and requests the Government to take measures for the reinstatement of the teacher trade unionist, Mrs. Montiel de Ríos.

(f) Lastly, the Committee requests the Government to confirm whether the trade unionists of the National Peasants' Union, Messrs. Flores, Melgarejo and Pereira have been released, and requests all parties involved to seek to resolve peacefully problems which may arise from agrarian reform and rural development.

Case No. 1511

COMPLAINT AGAINST THE GOVERNMENT OF AUSTRALIA PRESENTED BY THE INTERNATIONAL FEDERATION OF AIR LINE PILOTS ASSOCIATIONS (IFALPA)

151. By communications dated 2 and 27 October 1989 and 24 January 1990 the International Federation of Air Line Pilots Associations (IFALPA) presented a complaint of violations of trade union rights against the Government of Australia. The Government sent its observations on the case by communications dated 23 January 1990, 23 April 1990 and 4 October 1990.

152. At its meeting in May 1990 the Committee decided to adjourn its examination of the case until its next meeting, and in the interim asked the Government to provide further information in relation to certain matters [272nd Report of the Committee, adopted by the Governing Body at its 246th Session, May-June 1990, para. 8]. At its meeting in November 1990 the Committee again decided to adjourn its consideration of the case, and asked its Chairman to request the Government and the complainant to provide any additional information they might want to submit in relation to the complaint [275th Report of the Committee, adopted by the Governing Body at its 248th Session, November 1990, para. 6].

153. In a communication of 11 December 1990 the complainant made a further submission in relation to this case. The Government supplied its observations on this submission in a communication dated 15 January 1991.

154. Australia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

The original complaint

155. This complaint is presented by IFALPA on behalf of its Australian affiliate, the Australian Federation of Air Pilots (AFAP). It arises out of a dispute in the domestic airline industry, and relates to two principal sets of issues: first, the ability of pilots collectively to negotiate, through the AFAP, with their employers free of government intervention, and secondly, their right to take industrial action in support of their case without hindrance or victimisation by the Government.

156. The AFAP is registered under the federal Industrial Relations Act 1988, and at the time the dispute began represented all pilots employed by the four major domestic airlines in Australia (Ansett Airlines, Australian Airlines, East-West Airlines and IPEC).

157. On 26 July 1989 the AFAP claimed a pay increase of 29.47 per cent from the four Airlines. On 7 August the Australian Industrial Relations Commission (AIRC) handed down its decision in a National Wage Case, which had been presented on behalf of the trade union movement by the Australian Council of Trade Unions (ACTU) (to which the AFAP is not affiliated). This decision set out a series of "National Wage Principles" which were to govern wage increases within the federal industrial relations system until further review by the AIRC. Amongst other things, the decision provided for general increases in award wages of up to 6 per cent, subject to certain productivity and efficiency improvements. Claims for increases beyond this amount would have to be dealt with as a "special case" before a Full Bench of the Commission. Access to the 6 per cent increase was stated to be conditional upon the relevant trade union entering into a commitment (which would be embodied in a legally enforceable "award") to the effect that it would not "pursue any extra claims, award or overaward" other than in a manner consistent with the principles laid down by the AIRC. The AFAP refused to give the necessary commitments, and indicated that it wished to pursue its claim outside the National Wage Principles, by means of direct negotiation with the employers in the industry. The Airlines responded that they were prepared to negotiate only within the framework of the National Wage Principles laid down by the AIRC.

158. The AFAP held meetings of its members between 11 and 14 August 1989. These meetings authorised it to take industrial action in support of the wage demand. The Federation then directed its members to work only from 9.00 a.m. to 5.00 p.m. each day [the "9 to 5

campaign"]. This instruction took effect from 18 August 1989. It had the effect of severely disrupting the operations of all four Airlines.

159. On 18 August 1989 the Airlines applied to the AIRC for the cancellation of existing awards to which the AFAP was party. The Commission gave the Federation until 21 August to agree to work to award conditions or the awards would be cancelled. The AFAP refused to give any such commitment. The awards were cancelled with effect from 21 August 1989, whereupon the Airlines asked each individual pilot to agree to work according to a new contract of employment. This they refused to do.

160. At around this time the Federation became concerned that the Airlines were about to take common law action against itself and individual pilots. They were also apprehensive at the possibility of (unspecified) criminal proceedings. In order to minimise these risks some 1,647 members of the AFAP employed by the airlines resigned from their employment with effect from 24 August 1989. These resignations were effected in accordance with the terms of the pilots' contracts of employment.

161. Following this action, the pilots were subjected to a deliberate campaign of intimidation and denigration by their former employers and by the Australian Government. The Government had allegedly also had the support of the ACTU in its campaign against the AFAP. On or about 24 August 1989 civil proceedings were commenced against the Federation, its principal officers and "many individual pilots". Concerns at the possibility of criminal proceedings continued, although no such prosecutions had in fact been initiated. In addition to all of this, many pilots were threatened that they would not receive their full superannuation entitlements.

162. The resignation of the members of AFAP had brought domestic air services to a virtual standstill. The Government had responded to this by: (i) permitting international carriers to carry passengers on domestic routes; (ii) waiving certain airport charges as a quid pro quo for the Airlines continuing to pay full wages to all staff apart from the pilots; (iii) making Royal Australian Air Force (RAAF) planes and crew available for civilian flights; (iv) modifying regulations governing the training and certification of pilots in order to facilitate the employment of foreign pilots in operations formerly carried out by AFAP members, thereby undermining the Federation's position in the dispute; and (v) making public statements in support of the Airlines, and denigrating the AFAP and its members and officials. According to the complainant the changes to the rules relating to the certification of pilots had compromised safety standards in the industry in order to meet economic and political objectives associated with the dispute between the AFAP and the Government and Airlines.

163. In October 1989 the AIRC made a number of awards which obliged the Airlines to observe specified terms and conditions of employment in relation to individual pilots employed by them. As of

27 October 1989, the AFAP was not a party to these awards. However, it was made party to the awards in May 1990 after giving certain assurances as to its future conduct to the Commission.

164. By its communication of 24 January 1990 the complainant indicated that on 23 November 1989 the Supreme Court of Victoria handed down judgement in the common law case brought by the Airlines against the AFAP and six of its officers (four of whom were members of the executive, and two of whom were trustees of the funds of the Federation). The Court determined that the Federation and its six officers were liable to pay damages in respect of the torts of interference with contractual relations, unlawful interference with trade or business, and unlawful means conspiracy. Following further hearings in the early part of 1990 damages were assessed at A$6.48 million. The defendants were also ordered to pay the Airlines' costs.

165. The complainant considers that awards of damages of this nature constitute "victimisation" on the ground of trade union activity. If they became the norm it would be impossible for any representative organisation to organise industrial action, or for any employee to contemplate participating in such action, without running the risk of being sued in damages by their employer. This would tip the balance in employer/employee relations heavily in favour of employers, and would constitute a return to an era preceding the establishment of the trade union rights which the ILO has fought so painstakingly to define.

166. The complainant states that in late 1989 the Government, for reasons of "electoral popularity", modified its former highly aggressive stand against the AFAP. For example, it recommended to the Airlines that they should not seek to claim the damages awarded by the Supreme Court of Victoria. The complainant considers that a similar posture at an earlier stage in the dispute would have prevented the present situation from arising.

IFALPA's further submissions

167. By its communication of 11 December 1990 the complainant makes further submissions in relation to: (i) the reasons for the dispute; (ii) the immigration of foreign pilots; (iii) victimisation of the union and its members; and (iv) recognition of the AFAP by the Airlines.

168. The complainant states that according to the Government the central issue which was at stake in the dispute was the effect the pilots' pay claim might have on the "Accord" between the Government and the ACTU. However, the complainant considers that more recent developments bear out the AFAP's contention that the rejection of the pay claim was merely an excuse to destroy the Federation prior to the deregulation of the domestic airline industry in November 1990. In support of this contention, the complainant states that: (i) only the ACTU and the Government are bound by the Accord; (ii) that the 29.47

per cent pay claim has never been discussed or examined in order to determine "whether it would meet the guide-lines of the Accord"; (iii) that pilots employed by Qantas (the Australian overseas carrier) received pay increases of 18 per cent at the time the AFAP was pursuing its 29.47 per cent claim. Over the same period, air traffic controllers received 20 per cent, and judges and politicians received more than 30 per cent; (iv) that the new awards covering pilots employed by the Airlines contain a productivity scale allowing for salaries between 30 to 100 per cent higher than those achieved prior to the dispute; and (v) AFAP had always been prepared to discuss productivity improvements with the Airlines and indeed had discussed the potential for a reduction in the number of pilots with Australian Airlines in July 1989.

169. Referring to its earlier allegations that the rules relating to the training and certification of pilots had been relaxed in order to facilitate the employment of overseas pilots, the complainant indicates that the AFAP had also become concerned at possible abuses of immigration procedures for the same purpose. It had indeed obtained an injunction in June 1990 to prevent the issue of further visas or the extension of existing visas in relation to pilots already in employment in Australia. Despite this vindication of the Federation's position, the Airlines were still trying to recruit overseas pilots rather than re-employing some of the 700 Australian pilots who remain unemployed having been forced to resign at the start of the dispute in order to avoid punitive fines and awards of damages at common law. The complainant quotes from various letters and statements in order to show that the Government is actively assisting the Airlines to implement their overseas recruitment policy.

170. The complainant further alleges that there is increasing evidence that the Government had been victimising the AFAP "by persuading other foreign airlines not to employ its former members". This "persuasion" had, in some instances, involved threats to withdraw foreign airlines' landing rights in Australia if they were found to be employing AFAP members. As a consequence, both AFAP and individual pilots are preparing to take legal action against the airlines concerned on the grounds that their failure to re-employ Australian pilots previously involved in the dispute is discriminatory.

171. The complainant also claims that the media had continued to subject the AFAP and individual pilots to a campaign of intimidation and denigration. For example, the press had published unsubstantiated reports of threats of violence by AFAP members against foreign aircrews, and had accused pilots caught up in the dispute of exploiting their families in the cause of attacks upon the Government and the Airlines.

172. The complainant describes the process by which the AFAP became party to the new awards in the industry in May 1990. It asserts that despite the fact that the Federation had given the necessary commitments to respect the decisions of the AIRC the Government still refused to accept that under the Industrial Relations

Act the Federation remained the sole representative body of Australian domestic pilots. The Airlines had also refused to recognise, or negotiate with, the Federation. Indeed, just before the Commission's decision in May 1990 to make the AFAP party to the new awards, the Airlines had filed an application to deprive it of its capacity to represent the industrial interests of pilots employed by them. This application was still pending.

173. Again with the support of the Government, the Airlines had been encouraging pilots to join either in-house associations or the Australian Transport Officers' Federation (ATOF) (even though the eligibility rule of this latter enables it to represent only clerical and lower management staff rather than pilots). This behaviour constituted a denial of the pilots' fundamental right to choose their own representative body. It was also inconsistent with government and ACTU policy relating to the rationalisation of trade union structures.

B. The Government's reply

174. By its communication of 23 January 1990 the Government provided a detailed reply to the complainant's initial allegations. This response: (i) provided background information on the federal industrial relations system within which the AFAP had voluntarily decided to operate; (ii) outlined the history of the industrial campaign which gave rise to the matters to which the complaint relates, including the decisions and findings of fact by independent courts and tribunals in relation to the actions of the AFAP and its members; and (iii) replied to the complainant's specific allegations. In a further communication of 23 April 1990 the Government: (a) provided an account of developments in the dispute subsequent to its response of 23 January 1990; (b) set out its response to the further allegations by IFALPA contained in its communication of 24 January 1990; and (c) provided supplementary information concerning the capacity of non-registered unions to operate outside the federal industrial relations system in Australia. By its communication of 4 October 1990 the Government provided information relating to developments between mid-April and late September 1990. In doing so it also provided replies to the queries which were directed to it by the Committee at its meeting in May-June 1990 [272nd Report, para. 8]. By its most recent communication, the Government provides its observations on the further submissions of the complainant and also an update on court and tribunal proceedings involving the AFAP and its members.

Background

175. The Government explains that in Australia legislative competence with respect to industrial relations is shared between the Commonwealth and the States. The federal system is primarily based on

the Industrial Relations Act 1988, which with effect from 1 March 1989 replaced the broadly similar Conciliation and Arbitration Act 1904. Each of the States has adopted its own form of industrial regulation. There are many differences between the various systems as to matters of detail. But in broad terms they all provide for the prevention and settlement of industrial disputes through processes of conciliation and arbitration, and they all accord an important role to organisations of employers and workers (depending, in most cases, upon systems of voluntary registration).

176. The Government states that Australian Bureau of Statistics figures show that as of 30 June 1989 there were 299 trade unions in Australia. Of these, 140 (47 per cent) were registered under the federal Act. The vast majority of the remainder were either registered or (in the State of Victoria) "recognised" under one or more of the state systems. It is, however, possible for a trade union to exist and effectively to represent the industrial interests of its members even though it is not registered or "recognised" under either state or federal legislation. Indeed, the AFAP was in precisely that position between 1959 (when it was established) and 1986 (when it was registered under the federal legislation for the first time, its application for such registration having originally been lodged in 1980). In terms of award coverage, Bureau of Statistics figures show that the basic terms and conditions of employment of 32.6 per cent of all employees are determined by reference to federal awards; 49.8 per cent are covered by the awards of state tribunals; 2.6 per cent by unregistered collective agreements; and 15 per cent by "other means" (including individual negotiation). It can be seen, therefore, that participation in the federal (or state) system is truly voluntary. The AFAP had chosen to register under the federal legislation, and functioned only in that sphere. (The Government also points out that, for historical reasons, there was a separate federal industrial tribunal for flight crew officers between 1967 and 1989. This was comprised of a member of the former Australian Conciliation and Arbitration Commission, and operated in essentially the same manner as that body. The Flight Crew Officers Industrial Tribunal was abolished in 1989, and its functions were merged with those of the AIRC. This occurred prior to the events which constitute the subject-matter of the present complaint.)

177. Registration under the Industrial Relations Act confers substantial benefits upon the organisation concerned: particularly in terms of legal status, organisational security, access to the AIRC and the capacity to obtain and enforce awards on behalf of its members. Registration also carries with it a number of obligations, including: compliance with certain statutory requirements designed to ensure the democratic control of organisations by their members and to protect the other interests of those members; the duty to notify the AIRC of industrial disputes to which the organisation is a party, and to participate in proceedings of the Commission in relation to such disputes; and to accept, subject to statutory rights of review and appeal, the decisions of the AIRC in relation to matters affecting the organisation and its members. Failure to adhere to the norms of this

system of dispute resolution may result in denial of access to the benefits of the system and, ultimately, may lead to the exclusion from it (by means of cancellation of registration).

178. Over the years the AIRC (and its predecessor, the Australian Conciliation and Arbitration Commission) has developed highly sophisticated procedures for dealing with industrial disputes which fall within its jurisdiction. The end-product of these procedures are "awards". These may be imposed by arbitration, or may be wholly or mainly the product of agreement between the parties to the dispute. Such awards may regulate some or all of the terms and conditions of employment of persons employed by employers who are party to the award. They may also deal with a range of procedural and substantive issues - for example the duty of employers to consult with unions which are party to the award prior to technological change, or occupational health and safety standards to be applied at the workplace. Awards are legally binding on the parties, and breaches may lead to the imposition of penalties and, where appropriate, the payment of any remuneration due under the award to employees entitled to the benefit thereof.

179. The AIRC also plays a very important role in the social and economic life of the community through the agency of periodic "National Wage Cases". In the course of these cases (which normally take place between two and four times a year) the Commission hears submissions from peak employer and union bodies, the federal, state and territory Governments and other interested parties. In reaching a decision, the AIRC is required to have regard to what is in the interests of employers, workers, the community generally and harmonious industrial relations. The jurisdiction of the tribunal in these cases is based on claims made for improvements in wages and conditions in a number of industries and involving particular awards applying to those industries. Parties to other awards may then seek to have those awards varied to take account of the Commission's decision. Normally, the process of variation is largely automatic, although in recent years it has been made subject to the applicant union being prepared to give an undertaking to abide by the so-called National Wage Principles (which are themselves the product of hearings under the "National Wage System"). It is most unusual for unions to decline to give the requisite undertaking. If they do refuse, they will not be able to obtain the benefit of the decision through the award mechanism. They may, however, seek to obtain similar (or improved) benefits through direct negotiation with employers. Employers are usually somewhat reluctant to concede wage increases or other improvements in terms and conditions of employment by this means, but have the legal right to do so if they choose.

The Airlines' dispute

180. The Government presents evidence which in its opinion establishes that the AFAP had been profoundly dissatisfied with the operation of the federal system of conciliation and arbitration for

some considerable time. For example, in February 1989 the Executive Director of the Federation was reported in one of its publications (entitled "Deadline 89") as having said:

> We are now at the stage of deciding whether or not this system will ever provide us with real wage maintenance. A major reason for the stopworks [i.e. meetings between union officials and members] being called was to inform you of the major battle ahead should the existing system not become flexible or pragmatic enough to remedy your real salary slippage. Should it reach that stage then it will be a real battle, as we will be fighting the Government, the Arbitration system, the companies and all the vested interests. Pilots, by being united, have done it before and we can do it again.

In July in another publication the Federation had asserted that "the present archaic system of industrial relations in this country must be abolished".

181. This dissatisfaction with the system explains what the Government considers to have been a premeditated refusal to agree to adhere to the principles enunciated in the National Wage decision of 7 August 1989.

182. Turning to the cancellation of the awards to which the AFAP was a party, the Government points out that section 187 of the Industrial Relations Act 1988 enables a Full Bench of the AIRC to cancel or suspend an award where it is satisfied:

- that an organisation has contravened the Act, an award or an order of the AIRC; or

- that a substantial number of the members of an organisation are refusing to accept employment either at all, or in accordance with existing awards and orders; or

- that there is some other reason why an award of the Commission should be cancelled in whole or in part.

183. In its decision of 19 August 1989 the Full Bench found: (i) that the AFAP was encouraging its members to refuse to accept employment in accordance with the then-existing awards and orders; (ii) that the result of the AFAP's directive to its members was that the general public was being seriously prejudiced; (iii) that the industrial campaign of the AFAP was being pursued by industrial action contrary to directions made by the AIRC; and (iv) that the AFAP had refused to undertake to lift the industrial action and bans or to pursue its claims in accordance with the processes of conciliation and arbitration under the Act. These findings led the Commission to the conclusion that:

> The Federation is clearly not prepared to accept its responsibilities under the Act and awards and we do not believe

that in this case it should continue to receive the benefits provided to the Federation's members as a result of it being a party to these awards of this Commission.

184. The Government emphasises that cancellation or suspension of an award does not have any adverse effect upon the terms and conditions of employment of workers to whom the award applied. They continue to be employed under contracts of employment the content of which would be the same as the appropriate provisions of the cancelled award. The cancellation affects only the position of the Federation, including its capacity to secure improvements in terms and conditions of employment through the award mechanism, and to enforce the award provisions through the procedures set out in the Industrial Relations Act.

185. The Government confirms that from 23 August 1989 onwards the Airlines refused to accept the partial performance of their contracts by the pilots which was inherent in their refusal to work other than from 9.00 a.m. to 5.00 p.m. On 24 August 1989 they began serving writs on the Federation and certain of its members and officers. On the same day the pilots resigned en masse from their employment. This was done in accordance with the terms of their contracts of employment. The Government also indicates that as part of their response to the "9 to 5 campaign" the Airlines were contemplating the termination of the employment of the pilots. This response was, of course, pre-empted by the mass resignations of 24 August.

186. These resignations led to the virtual collapse of services by the Airlines. This had potentially very serious consequences for workers elsewhere in the airline industry, and for the national economy. If continued over an extended period, the absence of air services could seriously jeopardise the material and personal well-being of members of the community and, in some cases, pose a risk to the life, health or personal safety of members of the community, particularly in remote areas. It was these considerations which led the Government to take the steps outlined by the complainant in order to maintain air services. However, the Government points out: (i) that the involvement of the defence services ended on 15 December 1989; (ii) that the carriage of domestic passengers by international carriers ended on 31 December 1989; and (iii) that the waiver of airport charges ended for IPEC on 8 November 1989, and for the other Airlines on 12 January 1990.

187. The mass resignations of the pilots also caused the Airlines to charter aircraft and crews from outside Australia, and to advertise for pilots, both in Australia and overseas. The Federation responded to this latter development by publishing notices in Australian newspapers and in trade journals overseas warning pilots who accepted employment with the Airlines that they would be acting as strike-breakers, and that terms of settlement of the dispute between AFAP and the Airlines would involve the dismissal of such pilots. Nevertheless, by March 1990 the Airlines had succeeded in recruiting sufficient pilots to meet current passenger demand (which was running

at between 80 and 88 per cent of demand a year earlier). They had also been able greatly to reduce their dependence upon the use of chartered aircraft and crews from overseas. This explains the ending of the special arrangements referred to in the previous paragraph.

188. The Airlines not only advertised for new pilots, they also contacted their former employees individually, and offered to discuss re-employment on the basis of individual contracts. They also gave a public indication that, subject to suitable vacancies being available, former pilots would be re-engaged at levels of seniority equivalent to their former position - so long as applications were received by 22 September 1989. In its communication of 4 October 1990 the Government indicated that the process of "normalisation" was almost complete. Levels of passenger demand and "revenue passenger kilometres" for the quarter ending 30 June 1990 were running at around 97 per cent of the same quarter for 1989. The last chartered foreign aircraft left Australia towards the end of April 1990. As of 15 May 1990 Ansett Airlines and East-West Airlines between them employed a total of 553 pilots, of whom 502 were Australian citizens and 51 were citizens of the United States. As of 6 August 1990 Australian Airlines employed 280 pilots, of whom 51 were foreign nationals and 229 were Australian citizens. Between them the Airlines now employ in the order of 900 pilots, as compared with more than 1,600 before the dispute began. This reduction in the total number of pilots employed by the Airlines reflects improvements in productivity which have been implemented subsequent to the dispute. The Government is unable to supply precise information as to the employment position of the 1,647 pilots who resigned on 24 August 1989. However, it does indicate that approximately 50 per cent of the pilots presently employed by Australian Airlines are persons who have been re-employed subsequent to their resignation in August 1989. The equivalent figure for Ansett Airlines is 60 per cent. Around 500 pilots are believed to have obtained employment with overseas airlines, whilst the remainder must be assumed either to have found other employment within Australia or to be unemployed.

189. In October 1989 the AIRC made a series of new awards requiring each of the Airlines to observe specified terms and conditions of employment in relation to pilots employed by them. The new awards differed from those cancelled in August principally in that they provided for increased salaries in return for certain productivity improvements, including the removal of a seniority-based system of bidding by pilots for duty rosters and increased average flying hours. They also differed from the cancelled awards in that the AFAP was not a party to them. The Federation had participated in the proceedings leading to the making of the awards, but the Airlines had submitted that in the circumstances it should not be party to the new awards. The Full Bench of the AIRC upheld this submission, but also indicated that the Federation could apply to be made party to the awards when it was prepared to give appropriate undertakings as to its future conduct.

190. On 12 February 1990 the AFAP lodged fresh applications with the AIRC seeking to be made a party to the relevent awards. In proceedings before the Commission the Federation indicated that it now accepted the conditions laid down by the Full Bench in October 1989. It also stated that it was seeking the continuing involvement of the AIRC in effecting an orderly return of AFAP members to employment with the Airlines, and in re-establishing relations with the Airlines. At the request of the Commission, the Federation formally stated that if its application was accepted it would: (i) accept any subsequent decision of the Commission about awards covering the hiring of pilots; (ii) desist from any action other than through the Commission to prevent or discourage pilots from gaining employment with the Airlines; (iii) desist from any harassment or intimidation of pilots currently employed; (iv) desist from picketing activity in relation to matters in dispute since August 1989; and (v) advertise widely, including overseas, the Federation's changed attitude.

191. The Airlines opposed the application by the Federation. However, the Commission took the view that making the AFAP a party to the relevant awards was the course which provided it with "the better chance of securing and preserving orderly relations in the industry with fairness to both employers and employees". Nevertheless, it also considered that "sufficient doubt" had been cast upon the bona fides of the Federation to warrant the adoption of "safeguards" which would enable its behaviour to be kept under review. Consequently, the Commission imposed a moratorium on the award respondency issue until 15 May 1990. On that date the Commission granted the application of the AFAP, having satisfied itself that the Federation: (i) had not impeded applications by its members for jobs with the Airlines; (ii) had made "acceptable efforts" to prevent the harassment of working pilots; and (iii) had given an undertaking to ask overseas associations to remove all impediments imposed by those associations on the recruitment of pilots by the Airlines.

192. Since May 1990 the AFAP has been involved in a number of proceedings before the AIRC. These have included applications to vary awards covering the employment of pilots initiated by both the Federation and the Airlines, and an attempt by the Airlines to obtain orders under section 118 of the Industrial Relations Act 1988 to exclude the AFAP from representing the industrial interests of pilots in their employment. The Federation challenged the jurisdiction of the AIRC to deal with this latter application in the High Court of Australia. This challenge was unsuccessful, and the matter is still pending before the AIRC. The Federation has also involved itself in a number of other legal proceedings in the aftermath of the dispute, including an unsuccessful attempt to prosecute the Airlines for "obstruction" of its officers under section 306 of the 1988 Act, and a complex series of proceedings whereby it has attempted to impugn the grant by the immigration authorities of entry visas to foreign pilots. According to the Government, the fact that it has been able to initiate or participate in all of these proceedings shows that the AFAP has not in any sense been deprived of the opportunity to represent the industrial interests of its members in proceedings

before the appropriate courts or tribunals. The fact that those proceedings have in some cases produced results unfavourable to the Federation reflects the merits of the arguments put to the tribunals, and not any inherent bias or legally imposed restrictions on the rights of the AFAP.

193. As regards the common law actions against the Federation and certain of its officials, the Government confirms that on 23 November 1989 the Supreme Court of Victoria found that the defendants had acted unlawfully on a number of counts when they had instigated the "9 to 5 campaign" in August 1989. However the court had also ruled that the defendants had not acted unlawfully in organising the mass resignation of the pilots, or in publishing the "warning notice" to potential "strike-breakers". It also declined to issue an injunction to restrain the Federation from publishing any such notice in the future. Following further hearings in February 1990, the Court awarded damages totalling A$6.48 million, plus costs. Immediately after this decision the Airlines released a statement whereby they indicated: (i) that they would not take action to recover damages from individual officers of the AFAP; (ii) that they reserved their position as to whether to enforce the damages award against the Federation; and (iii) that they would seek to recover full legal costs from the Federation. The Government repeated its earlier appeal to the Airlines not to enforce the damages award. On 14 March 1990 the AFAP lodged a notice of appeal against the decision of the Supreme Court of Victoria. In November 1990 it lodged the necessary documents for the matter to proceed to a hearing before the Full Court of the Supreme Court of Victoria. However, it is still not entirely clear whether the AFAP will go ahead with its appeal. If it does, the matter will not be heard before the middle of 1991 at the earliest. Meanwhile, the Airlines have taken no action to enforce either the judgement as to damages or the order as to costs.

The specific allegations

194. The Government professes to have had some difficulty in understanding the precise nature of the allegations contained in the complainant's communications of October 1989 and January 1990. However it based its replies on the assumption that the complaint related to: (i) the use of the civil law and alleged threats of the use of the criminal law in the context of an industrial dispute; (ii) threats of withholding of superannuation and other entitlements of pilots upon resignation; (iii) refusal by the Airlines to recognise the AFAP as representing pilots in the domestic aviation industry; and (iv) the role played by the Government in the dispute. This last included: (a) providing an improper degree of support for the Airlines; (b) hindering pilots from taking industrial action and victimising pilots who did so; (c) intimidating and denigrating pilots and their leadership; and (d) seeking to exclude the AFAP from representing pilots and engaging in collective bargaining on their behalf (for example through its intervention in proceedings before the AIRC). The Government also notes that the complainant alleges that

its requests to the Airlines not to proceed with their claims for damages represented "a change of position merely for reasons of electoral popularity".

195. The Government prefaces its response to these allegations by pointing out: (i) that the wage increases claimed by the AFAP in July 1989 were deliberately made outside the requirements of the National Wage Principles which applied to all registered organisations within the federal system; which had been endorsed by a special unions conference convened by the ACTU; and which had been formulated by the AIRC, taking account of the state of the economy, the public interest, and the interests of employers and workers. If the Federation's claim had been conceded, it is probable that the operation of the National Wage Principles would have been jeopardised, not just in the airline industry but throughout the economy. In support of this proposition the Government refers to a letter from the ACTU to the Airlines, dated 11 August 1989, indicating that if the pilots' claim was settled outside the Principles it would need to pursue "with the greatest vigor increases equal to those offered to pilots for all other airline workers"; (ii) that the Government considers it unacceptable for an organisation which has voluntarily registered under the federal industrial relations system to repudiate its obligations under that system in the manner which the AFAP had done in this instance; and (iii) that the industrial campaign initiated by the AFAP and its members caused serious damage to the community and to the national economy.

196. As regards its role in the dispute, the Government does not accept that, in the circumstances of such a highly damaging dispute, it was in any way unfair or inappropriate for it to make public statements supporting the processes of conciliation and arbitration, supporting the Airlines' refusal to concede the Federation's demands and criticising the AFAP and its members for making the claims they had and for embarking upon a campaign of industrial disruption. Nor does the Government accept that such actions are contrary to the principles of freedom of association.

197. As to its intervention in proceedings before the AIRC, the Government points out that it has a statutory right to seek leave to intervene in all proceedings before the Commission, and that it has a further right to intervene without leave in the public interest in proceedings before a Full Bench of the Commission. As an intervener, however, it is in no different position from any other party which seeks and obtains leave to intervene. It is entirely up to the Commission to decide how much weight it will attach to any submissions or evidence presented by any intervener. In the present case the Government considered that it was necessary to intervene in view of the importance of the issues involved.

198. Similarly, the Government considers that the actions it took to maintain domestic airline services were warranted by the importance of those services to the social and economic well-being of the

community, especially given Australia's great size and sparse population.

199. The Government totally repudiates the allegation that safety standards had been compromised in relation to the licensing arrangements for overseas pilots, aircraft and flight crew. In support of this position it refers to the report of an independent Parliamentary Inquiry which concluded in December 1989 that the airline system had not been rendered unsafe by changes in procedure due to the dispute.

200. The leasing to the Airlines of defence force aircraft and personnel was justified by the need to provide services to geographically remote areas which could not be serviced adequately, if at all, by other means.

201. The Government denies that it hindered pilots in their engaging in industrial action or victimised them for so doing. The Government considers that it behaved responsibly by exhorting the AFAP and its members to act in accordance with the principles and processes of the system within which the Federation is registered. The position in which the Federation and its members subsequently found themselves was entirely the consequence of their own actions.

202. The Government further denies that it intimidated or denigrated pilots. The Government does not understand the assertion that it has engaged in such actions. It is true that the Government made public statements and submissions to the AIRC critical of the industrial claims and campaign by the AFAP and its members, and that it publicly rejected the AFAP's position that its members' occupational skills and work justify exceptional treatment for pilots compared with other workers. The Government points out that the AIRC made findings to the same effect. Consequently, the Government does not accept that its conduct in this respect could reasonably be seen as intimidation or denigration of pilots.

203. The Government also denies that it has sought to exclude the AFAP from engaging in collective bargaining on behalf of its members. In support of this assertion it quotes from a public statement by the Prime Minister on 16 November 1989 concerning the Government's attitude to the AFAP:

> The Government wishes to reiterate firmly its position first on the right of pilots employed by the Airlines to be represented by a union of their choice, and second on the ability of pilot employees to seek changes to the current contracts on offer.
>
> My Government has always accepted that pilot employees can be represented by a union of their choice. My Government is philosophically committed to the right of employees to be represented by unions.

> Which union represents pilots employed by the two Airlines [Ansett and Australian] is a matter for those pilots themselves.
>
> Former pilots considering re-employment need have no concerns as to their right to be represented by a union, and clearly there are established procedures for any union that represents pilots employed by the Airlines to put arguments as to the form of award conditions.

204. The Government also points out that in its decision of 23 November 1989, the Supreme Court of Victoria expressly rejected the Federation's claim that the Airlines and the Government had engineered the dispute as part of a plan to, among other things, remove the AFAP as a representative of pilots in the industry. Evidence before the court clearly showed that the AFAP had been preparing itself for a major dispute since February 1989, if not earlier.

205. As regards the consequences of the mass resignations of the pilots on 24 August 1989, the Government points out: (i) that whilst in a technical sense the AFAP remained in dispute with the Airlines (under the federal industrial relations system, a registered union may create a dispute to which it is a party in its own right by making claims in relation to persons eligible to be its members), the same was not true for its members. This was because they had voluntarily resigned from their employment, and thus could not be said to be engaged in a strike or other industrial action against the Airlines; (ii) that the AFAP had been found not to represent pilots currently employed by the Airlines and those pilots were found not to wish to be represented by the AFAP; (iii) that there is no obstacle to pilots currently employed by the Airlines joining the AFAP if they wish or, if that occurred, the AFAP representing their interests; and (iv) that the AFAP had had several opportunities to have its claims dealt with by the processes of conciliation and arbitration, but prior to March 1990 had consistently failed to avail itself of those opportunities. Following the decision of the AIRC on 15 May 1990 the AFAP had again become party to awards applying to pilots employed by the Airlines, and had been involved in various proceedings before the Commission. The application by the Airlines under section 118 of the Act to exclude the AFAP from representing pilots within their employ was based on a number of grounds, including the fact that "the overwhelming majority of pilots employed by the applicants [i.e., the Airlines] are vehemently opposed to being represented industrially by the AFAP". This is borne out by the fact that the employed pilots had formed or joined "staff associations" which had entered into "agency" arrangements with another federally registered union. This application is still pending before the AIRC. Like the other difficulties in which it found itself, this application was entirely the consequence of the Federation's own actions.

206. As regards the common law action in the Supreme Court of Victoria, the Government points out that this action was commenced only after the AFAP: (i) had refused to abide by the directions of the AIRC not to engage in work stoppages; (ii) had refused to end the

"9 to 5 campaign"; (iii) had encouraged its members not to work in accordance with existing awards and orders; and (iv) had refused to pursue its claims in acordance with the processes of conciliation and arbitration set out in legislation under which it had freely chosen to register. It should also be noted that the court found the meetings which authorised the "9 to 5 campaign" not only occurred after the AIRC had issued a direction not to engage in industrial action, but were also convened in a manner which did not comply with the Federation's own rules.

207. The liability of the AFAP and its officers largely turned on the fact that by embarking upon the "9 to 5 campaign" the pilots were acting in breach of their contracts of employment. This in turn rendered those who caused them to do so liable for the tort (civil wrong) of "interference with contractual relations". The defendants were also liable for the torts of "unlawful interference with the trade or business" of the Airlines, and for "unlawful means conspiracy". The "unlawful means" in these instances were furnished by the interference with contractual relations, and by the fact that the Federation had been involved in breaches of section 312 of the Industrial Relations Act 1988. This is a provision which makes it an offence (punishable by a fine of up to A$500) for an officer or agent of an organisation bound by an award to engage in certain conduct which constitutes incitement to boycott an award. Its purpose is to protect the integrity of the system of conciliation and arbitration by ensuring that organisations which are registered under the 1988 Act do not subvert it by inciting their members not to adhere to the terms of awards handed down by the AIRC. The Court considered that there had been breaches of this provision (although no prosecution in respect of any such contravention had actually been initiated), and that this constituted "unlawful means" for purposes of the torts of "unlawful interference with trade or business" and "unlawful means conspiracy".

208. The Government states that it does not support the use of the civil law as a normal means of resolving industrial disputes or ending industrial action. However it considers that in the present case the Airlines found themselves in a situation where the processes of the civil law provided the only meaningful remedy in relation to the behaviour of the AFAP and its members and officials. Such proceedings would have been unnecessary if the Federation had been prepared to advance its claims through the AIRC.

209. The Government also points out: (i) that the Airlines had not gone ahead with their actions against individual pilots (other than six officers of the Federation); (ii) that they had indicated that they would not seek to enforce the damages award against these six officers; (iii) that the Prime Minister had again publicly called upon the Airlines not to enforce the award of damages against the Federation. The Government denies that this initiative was based on political considerations: rather it reflects its assessment that there would be little point in proceeding to collect these damages, especially in view of the progressive return to normal operations by the Airlines and the possibility of a renewed industrial relationship

between the four companies and the AFAP; and (iv) that to date neither the award of damages nor the orders as to costs have been enforced against the Federation.

210. The Government notes that the complainant does not provide any particulars as to alleged threats to use the criminal law against the Federation or its members or officials. Nevertheless the Government categorically states that it did not at any time attempt, or threaten, to use the criminal law in relation to the industrial action by the AFAP and its members. It should be noted, however, that a number of statements were made in the course of proceedings before the AIRC to the effect that pilots currently employed by the Airlines had received threats of violence. If any evidence was brought forward of criminal conduct in this respect, the Government would expect the normal processes of the criminal law to be put in train. No such evidence had so far been brought forward.

211. As to the complainant's allegations about the payment of superannuation and other entitlements upon the termination of pilots' employment, the Government understands that all pilots formerly employed by the Airlines were paid their full entitlements. Although the trust deed applying to the superannuation benefits of former Ansett pilots permitted the withholding of benefits in certain cases of misconduct and negligence, it is understood that this provision did not apply in the present circumstances. As concerns former pilots who returned to work for the Airlines, they were given the choice of either keeping any benefits already paid and joining a new scheme for all pilots, or repaying benefits paid and rejoining their old scheme. In its most recent communication the Government indicates that number of individual pilots are engaged in, or are contemplating, litigation with their former employers about the quantum of their superannuation payments. These are disputes as to matters of individual entitlement and were not part of any systematic attempt to put pressure on the Federation or its members.

212. The Government considers that the complaint relating to the alleged refusal by the Airlines to recognise the AFAP as the representative of the pilots cannot be sustained. In support of this proposition, it points out: (i) that no action was taken against the AFAP in relation to its continued registration as an organisation of employees under the Industrial Relations Act; (ii) that there was no interference with the rights or capacities of the AFAP under its registered rules, nor with its ability as a registered organisation to make claims in relation to employees eligible to be its members; (iii) that the Federation at all times had undiminished access to the AIRC for the resolution of the industrial situation in which it had placed itself; (iv) that the cancellation of awards to which the AFAP was a party and the making of new awards in relation to employment in the industry to which the AFAP was not initially a party followed proceedings before an independent tribunal, the AIRC, in which the AFAP had full opportunity to be heard; (v) that there was full recognition of the AFAP as representing pilots employed by the Airlines prior to the mass resignations; (vi) that subsequently it

was found by the AIRC that the AFAP no longer represented pilots currently employed by the Airlines and that those employees did not wish to be represented by the AFAP; (vii) that in proceedings before the AIRC the Airlines opposed the AFAP's being made a party to the new awards; (viii) that the AIRC had none the less indicated that it was open to the AFAP, subject to meeting certain requirements in relation to its position as a registered organisation, to apply to become a party to the new awards. As a result of undertakings given to the Commission in March 1990, this had in fact occurred; (ix) that the Government had repeatedly stated throughout the dispute that it was up to the AFAP to decide whether it would accept its obligations as a registered organisation and seek to restore, in an appropriate way, its industrial relationships with the Airlines; and (x) that the functions of the AFAP as a registered organisation in relation to pilots in the other sectors of the aviation industry had not been affected and it had continued to be a party to the relevant awards throughout the dispute.

IFALPA's further submissions

213. By its communication of 15 January 1990 the Government provides a detailed response to the further submissions of the complainant. It notes that the points raised in these submissions appear simply to be an elaboration of matters previously raised, or to be closely related to them. The Government also states that many of the claims made in IFALPA's communication of 11 December 1990 are either misleading or incorrect.

214. The Government categorically rejects the complainant's analysis of its motives in the dispute. Its concern had always been to ensure that the 29.47 per cent claim was dealt with in accordance with the National Wage Principles. There was no conspiracy to destroy the AFAP. The complainant totally misrepresents the nature and effect of the Accord. This is an agreement between the Government and the ACTU. It does not, and in constitutional terms could not, bind the AIRC. That body formulates National Wage Principles after hearing submissions from all interested parties. Not only had the AFAP never sought to intervene in national wage proceedings at any stage, but it had accepted the principles and obtained wage increases in accordance with them until its repudiation in 1989 of the AIRC and the dispute-resolution procedures established under the Industrial Relations Act. In May 1990 the AFAP had reaffirmed its acceptance of the principles and the jurisdiction of the Commission.

215. The wage increases for Qantas pilots, domestic pilots and air traffic controllers referred to by the complainant had all been determined in accordance with the National Wage Principles. Salary increases for judges and politicians were dealt with under separate legislation, but had been awarded only after consideration of the National Wage Principles by the relevant tribunal.

216. The Government rejects the suggestion that its actions in relation to the immigration of overseas pilots in any way contravened the principles of freedom of association. It also denies that there has been any abuse of procedures, but notes that questions relating to the legal validity of certain of its actions in this regard had been raised in proceedings initiated by the AFAP. These matters were still before the courts. The injunction referred to by the complainant had been granted only on an interim basis pending full trial of the action. It did not, therefore, constitute a "vindication" of the Federation's position.

217. It is not true that the Airlines are continuing to recruit pilots overseas. Australian Airlines has not recruited any foreign pilots since 21 March 1990, and Ansett Airlines has not offered employment to any pilot who would require government approval to work in Australia since the end of 1989.

218. The Government notes that the complainant has not provided any evidence to support its assertion that the Government has been victimising the AFAP by persuading other foreign airlines not to employ its former members. The Government denies that it has acted in any way to victimise the AFAP or its members. It also points out that s. 334 of the Industrial Relations Act makes it an offence for an employer to refuse to employ a person because the person is or has been an officer, delegate or member of a registered trade union or employer organisation.

219. As regards alleged media intimidation and denigration, the Government states that it respects the independence of the media and does not direct or interfere with their editorial practices and policies. It also points out that the Federation and its members have various means of legal redress available to them if they consider that they have been unfairly treated by the media.

220. As concerns the alleged refusal of the Government and the Airlines to "recognise" the AFAP, the Government states that it is misleading to assert, without qualification, that "under the terms of the Industrial Relations Act, the Federation remains the sole representative body of the Australian domestic pilots". It is correct that, in its eligibility for membership rule, the AFAP expressly covers domestic pilots, thereby making it an easier matter for the AFAP to invoke the jurisdiction of the AIRC in relation to matters involving pilots and entitling the AFAP to be a party to awards. The 1988 Act does not, however, preclude the industrial interests of employee pilots being represented by other competent bodies. So, for example, the AIRC has accepted the interest of ATOF in representing employed pilots by permitting its intervention in proceedings before the AIRC in which the AFAP is seeking to vary current awards. It has also been accepted by the AIRC that individual groups of pilots may be represented before it. Furthermore, submissions made on behalf of employed pilots indicate that they continue to be opposed to the AFAP's representing their industrial interests.

221. As to the alleged refusal of the Airlines to recognise or negotiate with the AFAP, the Government points out that it is open to any registered union which is unable to make headway in negotiations with an employer to invoke the jurisdiction of the AIRC, including its capacity to convene compulsory conferences under s. 119 of the Industrial Relations Act. The AFAP is in fact presently involved in a substantial number of proceedings before the Commission. Some of these matters have been initiated by the Federation, some by the Airlines.

222. As regards the claim that the Airlines are actively encouraging their pilots to join ATOF or "in-house" associations, the Government reiterates that its position has always been that it is for the pilots themselves to determine the union to which they wish to belong. It adds that it has no knowledge of pressure being applied in the manner alleged by the complainant, and states that both Ansett and Australian Airlines deny having applied any such pressure.

223. In conclusion, the Government states that the practical difficulties which the AFAP continues to encounter are a direct consequence of its own actions in 1989. Even so, it is to be noted that the AFAP is in a position to participate freely in proceedings before the AIRC relating to the air transport industry and to pursue all of its rights and remedies as a registered organisation. It is through the legitimate use of such processes that the AFAP, like any other registered union, will be able to re-establish and maintain an appropriate place in its industry. If the AFAP had not repudiated those processes in 1989, despite its obligations as a registered organisation, none of the matters about which IFALPA complains would have arisen. Throughout the entire dispute, the Government has been motivated by two principal considerations:

- first, that the dispute should be resolved in an orderly and effective manner in accordance with the processes provided under federal industrial law and the National Wage Principles established by the AIRC, thereby providing a proper basis on which employment of pilots in the domestic airline industry could proceed; and

- secondly, its awareness of its responsibility to assist in maintaining and re-establishing domestic airline services, and thereby to seek to limit the disruption caused by the dispute to the economy, the employment of workers in the airline and other affected industries, to national commercial and social life generally and to prevent, as far as possible, serious harm to the life, health and personal safety of members of the community.

In pursuing these objectives, the Government had acted responsibly in the public interest, and in a manner fully in accordance with its obligations under Conventions Nos. 87 and 98. In the circumstances, the Government considers that the complaint made by IFALPA cannot be sustained.

C. The Committee's conclusions

224. This complaint arises out of a protracted and complex industrial dispute in the domestic airline industry in Australia. The complainant's allegations basically centre around two principal sets of issues: alleged interference by the Government and the Airlines with the right of the AFAP freely to represent the interests of its members, and denial of the right of the Federation and its members to take industrial action to protect and to promote their legitimate industrial interests.

225. Information provided by the Government shows that the basic terms and conditions of employment of some 32 per cent of the Australian workforce are regulated through the federal system of conciliation and arbitration. Like almost all of its state counterparts, the operation of this system is heavily dependent upon the registration of organisations of employers and workers. Registration is voluntary, but confers substantial benefits in terms of legal protection of organisational security and of access to procedures for the prevention and settlement of industrial disputes by means of conciliation and arbitration under the auspices of the AIRC. Access to these benefits is subject to a number of conditions, the most important of which are adherence to specified standards of democratic control of registered organisations, and adherence to the orders and awards handed down by the AIRC. Some 47 per cent of Australian trade unions have elected to register under the federal legislation. The overwhelming majority of the remainder are registered under state law.

226. Within the legislative framework established by the Industrial Relations Act 1988 (and its forerunner, the Conciliation and Arbitration Act 1904) there has developed a sophisticated system of national wage fixation. This system centres around periodic National Wage Cases. In formal terms these consist of an application to vary existing awards in a number of key industries. Before arriving at its decision in these cases the AIRC hears submissions from all interested parties - including trade unions (usually through the agency of the ACTU), employers and governments (federal, state and territorial). It is also obliged to take account of the interests of employers and workers generally, and of the interests of the Australian community as a whole (sections 3(c) and 90(b) of the Industrial Relations Act 1988). The benefit of decisions in National Wage Cases normally flows through to all other awards in the federal system, and through State Wage Cases, to state awards as well. In recent years the AIRC (and its predecessor, the Australian Conciliation and Arbitration Commission) has followed a practice of adopting, and periodically revising, a set of guide-lines known as the National Wage Principles. Access to the benefit of National Wage decisions is then made conditional upon the union concerned giving an undertaking to the effect that it will not press any industrial claims other than in accordance with these Principles. Refusal to give (or to honour) this commitment means that the union and its members cannot

derive benefit from the decision through the procedures established under the Industrial Relations Act 1988. It is, however, free to pursue its claims by processes of collective bargaining outside the system, if it so chooses.

227. The AFAP did not register under the forerunner of the 1988 Act until 1986. But it had participated in the federal system of industrial regulation (through the Flight Crew Officers' Industrial Tribunal) for many years. It appears to have become increasingly dissatisfied with the operation of the system in terms of protecting the real incomes of its members. Consequently, in August 1989, it declined to give the "no extra claims" commitment which was a pre-condition of access to the benefits of the Commission's decision of 7 August of that year. Instead it opted to pursue a substantial claim outside the framework of the federal system of conciliation and arbitration. It appears to have been perfectly within its legal rights in adopting this course. However in doing so it, in effect, cut itself off from access to the dispute-resolution procedures established under the Act of 1988. Subsequent decisions of the AIRC made it clear that this access could be restored if and when the Federation was prepared to agree to abide by the norms of the system. This eventually occurred in May 1990.

228. Faced with the Federation's decision to "opt out" of the wages system, the Airlines declined to engage in collective bargaining, other than within the parameters of the prevailing National Wage Principles. The employers also appear to have been entirely within their legal rights in adopting this course. Furthermore, they were encouraged in their stand by the federal Government.

229. The Committee does not consider that these events disclose any breach of the principles of freedom of association. Registration under the 1988 Act is optional. The AFAP had elected to register, and to accept the advantages which derive therefrom. The Committee considers that it is reasonable for the legislation, and the AIRC, to require adherence to the norms of the system of conciliation and arbitration as part of the quid pro quo for these benefits. This does not appear to be in any way inconsistent with the guarantees provided by Articles 2 and 3 of Convention No. 87, or by Article 4 of Convention No. 98. Workers can form and join the union of their own choosing. That union can then elect to register under the federal Act if it wishes. Alternatively, it may register under one or more of the state Acts, or it may remain unregistered. Whether registered or not, it may formulate its programmes in full freedom. It may also engage in free collective bargaining. If that bargaining takes place within the framework of the Industrial Relations Act, the outcomes must conform to the current National Wage Principles. If it takes place outside the legislative framework, then the parties may strike their own bargain. In the present case, the employers, supported by the Government, declined to engage in collective bargaining other than in accordance with the Principles laid down by the Commission. The Committee is not competent to express any opinion on the advisability

or otherwise of their adopting that position. But it is competent to determine that in doing so neither the employers nor the Government acted in a manner which was inconsistent with the principles of freedom of association.

230. Faced with the employers' refusal to negotiate on its 29.47 per cent claim, the Federation decided to take industrial action in the form of the "9 to 5 campaign". This action was clearly intended to have, and had, the effect of severely disrupting the operations of the Airlines. On 23 August 1989, after several days of such disruption, the employers indicated that they were not prepared to accept the partial performance of their contracts of employment by the pilots, and required instead that they work in accordance with the terms of their contracts. They also initiated common law proceedings against the AFAP and a number of its members and officers. In anticipation of this response by the employers, the pilots resigned from their employment en masse on 24 August 1989 - apparently on the basis of legal advice to the effect that this would minimise their exposure to damages actions at common law.

231. At one level, these mass resignations might be said to have brought the industrial dispute between the pilots and the Airlines to an end. The pilots had not broken their contracts of employment - as would have been the case, for example, if they had gone on strike, or terminated their employment otherwise than in accordance with the terms of their contracts and of the relevant awards. Nor had they been "locked out" by their employers. Instead, they had chosen, on the basis of independent legal advice, to resign from their employment. In the course of their damages action against the Federation and six of its officers, the Airlines had argued that this decision to resign en masse constituted a conspiracy to injure at common law. This argument was rejected by the Supreme Court of Victoria in its judgment of 23 November 1989. The Court did, however, determine: (i) that the meetings which authorised the Federation to proceed with the "9 to 5 campaign" were not convened in accordance with its own rules; (ii) that the "9 to 5 campaign" was unlawful by virtue of section 312 of the Industrial Relations Act, which makes it an offence to engage in certain conduct which is intended to incite "boycotts" of awards; and (iii) that implementation of the campaign involved breaches of the contracts of employment of the members of the Federation. These factors provided the basis for findings that the Federation and its officers had: (a) engaged in an "unlawful means conspiracy"; (b) unlawfully interfered with the "trade or business" of the Airlines; and (c) unlawfully interfered with contractual relations between the Airlines and their pilots, and between the Airlines and other persons. They were, therefore, liable in damages in respect of the losses incurred by the Airlines in consequence of their unlawful acts.

232. The Committee has always considered that the right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests [see Digest of decisions and principles of the Freedom of

Association Committee, 3rd edition, 1985, para. 363]. It follows that in order to determine whether there has been any breach of the principles of freedom of association in the present instance it is necessary to determine whether the "9 to 5 campaign" and the mass resignations of members of the AFAP constituted legitimate exercises of the right to strike as a means of promoting and defending the economic and social interests of the pilots.

233. As concerns the "9 to 5 campaign", the Committee considers that in the circumstances of the present case it cannot be so regarded. In reaching this conclusion the Committee recalls that Article 8(1) of Convention No. 87 requires that in exercising their rights under the Convention "workers and employers and their respective organisations ... shall respect the law of the land", whilst Article 8(2) stipulates that "the law of the land shall not be such as to impair, nor shall it be so applied as to impair the guarantees provided for in this Convention". In the present case the AFAP had initiated its campaign in direct defiance of the directions of a tribunal (the AIRC) to whose jurisdiction it had voluntarily submitted. It had also, in the opinion of the Supreme Court of Victoria, contravened section 312 of the 1988 Act. This latter provision appears to the Committee to be a legitimate means of seeking to protect the integrity of the processes of conciliation and arbitration which are set out in that Act. It follows that in terms of Article 8, the Federation had failed to "respect" laws which themselves were compatible with the guarantees provided in the Convention. This, inevitably, deprives the "9 to 5 campaign" of the character of a legitimate exercise of the right to strike.

234. The fact remains, however, that the AFAP and six of its officers have been found liable to pay a very substantial sum of damages in respect of what would, in other circumstances, be regarded as a legitimate exercise of the right to strike. It does not possess that character in this instance. The Committee nevertheless recalls that it has always considered that the development of harmonious industrial relations could be impaired by an inflexible attitude being adopted in the application of severe sanctions, especially penal sanctions to workers who participate in strike action [Digest, op. cit., para. 440]. The Committee considers that in the present case it would be consonant with the spirit of this principle if the Airlines were to accede to the Government's suggestion that they do not enforce the award of damages against the Federation. It notes that no steps have in fact been taken to enforce the damages award in this instance. It calls upon the Government to continue its efforts to persuade the Airlines to maintain this position.

235. The Committee notes that in the course of its detailed judgement, the Supreme Court of Victoria referred to the work of a number of academic commentators who had suggested that the scope of the tort of interference with contractual relations is such that it would render all Australian unions and their officials who call their members out on strike liable to actions for damages and injunctions at common law. The court observed that "whether this is a good thing or

a bad, is not my concern but if it is undesirable then the remedy must lie with Parliament".

236. The Committee cannot view with equanimity a set of legal rules which: (i) appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein; (ii) makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequence of their actions; and (iii) enables an employer faced with such action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct. The cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action to promote and defend their economic and social interests [see Digest, op. cit., para. 363]. Accordingly, the Committee considers that it would be appropriate to draw this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

237. As regards the mass resignations of pilots, the Committee is of the clear view that in appropriate circumstances mass resignations of workers can constitute a legitimate exercise of the right to strike as guaranteed by the principles of freedom of association. However, in the particular circumstances of the present case the Committee considers that the resignations of pilots on 24 August 1989 cannot properly be regarded as an exercise of the right to strike for purposes of the application of those principles.

238. The Committee notes that the pilots resigned in accordance with the terms of their contracts of employment on the basis of independent legal advice. Upon resignation, they claimed, and received, their full superannuation entitlements. They had evinced a clear intention to work for the Airlines only on the basis of new contracts of employment, on their own terms. The Committee considers that these factors impel the conclusion that the pilots regarded their employment with the Airlines as at an end. It is not for the Committee to determine whether this was a prudent course for them to adopt in either legal or industrial terms. But that they did indeed intend to terminate their employment is quite clear.

239. It is equally clear that the Airlines also regarded the pilots' employment as at an end. They paid superannuation entitlements in full, at the request of the pilots. They immediately began to look for replacement pilots, both in Australia and overseas. It is true that they offered to re-employ pilots who were prepared to contract on an individual basis, and that they actually did so in certain instances. However, this situation was qualitatively different from that which prevails in a "normal" strike situation where the contracts of employment of the workers concerned may be "suspended" or breached as a consequence of the strike, but where both the employer and the workers assume that in due course the strikers will return to work on the basis of their former contracts of employment (possibly with amendments to reflect the strike

settlement). It is also qualitatively different from situations where an employer dismisses workers as a penalty for going on strike or taking other industrial action.

240. It follows from the foregoing that the response of the employers and of the Government to the mass resignations of the pilots did not constitute a breach of the principles of freedom of association relating to the right to strike. Rather, it consisted of an attempt to minimise the social, industrial and economic impact of the pilots' actions.

241. The complainant has not provided any evidence in support of its assertion that the pilots' decision to resign was partly motivated by the fear of criminal prosecution. The Government denies that it had threatened prosecutions at any time. In the circumstances the Committee considers that this allegation does not call for further examination.

242. The complainant has also failed to adduce any evidence in support of its allegation that certain pilots were threatened that they would not receive their full superannuation payments after their resignation. The Government indicates that a number of pilots have commenced, or are contemplating, legal action against their former employers in relation to disputed superannuation entitlements. These actions seem to be quite specific to the circumstances of the individuals concerned, and do not appear to be part of any systematic attempt to exert pressure upon the Federation or its members through the withholding of superannuation payments. Accordingly, the Committee considers that this aspect of the case does not call for further examination.

243. In its communication of 11 December 1990 the complainant alleges that there is increasing evidence that the Government has been victimising the AFAP by threatening to withdraw the Australian landing rights of foreign airlines if they offer employment to former members of the AFAP. The complainant has not made any of this evidence available to the Committee, and the Government has denied its existence. In the circumstances, the Committee can only conclude that this aspect of the case does not call for further examination.

244. The complainant has also made further submissions relating to the original reasons for the dispute, the immigration of foreign pilots and the refusal of the Airlines to recognise the AFAP as representing the interests of pilots. The Government has provided detailed observations on all of these submissions. The Committee considers that these submissions, and the Government's observations thereon, clearly demonstrate that the AFAP is now able fully to participate in the system of conciliation and arbitration established by the Industrial Relations Act 1988, but that its membership base has been considerably eroded as a consequence of events since August 1989. However, none of the additional matters raised by the complainant appear to the Committee to disclose any breach of the principles of freedom of association.

245. Finally, the Committee notes that although no action has yet been taken to enforce the awards of damages and of costs against the AFAP and certain of its officers, the decision of the Supreme Court of Victoria in November 1989 still stands. It further notes that the AFAP has lodged an appeal against this decision. Accordingly, it asks the Government to keep it informed as to future developments in relation to this aspect of the complaint. It also asks the Government to keep it informed as to the outcome of the various proceedings before the AIRC in which the AFAP is presently involved: in particular the application by the Airlines under section 118 of the Industrial Relations Act 1988 to have the Federation deprived of the right to represent the industrial interests of pilots employed by them.

The Committee's recommendations

246. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

(a) That the complainant's allegations relating to: (i) denial of the right of the pilots, through the AFAP, to engage in collective bargaining with the Airlines free of government intervention; (ii) denial of the right of the AFAP and its members to take industrial action as guaranteed by the principles of freedom of association; (iii) threats of criminal prosecution; (iv) withholding of superannuation payments; and (v) victimisation of the AFAP and its members by the Government do not call for further examination.

(b) That the Committee is concerned about the scope of the common law liabilities which appear to attach to industrial action in Australia, and accordingly draws this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

(c) Recalling that the development of harmonious industrial relations could be impaired by the adoption of an inflexible attitude in the application of severe sanctions to workers who participate in strike action, the Committee calls upon the Government to persevere with its endeavours to persuade the Airlines not to enforce the damages of A$6.48 million awarded against the Australian Federation of Air Pilots and six of its officers by the Supreme Court of Victoria.

(d) That the Government keep the Committee informed as to future developments in relation to: (i) the enforcement of the awards of damages and costs against the AFAP and its officers; (ii) to the outcome of the Federation's appeal against the decision of the Supreme Court of Victoria, and (iii) the proceedings initiated by the Airlines under section 118 of the Industrial Relations Act.

Case No. 1528

COMPLAINTS AGAINST THE GOVERNMENT OF GERMANY PRESENTED BY
- THE GERMAN CONFEDERATION OF TRADE UNIONS (DGB) AND
- THE EDUCATIONAL AND SCIENTIFIC TRADE UNION (GEW)

247. By a communication dated 12 March 1990, the German Confederation of Trade Unions (Deutsches Gewerkschaftsbund/DGB) presented a complaint of violations of trade union rights against the Government of the Federal Republic of Germany. On 6 July 1990, the Educational and Scientific Trade Union (Gewerkschaft Erziehung und Wissenschaft/GEW) presented similar allegations against the Government. The Government supplied its observations on the case in letters dated 29 October 1990 and 7 January 1991.

248. The Federal Republic of Germany has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); it has not ratified the Public Service (Labour Relations) Convention, 1978 (No. 151).

A. The complainants' allegations

249. In its communication of 12 March 1990, the DGB alleges that, by restricting the right to strike of teachers having the status of civil servants (beamtete Lehrer), the Government has violated Convention No. 87.

250. According to the complainant, in 1988 the collective agreement for the public service provided for salary increases and a working time reduction of 1 1/2 hours for 1989 and 1990. It was standard practice until then for this agreement - which covered only non-permanent salaried employees in the public service - to be subsequently extended to civil servants (Beamte). However, in 1989 the employing authorities refused, for the first time, to grant this reduction in working time to teachers in public institutions. The unions involved in the Länder of Hesse, Hamburg and Bremen went on strike to force the employing administrations to reverse their decision.

251. As a result of this one-day strike, in Hesse alone about 8,000 teachers in the public service received disciplinary sanctions and over 500 were fined sums of up to two weeks' salary. The non-permanent staff were not spared either: several hundred of them were threatened with dismissal.

252. In Bremen and Hamburg the strikes were successful in getting the Länder Governments to reduce teachers' working hours in accordance with the collective agreement.

253. Recalling the views already expressed by the Committee of Experts and the Committee on Freedom of Association on the right to strike, the complainant states that the above-mentioned disciplinary measures violate Convention No. 87 - whether the teachers involved are civil servants or not.

254. In the supporting document attached to the complaint, the DGB explains the background to the strike of 2 March 1989. It states that in the 1980s the unions, faced with increasing unemployment, called for reductions in working time so as to help job creation and thus were willing to go as far as strike action if necessary to obtain a marked reduction in working time. The collective agreement for the public service signed on 22 March 1988 provided for progressive salary increases for 1988 through 1990 and a total reduction of 1 1/2 hours in the working time for 1989 and 1990.

255. Given the special status of civil servants in Germany, this collective agreement only covers non-permanent salaried employees in the public service. Civil servants' conditions of employment are determined by the law, which only grants them the right to receive the salary corresponding to the post held. Thus the conditions of employment of civil servants - to which category belong most public sector teachers - are not dependent directly on collective bargaining. However, in accordance with well-established custom, the two parties (namely, the employers' representatives and the workers' representatives) tacitly agree, during negotiations to extend to civil servants the advantages obtained on behalf of non-permanent staff. These advantages are then officially integrated into the civil servants' regulations both at the federal and Länder level. The public service unions which cover both non-permanent staff and civil servants thus formulated their 1988 claims on the basis of the principle that any advantages gained would naturally flow on to civil servants.

256. The dispute in Hesse arose when this State's majority government categorically refused to follow this custom which had - through its equal treatment of the various staff categories - until then achieved much in maintaining social peace in the public sector. This refusal was even worse because the advantages signed into the collective agreement of March 1988 were extended to federal public servants and those in most other Länder apart from Hesse. Another reason for condemning this refusal is that, in Hesse, the hours of work of teachers are not fixed. According to case law, working time includes not only compulsory teaching hours but also time spent in meetings, preparatory work and correction and various other tasks; also according to case law, teachers cannot be forced to work longer hours than other public servants. So, if the number of their compulsory hours is not reduced they can, by law, reduce themselves the length of time spent on preparatory and correction work. The

reality is, however, according to the complainant, completely different since teachers work well over the 40 hours usually worked in the German public service. The complainant points out that while over the years 1958 to 1986 the length of the working week fell from 48 to 40 throughout the public service, the compulsory presence of public service teachers in Hesse has only dropped by between one and three hours, the last decrease being in 1969.

257. The complainant stresses that since December 1988 when the Hesse teacher union representatives decided to call a strike vote, it has endeavoured to gain satisfaction by other means, for example, by debate in the Hesse Parliament, and requests to the State's Prime Minister. Faced with a blanket refusal to change the decision, the union held a strike vote in February 1989 and the necessary majority was in favour of such action. At the same time, however, representatives of the political party in power launched a press campaign against the union calling the proposed strike a threat to the legal basis of the nation. On 1 March 1989, the Hesse administrative tribunal decided that the strike call justified recourse to police powers (including the imposition of fines) but the union did not change its course of action. The Government of Hesse formally banned the strike on pain of fines.

258. The complainant explains that, under German case law established by the higher administrative courts, these unions, in view of the fact that they consist of officials, are subordinate to the State; the union considers this position so dangerous as to force it to present this complaint to the ILO.

259. The complainant describes the severe measures taken against striking teacher unionists: warnings of threatened dismissal were issued to many hundreds; over 8,000 civil servants received disciplinary sanctions; over 7,000 teachers received a reprimand entered on their personnel files where it will be visible for many years to come; over 500 civil servants received pecuniary fines (for unknown reasons, different amounts have been claimed averaging out at between two weeks' and one month's salary). As a result of these measures there have already been incidents of teachers' career prospects being altered because they took part in the strike.

260. Lastly, the complainant complains of the position of the right to strike under the European Convention on Human Rights. The European Commission on Human Rights (5 July 1984, Demand No. 10365/83, Stöcker) examined the issue brought by a German union officer who had, in 1979, called a short teachers' strike with a view to obtaining a reduction in working time. It held that the defence of occupational interests did not necessarily require strike action to become an essential element of freedom of association and rejected the claim to lift the sanctions which had been imposed on the striking public service teachers. This confirmed the principle of a general ban on strikes by civil servants.

261. By a letter dated 6 July 1990, the GEW, an affiliate of the DGB, sent its specific comments alleging violation of Convention No. 87 by the ban on the right to strike of teachers having official (Beamte) status. In particular, it points out that "formal disciplinary proceedings" have been instituted by the Land of Hesse, through the Ministry of Education concerned, against Mr. Klaus Müller, Chairman of the GEW in Hesse.

262. This is evidence, according to this complainant, that the scope of the disciplinary regulations governing civil servants has been extended to cover also those officials who are on leave of absence. Mr. Müller has been on such leave without pay from the education service of Hesse since 1983 (he had been successively re-elected to the office of Chairman and his leave of absence was extended in 1985, 1987 and 1990) for the express purpose of exercising his union mandate as the GEW Chairman. Sanctioning Mr. Müller is, in the complainant's opinion, not only a restriction of the right of association guaranteed by article 9 of the Basic Law and by the Constitution of Hesse, but also a great restriction on the possibility of carrying out trade union functions.

263. On 6 December 1988, states the GEW, a special meeting of the Hesse union representatives decided to organise a vote among the members of the Hesse GEW employed in the education service with a view to declaring a one-day strike on 2 March 1989, on the grounds that the part of the collective agreement of March 1988 which deals with working time was not being extended to officials (Beamte) in Hesse. After a successful vote, the strike took place on 2 March 1989. About 10,000 colleagues participated in the strike. Immediately after 2 March 1989, the Ministry of Education of Hesse initiated preliminary disciplinary investigation proceedings against the Chairman of the Hesse GEW. The charges made against him were, inter alia, "that by the dissemination of documentary material countersigned by him - in particular, calls to strike action - he contributed decisively to the fact that in the context of a one-day 'work stoppage' decided on for 2 March 1989 more than 7,700 teachers in Hesse absented themselves from duty for a period of one day, even though by circular dated 8 February 1989, addressed to all principals of schools of the Land of Hesse, the Minister of Education of Hesse had expressly stressed the inadmissibility of the teachers' 'strike' and of strike-like measures and had forbidden both the Educational and Scientific Trade Union and Mr. Müller as its First Chairman to engage in the proposed 'strike'". On the conclusion of this preliminary investigation, in the course of which Mr. Müller was given a hearing, "formal disciplinary proceedings" were instituted on 2 March 1990. In bringing these formal disciplinary proceedings the Hesse Ministry of Education stated that the object is "to secure the transfer of the official to a post in the same career at a lower base salary".

264. This, in the GEW's view, means that the Hesse union chairman is the subject of disciplinary proceedings which - in conformity with the "ring-leader" principle - transcend all other disciplinary proceedings brought against officials who had participated in the

strike. Whereas in all other cases the object of the disciplinary proceedings is to administer a reprimand or to impose a single monetary fine, the Chairman of the Hesse union is to be transferred to a lower salary grade, which would constitute a permanent punitive measure and which could be made effective when the trade union's Chairman returns to the education service of the Land of Hesse.

265. Lastly, the GEW provides copies of the minutes of the first disciplinary hearing against Mr. Müller from which it appears that this teacher unionist was represented by legal counsel and was able to make oral presentations. In his arguments he relied on the ILO principles on the right to strike, pointing out that the general ban on strike action which, by case law, applies to all German civil servants goes beyond acceptable limits because the civil servants involved in the strike, namely public teachers, are not agents of the public authority or providing an essential service. Mr. Müller's counsel also challenged the prevailing jurisprudence in Germany and claimed that there is no general ban on strike action by civil servants, so that the sanctions imposed on striking Hesse teachers were misconceived ab initio. It appears from further documentation attached to the complaint that, on 25 June 1990, Mr. Müller requested that the formal disciplinary proceedings be stayed.

B. The Government's reply

266. To an initial communication dated 29 October 1990, the Government attaches the comments on this complaint of the Federal Confederation of German Employers' Associations (Bundesvereinigung der Deutschen Arbeitgeberverbände/BDA). The BDA sees no violation of Convention No. 87 in the sanctions applied to non-titular teachers after their strike in Hesse. It argues that neither this nor other ILO Conventions refer specifically to strikes and that the International Court of Justice - recognised under the ILO Constitution as the only body for interpreting these instruments - has not to date taken a position on the right to strike and ILO Conventions. It claims that the Committee of Experts on the Application of Conventions and Recommendations has exceeded its role in using Conventions Nos. 87 and 98 on which to base a very wide concept of right to strike, particularly in the case of services available to the public and protest strikes against government policy. The BDA sees no link between the Committee of Experts' protection of strikes and the reality of strike situations. Referring to the Vienna Convention on the Law of Treaties, the BDA believes that the ILO jurisprudence on strikes is unjustifiably wide. In the context of this particular case, it believes that public servants in Germany accept an employment relationship based on service and loyalty, excluding the right to strike in return for which the State accepts greater responsibilities towards them than an ordinary employer has.

267. In its letter of 7 January 1991, the Government denies that the disciplinary sanctions (in the form of reprimands, warnings and fines) imposed both on teachers having the status of officials and on those employed as non-permanent salaried public servants for striking violated Convention No. 87.

268. It argues that as far as teacher officials (beamtete Lehrer) are concerned, Convention No. 87 does not apply. That instrument contains provisions on freedom of association and the right to organise for workers and the Government believes that the concept of worker therein does not include officials. It refers in this connection to the reference to Convention No. 87 in the Preamble to Convention No. 151, which latter instrument deals particularly with the protection of the right to organise of public servants. Convention No. 151 would not have been necessary if officials had already been covered by Convention No. 87.

269. The Government explains that the principles guaranteed in Convention No. 87 nevertheless have force of law in Germany and are constitutionally guaranteed by article 9(3) of the Basic Law. It gives its view on Articles 2 and 3 of the Convention: while Article 2 deals with the freedom of individuals to organise themselves in trade unions or employers' organisations, the purpose of Article 3 is to protect unions as such. It believes that article 9(3) of the Basic Law meets these requirements in guaranteeing individual and collective freedom of association as well as bargaining autonomy for workers. The Federal Constitutional Court has confirmed this scope of the Basic Law in its jurisprudence: according to its decision of 1 March 1979, freedom of association guarantees "the freedom to unite in associations to improve working and economic conditions and the freedom to pursue this goal in common; the persons concerned must determine both of these themselves and on their own responsibility, and, as a matter of principle, free from state intervention. The elements of this guarantee are the freedom to form and join, withdraw from and refrain from joining associations, as well as protection of the association as such and of its right to pursue the aims referred to in article 9(3) of the Basic Law through activities specifically appropriate to associations". In addition, by virtue of section 91 of the Federal Civil Servants Act, federal civil servants, like all other citizens, can exercise the right of association protected by Convention No. 87, and can therefore join and to be active in associations. This is likewise guaranteed to Länder civil servants by the appropriate Länder laws and regulations.

270. The Government states, however, that Convention No. 87 sets forth universal principles and thus represents only a general rule; in particular, it contains no provisions in respect of labour disputes. The Government is thus of the opinion that the Convention imposes no a priori obligation on ratifying States to guarantee the right of civil servants to take industrial action. On this point, it observes that article 33(5) of the Basic Law does not allow civil servants' associations to impose their demands by means of industrial action. One of the traditional principles of the civil service,

according to article 33(5) is that civil servants, as loyal public employees, do not enjoy the right to strike. The relation of the civil servant to the State is that of an employee to his employer, but this employer, in its capacity as legislator, is also competent and responsible for regulating the legal situation, and for allocating reciprocal rights and obligations. The individual civil servant has no legal possibility of influencing the form of his legal status; according to Federal Constitutional Court Ruling 8, neither do traditional principles entitle him to resort to measures of collective industrial dispute in the furtherance of common occupational interests. This restriction on the rights of civil servants is in keeping with the special obligations of the employer to provide for the welfare of its employees, which, in this case, far exceeds the obligations of a normal employer.

271. The Government points out that Article 3, paragraph 1, of the Convention is modified by Article 8, paragraph 1, which provides: "In exercising the rights provided for in this Convention workers and employers and their respective organisations shall respect the law of the land." The Government understands the contradiction between these two Articles of the Convention as meaning that the election of representatives, the administration and the organisations' other internal activities shall not be subject to any interference, in conformity with Article 3, paragraph 1. On the other hand, the organisations must take into account the fact that, when their activities have external repercussions, these activities can, and very often do, affect the rights of third parties. In this respect Article 8, paragraph 1, of the Convention requires that national laws, especially the national Constitution, be respected. As stated earlier, article 33(5) of the Basic Law does not allow civil servants the right to strike.

272. Moreover, the Government stresses that Germany allows extensive freedom of industrial action subject to the justified and legitimate condition that it must relate to an issue that can be settled by collective agreement. Conditions of employment for civil servants are, however, established not by collective agreement but by law. Therefore, industrial action taken to improve conditions of employment for civil servants would not be pursuing a goal which can be settled by collective agreement; it would rather be directed against the legislative authorities. The Government adds that in the case of a settlement awarded by the legislator, the following principles are of essential importance: Germany is a parliamentary democracy with freely elected legislative bodies; legislative procedures are such that all politically relevant groups concerned with the settlement of the issue in question have an opportunity to state their positions; this means that the trade unions also receive a hearing on all socio-political legislation and can try to bring their political influence to bear on the debates. The preparation of laws concerning federal civil servants is governed by section 94 of the Federal Civil Servants Act whereby the central organisations of the relevant trade unions must participate in the preparation of general regulations concerning civil servants' conditions of

employment. The civil servants' laws in force in the various Länder contain similar provisions. This participation may even occur at two stages: first, before the Federal Government refers the proposed legislation to Parliament, it gives the organisations an opportunity to contribute their views and their specialised knowledge on the proposed legislation; secondly, during the subsequent legislative procedure the organisations may receive another hearing from Parliament or parliamentary committees.

273. In addition to these possibilities of political influence, the Government indicates that trade unions may also appeal to the courts, in particular to the Federal Constitutional Court. In this way they can have laws checked for conformity with the Constitution. The Government draws attention to the fact that Germany allows unrestricted right of demonstration under articles 5 and 8 of the Basic Law and the corresponding Act concerning assemblies and marches of 15 November 1978. Trade unions are therefore at liberty to demonstrate against the Government or the legislature, so long as such action is taken outside normal working hours.

274. According to the Government, a strike called for the purpose of evoking a specific response from the government authorities (legislature, administration, judiciary) violates the principles of sovereignty of the people and parliamentary democracy. It is inconsistent with the obligation of the administration to act lawfully and with the independence of the judiciary. In addition, in accordance with the above-mentioned rulings issued by both the Federal Constitutional Court and the Federal Administrative Court, the right to join and to be active in associations in no way implies the right to strike for all members of associations. In this context, it draws attention to the view expressed by the European Commission on Human Rights, which does not consider the right of civil servants to strike as an essential element of freedom of association.

275. The Government therefore claims that if the ban on civil servants from striking is not a violation of the right of association, then disciplinary sanctions imposed in connection with this ban cannot be considered as violations of the right of association.

276. Turning to employees in the public service, including non-permanent salaried teachers, the Government states that unlike civil servants they have the right to take industrial action under the usual conditions laid down in industrial law. In the present case, however, the strike by the non-permanent salaried teachers was not lawful, as the clauses in the collective agreement concerning the working hours of non-permanent salaried teachers were still in force. These teachers were therefore legally bound to avoid industrial action. The reprimands issued following the violation of this obligation to avoid industrial action were therefore also lawful. (The decision by the Administrative Tribunal of Hesse of 1 March 1989 is provided by the Government.) With regard to the reprimands issued against non-permanent salaried teachers, it adds that the reprimand, which is not the equivalent of a disciplinary measure under civil

service law, presupposes a breach of duty arising from the employment relationship. Its sole purpose is that of a warning or advance notice. Unlike its counterpart in the Civil Service Disciplinary Code, it has no element of sanction beyond that of a caution. Moreover, reprimands, in individual cases, can be referred to the labour tribunals for justification. The rights of the employees in question are thus, in the Government's opinion, adequately safeguarded.

277. The Länder in which these walk-outs took place (Bremen, Hamburg and Hesse) took the following action:

(a) In Bremen: those teachers having civil servant status were given a caution on the illegality of such a strike and were informed that a civil servant who participates in a strike and absents himself from his duties commits a breach of duty; a copy of this letter was placed in the personal file of each teacher concerned; furthermore, they were informed that their salaries under section 9 of the Federal Wages and Salaries Act would be withheld for the time of their illegal absence from duties (one day), and a corresponding deduction was made. The non-permanent salaried teaching staff received a communication concerning loss of salary under section 18(2), clause 3, of the Federal Employees' Collective Agreement for the time of their unauthorised absence from work because of the day-long teachers' strike, and a corresponding deduction was made. The proceedings instituted have in the meantime been concluded.

(b) In Hamburg: disciplinary procedures were abandoned in the case of teachers having civil servant status but not occupying posts of responsibility; however, they received a reprimand in writing. Deputy school principals with civil service status were fined the equivalent of half of one month's basic salary and school principals were fined the equivalent of one month's salary. Non-permanent salaried teachers received a reprimand. All proceedings instituted have meanwhile been concluded.

(c) In Hesse: ordinary teachers with civil service status but without posts of responsibility were issued a reprimand in principle. In general, fines were imposed on teachers with civil service status occupying posts of responsibility. Non-permanent salaried teachers were issued reprimands. The proceedings have not all been finally concluded. According to the Government, the fact that the various Länder affected by the teachers' walk-out took different types of action is explained by the sovereignty of the Länder in matters of education, as in others, guaranteed by the Basic Law.

C. The Committee's conclusions

278. The Committee notes that the facts in this case are not in dispute. It is rather the fundamental question of recognition of the right of a certain group of employees to take strike action that is the centre of disagreement.

279. The complainant argues that the following events constitute a violation of Convention No. 87: a dispute over teachers' working conditions (namely the unexpected government refusal to extend through regulations to teachers having the status of civil servants, the working time reductions agreed upon in the 1988 collective agreement for non-permanent salaried public servants) led to a one-day strike on 2 March 1989 by both types of teachers which in turn led to sanctions of various types being imposed on over 8,000 teachers. The disciplinary procedures against one particular teacher union leader - Mr. Müller, Chairman of the Hesse GEW - are described in detail to show the severity of the sanctions and to show that ILO principles on the right to strike were relied on as justification for the teachers' action.

280. The Government denies any violation of Convention No. 87. It argues that, at the national level, the special status of the teachers involved (beamtete Lehrer) justifies the withdrawal of their right to take industrial action; it adds that the fact that their conditions of service are set by regulations, and not by collective bargaining, further justifies this ban. It also argues that Convention No. 87 contains no provisions in respect of labour disputes; that, in any case, Article 8, paragraph 1, of the Convention requires that national laws be respected; and that if the ban on civil servants striking cannot be seen as a violation of freedom of association, then disciplinary sanctions imposed in connection with this ban cannot be seen as violations. Lastly, the Government argues that, although non-permanent salaried public service teachers do have the right to strike, in the present case the strike was unlawful because their collective agreement was still in force; it adds in this connection that the reprimands issued against this category of striking teachers in Hamburg and Hesse involve no element of sanction beyond that of a caution.

281. At the outset the Committee wishes to clarify one aspect raised briefly in the Government's reply and which might lead to confusion. The Government maintains that the concept of "worker" in Convention No. 87 does not include "officials"; it states that Convention No. 151 deals particularly with protection of their right to organise and such a Convention would not have been necessary if officials had already been covered by Convention No. 87. The Committee would refer the Government to this Committee's opinion given in May 1984 during consideration of a similar argument involving the interplay of Conventions Nos. 87 and 151:

> By its terms, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) guarantees the basic right to form and join organisations of their own choosing to all workers "without distinction whatsoever", including all public servants, whatever the nature of their functions, the only limitations permitted by the Convention concerning members of the armed forces and the police. Both the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations have always taken the view that the exclusion of public servants from this fundamental right contravenes the Convention. Not only must all workers be granted the right to organise but, by virtue of Article 11, ratifying States must take all necessary and appropriate measures to ensure that workers may freely exercise that right. [234th Report, Case No. 1261 (United Kingdom), para. 362.]

282. Turning to the central issue in this case, the Committee would first set out its position on the right to strike, the more important elements of which were stated as early as its second meeting in 1952: The right to strike is one of the essential and legitimate means through which workers and their organisations may further and defend their social and economic interests [see Digest of decisions and principles of the Freedom of Association Committee, 3rd edition, 1985, paras. 362 and 363]. This basic principle may, however, be restricted in three circumstances: (1) situations of acute national crisis; (2) in essential services in accordance with the definition given by the ILO supervisory bodies; and (3) in the case of public servants acting in their capacity as agents of the public authority [see Digest, paras. 394 and 423]. Such restrictions would have to be accompanied by some form of disputes settlement procedure so as to compensate the workers involved for this limitation on their freedom of action [see Digest, paras. 396 and 397].

283. The Government claims that this jurisprudence cannot be based on Convention No. 87. The Committee recalls that already in 1977 it was referring to general bans on strikes as constituting "a considerable restriction of the means open to trade unions for furthering and defending the interests of their members (Article 10 of Convention No. 87) and of the right of trade unions or organise their activities (Article 3)". [See 165th Report, Case No. 857 (United Kingdom/Antigua), para. 177, and Digest, para. 416.] The Committee of Experts on the Application of Conventions and Recommendations has also referred specifically to Articles 3 and 10 of the Convention in its comments on strike action over the years [General Survey, 1983, para. 205; General Survey, 1973, para. 107].

284. However, despite all this, it must be kept in mind that this Committee is not the place to debate the weight, if any, to be given to Convention No. 87 when considering whether the Government's actions in this case violate the ILO's position vis-à-vis strikes. This is so because this Committee has been established by the Governing Body to examine allegations such as this irrespective of whether an impugned government has ratified the specific freedom of association