(j) The *Association of Salaried Medical Specialists* has been unable to negotiate multi-employer contracts and faced refusals to negotiate collectively.

(k) The *Journalists and Graphic Process Union* at the *Southland Times* met with a refusal to negotiate a collective contract. At the *Otago Daily Times* most new staff could not join the collective contract; the employer promotes IECs.

### C. THE GOVERNMENT'S FURTHER OBSERVATIONS

**155.** In its communication of 10 October 1994, the Government first recalls that the Act is an important element of its strategy for growth, employment and social cohesion, and must be seen in that context. From 1950 to 1985 New Zealand's economic growth was well below the OECD average. Real income per head grew just 1.4 per cent a year compared to 2.9 per cent for the OECD as a whole, even with a substantial debt build-up. As in many countries, policies in New Zealand through the 1970s were aimed at maintaining a high level of economic activity and employment. At the micro-economic level, capital, product and labour markets were increasingly highly regulated and inflexible. This culminated in the wage and price freeze in the early 1980s. The policy settings did not promote, and probably impeded, the responses needed to take advantage of and adjust to a changing world. These policies led to macroeconomic imbalances, structural problems, low productivity and rapid rise in government domestic and external indebtedness. Unemployment had been rising steadily since the late 1960s, in spite of the growth in public sector employment. The outlook was poor. Current policies therefore need to be seen as being developed in response to a history of poor economic and employment performance. This led to a serious re-evaluation of the Government's role in the economy and to a comprehensive programme of economic reform. The approach of successive governments since the early 1980s to economic reform has been the implementation of orthodox economic policies based on international best practice, which is best articulated by agencies such as the OECD, the World Bank and the IMF.

**156.** The Government has consolidated these reforms into an ongoing comprehensive strategy for maintaining and accelerating economic growth and building strong communities and a cohesive society. Achieving rapid employment growth and lowering unemployment while generating real income growth is the Government's highest priority. The economic strategy involves six basic building blocks of economic policy:

— the Reserve Bank Act (RBA), particularly the price stability target;

— expenditure control and the Fiscal Responsibility Act (FRA) aimed at the continued reduction of public expenditure and debt as a percentage of GDP;

— a broad-based low-rate tax regime with no increases in tax rates;

— building an open, internationally competitive enterprise economy;

— the Employment Contracts Act (ECA) allowing labour market flexibility, within the context of legislatively set minimum terms and conditions of employment;

— education, training and income support policies aimed at delivering necessary support and opportunities while encouraging labour force participation.

**157.** Macroeconomic stabilization, culminating in the RBA and FRA, regulatory reform, the opening up of the economy to international competition, and the Employment Contracts Act have been instrumental in achieving the resumption of sustainable high economic growth which has been translated quickly into improving labour market outcomes:

— Regulatory reform, which generally removed the special protection to firms in various markets, has resulted in competitive gains in the economy, including growth in labour productivity, which have encouraged and allowed exporters, import competing firms and domestic services to become increasingly more efficient.

— Reduced inflation expectations resulting from the RBA have helped moderate wage growth (average hourly earnings increased by 1.5 per cent in the year to March 1994) and hence increased the sustainability of employment and output growth.

**158.** The flexibility provided by the Employment Contracts Act has:

— allowed firms and employers (together with their representatives) to develop employment contracting arrangements that reflect the market-place realities that apply to each particular firm, with remuneration policies that can reflect productivity;

— enhanced the ability of people to choose a variety of options on the continuum between working and not working (such as working full time, working part time and training part time and receiving income support);

— encouraged many firms to increase the extent to which they are able to communicate directly with their employees and integrate human resource management into overall business planning; and

— removed restrictions on individuals and groups that wished to offer bargaining agent services.

**159.** The process of consultation in the course of developing long-term tariff policy has generated significant feedback on the value of the Employment Contracts Act in creating more effective and harmonious management/employee relations. This is particularly the case for small and medium-sized enterprises which are expected to be the major source of employment growth over the next decade.

**160.** These reforms, together with a more competitive international environment, have placed pressure on wages and conditions of employment, particularly of the less skilled. The Government is directing efforts at giving people the opportunity to get involved in work and training opportunities that boost their skills in line with their preferences and abilities, and providing a welfare system aimed at getting people into productive and meaningful work, while giving adequate income support.

**161.** The New Zealand economy is growing rapidly, with non-inflationary fiscal and monetary policy settings and without the stimulus from abnormal terms of trade "shocks". There was 5.3 per cent annual growth in real GDP in the year to March 1994. Strong productivity growth and low inflation have been an integral part of New Zealand firms competing increasingly successfully in both foreign and domestic markets. Increased business confidence has led to business strategies involving strong growth in investment and output. Sustained high confidence, high profitability, and labour market improvements have also led to growth in consumption and residential investment. Sustained high levels of economic growth over the last three years have also translated

into strong employment growth. On an annual basis, total employment grew by 58,600 or 3.9 per cent in the year to June 1994. As employment has increased, unemployment has fallen. The seasonally adjusted unemployment rate was 8.4 per cent in the June quarter 1994, down from its September 1991 peak of 10.9 per cent. The long-term unemployed and other disadvantaged jobseekers are gaining more from current improvements in employment opportunities than the short-term unemployed (since June 1993, long-term unemployment (persons unemployed for greater than 26 weeks) fell by 17 per cent while total unemployment fell by 13 per cent). The position is less favourable for the very long-term unemployed. The Government is concerned about the heavy representation of Pacific Islanders and Maori in the group and in developing policies targeted at the problem. These reductions in unemployment have been achieved while earnings have been maintained in relation to inflation. A Prime Ministerial Task Force on employment was established in March this year in consultation with other political parties. The Task Force is expected to report on options for improving the position of disadvantaged jobseekers later in the year.

**162.** The current growth phase in New Zealand is significantly different to previous periods of growth over the last 20 years. Previous periods of strong economic performance have been checked by fiscal and external deficits and/or rising inflation. The current growth phase appears sustainable because: it is being achieved through strong productivity growth and competitive gains which will help avoid current account problems (the current account deficit is around 2 per cent of GDP and expected to improve); it is not threatened by serious inflationary pressures (annual inflation in the June year is 1.1 per cent and underlying inflation is expected to remain within the 0-2 per cent band); and it is supported by an improving fiscal position (the 1994 Budget announced the first budget surplus in 17 years, the expectation of continued fiscal surpluses, and a commitment to reducing debt).

**163.** The 1994 Budget predicts growth of around 4.5 per cent in 1994-95 and 3.5 per cent in the following two years, as continued productivity growth and competitiveness gains are translated into further growth in investment, exports and consumption. Sustained economic growth of this type will lead to continued employment growth and unemployment reductions. Recent forecasts by the Reserve Bank of New Zealand project employment growth of 3 per cent in 1994-95 and 2.1 per cent in 1995-96 and the unemployment rate dropping to 7.6 per cent in 1995-96. The Act enables wage changes to reflect collective and individual productivity changes and skill imbalances. As economic growth continues and productivity improves, wage growth is expected to pick up and wage dispersion may increase before it reduces. The latter will depend on how quickly and successfully individuals invest in training in order to take advantage of new opportunities.

**164.** The Government concludes this overview of the general context by stating that the current set of policies should ensure that growth is fast as is possible, is sustained and is employment-rich. The Government is committed to keeping these policies in place and improving them where appropriate. Price stability, expenditure control, lowering the tax burden and an increasingly flexible labour market will be crucial. The Government also intends to ensure that New Zealanders are able to be well educated and trained. To that end, it will be ensuring that public educational and training institutions are both effective and efficient in responding to those demands. The Employment Contracts Act

is an integral part of the government policy mix which is internationally respected and is delivering high rates of economic and employment growth.

**165.** The Government then describes New Zealand's social and judicial framework. New Zealand is a small country with a democratic system of government. Its population is predominantly European, but there are significant ethnic minorities, particularly of Maori and Pacific Island people. Democracy is maintained through elections and consultative processes at all levels of the Government. In respect of national government policies, groups and individuals have a number of ways in which they can express their views. The most fundamental of these is the general election, which is held every three years. The political parties normally set out their policies in their manifestos before the election, giving the community the opportunity to assess the policies of the parties. The Citizens Initiated Referenda Act 1993 allows non-binding referenda to be held on any subject if the organizer can gather signatures of at least 10 per cent of registered electors. Other avenues of expression include rights of peaceful demonstration, freedom of speech and access to Members of Parliament through letters, electorate clinics, invitations to MPs to attend meetings and similar avenues. The Government consults with the community, including employer and employee groups, on a range of policy issues. In particular, the public can become involved in the process of passing legislation through the select committee process, in which the committee publicly calls for submissions on any Bill it is considering. Submitters may choose to appear in person before the committee in support of their submissions, and major interest groups normally do so. Submissions are considered in detail by the Committee. The Bill, with amendments recommended by the select committee, is then debated in Parliament and either passed into legislation or rejected by Parliament.

**166.** New Zealand has a hierarchical judicial system in which the final appeal tribunal is the Judicial Committee of the Privy Council, which although not an English court, primarily consists of eminent British judges. The highest appeal court in New Zealand is the Court of Appeal. There are a number of courts with specialist functions, of which the Employment Court is one. Appeals from the Employment Court are taken to the Court of Appeal, which is the final appeal tribunal for employment matters. The Employment Tribunal is one of a number of tribunals dealing with disputes in particular areas. The Employment Tribunal deals with personal grievances and disputes between parties to employment contracts. All employees and employers have access to the Employment Tribunal, which may resolve issues by mediation or adjudication. The common law is an important source of employment law.

**167.** The framework of employment law includes common law and the Employment Contracts Act, the State Sector Act 1988 and other legislation providing minimum standards of employment. Freedom of association and choice of bargaining operates within these minimum standards. Thus, the Employment Contracts Act provides protection in relation to freedom of association, access for all employees to personal grievance and disputes procedures, and protects against unilateral change to employment contracts. The State Sector Act and other state sector legislation requires employers to be "good employers". A "good employer" is defined by the State Sector Act as "an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment." Other minimum code legislation includes:

— the Minimum Wage Act 1993 provides minimum wages at adult and youth rates;

— the Holidays Act 1981 provides entitlements to annual and statutory holidays and special leave;

— the Wages Protection Act 1983 protects wages from deductions and requires payment in cash unless authorized by employees;

— the Parental Leave and Employment Protection Act 1987 provides parental leave for both parents and protects against dismissal on grounds of pregnancy;

— the Equal Pay Act of 1972 provides equal pay for men and women;

— the Volunteers Employment Protection Act 1973 provides protection against dismissal for employees who take leave for voluntary military service;

— the Health and Safety in Employment Act 1992 requires employers to provide a healthy and safe working environment.

**168.** In addition, other protections in the labour market are provided by the following legislation:

— the Trade Unions Act 1908 provides that workers', employers' and trade organizations cannot be deemed unlawful because they are in restraint of trade;

— the Human Rights Act 1993 protects against discrimination on a wide range of grounds;

— the New Zealand Bill of Rights Act 1990 affirms certain rights and freedoms in New Zealand, in particular, freedom of peaceful assembly (section 16), freedom of association (section 17), and freedom from discrimination (section 19). It requires the Government to consider whether legislation it proposes to introduce is consistent with the Bill of Rights. Recent court decisions, such as *Baigent* v. *Attorney-General*, and *Unemployed Workers' Rights Centre* v. *Attorney-General*, have shown that the Act provides effective remedies for breach of the rights affirmed by it;

— The Commerce Act 1986 exempts contracts and arrangements about terms and conditions of employment from its general provisions prohibiting anti-competitive practices, in order to protect the right to bargain collectively;

— the Health and Safety in Employment Act 1992 makes employers responsible for providing a safe and healthy workplace.

**169.** The parties themselves or their representatives can enforce the employment-related legislation described above through the Employment Tribunal. The Labour Inspectorate of the Department of Labour can enforce the Minimum Wage Act, the Holidays Act, the Wages Protection Act and the Equal Pay Act. In addition, the Inspectorate provides information and advice on employment matters generally. Information about negotiated employment conditions is made available by the Department of Labour through its publication Contract, which reports on the analysis of collective employment contracts covering 20 or more people lodged with the Department under section 24 of the Employment Contracts Act. The Health and Safety in Employment Act is enforced by the Health and Safety Inspectors of the Department of Labour.

**170.** Together with statute, common law acts as a fundamental source of employment law in New Zealand. Thus, provisions of the common law are important to an understanding of the whole system of employment law under the Employment Contracts Act. The courts have identified the existence of mutual obligations of trust and confidence between employers and employees. Employers have an implied duty to be

fair and reasonable in their treatment of employees. The Court of Appeal and Employment Court have relied on this duty in holding that the statutory concept of "unjustified dismissal" requires that all dismissals be for a good reason, and be carried out in a procedurally fair manner. For example, the duty of fair and reasonable treatment may in certain circumstances require employers to pay employees redundancy compensation where the employer has not explicitly contracted to do so. A recent decision of the full bench of the Employment Court (*New Zealand Medical Laboratory Workers' Union Inc.* v. *Capital Coast Health Limited*) confirmed that the mutual obligations of confidence and trust between employers and employees also apply during the negotiations for a new employment contract. Capital Coast Health Limited has been appealed to the Court of Appeal; however, the Court of Appeal's comments in *Eketone* v. *Alliance Textiles* should also be noted. Where a contract of employment does not specify a period of notice of dismissal, the courts have found that "reasonable" notice is required. What is reasonable will depend on various circumstances such as length of tenure, salary, expertise and qualifications. A further important principle of common law which has been reinforced by the courts under the Employment Contracts Act on many occasions is that employers cannot unilaterally change an employment contract. In *Northern Local Government Officers' Union Inc.* v. *Auckland City*, the full bench of the Employment Court reiterated that employers cannot unilaterally vary an employment contract, even where there are sound commercial reasons to do so.

**171.** Turning to the individual recommendations in the interim report, the Government states that it endorses the importance of consultation and cooperation within the community, which is undertaken in a number of ways. In the select committee process, submissions are normally called for through public advertisements. In the case of legislation of major public interest, such as the Employment Contracts Bill, the relevant select committee may (and did, in this case) travel to various towns or cities to hear submissions. Where the committee believes that particular groups have a special interest in the Bill, those groups are specifically advised that the committee is considering the Bill and invited to make submissions. In the case of the Employment Contracts Bill, a range of groups, including the New Zealand Council of Trade Unions and the New Zealand Employers' Federation, were invited to make submissions.

**172.** The Government also consults with community interests, including employer and employee groups, in various other ways. For example, as part of a current technical review of the Holidays Act, the Government has first invited the New Zealand Employers' Federation and the New Zealand Council of Trade Unions to put forward general comments about the problems with the Holidays Act. Following the comments, a consultative document has been sent to about 200 employer and employee organizations and other practitioners and is supplied to any other groups or individuals who may express interest in response to a press statement by the Minister of Labour. As a second example, a Prime Ministerial Task Force on Employment is currently undertaking a review of employment policies. The membership of the Task Force was agreed by the three main political parties, and includes central organizations of employees and employers, the Maori community, officials and people from the community with experience in working with the unemployed. The Task Force has produced a comprehensive issues paper, invited submissions from the community at large, and has held meetings with a wide range of groups around the country. Following the

consideration of the response to the issues paper, the Task Force will produce an options paper for consideration by the Government.

**173.** For more general, ongoing consultation, the Prime Minister's Enterprise Council has been established as a means of providing a forum for regular consultation on a range of policy issues related to business and employment, such as skill shortages, training, industrial safety and so on. The Council has a changing membership, including representatives of business and trade unions. General consultation as part of the democratic process takes place through elections, lawful demonstrations, freedom of speech, access to Members of Parliament, petitions and the Citizens Referendum Act.

**174.** As regards the right of representative organizations to negotiate, the Government indicates that the Trade Unions Act, 1908, provides very clear recognition of the role of trade unions, by ensuring that their purpose cannot be deemed unlawful merely because they are in restraint of trade. These protections apply to all organizations which fall within the wide definition provided by the Act. Unions can choose to register under the Act, although the protections apply whether or not they are registered. Unions are free to represent employees whether or not they are registered under the Trade Unions Act. Since the Government's original response to the complaint in November 1993, there have been several court decisions which have made it very clear that the Employment Contracts Act does expressly provide for recognition of authorized representatives, including workers' organizations. This applies to both individual and collective bargaining. Section 12 of the Act explicitly requires the recognition by employers of the representative person, group or organization authorized by employees to represent them in negotiations for an employment contract. In *Capital Coast Health Ltd.*, the Employment Court has very clearly indicated that the authorized representative must be recognized under section 12, and that this means that if the employer wishes to negotiate an employment contract, he/she must do so through the authorized representative. A number of other provisions also give support to the role of representatives. Part I of the Act recognizes the right of employees to choose whether or not to belong to employees' organizations, including unions. Sections 10 and 59 give employees the right to choose their representative for the purposes of negotiations or other matters to do with their employment contract. Sections 13 and 14 provide for the right of access by representatives. Section 17 explicitly states that a representative may become party to an employment contract with the agreement of the employees and employers concerned.

**175.** As regards the court decisions on recognition of representatives, the case law has developed in this area since the original government response. The principle has been firmly established that employers must negotiate with the authorized representative if they negotiate at all. A significant case was *Eketone* v. *Alliance Textiles*, where the Court of Appeal took the opportunity to comment that recognition of the employees' representative should mean that the employer must negotiate with that representative if it negotiates at all, and does not mean that the employer can bypass the representative and negotiate directly with the employees. These principles have subsequently been reaffirmed in a number of cases, including *Mineworkers' Union of New Zealand Inc.* v. *Dunollie Coal Mines Ltd.*, where the Employment Court found that the employer had arguably breached section 8(1) of the Employment Contracts Act relating to undue influence. The Court granted an interim injunction, indicating that it was applying the Court of Appeal's views in *Eketone*. A substantive application of these views has now

been made in a full court decision by the Employment Court in *New Zealand Medical Laboratory Workers' Union* v. *Capital Coast Health Ltd.*, WEC 45/94. The Court explicitly adopted the conclusions of the Court of Appeal in *Eketone*. It held that the right of the employer to freely express its views under section 5 of the Bill of Rights Act was subject to the employees' rights under section 12 of the Employment Contracts Act, relating to the authorization of a representative; to the employer's statutory duty to be a good employer under the Health and Disability Services Act, 1993; and to the implied mutual obligations of confidence and trust. The Court concluded that the actions of the employer had breached both section 12 and its duty to be a good employer. It ordered a permanent injunction against the employer and also declared that Capital Coast Health had acted unlawfully in attempting to negotiate directly with the employees and attempting to interfere with their right to strike. These cases reinforce the importance of section 12 which explicitly provides for the recognition of the authority of the authorized representative to represent the employees in negotiation.

**176.** The authority of the authorized representative is further reinforced by the representative's ability to meet employees in the workplace. The Act, in section 14, provides a right of entry to the workplace by authorized representatives to discuss matters related to contract negotiations. The Government's original response noted that a number of cases have addressed the issue of access for authorized representatives to workplaces. Two recent cases further reinforce the right of entry. In *Service Workers' Union of Aotearoa Inc.* v. *Southern Pacific Hotel Corporation (NZ) Ltd.*, the Employment Court affirmed the right of the employees' representatives to enter the workplace at a reasonable time without unauthorized conditions or restrictions. The Court noted that the freedom of association guaranteed by the Employment Contracts Act could not be satisfactorily exercised without fully free access between employees and their representatives during the employees' working hours and at their place of work. In *National Distribution Union* v. *Foodstuffs (Auckland)*, the Employment Court found that employers are not entitled to make deductions for time not worked from wages of employees who are visited by representatives pursuant to section 14(1) either singly or in groups, because the statutory right of access is during the time when employees are employed to work.

**177.** On the issue of encouragement of collective bargaining, the Government believes that the Act does encourage collective bargaining. Part II of the Act which deals with bargaining explicitly recognizes collective bargaining, and makes provisions for collective contracts which are different from those for individual contracts:

— it defines collective employment contract, and establishes requirements such as that the collective contract shall be in writing and shall state its expiry date;

— it provides for the variation of a collective employment contract only by agreement, a principle which has been reinforced by a number of cases described in the government response;

— it provides that employees and their unauthorized representatives shall agree on a procedure for ratification of any settlement negotiated by the representative;

— it requires that collective contracts covering at least 20 employees be lodged with the Department of Labour. The Department regularly publishes information about collective contracts in order to ensure that information about collective bargaining is readily available;

— the Employment Contracts Act gives the Employment Tribunal the power to provide a general mediation service to assist with the negotiation of collective contracts (see section 78);

— industrial action relating to the negotiation of a collective contract is explicitly lawful under section 64 of the Act. Industrial action in relation to negotiations for an individual contract does not have similar protection.

**178.** The Employment Court and the Court of Appeal have issued a number of important decisions, mentioned above, which support the principle of collective bargaining through the requirement to recognize the authorized representative chosen by employees. Another significant decision, *Witehira* v. *Presbyterian Support Services*, has shown that the Act protects the interests of employees in collective bargaining. In a previous decision, the Employment Court had found that employers were lawfully able to "partially lock out" their employees as a bargaining tactic. This involved reducing the employees' conditions until they agreed to the proposed contract. In *Presbyterian Support Services*, the Full Court of the Employment Court has subsequently found that an employer cannot lawfully reduce pay and conditions while requiring performance in full of the employees' duties. These decisions indicate that "partial lockouts" do not constitute lawful exceptions to the general principle that changes to employment contracts must be negotiated.

**179.** As regards the extent of collective bargaining, the Government submits that the Act has for the first time given the whole of the New Zealand workforce the opportunity to negotiate collectively if they so choose. Under the previous legislation, only employees covered by the rules of a registered union were able to be covered by collective arrangements recognized by legislation. These employees only benefited if the union did actually negotiate an award or agreement on their behalf. There were a number of procedural provisions that made it difficult to move from established individual bargaining arrangements to collective bargaining recognized by the industrial legislation of the time.

**180.** The findings of several surveys show that collective bargaining is significant under the Act. The Quarterly Employment Survey (QES) is conducted by Statistics New Zealand, which is established as an independent organization under statute. The QES covers all enterprises with more than two full-time equivalent employees, in all industries except agriculture and hunting, fishing and a few other small groups. The special February 1993 QES survey of employment contracts showed that 43.2 per cent of all employees covered by the survey were covered by current collective contracts and 3.4 per cent by expired collective contracts negotiated under the Employment Contracts Act. Thus 47.6 per cent of all employees, or 61.2 per cent of employees covered by contracts negotiated under the Employment Contracts Act, were covered by collectively negotiated contracts. While some of these contracts had expired, with the result that the employees concerned were deemed to be on individual contracts, the majority of these are likely to renegotiate a collective contract. In February 1993, 0.2 per cent of employees were covered by a current award or agreement negotiated under the previous legislation, and 23.7 per cent by expired awards or agreements negotiated under the previous legislation. Only 29.5 per cent were covered by individually negotiated contracts. A 1993 survey conducted by Heylen Research Ltd., as a follow-up to the 1992 survey reported in the government response, showed that 49 per cent of employees in private enterprises were covered by collective contracts, the same proportions as in the 1992 survey. This result

shows that contract structures had stabilized. The Heylen survey excluded enterprises with less than four employees.

**181.** A survey by Raymond Harbridge, of Victoria University of Wellington, claims that collective contracts are unlikely to cover more than 370,000 employees, i.e. 22 per cent of the total workforce of 1,636,000 (this figure includes working proprietors; hence the percentage should not be directly compared with the percentages below). The claim is based on the fact that this database covers 340,000 employees, and his claim that he has missed no more than another 30,000 employees. The Government does not accept these claims, which are based on assumption rather than survey. As noted above, the 1993 Heylen survey shows that 49 per cent of private sector employees in surveyed enterprises are covered by collective contracts. It also shows that collective contracts cover 69 per cent of employees in the public sector, and overall coverage is 54 per cent. Similarly, the February 1993 QES showed that 427,082 employees or 43 per cent of all employees surveyed were covered by current collective contracts. Given that the QES and the Heylen survey are systematic surveys with extensive coverage of the workforce, while Harbridge relies on unions and employers to provide contracts voluntarily, the Government has more confidence in the surveys. The Department of Labour's analysis of collective employment contracts covering 20 or more people continues to show that unions represent most employees in collective bargaining. The August 1994 edition of *Contract* reports on the analysis of 1,449 collective employment contracts covering 340,023 employees. The analysis shows that unions represent 85 per cent of the employees in the negotiation of the majority of collective employment contracts (65 per cent).

**182.** It is important to stress that all employees have the opportunity to bargain collectively, a new opportunity for many under the Act. While there was a change in bargaining structures following the introduction of the Act, as a result of the loss of blanket coverage of awards, collective bargaining has now stabilized at a level which involves a significant proportion of the whole workforce. Collective bargaining is more commonly associated with larger workplaces, and is strongly associated with union representation in those workplaces. The Government concludes that collective bargaining continues to be an integral part of the New Zealand workplace.

**183.** As regards the issue of authorization of representatives, the Government points out that the Employment Court in *Capital Coast Health* has clearly indicated that attempts by an employer to persuade workers to withdraw their authorization of their representative which undermine the authority of the representative are in breach of section 12. The Court found that a series of communications by the employer to the employees were designed to belittle the union and undermine its authority, thereby breaching section 12. In addition, section 57 of the Act provides that the Employment Court may put aside an employment contract or any part of it which was obtained by harsh and oppressive behaviour or undue influence. The *Talleys* decision cited in the Government's initial response demonstrated the effectiveness of section 57.

**184.** As regards protection against interference and discrimination by employers, the Government refers to the information provided in response to the issue of recognition of representatives relating to the Court of Appeal decision in *Eketone*. This decision, together with those that followed it, have clearly established the principle that employers must recognize an authorized representative and must bargain with that representative if they bargain at all. Section 12 of the Act is therefore enforceable. In addition, Parts

I and II of the Act may be enforced by means of compliance orders. The personal grievance provisions relating to discrimination and duress are available, and section 27 sets out the circumstances in which discrimination is a basis for personal grievance. These circumstances include discrimination by reason of an employee's involvement in the activities of an employees' organization, a broader protection than simply protection for union membership. While a case relating to discrimination on the basis of authorization of a union has not been heard, the Government believes that the Act provides sufficient protection in such circumstances. Section 57 provides effective remedies in relation to harsh and oppressive behaviour, as shown by the *Talleys* case discussed in the original government response.

**185.** The Committee had referred to the *Richmond* case as an example of employer interference and discrimination on the basis of authorization of a union. In the *Richmond* case, the union alleged that the company had locked out its employees at three plants and that the lockouts were unlawful, both because they did not meet the notice requirements relating to essential services, and because they related to Part I of the Employment Contracts Act (Freedom of Association). The union also alleged that the company had refused employment to employees until they accepted that the union would not represent them further in negotiation for a collective employment contract. The majority of the Employment Court found that there was no lockout in two of the plants and that the lockout at the third plant was lawful. In a minority decision, the Chief Judge found that there was a lockout at all three plants and that two of the three were unlawful, although not because they breached Part I of the Act relating to freedom of association. The Court commented that while the employer had approached the employees directly, it had not interfered in the employees' communication with each other. Judge Finnigan concluded in response to the situation at all three plants that the union had been authorized only to negotiate a company-wide contract, and that in seeking to negotiate plant-only contracts, the employer had no option but to deal with the employees directly. He found that the employees exercised their free choice to associate freely. However, Judge Finnigan's comments in relation to the employers' actions in attempting to negotiate directly with employees were made prior to the Court of Appeal decision in the *Alliance* case and subsequent decisions, which establish clearly that an employer may not negotiate directly with an employee when there is an authorized representative.

**186.** Concerning the independence of parties in collective bargaining, the Committee was critical of a finding by the Heylen 1992 survey that 28 per cent of employees with collective contracts were represented by non-union bargaining agents, and a further 8 per cent had no representation at all. Recent surveys show the following patterns of representation:

— Raymond Harbridge shows that 87 per cent of employees covered by collective bargaining arrangements were represented by a trade union, 10 per cent had no representation, and 3 per cent had a "company-based bargaining unit" (presumably comprising employees) to represent them;

— the Department of Labour's database of employment contracts (August 1994) covering 20 or more people show that 85 per cent of employees were represented by unions, 7 per cent of employees were represented by employee representatives and 5 per cent of employees do not have a bargaining agent;

— the Heylen 1993 survey showed, by comparison with the 1992 survey, an increasing use of trade unions (67 per cent), and an increasing use of nominated groups of

employees (17 per cent), with fewer individual representatives (9 per cent) and fewer employees with no representation (6 per cent). At the same time, 85 per cent of employees felt free to choose their representative, a similar proportion to the 1992 figure (87 per cent). In 1993, 87 per cent were satisfied with their representation, but those who were dissatisfied were more likely to be represented by trade unions than by themselves.

**187.** These figures, taken together, show that there is increasing representation by unions and that the vast majority of employees feel free to choose their representation and are happy with their representation. There will have been a range of reasons why a small minority of employees did not feel free to choose, not necessarily related to the issue of potential employer domination. While ideally, it would no doubt be desirable that 100 per cent of employees felt free to choose their representatives, the practical realities of the labour market and of individual relationships will mean that this is unlikely in any system, no matter how stringent the legislative protections.

**188.** The above data also shows that the majority of employees in collective arrangements voluntarily choose a union to represent them, and a minority of others are exercising their right to choose other representation, including group representation. The largest group of non-union bargaining agents in collective negotiations are groups of employees acting to represent co-employees. This is compatible with the principles of freedom of association and of collectivism, under which employees are free to establish employees' organizations whether these are called unions or some other name. The Government believes that employees should have the freedom to choose their representative whether the representative is a union or another employee or group of employees or some other group or individual.

**189.** The Committee's concerns about the domination of bargaining agents by employers appear to be based on the two anecdotal examples cited by the NZCTU, in relation to the Ohope Lodge and the Accident Compensation Corporation (ACC). The ACC is partially funded by the Government but operates independently under its own legislation. The Government did not originally address these anecdotal examples directly on factual grounds, as, first, it considered that arguments based on countering anecdote with anecdote were inappropriate; and second, the New Zealand Government does not normally conduct the type of investigation required to raise these examples above the anecdotal level. Legal processes and remedies are available to the employees if they believe that their employer has acted unlawfully. In neither of these cases did the employees seek such remedies. Relevant legal decisions are therefore not available. Given, however, that the Committee had used that information to support its recommendations, the Government has made inquiries on these two cases.

**190.** ACC's management's views of events is very different from the view presented by the NZCTU. The Government has not attempted to assess the relative merits of the differing views. There are appropriate mechanisms under the Act and through the Employment Court to do so if the parties wished to use them. The purposes of supplying the information is to show that anecdotal information is by its nature incomplete and to present another side to the story. The management's view of the events at the ACC is as follows. In 1991, a staff association was established, with representatives from the various districts. No managers were members of this association. There was, and continues to be, a low level of unionization in the ACC. Those who were union members belonged to the Public Service Association (PSA).

When entering into negotiations, management negotiated with a team representing staff consisting of two staff representatives from the staff consultative group, two staff representatives who were PSA members, one PSA representative from the national office of the union and an advocate from a firm of industrial relations consultants. The PSA representative was included in the team at the request of those staff who wanted the PSA to be their agent. Given the relative lack of negotiating experience of many in the staff negotiating team, the ACC management offered to pay for professional representation. The management had no role in the selection of the advocate, who was chosen by the staff association after interviews with several candidates. While the employer paid for the professional advocate, they state that in no way was this advocate, or the other members of the staff negotiating team, dominated by management. The staff team negotiated as a unit, with the PSA representative, the staff delegates and the professional advocate working together.

**191.** The Ohope Motor Lodge, which was also cited in the Committee's report, is understood to be a small privately owned hostelry, and has not been approached. In New Zealand, it would be highly unusual for the Government to make inquiries of this kind to a small private business. Again, it is noted that remedies are available if employees believe that their choice of representative is not recognized by the employer.

**192.** The Government believes that the Employment Contracts Act provides ample protection from domination of representatives by employers consistent with allowing employees to choose their representation. The Employment Court's decision in *Capital Coast Health* again demonstrates the effectiveness of that protection. The employer announced that it would deal with only six negotiators, of which only one was to be a representative of the several unions representing the 450 workers involved. The plaintiff union was likely to be excluded because it represented only a quarter of these workers. The Court found that this announcement was one of several attempts to undermine the authorized representative. The Court noted that the employer was bound not only by section 12 of the Act, but also by the "good employer" provisions of the State Sector Act and by mutual obligations of trust and confidence between employers and employees. The protections provided by the Act are as follows:

(i) section 8, which states that it is unlawful to exert undue influence on a person in relation to several grounds, including membership of an employees' organization and whether or not a person acts on another person's behalf;

(ii) section 10, which gives an individual the right to choose their own representative;

(iii) section 12, which requires a representative to establish its authority to represent employees in negotiations and requires the employer to recognize an authorized representative, and as shown by recent Court decisions, to bargain with the authorized representative if they bargain at all (see response to recommendation (c));

(iv) section 16, which requires employees and their representatives to agree on a ratification procedure for any settlement, within three months before negotiations start;

(v) section 27, which sets out the grounds for personal grievances, including an unjustifiable action by an employer which has disadvantaged an employee;

(vi) section 28, which sets out the grounds on which an employee can take a personal grievance if they believe that they have been discriminated against. These include involvement in the activities of an employees' organization. Such involvement may include acting as a negotiator, or claiming a benefit on an employee's own behalf or on behalf of another employee;

(vii) section 30, which makes duress a ground for a personal grievance in circumstances including those where an employee is subject to undue influence or disadvantage, or is offered advantage, in relation to membership of an employee's organization;

(viii) section 57, which provides that the Employment Court may put aside an employment contract or any part of it which was obtained by harsh and oppressive behaviour or undue influence. The *Talleys* decision cited in the Government's initial response demonstrated the effectiveness of section 57. In the *Ports of Auckland* case, the Employment Court drew attention to the jurisdiction the Court had under section 57 to set aside the contract, wholly or in part, although no allegations of harsh or oppressive behaviour were made in that case.

**193.** As regards the establishment of authority to represent, the Government submits that it is not clear how the requirement to establish the authority to represent might be applied to impede the right of workers' organizations to represent their members. The evidence supplied by the NZCTU in its complaint suggested that although there may be some inconvenience involved in some cases, freedom of association was not impeded. Section 12 of the Act requires representatives to establish their authority to represent any employee. It is intended to ensure that the individual's choice of representative is respected and that the agent is genuinely representative of the employees. It also helps to ensure that employees cannot be bound to agreements or negotiations without their knowledge and against their interests. The *Capital Coast Health* decision has reinforced the principle that the employer must negotiate with the authorized representative if it negotiates at all, thus reducing the potential for undermining the employees' representative.

**194.** The administrative work involved in establishing authorization must be balanced against protecting the right of employees to choose their representative. Through this provision, among others, the Act enables all employees to participate more actively in negotiations than they were able to do under the previous legislation. At the same time, the Employment Court in *Capital Coast Health* placed considerable emphasis on the mutual obligations of trust and confidence between employers and employees, as well as the "good employer" provisions of the State Sector Act which apply to public sector employers. The Court quoted the State Sector Act's definition of a good employer: "For the purposes of this section, a 'good employer' is an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment." Attempts to use the requirement to establish their authority to impede the right of a workers' organization to represent its members could be challenged on these grounds.

**195.** It may be noted that under previous legislation, unions did not have to provide direct evidence of authorization to negotiate because of the registration system which gave them monopoly rights to bargain for workers covered by their membership

rule. In response to a previous complaint by the New Zealand Employers' Federation to the ILO about freedom of association under that system, the Freedom of Association Committee expressed concern about the exclusive rights given to registered unions because it believed that the development of workers' organizations of their choice might be hindered. The Government believes that the Act provides this freedom to workers. Some evidence of authorization is required in this environment to ensure the accountability of representatives to those they represent.

**196.** On the issue of right of access, the Government points out that the rights of access to the workplace have been further reinforced by the Employment Court in *Service Workers' Union of Aotearoa Inc.* v. *Southern Pacific Hotel Corporation* and *National Distribution Union (Inc.)* v. *Foodstuffs (Auckland)*, as discussed in its response in relation to the issue of recognition of representatives.

**197.** With respect to strikes in support of multi-employer contracts, the Government states that multi-employer bargaining continues to be an option chosen by a number of employees and employers. The Department of Labour's database shows that the coverage of multi-employer contracts has steadily increased since March 1992 when the first analysis was done, to 67,090 employees in August 1994. These 49 contracts represent 3.4 per cent of the contracts analysed by the Department, and cover 19.7 per cent of the employees covered by contracts in the database. This is 4.4 per cent of the total employed labour force. The provisions of the Act attempt to balance employees' rights to strike with employers' rights not to have to face strike action and economic loss due to the actions of other employers; with the right not to be bound into arrangements with other businesses, perhaps competitors, which do not allow for their reasonable business requirements; and with concerns over effects on the community generally. The above data show that multi-employer bargaining is a viable option for employees and employers. In addition, it should be noted that employees do have a right to strike *in support of the content* of multi-employer contracts.

**198.** As regards strikes on social and economic issues, the Government reiterates that such strikes are not explicitly stated to be unlawful in New Zealand, but are not specifically protected against actions related to torts, injunctions or breach of contract. The Government does not believe that employers should suffer individual economic loss due to factors over which they have no individual control. The Government is also concerned with the broader effects on the community and the economy. The original government response outlined the various ways in which New Zealanders can express their dissatisfaction over economic and social issues. In addition to those provisions, the Citizens Referenda Act, 1993, has introduced another channel through which any person can have a referendum held on any matter. The Government does not believe that a right to strike over economic and social issues would add significantly to the ability of employees to express their dissatisfaction in these areas.

**199.** Appended to the Government's communication of 10 October 1994 was a document, whereby the Government responds to the examples and case-studies supplied by the NZCTU to the mission. For the Government, the issues raised by the NZCTU have generally been illustrated by anecdotal examples provided by affiliated unions, which provide one side of the story only. The Government's approach has been to focus on the remedies available for the allegations made in relation to these anecdotes rather than investigating each specific instance and commenting on the merits of the cases.

**200.** An example in the state sector indicates the way in which the anecdotal material is used to present one side of the case. In the example of the primary principals, the New Zealand Education Institute (NZEI) alleged that the Government as employer was actively discouraging collective contracts and that an alternative organization to the union was receiving government support to promote individual contracts to primary principals. The State Services Commission (SSC), acting as the employer of the principals, rejects these allegations. The NZEI implies that the SSC agreed not to promote individual contracts from 30 June and that the letter dated 11 July from Rod Lingard undermined that agreement. The SSC states that the agreement was in effect from 30 June to 8 July only, and there was no further agreement until 28/29 July when letters were exchanged. In the 28 July letter, the SSC indicated that it preferred individual employment contracts but that it was prepared to agree to principals being allowed a choice between individual and collective contracts. The SSC also rejects the allegation that the Government provided support for a nonunion representative of the principals on the basis that it "promoted government objectives" relating to individual contracts. The New Zealand Principals Federation is a long-standing professional association representing about 80 per cent of principals, with little involvement in industrial relations matters. It may receive some government funding in relation to educational reforms. As regards alternative representation, the SSC notes that, as the letter from Lingard Labour Markets indicates, Rod Lingard was the authorized representative acting for approximately 30 principals who were not members of the union. The SSC was negotiating with Rod Lingard as the authorized representative of these principals. The SSC states that the proposal to Lingard Labour Markets was different from that offered to the NZEI largely because NZEI would not accept an offer relating to an individual contract. Finally, the NZEI has in fact not presented any evidence that collective contracts would not be available to principals. The comment that "if a collective was negotiated it would not be worth the paper it was written on" refers to a document (Annex B) produced by the NZEI. As noted in the response to the interim conclusions in relation to the ACC example, the Government offers the SSC's version of the story in order to illustrate that anecdotal information is incomplete. Again as noted there, it would be highly inappropriate for the New Zealand Government to make inquiries with individual private sector employers about their employment relationships. Issues arising within employment relationships are matters for the parties and the courts.

**201.** The Government's response identifies the issues and the examples in which they are raised, and briefly explains the remedies available in relation to each issue. The explanation is cross-referenced to the full discussion in the original government response to the complaint and to the present response to the interim conclusions of the Freedom of Association Committee.

*(a) Refusal to negotiate collectively*

**202.** A number of examples were supplied of employers who refused to negotiate collective contracts but preferred individual contracts, which in some cases were identical except for certain conditions such as rates of pay. A subsidiary issue here was coverage of new employees, who may be signed up to alternative individual contracts outside the existing collective employment contract, thereby enabling employers to reduce the coverage of the collective contract. (*Alleged examples include*: Mobil; Whitcoulls; Pak'n Save, Henderson; Toy Warehouse; Cliff Green; BASS; Premier

Bakery Ltd; Ports of Auckland Ltd; Port of Nelson Ltd; Barnardo's; Primary school principals; School "A" (NZEI case-study B); Aspak Foods Ltd; Taranaki Savings Bank; NZ Aluminium Smelters; Southland Times; Otago Daily Times; Office of Film and Literature Classification; Aoraki Polytechnic; Tai Toutini Polytechnic; Romano's Pizzas; Telecom-Finance, Human Resources and Business Systems Unit; seven of the 14 Area Health Boards (in particular Southland); Healthlink South; Southern Cross Healthcare Ltd; Wrightson; Cigna Life Insurance; Katies.)

**203.** *Comment*: The Government is committed to freedom of choice in bargaining by the parties and their representatives. For this reason, the structure of bargaining is a matter for negotiation, under section 18 of the Employment Contracts Act. However, collective bargaining is provided for and constitutes a significant feature of the New Zealand labour market. This issue is discussed in the response to the interim conclusions in relation to recommendations (d), (e) and (f). Collective bargaining is promoted in a variety of ways through the Employment Contracts Act, as discussed in the Government's response to recommendation (d). Employees have the right to negotiate for either individual or collective contracts. They have rights to organize collectively which can assist in attempts to negotiate collectively. They may take industrial action to support their negotiation. Their rights to have their authorized representative recognized by the employer have been reinforced in a number of recent court cases, as discussed in the response to recommendation (c). Employers may not bypass employees who have authorized a representative in order to persuade them to accept individual contracts. In particular, the *Capital Coast Health* case stressed that any direct approach to employees may constitute a failure to recognize the authorized representative. A number of court cases reinforce this point. For example, in *Rasch* v. *Wellington City Council*, WEC 17/94, the Court noted that steps the Council took to approach the employees directly, and to run down the union in the eyes of the employees, constituted: "... an uncalled for interference in and obstruction to the exercise of the employees' inherent freedom of association including the right to bargain collectively and to organize for that purpose, which is a part of that freedom, as is recognized by the Employment Contracts Act 1991". At the same time, employees have the right under freedom of association to negotiate for individual contracts if that is the structure they prefer. New employees may become party to the collective contract if the original parties agree. This issue is a matter for negotiation between the employer and the employees who are signatories to the document at the time it is negotiated. The above comments apply to these negotiations also.

*(b) Disputes over the type of collective employment contracts that are negotiated*

**204.** A number of private sector and state sector unions affiliated to the NZCTU have also cited difficulties concerning the type of collective employment contracts that are negotiated. Their concerns relate, in particular, to complaints by the unions over the negotiation of multi-employer contracts. It should be noted that unions have noted dissatisfaction in those instances where employers have been unwilling to be part of multi-employer collective employment contracts, and also in those instances where employers *have agreed* to multi-employer collective employment contracts. In both instances the prohibition on the right to strike in pursuit of a multi-employer contract has been cited as the reason for this dissatisfaction. Unions have also cited difficulties with those employers who have wanted to break up collective employment contracts that

cover, for example, all the employees of a large enterprise, into smaller collective contracts covering, for example, the employees in a particular unit or division of that enterprise. (*Alleged examples include*: Southern Pacific Hotel Corporation (SPHC); Commercial and School Cleaners; Georgie Pie; those parts of the national public health system whose employees are members of the Service Workers Union; private rest homes and hospitals whose employees are members of the Service Workers Union; Telecom Finance and Human Resources Division and Telecom Business Systems; Area Health Boards; port companies; Auckland Girls Grammar School; a number of the Colleges of Education; and a number of Polytechnics, especially Aoraki Polytechnic.)

**205.** *Comment*: The Government's original response notes, in the discussion of choice of contract type, that the parties are free to choose the form of contract they wish to negotiate. The Government's original response and the response to the interim conclusions discuss the issue of multi-employer bargaining. Multi-employer bargaining is clearly an option under the Employment Contracts Act and multi-employer contracts are covering an increasing percentage of the total employed labour force. The provisions of the Act balance employees' rights to strike with employers' rights to not be forced to associate with potential competitors to the possible detriment of their legitimate business interests. It is also unreasonable to make employers subject to industrial action relating to actions by other employers, over whom they have no control. As noted in the response to the interim conclusions, employees do have a right to strike in support of the content of multi-employer contracts. Employees are, however, able to take lawful industrial action in pursuit of collective contracts where an employer proposes moving from a large collective contract to several smaller collective contracts.

*(c) Allegations of employers bypassing and/or undermining authorized representatives*

**206.** The additional material provided by the NZCTU includes a number of examples in which it is alleged that employers have, since the Act came into effect, bypassed the authorized representative in order to negotiate directly with employees. The NZCTU questions the effect of recent court decisions; criticizes the legal process as slow and costly; and argues that employers can still undermine authorized representatives in ways other than bypassing them. *(Alleged examples include:* Southern Pacific Hotel; various business divisions of Telecom; Southern Cross Healthcare Ltd; Healthlink South; Romano's Pizzas; Deka; "School A" in NZEI material; Auckland Girls' Grammar School.)

**207.** *Comment*: The Government's response to recommendation (c) of the Interim Recommendations discusses the court decisions relating to this issue and in particular *Eketone* and *Capital Coast Health*. These decisions make it very clear that employers are bound to recognize the representative authorized by employees. Both parties are free to decide whether they wish to negotiate, but if an employer wishes to negotiate it must do so with the authorized representative or not at all. The Employment Court in *Capital Coast Health* concluded that actions such as directly approaching employees and disparaging the representative in the eyes of the authorizing employees may well constitute conduct breaching section 12, regardless of the employer's motive. In deciding whether an employer's actions are in breach of section 12, however, the motives of the employer may be decisive. The Court stated that: "A communication could be made for mixed motives ... while ... the freedom of expression ... is qualified by s. 5 of the New

Zealand Bill of Rights Act, the obligation to recognize the authority of the representative is not qualified. It must therefore prevail and if the motive is partly to detrimentally affect the ability of the representative to negotiate effectively that is enough to proscribe the communication ..." The Employment Court also discussed the mutual obligations to maintain confidence and trust between employers and employees, which are an implied term of every employment contract. The Court referred to an earlier decision in which it had held that these mutual obligations, which arise from an existing and continuing employment relationship, continue to apply during bargaining, "though perhaps modified in some instances to take account of the parties' conduct towards each other permitted by the law at the time of bargaining". These obligations were enhanced in respect of Capital Coast Health, because it was also under a statutory obligation to act as a good employer. In *Capital Coast Health* the Court concluded that: "The constraints imposed by s. 2, by the statutory good employer provisions and by the contractually implied duties of confidence and trust impinge upon an employer's freedom to express itself in bad faith and by means of misleading statements." These findings are consistent with earlier comments by the Court in *Rasch* v. *Wellington City Council*, cited above, that actions by an employer to bypass the authorized representative and to run the union down were inconsistent with the rights of freedom of association and to bargain collectively provided by the Act. The Court in *Capital Coast Health* noted earlier decisions which found against employers who had attempted to place representatives in a "position of impotence" by exerting undue influence on employees not to continue to employ a particular representative. The cases cited were *Southern Pacific Hotels*, *Talley* and *Dunollie* which have all been supplied to the Committee. The Court found that such undue influence was indirectly exerted also on the representative, as it would eventually affect the representative's ability to represent the employees. There have been several decisions such as *Bartle & McLean* v. *Romano's Pizzas* (September 1994) which demonstrate that employees who believe that their employer is bypassing their authorized agent can obtain speedy relief. In *Romano's Pizzas* the Employment Court showed its readiness to use available remedies such as interim injunctions to restrain an employer from discussing bargaining issues with employees so long as they had an authorized representative, pending a substantive hearing. The Court also provided speedy interim relief in *Dunollie* and *Capital Coast Health*.

*(d) Allegations of employer domination of bargaining agent*

**208.** The NZCTU has provided some examples where it alleges that a bargaining agent has been selected or promoted by an employer and is therefore not independent of the employer. In some cases, it is suggested that members of a staff association within the workplace have been selected by the employer; or that the employer insists on negotiating only with representatives from inside the organization; or that a staff organization receives financial support from the employer, including in some cases, government support; or that an outside agent such as a consultant is engaged and paid by the employer to represent the employees. (*Alleged examples include:* Barnardo's; primary school principals; Ohope Lodge; Farmers Mutual Group; ACC; Inland Revenue Department; Mercury Energy; Southern Cross Healthcare Ltd; Southern Pacific Hotels Ltd.)

**209.** *Comment*: The Act provides that employees may choose their representative, and that their authorized representative must be recognized by the employer. These provisions do not preclude the employees from choosing a representative from within the workplace, such as a representative group of employees, or from using a consultant who may be suggested by the employer. The management view of the allegation of employer domination of the representative at ACC has been presented in the government response to the interim conclusions. The suggestion that workplace based representatives must necessarily be dominated by employers is discussed in the Government's original response to the complaint. If employees feel that their interests are not adequately represented by a representative, there are a number of provisions which enable employees to challenge employer interference with their right to choose their representative. The right of employees to associate freely is guaranteed by sections 6,7 and 8 of the Act. Sections 10 and 12 provide for the right of the employees to choose their representative and for the authorized representative to be recognized by the employer. The *Capital Coast Health* case has demonstrated the effectiveness of section 12 in ensuring that employers recognize the representative chosen by the employees. This means that they cannot force an alternative representative on the employees against their wishes. As discussed in the response to recommendation (g) in the response to the interim conclusions, the Court in *Capital Coast Health* also addressed the authorization relationship between the employees and their representative, finding that the employer must not undermine the representative in the eyes of the employees. Section 57 protects against harsh and oppressive behaviour by an employer, and the *Talleys* case showed that efforts to prevent employees from being represented by their union were not acceptable under section 57. In *Adams* v. *Alliance Textiles*, the Chief Judge of the Employment Court noted that if employers were seen removing an independent source of advice, they would risk reinforcing a claim of undue influence under section 57. Sections 27, 28 and 30 enable employees to challenge discrimination by employers on the basis of membership of an employees' organization or involvement in the activities of an employees' organization, or undue influence on employees in relation to membership of an employees' organization. These provisions enable employees to belong to or participate in the activities of an employees organization of their choice, and hence to assert their right to make that choice.

*(e) Access issues*

**210.** Several unions have cited difficulties with access to workplaces. The NZCTU has acknowledged that the Freedom of Association Committee has noted that it believes that the right of access to workplaces is sufficiently guaranteed by the Act and reinforced by case-law. The NZCTU has, however, noted that the lack of access to workplaces for the purposes of recruitment or obtaining an authority to represent employees restricts the free association of workers and makes it easier for employer dominated organizations to be formed, and makes the requirement to have individual authorization more onerous. (*Alleged examples include:* Southern Pacific Hotels (SPHC); Romano's Pizzas; Southern Cross Hospital North Harbour; Ohope Lodge; James Hardie Building Services; Ogden Aviation; Ajax Spurway Fasteners NZ Ltd; and Aspak Foods Ltd.)

**211.** *Comment*: As set out in the Government's original response and in the response to the interim conclusions, section 14 of the Employment Contracts Act clearly provides a right of entry to the workplace by authorized representatives to discuss

matters related to contract negotiations. This right has been reaffirmed in a series of cases heard in the Employment Tribunal and Employment Court including *Argyle Hospital, Southern Pacific Hotel Corporation (NZ) Ltd.*, and *National Distribution Union* v. *Foodstuffs (Auckland) Ltd.* These cases have confirmed this right of access and have noted that this right protects employees from having deductions made from their wages if they are visited by representatives pursuant to section 14 during paid working time. The Committee has noted that it believes that the right of access to workplaces is sufficiently guaranteed by the Act and reinforced by case law. The NZCTU has made an additional claim that restrictions on rights of access to workplaces for the purposes of obtaining an authority to represent makes it easier for employer dominated organizations to be formed, and makes the requirement to have individual authorization more onerous. The NZCTU claim concerning employer domination of bargaining agents is discussed above, in relation to allegation (d). The liberal access to the workplace granted to authorized representatives under the Act combined with the freedom that employees have to choose their representative provides sufficient freedom for employees to safeguard against concerns relating to employer domination of bargaining agents. The claim concerning the requirement to have individual authorization is discussed below (concerns about authorization procedures). In an environment characterized by choice and an increase in direct responsibility, requiring evidence of authorization to represent ensures the accountability of representatives to those they represent.

*(f) Allegations of employer interference in union membership issues*

**212.** The NZCTU has alleged that employers interfere in the decision of employees to belong to a union. Various examples of this interference are given, including refusal to negotiate with or recognize the union as the employees' representative; preferential treatment given to employees who resign from the union; pressure on employees to sign individual contracts, with the result that union membership is seen as irrelevant; issuing of anti-union notices to employees and other directly anti-union behaviour by employers; fear of being penalized for union membership; lack of promotion because of union membership; removal of facilities such as union fee deductions or access. The decline in union membership is attributed to all these causes. (*Alleged examples include:* Ogden Aviation; Department of Internal Affairs Translation Service; Aspak Foods; Westland Bank; NZ Aluminium Smelters; ECNZ; NZ Income Support Service; DEKA; Telecom Finance and Human Resources Division; Healthlink South; Pak'n Save Henderson; Port of Nelson; Barnardo's.)

**213.** *Comment*: Some of these issues have been considered elsewhere. For refusal to recognize the union and direct approaches to employees, see issue (c); for refusal to negotiate collectively, see issue (a); for questions of access, see issue (e). In relation to cases involving allegations of direct anti-union behaviour by employers or discrimination on the basis of membership of a union, clear remedies are provided by the Act. Sections 7 and 8 of the Act prohibit preference in obtaining or retaining employment or in terms and conditions of employment on the basis of membership of an employees' organization, and undue influence in relation to membership of an employees' organization. Sections 28 and 30 enable employees to take a personal grievance against an employer on grounds of discrimination related to membership of an employees' organization or undue influence in relation to membership of an employees' organization. The Communication and Energy Workers Union mentions one case in the Telecom

example which it says has been taken and won on the basis of discrimination in relation to union membership. The *Capital Coast Health* case emphasized that attempts to undermine the authority of the union breached the requirement to recognize the union established in section 12. See also issue (c) for discussion of this point, which is also discussed in the response to the interim conclusions, under recommendation (g). The NZCTU also claims that there is no recognition of the role of unions under the law, there is no protection for unions acting industrially in the course of collective bargaining, and that membership of the union is meaningless in relation to protection for action in the course of collective bargaining. These points have been dealt with in the response to recommendation (g) in the Government's response to the interim conclusions. It is noted there that the Trade Unions Act and the Commerce Act provide explicit protections for the role of unions in collective bargaining; that there are wide protections for employees acting in negotiations as well as in relation to their membership of a union both in relation to employment conditions and to recruitment and dismissal; and that the *Capital Coast Health* case demonstrates that the relationship of authorization between the employees and their union is covered by the Court's finding that the employer must not undermine the authorized representative in the eyes of the employees. The response to recommendation (b) in the Government's response to the interim conclusions reviews the provisions for recognizing workers' organizations for the purposes of collective bargaining in some detail. The fact that 85 per cent of employees covered by collectively bargained contracts are represented by unions indicates that the great majority of employers accept unions as representatives and negotiate with them willingly.

*(g) Refusal to recognize the union*

**214.** The NZCTU notes that the lack of a formal process for the recognition of employees' organizations in an environment of choice promotes fragmentation and instability in representation and frustrates the development of representative employee organizations for the purposes of collective bargaining. The NZCTU notes that it believes that unrepresentative worker organizations or agents have equal status with representative organizations when it comes to bargaining. The NZCTU also notes that because bargaining is done on behalf of employees and not in order to cover areas of work, new employees are not automatically covered by these agreements. (*Alleged examples include:* Westland Bank; ECNZ; Southern Pacific Hotels Corporation; and Healthlink South.)

**215.** *Comment*: As the Government's response to the interim conclusions notes, section 12 of the Employment Contracts Act provides for the employees' authorized representative to be recognized by the employer. Cases including *Eketone* v. *Alliance Textiles*, *Dunollie Coal Mines* and *Capital Coast Health* have demonstrated the effectiveness of section 12 in ensuring that employers recognize the representative chosen by the employees. Every employee has the right to be represented collectively or individually by the representative of their choice. Every employee is, therefore, entitled to be represented in bargaining. The complaint from the NZCTU that bargaining covers employees and not areas of work appears to be a reference to "blanket coverage" provided by the Labour Relations Act 1987 under the previous industrial relations system. In addition to giving employees the ability to choose their representative, the Employment Contracts Act also enables employees to decide whether or not they wish to become party to an employment contract into which they have had no input.

Employees and employers can no longer be bound by employment agreements without their agreement.

*(h) Absence of "good faith"*

**216.** Allegations of a lack of good faith were made where the employer made promises to bargain collectively and then refused to do so; where employers "went through the motions of negotiating" but reverted to their original position; and where employers refused to ratify [sic] settlements despite being party to the negotiations. Some examples related to a refusal to negotiate, in the sense that a contract was offered on a "take it or leave it" basis. (*Alleged examples include:* Auckland Girls Grammar School support staff; Romano' Pizzas; Telecom Finance and Human Resources Division; Southern Pacific Hotels Refusal to negotiate was alleged in Port of Otago, Barnardo's and School "A" support staff.)

**217.** *Comment*: The Act gives employers and employees. the right to enter freely into negotiations. Negotiations are not compulsory as a fundamental premise underlying the Act is that the best basis for effective, binding, productive employment relationships is one of voluntary negotiations freely entered into. Employees and their representatives may seek negotiations, and may strike in support of collective contract negotiations where there is no collective contract in force. One example is given of a case where the united resistance of workers to the employer's restructuring proposal was successful in defeating the proposal (Port of Otago). Employers and employees are free to bargain, but there are a number of constraints on the way they bargain, as discussed in the Government's response to the interim conclusions. Industrial action in pursuit of a new collective employment contract is lawful, with the limits set by legislation and by the courts. Employers must negotiate with the authorized representative of the employees, if they negotiate at all. Efforts to persuade or influence employees must stop short of undue influence or harsh and oppressive behaviour. In *Capital Coast Health*, the Court indicated that the right of the employer to freely express its views under section 12 of the Bill of Rights Act was subject to the employees' rights to be represented in negotiations by their authorized representative, and to the implied mutual obligations of confidence and trust, as discussed under issue (c) above and in the Government's response to the interim conclusions. These provisions support the right of employees to act collectively in negotiations, thus enabling them to exert considerable influence on the employer to persuade it to negotiate.

*(i) Effects of decentralized bargaining on unions*

**218.** Some of the unions noted that they had experienced difficulties with the number of contracts they were required to negotiate under the system of decentralized bargaining under the Employment Contracts Act. Unions have noted that the number of contracts they are now involved in negotiating has led to a strain on the resources that are available to them. (*Alleged examples include:* The public health system; private rest homes and hospitals; and in the education sector, polytechnics and colleges of education.)

**219.** *Comment*: Decentralized bargaining in the private and public sectors is a phenomenon that has been experienced across the world as economies and industries have restructured in order to improve their efficiency. A number of sectors cited,

including those mentioned by the NZCTU, have been the subject of considerable structural reforms. In particular the health and education systems in New Zealand have been the subject of significant structural change in recent years. The decentralization that has taken place in bargaining has been the inevitable result of employers and employees seeking agreements that are relevant to their changed circumstances. These are changes that the union movement has been required to face throughout the world.

*(j) Concerns about authorization procedures*

**220.** The NZCTU continues to claim that the authorization requirements of the Employment Contracts Act place administrative burdens on employee organizations and the additional material supplied includes the alleged examples listed below. They also argue that authorization requirements have the effect of limiting the right to strike. (*Alleged examples include:* Southern Pacific Hotel; Romano's Pizzas; cleaners in the health and education sectors; fast food restaurants; private hospitals and rest homes.)

**221.** *Comment*: This issue is addressed in the Government's response to the interim conclusions. It continues to be unclear why the costs of a requirement which may at the most occasionally cause some administrative inconvenience for a representative, should outweigh the very real and substantial benefits to employees. The requirement ensures that employees have control over who represents them and is an extremely important protection. It should also be noted that the great majority of employees and their representatives operate comfortably within this requirement. In terms of authorization in relation to industrial action, it should be noted that the New Zealand courts have historically required both employers and employees to be clear and precise in their notice of action, because of the nature of the industries involved. Notices of strike action do not, however, have to indicate the intentions of individual employees if clear collective notification can be given as described in section 69(5). Sections 69 and 70 of the Employment Contracts Act set out the requirements for notice in relation to strikes and lockouts respectively in essential industries. Section 69(5) provides that: "Where the notice is given on the employee's behalf, it need not specify by name the employees on whose behalf it is given if it is expressed to be given on behalf of all employees who are employed in the relevant part of the essential service or at any particular place or places at which the essential service is carried on." As noted above, employers are also required to give employees notice of lockout action in essential industries. In *Merchant Service Guild & Seafarers Union* v. *New Zealand Rail Ltd.*, 1994 1 ERNZ, the Employment Court held that as the union concerned had denied that it had authority to accept lockout notices on behalf of its members, the employer was required to ensure that the employees themselves received appropriate notice of the action. The authorization requirements derived from the Act have neither the intention nor the effect of impeding bargaining or lawful industrial action. They respectively help underpin the rights of employees to determine who represents them and help address public interest issues in terms of notice of industrial action in essential industries.

*(k) Enforcement*

**222.** Allegations were made in the material provided by the NZCTU that the process of enforcement through the courts is slow and expensive. (*Alleged examples include:* Southern Pacific Hotel Corporation and Telecom.)

**223.** *Comment*: The Act established the specialist institutions, the Employment Court and the Employment Tribunal, as discussed in the Government's original response. As noted there, the Tribunal is a low level forum which is accessible to all employees and their representatives. The Tribunal is well used, and this has led to some delays in hearings. However the Government continuously monitors the situation and has increased resources for the Tribunal as noted in the response to the interim conclusions. Times to hearings are reducing as a consequence. Costs in the Tribunal are kept low (see the Employment Tribunal Regulations). A NZ$35 filing fee is the most common charge in the Tribunal. The parties can choose to represent themselves, or to be represented by another person or organization. There is ready access to the Employment Court, as discussed in the response to the interim conclusions. The unions in the above cases complain about having to enforce the legislation and express a wish for a high level of regulation which they believe would eliminate the need for enforcement procedures. This wish is unrealistic. All legislation and regulation requires interpretation. The Act is still new, and the case law relating to it is still under development. Where action is taken by unions or other agents to enforce the legislation, it has the effect of indicating to the parties where the boundaries of the law are.

*(l) Redundancy used as pressure in negotiation*

**224.** Allegations were made that redundancies were made or threatened in order to get employees to sign the contract proposed by the employer. (*Alleged examples include:* Ports of Auckland; Telecom Business Systems.)

**225.** *Comment*: Dismissals can be challenged through the personal grievance procedure if employees believe they are unjustified, and the personal grievance procedure is available to all employees through the Employment Tribunal. Applications for injunctions can also be made in respect of threatened redundancies, as in the *Ports of Auckland* case. One of the issues which the Court looks at in any case where redundancies are challenged as unjustified is whether the redundancies are justified for genuine business reasons. One such case was in fact the *Ports of Auckland* case, which was discussed in the Government's original response. The Court found in that case that the potential for redundancy was a genuine one which could have been avoided by achieving the changes sought in the contract.

*(m) Industrial action*

**226.** The NZCTU have again raised their original arguments concerning the provisions of the Act relating to industrial action over the issue of whether a contract should cover more than one employer and the absence of explicit protections for social and political strikes. The supplementary material also expressed concern about "partial lockout" action in the Port of Nelson; about alleged difficulties for employees with multi-employer contracts; and employers who treat strike action as a breach of contract. (*Alleged examples include:* Romano's Pizzas; Southern Pacific Hotel Corporation; commercial and school cleaners; fast food sector; health sector; Ohope Lodge; Port of Nelson.)

**227.** *Comment*: The Government refers to its response to recommendations (k) and (m) of the interim conclusions of the Committee as regards "partial lockouts". It should also be noted that employees party to a multi-employer contract are free to take

industrial action in relation to negotiations for a new contract, provided that this action does not relate to the issue of whether the contract will be multi-employer. The right to take lawful strike action has been explicitly recognized in New Zealand law since 1987 and continues to be a key element of the Act. Employees who believe that their employer does not recognize their rights to take lawful industrial action are able to seek prompt assistance from the Employment Court.

*(n) Miscellaneous non-bargaining issues*

**228.** The material provided by the NZCTU and its affiliates also provides a number of examples of actions by employers, which are not specifically bargaining or freedom of association issues. The remedies available for the various types of difficulties are briefly identified below, together with some alleged examples and a brief reference to the relevant legislative provisions.

**229.** *Health and safety issues*: Alleged health and safety deficiencies were identified in the case of the following employers: Telecom, port companies, Southland Area Health Board and Ogden Aviation. *Comment*: The Health and Safety in Employment Act 1992 gives employers the primary responsibility for providing a safe and healthy working environment. Regulations made under the Act set minimum standards for high-hazard industries and work practices, while guidelines developed in consultation with industry provide guidance on sound management practice. A dual approach of incentives and penalties is used to achieve compliance. The Occupational Safety and Health Service of the Department of Labour is responsible for administering and enforcing the Act and complaints can be made to the Service.

**230.** *Personal grievances*: In the following cases actions by the employer were alleged which did or could provide grounds for a personal grievance claim: Ogden Aviation; Romano's Pizzas; Telecom. *Comment*: The Act requires all employment contracts to contain effective procedures for the settlement of personal grievances. These procedures must not be inconsistent with specified parts of the Act, including sections dealing with definitions and remedies. If an alternative procedure is not negotiated, then the standard procedure set out in schedule to the Act applies. The standard procedures encourage the parties to the grievance to settle the dispute by discussion. If this is not successful, the grievant can apply to the Employment Tribunal for assistance.

**231.** *Disputes about the interpretation of employment contracts* (Ogden Aviation; "School A"). *Comment*: The Act requires all employment contracts to include effective procedures for the settlement of disputes about their interpretation, application or operation. As with personal grievances, if effective alternative procedures are not negotiated, then standard statutory procedures apply. If necessary, the parties can ask the Employment Tribunal for assistance as part of these procedures.

**232.** *Parental leave disputes*: An alleged difficulty relating to parental leave entitlements was identified in the supplementary material in relation to Ogden Aviation. *Comment*: The Parental Leave and Employment Protection Act 1987 sets out entitlements to parental leave and employment protection during pregnancy and such leave. These entitlements can be enforced through the Employment Tribunal.

**233.** *Allegations of unilateral variation to contracts*: Allegations of unilateral variations by employers to employment contracts were made in respect of the Taranaki Savings Bank (TSB) and in Part 6 of ASTE's supplementary material. *Comment*:

Changes to employment contracts must be negotiated and cannot be made by one party without the agreement of the other. This principle and related case law is discussed on page 48 of the original Government response to the NZCTU complaint.

**234.** *Hours of work*: Material provided by the NZ Harbour Workers Union and the NZ Waterfront Workers Union alleges that port company employees are working excessive hours. *Comment*: Section 11B of the Minimum Wage Act 1983 provides that employment contracts shall fix a maximum of 40 hours of work (exclusive of overtime), unless the parties agree to other arrangements. A 40-hour week continues to be the most common arrangement but some parties are negotiating different arrangements. Under the Health and Safety in Employment Act 1992 employers are required to take all practicable steps to ensure that employees are not exposed to hazards at work. Whether or not the number of hours worked amounts to a hazard in terms of the Act will depend on the actual circumstances of each case and would require consideration of such factors as the number of hours worked, the type of work done, and how stressful and/or physically demanding the work may be.

**235.** The Government concludes that the Act is an important element of its strategy for economic growth, increased employment and building strong communities and a cohesive society. It is proving effective in increasing flexibility to allow businesses and their employees and their representatives to develop employment arrangements which meet their needs in the market. It provides opportunities for people to choose work and training options and for more direct communication between employers and their employees, and enables people to choose how they associate and how they are represented in bargaining. At the same time, the Act provides a range of protection in relation to freedom of association and in relation to minimum conditions of employment. It operates within a society which supports those who are out of work or are otherwise disadvantaged. The Government believes that the interests of New Zealanders in a prosperous economy with wide opportunities and adequate protection for its people are well served by the Act.

## THE COMMITTEE'S CONCLUSIONS

**236.** Before proceeding to the examination of the outstanding substantive issues, the Committee wishes to make some general observations concerning its mandate in relation to this complaint.

**237.** Firstly, the Committee notes from the mission report that a substantial part of the extensive information provided and testimonies submitted by the Government and various spokespersons of employers and employers' organizations dealt with the situation prevailing previously in New Zealand, where capital, product and labour markets were highly regulated and where, according to this information, existing policies had led to macroeconomic imbalances, structural problems, low productivity, a rapid rise in unemployment and in the domestic and external debts. The Committee further notes that the Government considers that the Act is an integral part of its wider economic policy strategy, which enabled it to achieve significant results (see in particular the Government's further observations above and the mission report). Whilst appreciating the importance of these factors for governments, employers and workers alike, the Committee stresses that it is not called in this case to examine whether and to what

extent the Act has contributed to an improvement in the fiscal, financial and economic situation of the country. Moreover, statistics and analyses of causal relationships invariably lend themselves to differing interpretations, which the Committee cannot, indeed should not, attempt to reconcile.

**238.** Secondly, the Committee notes the strong emphasis put by the Government and employers on the flexibility provided by the Act which, they argue, allowed the structural rigidities of the previous industrial system to be overcome and an efficient labour market to be achieved. Whilst noting from the mission report that greater flexibility has undoubtedly been achieved under the Act in the field of labour relations (the effects of that flexibility on workers and their organizations being a quite distinct matter), the Committee points out in this regard that the question as to whether or not a more centralized industrial relations framework is to be preferred to a system based on enterprise bargaining is a policy decision to be made by national authorities in consultation with the social partners. The Committee recalls that it "is not called upon to express a view on systems of collective agreements in force in different countries except in so far as a system may impair the right of trade unions to assume freely the defence of the workers". [See *Digest of decisions and principles of the Freedom of Association Committee*, 1985, para. 591.] The Committee must however examine whether the measures enacted to implement that policy choice, including legislation and practice, are compatible with the ILO principles on freedom of association. To do so, it must proceed to an objective examination on the basis of specific allegations and, in this case, by taking into account the additional information collected by the direct contacts mission.

**239.** Thirdly, the Committee recalls in a broader perspective that its function is not to formulate general conclusions concerning the trade union situation in particular countries, but to evaluate specific allegations of freedom of association violations; it is to secure and promote the right of association of workers and employers, not to level charges at, or condemn, governments. [See *Digest*, op. cit., paras. 23 and 24.]

**240.** Fourthly, as questions were raised concerning the competence of the Committee to entertain complaints alleging freedom of association violations, where relevant Conventions have not been ratified, the Committee recalls that: "By membership of the International Labour Organization, each member State is bound to respect a certain number of principles, including the principles of freedom of association which have become rules above the Conventions." and that: "Such complaints may be presented whether or not the country concerned has ratified the freedom of association Conventions." [See *Digest*, op. cit., paras. 34 and 53.]

**241.** Turning to the merits of the complaint, the Committee notes that developments have taken place which have a bearing on the issues discussed in the interim report, and in particular various court decisions which have to a certain extent clarified the meaning of several provisions of the Act. The Committee will therefore consider these judgements here in some detail inasmuch as they relate to some issues raised in the complaint, which are closely intertwined.

**242.** In its interim report, the Committee had referred to, and drawn some conclusions from, the *Alliance Textiles* case, where the Employment Court had decided that the employer's actions in bypassing the authorized union representative were not at variance with the Act. This decision was appealed by the union. In a unanimous decision

(*Eketone* v. *Alliance Textiles*), the Court of Appeal dismissed the appeal on the grounds that the individual employment contracts had expired and there was no longer any live issue between the parties. The Court, however, added a number of observations which it qualified itself as *obiter*, but which were subsequently endorsed by the lower courts as the correct interpretation of the Act. It is therefore important to quote here some of these "dicta": "... Under section 8 an employer remains free, by means short of undue influence, to try to persuade a person to cease to be a member of an employees' organisation or not to become a member. But section 12 imposes ... an obligation while negotiations for an employment contract are being undertaken to recognise the authority of an organisation, if that authority is duly established, to represent an employee in the negotiations ... I am disposed to think that once a union has established its authority to represent certain employees ... then the employer fails to recognise the authority of the union if the employer attempts to negotiate directly with those employees. To go behind the union's back does not seem consistent with recognising its authority. The contrary argument advanced for the employer here is that authority can be recognised by trying to persuade the giver of the authority to revoke it. That seems to me a rather cynical argument not necessarily in accordance with the true intent, meaning and spirit of the enactment. It would apparently mean that, although employees had authorised a union to represent them from the start, the employer need never negotiate with the union. Certainly an employer is free not to negotiate with anyone; but if he wishes to negotiate I doubt whether he can bypass an authorised representative ... As I understand the relevant passage in the judgement of [... the lower court], the proposition is that even while a union's representation authority is in force the employer may approach the employees directly, provided only that undue influence is not used. I do not think that it could safely assume that this is correct. But as the question does not require determination in this case it is better not to express a final opinion and to sound a note of warning only." (Judge Cook, pp. 6-7, Judges Casey and Gallen concurring.) Judge Hardie Boys concurred and added: "Section 8 does not prevent an employer from using persuasion, provided the means are not unconscionable. But I think that the right to persuade is inhibited by section 12(2). Recognition of an authority given by employees is hollow indeed if the employer is able to undermine it by attempting direct negotiations with the employees while negotiations with their authorised representative are still in train" (page 2). Judge Gault also concurred and added (pages 15-16) in relation to the right of a person to choose whether or not to be represented by another person, group or organization for an employment contract: "... The right to elect and pursue collective bargaining arise out of, but generally are not regarded as elements of, the freedom of association ... Nevertheless the right is conferred by Part II of the Employment Contracts Act and that right should be fully accorded bearing in mind ILO Convention No. 98 concerning the right to organise and bargain collectively." He went on: I would go further than the Chief Judge. "I consider that the right to choose to be represented and to have the representative recognised by the other parties to negotiations is to be accorded even where sections 5(b) and 8 have no application and before any contract is concluded so as to give relief under section 57." As a postface to the *Alliance/Eketone* cases, the Committee notes from the mission report (paragraph 80) that the General Manager, Personnel, Alliance Textiles Ltd., presented to the direct contacts mission his own version of the factual situation which ultimately resulted in the Court of Appeal's decision. That, however, does not affect the *legal* issues arising from *Eketone* and, ultimately, in the *Capital Coast* case described below.

**243.** In *Mineworkers Union of New Zealand Inc.* v. *Dunollie Coal Mines Inc.*, the employer had bypassed the authorized representative (the union), approached the employees directly to seek their agreement to a new collective contract and, when they refused, locked them out. The union applied for an interim injunction restraining the employer from locking out those employees still involved. The Employment Court granted the injunction, stressing several times it was "speaking in an arguable case setting" (in other words, not deciding on the merits). The Court commented: "The company, knowing that the workers had an authorised bargaining agent, wholly bypassed that bargaining agent (the mineworkers' union) and locked the workers out ... The company thus disregarded the workers' rights in material aspects, that is to say their freedom conferred upon them by section 5 of the Act to choose to associate with other employees for the purpose of advancing their collective employment interests. The company knew that its mineworkers had appointed their union as their bargaining agent. Notwithstanding this knowledge, I stress, the company sought to negotiate at material times directly with its employees in gross disregard of their expressed wish that they were to be represented in negotiations by their bargaining agent." The Court also indicated that it took fully account of the Court of Appeal's decision in *Eketone* on the meaning of the term "undue influence" in section 8(1) of the Act.

**244.** The issue in *Service Workers' Union of Aoteraroa Inc.* v. *Southern Pacific Hotel Corporation Ltd.* was mainly the right of access by union representatives (section 14 of the Act) but the Court also made a reference to the issue of recognition (section 12 of the Act): "... it is perhaps necessary to restate what was made plain in *Alliance Textiles* that recognition of the representative must take the form of negotiating with the representative if that is the employee's wish. The legal position is quite simple: employees are entitled to appoint a representative and where they do so the employer must recognise that representative for the purpose of negotiations and must negotiate, if at all, with that representative" (page 23).

**245.** In *New Zealand Medical Laboratory Workers Union Inc. et al.* v. *Capital Coast Health Ltd.*, the employees involved had decided to be bound by a collective employment contract and had chosen to be represented by a union. As no agreement could be reached, the employer initiated direct communications with the workers. The union sought a permanent injunction restraining the employer from communicating directly or indirectly with the employees in relation to the negotiations for a new collective employment contract while the union remained their authorized bargaining agent. The Employment Court concluded that, through a number of actions, the employer had breached section 12 of the Act (authority to represent) and granted the injunction. It commented: "We do not agree that the observations in *Eketone* can properly be seen as obiter and therefore gratuitous merely because there was no live issue between the parties. The views were expressed in an official judgement of the Court of Appeal with the concurrence of a full Bench of five judges. The statements made indicate the likely line of policy that will be adopted by the Court of Appeal in the future. We should adopt that line here and put the onus on the party seeking to challenge its validity to take another case to the Court of Appeal and persuade it to depart from its earlier views ... In any event we agree with these views" (pages 39-40). The Court also reiterated (page 41) its previous comments in *Southern Pacific Hotel* (quoted in the preceding paragraph) and further held that the employer had acted unlawfully in bypassing the union. It should also be noted that, in *Capital Coast* (pp. 44 ff.) the Court

endorsed earlier judicial decisions (in particular *Unkovich* v. *Air New Zealand*) as regards the doctrine of "good employer" and "mutual obligations of trust and confidence" (see also paragraphs 68-69 of the mission report). The *Capital Coast* decision is currently on appeal.

**246.** The complainant and the Government also referred to other cases (*Witehira* v. *Presbyterian Services*; *National Distribution Union* v. *Foodstuffs (Auckland)*; *Rasch* v. *Wellington City Council*; *Unkovich* v. *Air New Zealand*) where certain observations about bargaining were made and one or several of the above-mentioned decisions were quoted.

**247.** The Committee notes that, according to the complainant organization, these cases essentially reaffirm the inability of the Act to provide effective controls on employers' acts aiming at bypassing unions, at persuading workers to revoke their authority to unions, or at subverting the unions' authority to represent their members. The Government considers for its part that these recent case-law developments confirm that the Act provides adequate protection to the workers. In the Committee's opinion, the reality probably lies somewhere between these two positions.

**248.** On the one hand, despite the misgivings expressed by the complainant (see paragraph 41 of the mission report), the line of jurisprudence flowing from *Eketone*, applied in *Dunollie* and *Capital Coast*, and mentioned in other decisions, indicates at least a trend more favourable to workers' organizations than was initially the case, in the interpretation given by New Zealand courts to some provisions of the Act, dealing for example with the issues of undue influence, designation of representative, authority to represent and right of access.

**249.** On the other hand, it is not clear whether and to what extent the reasoning of the courts applies to other issues raised in the complaint, e.g. employers' interference and domination (although some overlapping with the issues mentioned in the preceding paragraph is inevitable). From a more general perspective, questions also arise concerning the existence and extent of a duty to bargain collectively. The Committee notes for instance in the various judgements quoted above some remarks that raise questions regarding that duty: "Certainly, an employer is free *not to negotiate* with anyone" (*Eketone*, J. Cook, page 6). "... the employer must recognize [the representative appointed by employees] for the purposes of negotiations and must negotiate, *if at all*, with that representative" (*Southern Pacific Hotel*, page 23) (emphasis added).

**250.** The Committee notes that it is perhaps unfortunate but not unusual for new labour legislation to require a period of testing and judicial interpretation before it can be applied with certainty and that this consideration applies with special force when the changes introduced by the legislation are radical and result in a system which is unique in nature. In this respect the Committee also notes that the evolution of case-law has clarified a number of issues drawn to the attention of the Committee. It is to be hoped that the decision of the Court of Appeal in *Capital Coast* will clarify the meaning and interrelation of the relevant provisions in the Act. The Committee therefore requests the Government to keep it informed of the results of those proceedings and other judicial proceedings of significance.

**251.** That is not, however, the end of the matter. Whilst the recent jurisprudential developments and the forthcoming decision of the Court of Appeal have great

importance, the Committee notes that allegations of problems concerning the implementation of the Act in practice continue to be raised. The Committee refers in particular to the voluminous documents and numerous testimonies given by representatives of NZCTU affiliates (see paragraph 154 above and the comments made thereon in the mission report). As the Committee understands the Government's position on this subject, all these examples are said to be anecdotal and, rather than commenting on the merits of these cases, the Government focused on the "remedies available for the allegations made in relation to these anecdotes" (see paragraphs 202-334 above).

**252.** The Committee is not in a position to evaluate the respective merits of each of these examples in relation to the national law; that is the jurisdiction of New Zealand specialized institutions and courts which will decide the matter based on all testimonies and evidence, if and when complaints are filed. While it cannot conclude with certainty whether the additional and current problems brought to the attention of the mission are as widespread as the complainant alleges, the Committee cannot conclude that these are merely "anecdotes" but considers that these examples indicate, on a prima facie basis, that a significant number of collective bargaining problems have arisen and continue to arise in practice, from the point of view of compliance with ILO principles on freedom of association.

**253.** As regards the aggregate effects of the Act on collective bargaining, and taking into account the caveat expressed in the mission report concerning statistics (paragraphs 35-39 and 100-106 of the mission report), it generally appears that the drop in union membership and collective agreement coverage has levelled out, and that collective bargaining continues to take place, in particular in sectors and industries where workers' organizations are well structured and established and where workers are in fact able to exercise the freedom of choice between (a) individual and collective representation, and (b) individual and collective employment contracts. The situation might very well be different in other types of undertakings. For instance, problems may — but not necessarily do — arise in small and medium enterprises, where workers are relatively isolated. As the Government's own figures indicate that, in February 1993, 84.6 per cent of enterprises employed up to five employees (23.6 per cent of all employees), and that enterprises with 100 or more employees (0.6 per cent of all enterprises) employed 42 per cent of all employees, this might affect a significant part of the workforce. Similar problems may occur in enterprises, large or small, where employers prefer to deal with individual employees or with representatives other than trade unions.

**254.** On the whole, taking into account the provisions of the Act and the information contained in the mission report, the Committee considers that problems of incompatibility between ILO principles on collective bargaining and the Act stem in large part from the latter's underlying philosophy, which puts on the same footing (a) individual and collective employment contracts, and (b) individual and collective representation.

**255.** As regards employment contracts, the Committee finds it difficult to reconcile the equal status given in the Act to individual and collective contracts with the ILO principles on collective bargaining according to which the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations should be encouraged and promoted, with a view to the regulation of terms and conditions of employment by means of collective

agreements. In effect, it seems that the Act *allows* collective bargaining by means of collective agreements, along with other alternatives, rather than *promoting* and *encouraging* it. The Committee, therefore, hereunder draws the attention of the Government to certain principles it has established in this respect.

**256.** Regarding the voluntary character of collective bargaining and recognition of trade unions by employers, the Committee noted that although, according to the ILO supervisory bodies governments are not obliged to enforce collective bargaining by compulsory means with a given organization (as such an intervention would clearly alter the nature of bargaining) employers, including governments in their capacity as employers, should recognize for collective bargaining purposes the organizations representative of their workers. [See *Digest*, op. cit., paras. 614 and 617.]

**257.** While recognizing that the question as to whether one party adopts an amenable or uncompromising attitude towards the demands of the other party is a matter for negotiation between the parties within the law of the land, the Committee stressed the importance which it attaches to the principle that both employers and trade unions should bargain in good faith and make every effort to come to an agreement and that satisfactory labour relations depend primarily on the parties' attitudes towards each other and on their mutual confidence. [See *Digest*, op. cit. paras. 589-590.]

**258.** On a related subject, the Committee also stated that the Collective Agreements Recommendation, 1951 (No. 91) stresses the role of workers' organizations as one of the parties in collective bargaining; it refers to representatives of unorganized workers only where no organization exists; in these circumstances, direct negotiation between the undertaking and its employees, bypassing representative organizations where they exist, might be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted. [See *Digest*, op. cit., para. 608.]

**259.** As regards the prohibition of strikes or lockouts if they are "concerned with the issue of whether a collective employment contract will bind more than one employer", the Committee notes that no really new argument has been submitted by either side, to the mission or to the Committee. It was and remains true that such strikes are prohibited; it was and remains true that employees have the right to strike in support of the content of multi-employer contracts, once such a bargaining option has been chosen. Recalling that the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and that legislation should not constitute an obstacle to collective bargaining at the industry level [see *Digest*, op. cit., paras. 632-633] the Committee notes that section 63(e) of the Act is not neutral in that respect, since the impugned provision essentially removes the means of pressure that may be applied for the determination of that level. This does not imply that employers have to accept multi-employer bargaining but simply that the parties should be left free to decide for themselves on the means (including industrial action) to achieve particular bargaining objectives. The Committee therefore reiterates that workers and their organizations should be able to call for industrial action in support of multi-employer contracts.

**260.** The Committee notes with interest from the mission report that there is goodwill between the parties and a willingness to engage in constructive discussions. The Committee also notes the view expressed in the report that "if this goodwill is translated into a modicum of compromise on a limited number of issues which could be reflected

in a degree of legislative change, a workable solution might be found to the issues to which this case has given rise". The Committee therefore draws the attention of the Government to its established principles on collective bargaining and expresses the hope that the Government will initiate and pursue tripartite discussions as part of a process of ensuring that the provisions of the Employment Contracts Act are fully consistent with those principles. The Committee asks to be kept informed of progress in this respect.

## THE COMMITTEE'S RECOMMENDATIONS

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

(a) The Committee requests the Government to keep it informed of the results of the proceedings before the Court of Appeal in *New Zealand Medical Laboratory Workers' Union Inc. et al.* v. *Capital Coast Health Ltd.*, and of other judicial proceedings of significance.

(b) The Committee draws the Government's attention to its established principles on collective bargaining, and expresses the hope that the Government will initiate and pursue tripartite discussions as part of a process of ensuring that the provisions of the Employment Contracts Act are fully consistent with those principles. The Committee asks to be kept informed of progress in this respect.

(c) The Committee reiterates that workers and their organizations should be able to call for industrial action in support of multi-employer collective employment contracts, which is currently made expressly illegal under section 63(e) of the Act.

(d) The Committee draws the Government's attention to the fact that the advisory services of the International Labour Office are at its disposal if it so wishes.

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**262.** The Committee observes that the Government offered the widest possible facilities to ensure the smooth running of the mission and notes the spirit of cooperation demonstrated by the authorities and the other interlocutors. It wishes to express its deep appreciation to Mr. Alan Gladstone for having undertaken this direct contacts mission as representative of the Director-General. His detailed report on, and analysis of, the information obtained during the mission helped the Committee to take a fresh approach and reach conclusions with a fuller knowledge of the issues involved in the case. This report shows, once again, the usefulness of such missions where discussions and dialogue with all the parties involved contribute to a better understanding of complex issues.

# Annex

REPORT OF THE DIRECT CONTACTS MISSION TO NEW ZEALAND
BY MR. ALAN GLADSTONE,
REPRESENTATIVE OF THE DIRECTOR-GENERAL OF THE
INTERNATIONAL LABOUR OFFICE
CONCERNING CASE NO. 1698

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# I. Introduction

1. The New Zealand Council of Trade Unions (NZCTU) submitted a complaint of violations of freedom of association against the Government of New Zealand in February 1993, alleging that the Employment Contracts Act of 1991 violated the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

2. The Committee on Freedom of Association examined the case on the merits at its meeting of March 1994 and submitted an interim report, approved by the Governing Body at its 259th Session (March 1994). In its recommendations, noting the complexity of the case and the need to obtain additional information, the Committee considered that it would be very useful for a representative of the Director-General to undertake a direct contacts mission to the country with a view to obtaining this information from the parties.

3. The Government had indicated to the Governing Body and by a letter of April 1994 its willingness to accept the mission. After consultations during the 1994 International Labour Conference, it was agreed that the mission could take place from 19 to 27 September 1994. The Director-General appointed me as his representative to carry out the mission, throughout which I was accompanied by Mr. Patrick Carrière, an official of the Freedom of Association Branch.

4. The mission obtained full and effective cooperation from the officials of the departments involved, particularly the Department of Labour, in organizing the various meetings, as well as that of the officials of the workers' and employers' organizations, and individuals met during the mission, which enabled me to carry out my mandate successfully.

5. The mission met with the Minister of Labour and officials of the Department of Labour as well as with leading officials of other governmental ministries and a number of political and parliamentary personalities. It also met with officials and leading members of the New Zealand Employers' Federation and various trade organizations affiliated with the NZEF, and chief executives and other representatives of various companies as well as with members of the Business Round Table (a group of leading business personalities). On the employers' side sessions were held, at their request, with representatives of various chambers of commerce and related bodies. The mission had sessions with legal practitioners and consultants involved in advising companies and workers' organizations in the industrial relations and labour law areas. The mission also met with the officers and staff of the New Zealand Council of Trade Unions as well as a number of its affiliates. A meeting was also arranged by the NZCTU with a number of academics. At their request a meeting was held with the Trade Union Federation (a smaller central organization of trade unions counting some 35,000 members among its affiliates). A more complete listing of organizations and personalities is appended to this report.

6. I have organized my report so as initially to situate briefly the economic, social and political context of the policies and legislation (and in particular the Employment Contracts Act, 1991) that are the subject of the complaint. I then summarize the relevant provisions of the Act following which I make a number of general remarks on collective bargaining and collective agreements under the Act (including statistics on collective bargaining) as well as on certain aspects of law and practice under the Act. The next section addresses a number of specific questions inspired by the complaint and by the recommendations of the interim report of the Committee on Freedom of Association in this case. Finally, a concluding observation is made.

7. In this report, and given the material available earlier to the Committee, I emphasize the presentation of new information, and of views and opinions expressed during the course of the mission. However, to give a more or less complete picture of the situation, I cannot completely ignore the prior material available and/or included in connection with the interim report of the Committee.

8. I should emphasize that the report does not formulate conclusions or recommendations on the various issues involved in Case No. 1698; that is the sole responsibility of the Committee on Freedom of Association, whose conclusions are not, and should not, be prejudged. However, the process itself of presenting information in this case necessitates certain explanations and analyses which, in some instances, may involve some elements of a personal judgemental character and/or the expression of certain impressions. And, given the enormous amount of

information, documentation and oral testimony which the mission gathered, I was obliged to exercise some selectivity in considering which material to make reference to and in summarizing certain materials.

* * *

9. Finally, I consider that for the record I should refer here very briefly to certain comments made by government and employer personalities (including a constitutional law professor from Australia retained by an employer group), in respect of constitutional matters and those concerning the competence and procedure of the Committee, although I do not consider these matters relevant to my mandate.

10. Questions were raised as to the competence of the Governing Body Committee on Freedom of Association, as well as to the case-law developed and utilized by the Committee. An example of the latter related to the right to strike (as an element of freedom of association) which is not mentioned in Conventions Nos. 87 and 98. Also evoked were the nature of obligations incumbent on ILO members in respect of non-ratified Conventions, in particular in the freedom of association area. Where indeed there were deemed to be "obligations", should these obligations be co-terminous with those of the relevant Conventions and related case-law, or of a more general and less precise nature. New Zealand, it will be recalled, has not ratified Conventions Nos. 87 and 98.

11. Another question raised in government and employer circles concerned the fairness of committee procedures. In particular the point was made that it appeared inconsistent for the Committee to level criticisms at the Government in its interim conclusions and recommendations, and at the same time to admit that it had insufficient information on many of the points in issue.

## II. General remarks

### 1. Economic and social background

12. For some 80 years New Zealand had a legislative framework and practice that was characterized by nationwide occupational and industry-wide bargaining within a highly centralized system involving, for much or most of the period, compulsory arbitration and a form of compulsory union membership. All parties with whom the mission met (with the possible exception of some of the leaders of the minority trade union central organization, the "Trade Union Federation"), agreed that the old system had to be changed. Indeed, even before the advent of the National Party Government in 1990, the Labour Government had initiated substantial changes in industrial relations legislation, including the adoption of the Labour Relations Act 1987, as one of a series of measures aimed at a certain deregulation and decentralization of the economy. The election of the National Party Government in 1990 marked an intensification of this process and, in particular in the industrial relations field, the Employment Contracts Act 1991 (ECA) was adopted. This Act, in the view of virtually all of those with whom the mission met, was revolutionary in many respects, inter alia, in changing the industrial relations emphasis from centralized to decentralized and from a collective bent to at least the possibility of an individual one. In the view of the Government, the ECA promoted needed labour flexibility. The preamble of the Act states that its purpose is "to promote an efficient labour market".

13. The development of labour law and legislation was set against an historical backdrop, as told by the Government and various employers' organization spokespersons, where product, capital and labour markets were highly regulated and centralized. These policies had led to macroeconomic imbalances, structural problems, low productivity and, more recently, high unemployment and rises in domestic and external debt.

14. The mission was told by the Government that the ECA represented an essential element of an interlinked overall economic strategy which included as well ensuring price stability, the reduction of public expenditure and debt, the institution of a broad-based low rate tax regime, the building of an open, internationally competitive enterprise economy, and education, training and income support policies. The strategy, according to the Government, had been the impetus for a

turnaround in the economy and the resumption of sustainable high economic growth. This was translated into 5.3 per cent annual growth in real GDP in the year to March 1994. Moreover, there was 3.9 per cent total employment growth and seasonally adjusted unemployment rates had dropped from 10.9 per cent in the third quarter of 1991 to 8.4 per cent in June of 1994, with the longer term forecast very optimistic. In addition, the current account deficit had dropped to some 2 per cent of GDP and was expected to improve further. Annual inflation rates had fallen in the year ending June 1994 to 1.1 per cent and was expected to remain within a 0-2 per cent band. The first budget surplus in 17 years was announced for 1994 and there was an expectation of continued fiscal surpluses. Further estimates by the Government included growth rates at 4.5 per cent in 1994-95 and 3.5 per cent in the following two years; employment growth at 3 per cent in 1994-95 and 2.1 per cent in 1995-96 and unemployment rates dropping to 7.6 per cent in 1995-96.

15. The Government and a number of the mission's interlocutors from employers' circles emphasized that the ECA, through the flexibility it provides, permits the fashioning of appropriate employment contracting arrangements that reflect market realities (including wage policies linked to productivity), encourages increased communications by employers with their employees, and removes restrictions on individuals and groups that wish to offer bargaining agent services.

16. Many employer representatives with whom the mission met emphasized the role of the ECA in the economic turnaround in general and on the improved performance of their enterprises resulting from the changed industrial relations rules and climate brought about by the Act. Illustrations were provided of elimination of overmanning and unnecessary shift work and of restrictive practices owing to rigid demarcation rules, the diminution in the number and intensity of strikes, resultant increases in productivity, etc.

17. The trade union officials and staff, as well as certain opposition political personalities and academics with whom the mission met, while recognizing the need for change in industrial relations as mentioned above, disagreed that the ECA in its current form was a necessary element in the economic recovery (the extent and depth of which they would also question). They contend that the recovery, such as it is, is driven by various external factors. Indeed, they considered that substantially similar, or better results could have been achieved with a revision of the rules of the game which did not (as they believe the ECA has done) move the pendulum to a situation which permitted an extreme form of the individualization of the employment relationship at the expense of collective approaches. They pointed out that many countries were currently experiencing high rates of growth and relatively low unemployment without resorting to what they considered the draconian provisions of the ECA.

18. Many of these interlocutors questioned the use of pure contract theory and common law (as they, as well as many proponents of the Act, claimed was the thrust of current labour policy under the ECA) which presumed a certain equality of power in the bargaining relationship between employers and individual or unorganized employees. An imbalance in that relationship was particularly felt in a period of less than full employment.

19. As to the nature of the economic recovery, the trade unionists and certain of the academics and political figures contended that employment increases were not shared over the spectrum of the workforce and particularly as regards less favoured groups in the population such as the Maori and Pacific Islanders. This assertion was not out of line with what the mission was told by government contacts. Furthermore, it was contended that overall remuneration in real terms had not significantly increased and that, when the diminution in "penalty" and premium payments were taken into account there had been a drop in take-home pay.

20. One idea on which there seemed to be a large measure of consensus in all quarters was that trade unions could no longer be complacent about their role and place in industrial relations but rather had to be proactive in reaching out to members and possible members in terms of recruitment efforts and services rendered. In the view of trade unionists and certain others this was essential in the face of a "deck stacked against them" by virtue of the ECA.

21. The mission learned that the Labour Party was looking to a complete reconsideration of the ECA. A recent private members' Bill to initiate consultations with a view to repealing and replacing the Act was rejected by the Parliament on 29 June 1994. The Alliance Party (with two seats in the legislature) has pending a private members' Bill containing specific revisions to redress in the first instance what they consider to be the worst "violations" stemming from the ECA.

## 2. SUMMARY OF RELEVANT PROVISIONS OF THE EMPLOYMENT CONTRACTS ACT, 1991 [1]

22. The preamble states that the purpose of the Act is to promote an efficient labour market.

23. Part I, entitled "Freedom of association", provides that employers can choose whether they wish or not to have a collective involvement in employment matters and provides against undue influence on an employee by reason of the employee's involvement or non-involvement in collective arrangements (section 5.) It further provides for purely voluntary membership of any employee's association (section 6). Part I goes on to prohibit any preference by reason of membership or non-membership in an employees' organization (section 7). Finally, Part I provides for a penalty if undue influence is used on employees to become, cease to become or not to become a member of an employees' organization; not to act or cease acting as an individual agent for other employees; or to leave employment because of membership in an employees' organization (section 8).

24. Part II of the Act deals with bargaining. It provides for self-representation or representation by a person, group or organization of the employee's choosing, and that the parties can decide on having an individual or collective employment contract (sections 9, 10 and see section 59). The collective employment contract (CEC) is defined (section 1) as an employment contract that is binding on two or more employees. In addition to bargaining, representation can be for other purposes such as court appearances. Representatives have to establish their authority and that authority must be recognized by the parties (section 12). Those seeking employee representation authority can have access to the workplace only with the agreement of the employer. Authorized representatives must be granted access to the workplace of the employee(s) concerned at any reasonable time during working hours to discuss negotiation matters (sections 13 and 14). Finally Part II of the Act requires that a ratification procedure for settlements must be agreed between the parties and their representative (e.g., the employee organization and those it represents) within three months preceding the start of negotiations (section 16).

25. Part III deals with "personal grievances". A procedure for settlement of such grievances is required in all employment contracts (sections 26 and 32). Grievances include "duress" in respect of membership or non-membership of an employees' organization and "discrimination" by reason of involvement in the activities of an employees' organization (sections 27, 28 and 30).

26. Part V concerns strikes and lockouts. These are unlawful, inter alia, during the term of a collective employment contract, if they relate to a personal grievance or a dispute, if they relate to any matter concerning freedom of association (Part I of the text), or if on the issue of whether a collective employment contract will bind more than one employer (section 63). Lawful strikes and lockouts are those which relate to the negotiation of a collective employment contract and are not otherwise unlawful under the Act. Participants in lawful strikes are immune from civil claims, injunctions, damages or any action for breach of contract or for a penalty (section 64).

27. Part VI provides for the exclusive jurisdiction of specialist institutions — the Employment Tribunal and in particular the Employment Court — to deal with the rights of parties to employment contracts and with cases arising under the Act. Appeal lies from the Employment Court to the Court of Appeal on questions of law.

## 3. FURTHER GENERAL REMARKS

*(a) On the nature of bargaining and agreements under the ECA*

28. It is undoubtedly of importance for an understanding of the import of the ECA as regards bargaining to examine the possibilities inherent in the Act regarding bargaining and

[1] The text of selected provisions of the ECA is annexed hereto, as is a table of cases cited in this report.

resultant agreements (contracts). The experience of the mission and a study of the Act shows in my view a number of (not necessarily exhaustive) possibilities.

29. The first possibility is collective bargaining by an employee organization such as a trade union, but not excluding ad hoc temporary and "non-associative" employee representation bodies brought into existence for purposes of negotiation, leading to a "collective employment contract" which can be concluded and signed by the organization or representation body as a *party* (akin to the more usual concept of a collective agreement) or by the employees covered by the contract as parties, provided there are two or more employees covered.

30. A second possibility is collective bargaining as above resulting in the signing of a number of (probably identical) "individual contracts of employment".

31. A variant of the above is an individual contract of employment which results from an expired collective contract being rolled over and transformed into an individual contract pending the conclusions of a new contract, collective or individual.

32. Another possibility is individual bargaining leading to an individual employment contract (IEC). While I use the term "bargaining" here, there is not always necessarily a process of bargaining (in terms of give and take, proposition and counter proposition and possible compromise), particularly in the case of new employees and those at lower skill levels.

33. Finally, there are many examples of individual bargaining (or, as above, no necessary process of bargaining) resulting in a collective employment contract. In this case there is normally no representative, either collective or individual. The contract is prepared by or on behalf of the employer and the document is signed by and covers two or more employees. A collective employment contract need not necessarily be concluded through a representative.

34. To complete the picture, it should be added that an employee can be covered by both a collective employment contract and an individual employment contract, provided that the latter does not serve to worsen conditions specified in the former.

*(b) On the use of statistics*

35. I shall return to the question of statistics in relation to collective bargaining and when discussing the issue of whether collective bargaining is being encouraged and promoted. At this point I should merely like to indicate some of the problems in their use for our purposes.

36. First of all, any longitudinal or time series analysis of the effect of the ECA on collective bargaining must necessarily show a reduction in the coverage of collective agreements as between the period before the Act came into force and the post-adoption period. Prior to the Act, as indicated above, the combination of occupation-wide and industry-wide bargaining, coupled during most of that period with a form of compulsory trade union membership, necessarily meant extremely high, if not nearly universal, coverage by collective agreement. The acknowledged purpose of the ECA is to change the system to allow in principle for free choice by the parties as to the contractual form they wish their employment relationship to take. This in itself inevitably means, without taking into consideration other factors of significance to this exercise, that a number of employees (and employers) will move away from collective and to individual employment relationships. While the extent of this move may be construed as being of significance, the fact of change in itself is not revealing, given the circumstances and genesis of the ECA.

37. Of importance also is, as discussed above, that there are a variety of types of collective employment contracts, not all of which would necessarily reflect a result of collective bargaining as that concept has been commonly understood. And these contracts would presumably be included in the statistics of collective document coverage, or included in some surveys and not in others (to the extent that they can be separated out or particularized by those doing the survey).

38. But apart from the above considerations, there are also problems of the database used. For instance, if we are dealing with percentages, whereas one survey may take as a base for collective employment contract coverage the entire workforce, others may take the employed workforce; some may take one or the other excluding certain categories (occupational, managerial, agricultural employees, etc.) and others not. As may be seen from the various statistical sources presented to the mission there can be variances in from whence come the figures. Are all enterprises reached? The Department of Labour survey requires only enterprises employing 20

employees or more to report (and do they all?) whereas other surveys claim to reach more deeply into the employed population.

39. As a result, while statistics will be referred to in this report, it is with the caveat that they be read or appreciated in accordance with what I consider to be limitations as to the contribution that they can make to the Committee's consideration of this case.

*(c) On the law, the facts and the remedies*

40. It might be useful to point out (although this will be obvious to some) that an examination of the ECA in the context of its conformity with ILO principles, and in particular those relating to freedom of association, requires that the interpretation of the law as given by authoritative bodies be examined, in addition to the text of the law itself. Certain provisions of the law can be quite clear for purposes of the Committee, but legislative dispositions frequently gain meaning only when tested in the crucible of judicial decision-making. Thus the mission paid special attention to decisions of the Employment Court and the Court of Appeal which interpreted key provisions of the Act, and particularly those decisions rendered since the initial consideration of the case by the Committee.

41. The complainant, and the spokespersons for many of its members, argued that judicial interpretations (a number of which they admitted were favourable to the trade union position) were insufficient to remedy much of the activity complained of. They maintained that the decisions did not set clear guidelines, were often ambiguous, were sometimes the product of a divided tribunal or court, and were uncertain case-law which could easily be overturned on appeal or in subsequent cases. Moreover, to seek judicial enforcement of basic rights, where these are protected by the ECA and the interpretation of its provisions, was terribly costly, time-consuming and required efforts on the part of the trade unions that were sometimes beyond its capabilities. Nor could it monitor in a comprehensive manner what it considered to be the very many cases of abuse. In this regard the trade union spokespersons reminded the mission of the enormous number of very small enterprises, the average enterprise employing less than seven employees. These considerations were even more critical in their view since the complainant or its member organizations (or other employee organizations) could not be sure of prevailing (for reasons stated above) in court tests and recovering costs. In addition, the fear of job loss by employees who may have been affected adversely by questionable employer action made these employees reluctant to come forward and press a case under the procedures provided for by the Act; this fear was accentuated by what still is a tight labour market. The point was further made that in any event by the time the judicial process was completed and the law clarified (and the slowness of the system was emphasized), the dynamics of the situation were such that even if the union (or employee) prevailed, the damage had been done (perhaps the destruction of the union organizing effort in the enterprise concerned) and that no compliance order or award could afford an adequate remedy. It is of interest here to note that the minority conclusions of the Parliamentary Labour Committee, which reviewed the working of the ECA in September 1993, considered that there was a pattern of abuse either without remedy under the Act, or with remedies that could not be enforced because of the overloading of the institutions.

42. I pointed out that these were common problems, irrespective of questions of freedom of association, in many industrial relations systems in democratic industrialized countries, particularly where new and untested legislation came into force. Some employers (and indeed some trade unions) unfortunately acted in defiance of legal requirements, and others on a misapprehension of those requirements or where it was not yet clear what is allowed or not allowed by the law. The judicial system had to be relied on to render justice in such cases.

43. Similarly, on the permanency of case-law, one had to proceed on the basis of existing interpretations; while changes in interpretations may be possible (although unanimous and/or full court decisions made such possibility less probable) the rule of *stare decisis* and adhesion to higher court pronouncements were serious matters. I could mention here, anticipating later passages of this report, that two of the principal decisions in this area — *Eketone* and *Capital Coast* — were rendered by full courts (of the Court of Appeal and the Employment Court, respectively) and without dissent. The Government advised the mission that decisions such as these were the law of the land and binding. This however would not preclude further development of the law. A

number of lawyers (whose chief advocacy was for employers) informed the mission similarly that there was little likelihood of a reversal of the principles espoused in the above cases, although employers would continue to mount cases and appeals to get a better grip on what were acceptable guidelines, for example in respect of the limits of employee communication by the employer in a collective bargaining context.

44. I would also indicate here that the mission was informed that certain measures have been taken to deal with the problem of delay and that other measures are under consideration to enable the Employment Tribunal and Employment Court to expedite its proceedings, inter alia, through the provision of additional financing for engaging judicial and auxiliary personnel. Furthermore, the mission was informed that labour inspectors were increasingly equipped to advise all parties concerned as to their rights and responsibilities under the ECA, and that the Labour Department had installed a "hot line" that could respond to inquiries regarding the Act.

45. Finally, a comment should be made as to the mass of cases, examples and illustrations provided to the mission by both the complainants and various employers' circles, but particularly by the trade unions in support of the allegations made in the complaint (and to which I make reference below). These have been examined as carefully as possible. It may be noted that they fall into a number of categories. First, situations are described which involve employer activities that, colourably, are lawful under the ECA but which the complainant believes reflect behaviour inconsistent with ILO principles: these may or may not have been challenged in the Employment Tribunal or the Employment Court. Secondly, there are examples and cases which arose before more recent judicial pronouncements, which pronouncements would at a minimum cast doubt on the lawfulness under the Act of the activities described. Thirdly, examples are given of employer activities which would raise questions of freedom of association but are in a grey area — they may or may not be lawful — and which have not yet been tested before the Tribunal or courts.

46. Two related questions to be addressed are: (a) to the extent that the examples and cases described reflect conduct which raises questions related to freedom of association, are these examples and cases illustrative of a pattern of activity, and (b) to what extent is there reasonable assurance that the facts as stated reflect the actual situation. Indeed, in regard to the first point, the complainant insists that the situations described represent "mainstream" employer practice and reflect a range of measures available to employers under the Act to subvert authentic employee representation, and particularly representation by a trade union. Regarding the latter point, the mission noted that there was in respect of two situations described by the complainant indeed a significant difference of opinion regarding the facts as between the trade union concerned and either the employer concerned or the Government, the latter having taken counsel with the employer concerned.

47. In any event, a key point to bear in mind, it is contended, is, regardless of the number and clinical factual correctness of one or another of the examples or case-studies presented to the mission, does a given behaviour or conduct which is legal under the ECA (or does the fact that certain acts are unlawful under the Act) present problems of conformity with the relevant ILO standards? Thus even what may be seen as reprehensible conduct, reflected in a widespread pattern of behaviour, if unlawful under the ECA need not necessarily represent a case of non-conformity with applicable standards, putting aside the question of whether effective means of enforcement of the law are available to those concerned. Conversely, what may be seen as lawful conduct under the ECA might not be in conformity with the principles of freedom of association.

48. For reasons stated earlier, and not ignoring the considerable documentation and oral presentations before the mission, some special emphasis in this report will be placed on the provisions of the ECA and their interpretation in the Tribunal and Courts. It might be added here that the Government has indicated that it is quite comfortable with the recent decisions of the Courts which are referred to below and which were not considered in the Committee's interim report.

# III. Issues raised in the complaint and in the interim report

## 1. CONSULTATION

49. On this issue there is not much to add by way of information over and above what has already been before the Committee.

50. The complainant informed the mission that, as opposed to past practice, there was no consultation between the public authorities and, at least, workers' organizations at the national level *prior to* the introduction in Parliament of the Bill that was later to become the ECA. The NZCTU maintains that, in the Select Committee procedure, as referred to in the interim report, there was no real dialogue or interchange as between the public authorities, workers' and employers' organizations, but merely the submission of documents and the giving of testimony. The complainant stresses that the Select Committee stage is too late to discuss policy issues and the proceeding lends itself only to consideration of questions of detail. In their view changes were made only in areas where the Government itself was undecided and in some of which it had prepared "options" papers (e.g. personal grievances and the specialized institutions). Moreover, there was no discussion at all concerning the provision, key in the view of the trade unions and added at the last moment, prohibiting strikes on the question of whether a collective employment contract will bind more than one employer.

51. The Government sees the Select Committee procedure as an important and effective means for consultation of all interested and concerned parties in respect of proposed legislation. It points out that both the New Zealand Council of Trade Unions and the New Zealand Employers' Federation were invited to make submissions to the Select Committee considering the 1991 legislation. On a wider scale, there is frequent ad hoc consultation with the NZCTU and the NZEF on a number of questions, and institutional consultation through such bodies as the Prime Minister's Task Force on Employment in which both central organizations sit along with other interest groups. The Prime Minister's Enterprise Council also includes representatives of business and trade unions.

52. The NZEF agrees that both the Select Committee procedure and the debates held on proposed labour law change during the 1990 election campaign provided ample and effective opportunity for consultation with all parties concerned in respect of the draft ECA.

53. The mission was also informed and given documentation as to the report of the Labour Committee of the Parliament on the effects of the ECA on the labour market of the country, during the preparation of which evidence was taken from a wide range of interests, including the government, employers' and workers' organizations.

## 2. EMPLOYEE REPRESENTATION

54. In the following paragraphs I have tried, in presenting and examining the evidence gathered by the mission with regard to the law and practice under the ECA, to separate the relevant issues concerning representation in the following manner (while recognizing their interconnections and overlaps): (a) the rights and possibilities of employees to organize and to designate representatives, principally for purposes of collective bargaining; (b) questions of employer domination of employee organizations; (c) access to the workplace of workers' representatives; and (d) establishment of authority to represent.

*(a) Organization and authorization of representatives*

55. Sections 5 to 8 of the ECA, as summarized above, afford employees the right of association or non-association with an employees' association and protection to employees against undue influence in that choice, as well as protection with regard to an individual acting as an agent for other employees. What the Act does not *specifically and expressly* provide against is possible

interference by employers in the employee's *designation* of a representative (trade union or otherwise).

56. The complainant maintains that pressures by employers to influence employees not to authorize, or to withdraw authorization from, a representative are widespread, particularly where that representative is an established trade union. A number of examples have been cited in the testimony and documentation submitted to the mission by member unions of the NZCTU of such actions and efforts of employers (e.g. Department of Social Welfare, New World Supermarkets, Ajax Spurway). The NZCTU asserts that under present law and practice the employer is free to exert pressure on an employee to de-authorize — if not to leave — a trade union, although it concedes that no cases (at least no cases arising out of the personal grievance provisions) directly testing this question have yet been heard. The complainant does recognize that there might be a point where the courts may rule that certain forms of pressure on employees in this regard are unacceptable, but the limits on what may be done by the employer to persuade employees to withdraw authority are not established. It reiterates the oft-mentioned point that it is an expensive and time-consuming process to constrain employer behaviour through litigation.

57. The Government disagrees that there is insufficient protection against interference and discrimination on the basis of authorization of an employee representative, including an established trade union. It sees a wide range of protection under the ECA. Such protection might be sought under section 28(1)(b) which protects employees against discrimination in the form of dismissal or subjecting the employee to any detriment by reason of involvement in the activities of an employee organization, which activities include (section 28(2)(b) and (e)) acting as a negotiator in collective bargaining, or making a claim for some benefit of an employment contract either for him/herself or another employee. In its view the inclusion in the provisions proscribing "duress" or undue influence by the employer (or offers of monetary rewards or threats of monetary disadvantage) aimed at inducing an employee to participate or not participate in the formation of an employees organization (section 30(c)(6) and (7)) offers protection in this regard.

58. The Government also cited to the mission the *Capital Coast Health* case of August 1994 in which the Employment Court (in a judgement of the full court) took up the question of authorization and applied the mentioned protections. The Court commented that "It seems extraordinary that a penalty can be exacted for exerting undue influence on a representative not to act as such in the future while no penalty arises from exerting undue influence on the employee not to continue to employ a particular representative. However, such influence is indirectly exerted also on the representative because sooner or later the representative will have to say to the principal that the representative is unable, or has been prevented, from representing the employees effectively or at all" (pp. 42-43).

59. I would just remark that while the language cited is of a general nature, the Court, as the Government indicated, was commenting on the attempts of the employer to control the representative or to limit by unilateral edict the ability of the representative to represent effectively its constituents. In the view of the Government, the above finding clearly addresses the authorization relationship between the employees and the representative.

60. The NZCTU acknowledged to the mission that the *Capital Coast Health* case accepts the possibility that the section 8 prohibition against "undue influence" on a bargaining agent might be an avenue to prevent pressures on employees to reject a representative. But it maintains that such an approach is unlikely to survive serious challenge. And even if it were adopted, it could only serve to control some extreme examples of interference, i.e. where the agent is completely unable to act, this by virtue of the reference by the Court to inability to act "effectively or at all".

61. Both the Government and the NZEF reject the idea that the *Richmond* case, discussed in the interim report of the Committee, provides a basis for maintaining that employer interference and discrimination on the basis of authorization of a union is without remedy. Without dealing at length with the significance of this case (it being analysed by the parties on the occasion of the original complaint and response) suffice it to say that in the reading given to the Court decision by the Government and the employers, the holding turned, inter alia, on the fact that the authorization given to the union was for bargaining at a level different from that at which it sought to bargain, and hence there was not, in reality, an effort by the employer to have the employees withdraw a valid "authorization". In any event, the Government points out that the *Richmond* case

was decided before the decision of the Court of Appeal in the *Eketone* case and subsequent cases (discussed below), which served to change significantly the manner in which authorization and recognition questions are perceived and treated.

62. On the general question of authorization, I would also refer to a passage in the 1993 Report of the Parliamentary Labour Committee mentioned above, which, in its conclusions (in which only the majority members of the Committee participated) on the effects of the Act on unionization and use of bargaining agents stated as a recommendation: "The Committee was confronted with quite a substantial amount of evidence that suggested that some employers were either in breach of certain provisions in the Act, or certainly in breach of the spirit of the Act allowing for freedom of association. Section 30 *does provide* for personal grievances to be taken where duress has been applied in relation to membership of employees' organizations. The intent of the Act is to give an individual employee final right of choice who, if anyone, shall be their bargaining agent (subject only to section 11). The Committee notes that care is needed to ensure that employees' rights under this section are not effectively eroded, and that employers should respect the intention of the Act. The Committee recommends that the Government keep this issue under active review." (p. 26).

*(b) Employer domination*

63. The interim report of the Committee referred to the need to ensure that negotiations were not conducted on behalf of employees by bargaining representatives appointed by or under the domination of employers. The complainant offered the mission a good deal of documentation and testimony concerning situations of employer involvement in the establishment and/or funding of employee organizations or in the naming of employee representatives. The NZCTU complains that it is perfectly legal under the ECA for employers to set up and finance such organizations, to draft their constitutions, to exercise veto rights over their communications and employ their spokespersons. In their view the fact that under the Act *any* individual can be an authorized agent and exercise the powers of a workers' organization encourages employer-dominated or influenced employee representation. Moreover, according to the trade unions, employers make use of these possibilities to sponsor rival, management-dominated "worker organizations".

64. Examples of alleged domination presented to the mission by the NZCTU and its affiliates included Mercury Energy, Barnardos, primary school principals and, as discussed in the interim report, the Accident Compensation Corporation (ACC). In respect of the last example, the NZCTU provided documents which, in their view, clearly demonstrate, among other things, that management oversaw the development of the charter of the new employee group (the Staff Consultative Group or SCG); that under the charter elections and processing of candidatures were to be coordinated through the employer's human resources office; that the charter could be changed only through agreement between the employee group and management; that the expenses of the group would be borne by management; and that the corporate management group made a commitment "for a professional negotiator *selected by management* for the Staff Consultative Group when renegotiating the Collective Contract" (SCG's Charter attached to Memorandum, 18 July 1994, from Managing Director to all staff, points 10 and 12; emphasis added).

65. The Government reiterated to the mission its concern about reliance on "anecdotal" matter as presented by the complainant. It did not believe that countering anecdote with anecdote was appropriate and, moreover, the Government did not normally conduct the type of investigation required to raise the examples above the anecdotal level. Nevertheless, since the ACC example had been referred to in the report of the Committee, the Government sought the management's view of events. This view was as follows: management negotiated with a team representing staff consisting of staff representatives from the SCG, staff representatives who were union members (PSA), a PSA representative from the national office of the union, and an advocate. According to the ACC management, they offered to pay for the professional representation of the advocate since there was a relative lack of negotiating experience on the staff team. However, management claims that it had no role in the selection of the advocate, who was chosen by the staff association. While the employer paid the advocate, it states that in no way was the advocate or other members of the staff negotiating team dominated by management.

66. On a more general level, the mission was told by the Government that provisions of the ECA did not preclude employees from using as a representative a consultant who may have been suggested by the employer. However, the Government contends that there are ample protections and remedies available under the ECA (which, incidentally, were not resorted to in the ACC example) in cases of domination or control of the representative by the employer. These include:

(i) *section 7*, which prohibits preference in employment, or conditions of employment being made the basis of membership or non-membership of an employees' organization;

(ii) *section 8*, which states that it is unlawful to exert undue influence on a person in relation to several grounds, including membership of an employees' organization and whether or not a person acts on another person's behalf;

(iii) *section 10*, which gives an individual the right to choose his or her own representative;

(iv) *section 12*, which requires a representative to establish its authority to represent employees in negotiations and requires the employer to recognize an authorized representative, and as shown by recent Court decisions, to bargain with the authorized representative if they bargain at all;

(v) *section 16*, which requires employees and their representatives to agree on a ratification procedure for any settlement, within three months before negotiations start;

(vi) *section 27*, which sets out the grounds for personal grievances, including an unjustifiable action by an employer which has disadvantaged an employee;

(vii) *section 28*, which sets out the grounds on which an employee can take a personal grievance if they believe that they have been discriminated against. These include involvement in the activities of an employees' organization. Such involvement may include acting as a negotiator, or claiming a benefit on an employees' own behalf or on behalf of another employee;

(viii) *section 30*, which makes duress a ground for a personal grievance in circumstances including those where an employee is subject to undue influence or disadvantage, or is offered advantage, in relation to membership of an employees' organization;

(ix) *section 57*, which provides that the employment Court may put aside an employment contract or any part of it which was obtained by harsh and oppressive behaviour or undue influence.

67. The NZEF, after pointing out that there was a major leap between the employer agreeing to meet the costs of a professional representative to negotiate on behalf of employees and the employer asserting domination on that representative, also cited numerous provisions of the ECA which could be invoked against such domination.

68. The Government moreover considered that the recent *Capital Coast Health* case in the Employment Court, decided by a judgement of the full Court, lent support for the effectiveness of protection in matters of domination or control of bargaining agents. The Court found an attempt to undermine an authorized representative when the employer declared he would deal only with a limited number of negotiators, effectively freezing out a number of authorized unions, including the plaintiff. This was in violation of section 12 of the ECA as well as of a mutual obligation of trust and confidence between employers and employees (and of the "good employer" provisions of state sector legislation).

69. Section 12 relates to the obligation to recognize authorized representatives. The obligation of trust and confidence would appear to reflect the Court's espousal of a common law doctrine the application of which, if sustained, could, in the view of certain of the legal and government personalities that the mission met, conceivably have wider implications in terms of employee protection. The NZCTU remains rather sceptical as to the future possibilities of the doctrine in applying the provisions of the ECA.

*(c) Access*

70. On the question of access of employee representatives to the workplace, it will be recalled that section 14 assures access as a matter of right to authorized representatives; in the

case of representatives who are not, or not yet authorized, access is allowed only with the consent of the employer. The complainant argues that it is in the latter situation that access is particularly necessary; this for purposes of recruitment or to obtain authority to represent the workers concerned. The absence of such rights of access, in the view of the NZCTU, taken together with the wide scope of the employer to interfere in the process of authorization of a trade union and the possibilities of employer domination (see above), restricts free association and the development of representative organizations of workers.

71. The Government pointed out to the mission that rights of access for authorized representatives has been reinforced by the decision of the Employment Court in the *Southern Pacific Hotel* case (1993), and the *Foodstuffs (Auckland) Ltd.* case (1994). In *Southern Pacific* the Chief Judge of the Court, in ruling for the union, held that the employer could not unilaterally determine what is a reasonable time for entry, nor could the employer impose unauthorized conditions or restrictions for such entry. In the *Foodstuffs (Auckland)* case, the Court held that employers could not deduct for the time not worked from the wages of employees visited by authorised representatives, either singly or in groups.

*(d) Establishment of authority to represent*

72. In its interim report, the Committee's recommendations commented on the requirement in the ECA that a union establish its authority for all the workers it claims to represent in collective bargaining. According to the complaint of the NZCTU, the law and practice under the Act permit employers to impose on employer organizations, and particularly trade unions, onerous burdens of an administrative, financial and organizational nature, for example by insisting on individual verification of all employee authorizations to represent, burdens which can constitute a barrier to collective bargaining. In the case-studies presented to the mission reference was made to the example of the kindergarten teachers' organization that was "required" to photocopy 1,500 authorizations, and had to provide evidence of authorization of those who were already members of the organization. Some union spokespersons informed the mission that certain employers insisted that authorization levels be substantiated at every meeting. Others cited the cost and huge amount of time involved in meeting employer requests for validation of authorizations.

73. There appears to me to be some slight degree of confusion on this issue. The ECA does not detail how authority to represent is to be established and demonstrated. But reading sections 10 and 12 of the Act together seems to require an authorization to represent by all employees that the representative claims to represent, plus some type of act to "establish" that authority, presumably vis-à-vis the employer. Is it the provision of the ECA requiring authorization of *all* employees for whom the representative is claiming representational rights that is in question; or is it the exigencies that may be insisted upon by the employer as regards demonstrating or establishing such authorization that are seen as a problem? The parties appear to have treated at different times both aspects of the issue.

74. The Government, addressing the evidence supplied by the NZCTU, considers that while there may be some inconvenience involved in some cases, freedom of association was not impeded. It emphasized that the establishment of authorization authority is intended to ensure respect for the individual's choice of representative and that the agent is genuinely representative. The administrative work involved had to be balanced against protecting the free choice of the employee. The Government further postulated that, under the language of the *Capital Coast Health* case, attempts by the employer to use the requirement to establish authority to impede worker organizational rights could be challenged in the Employment Court as a breach of the enunciated common law mutual obligation of trust and confidence between employers and employees (as well as the "good employer" provision in the state sector legislation).

75. It will be recalled that the complainant entertained serious doubts as to the scope and sustainability of the common law doctrine of mutual trust and confidence as applied to cases under the ECA.

## 3. RECOGNITION, BARGAINING OBLIGATIONS AND "BYPASSING"

76. Article 12(2) of the ECA states that employers "shall ... recognize the authority" of authorized representatives of their employees in the negotiations. This has given rise to a number of intertwined issues which have been alluded to in the complaint of the NZCTU, the response of the Government and the interim report of the Committee. I shall mostly limit myself here to presenting later information bearing on certain of these issues as presented to the mission.

77. The ECA does not expressly provide for a general obligation to bargain with accredited representatives of employees. It may be noted that there have been suggestions, as will be seen below, that some sort of a general obligation to bargain in good faith might be construed on the basis of certain common law principles. However, it would appear that no court has moved in this direction in an authoritative manner. Nor does the Act provide for exclusive representation by a single workers' organization (of all employees similarly situated). The question at issue is to what extent and under what circumstances are employers obliged to bargain with authorized representatives of their employees. And here I would recall that there may be any number of such representatives.

78. The emerging case-law in New Zealand on this subject has been of substantial significance and will be examined here in the context of the NZCTU complaint to the Committee and the response of the Government. In its complaint — and at the time the complaint was submitted — the trade unions asserted that according to the then existing but limited jurisprudence under the ECA, employers could avoid dealing with a union authorized to represent certain employees and deal instead directly with those employees. In the *Adams* case (1992) the Employment Court held that the Act did not prohibit an employer, under the factual circumstances of the case, from refusing to deal with an authorized union representative, and from requesting that the workers who were members of that union withdraw the bargaining authority given to the union and sign individually a "collective employment contract".

79. On appeal to the Court of Appeal — as the *Eketone* case (the name of one of the appellant employees) — the Court dismissed the appeal as there was no longer a live issue and the issuing of compliance orders in favour of the appellant employees would be pointless. Nevertheless the various judges, in the November 1993 decision in this case, made some very important pronouncements affecting the shape of the emerging case-law. While these observations of the Court were considered as *obiter,* they were strongly stated by the five judges and subsequently followed by the Employment Court and Tribunal. The President of the Court of Appeal stated: "Under section 8 an employer remains free, by means short of undue influence, to try to persuade a person to cease to be a member of an employees' organization or not to become a member. But section 12 imposes ... an obligation while negotiations for an employment contract are being undertaken to recognize the authority of an organization, if that authority is duly established, to represent an employee in the negotiations. I am disposed to think that once a union has established its authority to represent certain employees — and in this case it is accepted by the respondents that the union had established its authority to represent the 34 employees who signed the old contract from 27 May 1991 onwards — then the employer fails to recognize the authority of the union if the employer attempts to negotiate directly with those employees. To go behind the union's back does not seem consistent with recognizing its authority. The contrary argument advanced for the employer here is that authority can be recognized by trying to persuade the giver of the authority to revoke it. That seems to me a rather cynical argument not necessarily in accordance with the true intent, meaning and spirit of the enactment. It would apparently mean that, although employees had authorized a union to represent them from the start, the employer need never negotiate with the union. Certainly an employer is free not to negotiate with anyone; but if he wishes to negotiate I doubt whether he can bypass an authorized representative. ... As I understand the relevant passage in the judgement of [the lower court] the proposition is that even while a union's representation authority is in force the employer may approach the employees directly, provided only that undue influence is not used. I do not think that it could be safely assumed that this is correct. But as the question does not require determination in this case it is better not to express a final opinion and to sound a note of warning only" (Judge Cooke, pp. 6-7).

Judges Casey and Gallen concurred. Judge Hardie-Boys also concurred and added: "Section 8 does not prevent an employer from using persuasion, provided the means are not unconscionable. But I think that the right to persuade is inhibited by section 12(2). Recognition of an authority given by employees is hollow indeed if the employer is able to undermine it by attempting direct negotiations with the employees while negotiations with their authorized representative are still in train." Judge Gault also concurred and commented that the right to elect representatives and pursue collective bargaining "is conferred by Part II [of the ECA] and that right should be fully accorded bearing in mind ILO Convention No. 98 ...". He continued: "I would go further than the Chief Judge. I consider the right to choose to be represented and to have the representative recognized by the other parties to negotiations to be accorded even where sections 22.5(b) and 8 have no application and before any contract is concluded."

80. I would note that the manager of Alliance Textiles, the defendant/respondent in the *Adams/Eketone* cases, gave to the mission his version of the particular facts which diverged in certain elements from those given the mission in other testimony and, to some extent, those reflected in the Court decisions. However, in my view it is the legal principle as enunciated above which is key in assessing the present situation.

81. The general line, pronounced as *obiter* in the *Eketone* case, i.e. the employer is free not to bargain, but if he does bargain he must do it with the authorized representatives, has been followed in subsequent decisions of the Employment Court (one or another of which may be appealed in future to the Court of Appeal).

82. In fact in a case decided in the Employment Court one month before *Eketone,* the *Southern Pacific Hotel* case (which mainly involved questions of access to the worksite by union representatives as discussed above) Chief Judge Goddard already stated (citing *Adams!*) that: "recognition of the representative must take the form of negotiating with the representative if that is the employee's wish ... [T]he employer must recognize that representative for the purposes of negotiations and must negotiate, if at all, with that representative."

83. In the *Dunollie Coal Mines* case, the Employment Court explicitly taking into account the *obiter* of *Eketone* found that the employer had bypassed the authorized representative (the union), approached the employees directly to seek their agreement to a new collective contract and, when they refused, locked them out. The union applied for an interim injunction restraining the employer from locking out those employees still involved. The Employment Court granted the injunction, stressing several times it was "speaking in an arguable case setting" (in other words, not deciding on the merits). The Court commented: "The company, knowing that the workers had an authorized bargaining agent, wholly bypassed that bargaining agent (the mineworkers' union) and locked the workers out ... The company thus disregarded the workers' rights in material aspects, that is to say their freedom conferred upon them by section 5 of the Act to choose to associate with other employees for the purpose of advancing their collective employment interests. The company knew that its mineworkers had appointed their union as their bargaining agent. Notwithstanding this knowledge, I stress, the company sought to negotiate at material times directly with its employees in gross disregard of their expressed wish that they were to be represented in negotiations by their bargaining agent".

84. The full consecration, at least as far as the Employment Court is concerned, of the *obiter* of *Eketone* came in the full Court opinion in the *Capital Coast Health Case* (currently on appeal). The employees involved had decided to negotiate a collective employment contract and had chosen to be represented by a union. As no agreement could be reached, the employer initiated direct communications with the workers. The union sought a permanent injunction restraining the employer from communicating directly or indirectly with the employees in relation to the negotiations for a new collective employment contract while the union remained their authorized bargaining agent. The Employment Court concluded that, through a number of actions, the employer had breached section 12 of the Act (authority to represent), as well as its statutory duty to be a good employer under state sector legislation, and granted the injunction. It commented: "We do not agree that the observations in *Eketone* can properly be seen as *obiter* and therefore gratuitous merely because there was no live issue between the parties. The views were expressed in an official judgement of the Court of Appeal with the concurrence of a full Bench of five judges. The statements made indicate the likely line of policy that will be adopted by the

Court of Appeal in the future. We should adopt that line here and put the onus on the party seeking to challenge its validity to take another case to the Court of Appeal and persuade it to depart from its earlier views ... In any event we agree with these views."

85. Another recent ruling brought to the attention of the mission which goes in the direction of protecting employees from certain pressures in the course of bargaining (and at least indirectly limits the employers' possibilities of bypassing the union) is *Presbyterian Support Services,* decided in June 1994. In this case, the employer moved to replace expiring awards (under the old system) with a CEC which it put forward "not so much for discussion as for signature" (in the words of the Court). Although the union in the meanwhile was engaged in discussions with the employer, the vast majority of employees, notwithstanding the union's opinion, signed the CEC. Those few employees who chose to remain on individual contracts based on the terms of the old award were subjected to what was known as a partial lockout until they agreed to sign the CEC. (I would recall that the ECA recognizes as lawful lockouts those relating to the negotiation of a CEC.) The "partial lockout" meant the employees doing the same work for less pay. This form of industrial action had earlier been recognized by the Employment Court as a legitimate lockout. The Court ruled that the previous decisions were not good law and held the partial lockout in this form to be unlawful. This meant that the employer had breached the employment contracts of the employees concerned (and appropriate injunctive relief was granted by the Court).

86. I might recall that the Government, in the person of the Minister of Labour, told the mission that it was quite comfortable with these decisions. The Government considers that these cases reinforce the importance of section 12 of the ECA which explicitly provides for the recognition of the authority of the authorized representative to represent employees in negotiations.

87. The NZEF also cites *Eketone*, and affirms that the decision ensures that the intention of the legislation to deliver true freedom of association is carried out.

88. The complainant recognizes that this is an area in which court rulings have changed since the original complaint was lodged. But in its view the significance of the *Eketone* and post-*Eketone* cases have been exaggerated. They expressed the view to the mission that law and practice still allow substantial bypassing of authorized representatives and offer protection only in extreme cases. The complainant's examination of the various decisions convinces them that the rulings have explicitly acknowledged that employers have the right to contact workers directly. They consider that the decisions indicate only that there is a point, in engaging such contacts, at which influence becomes "undue" (and presumably falls under the interdiction of section 8 and/or 30(c)). However, they see no clarity in the decisions as to where that point lies and they note inconsistencies in the rulings.

89. As regards *Eketone*, the NZCTU cites the language of Judge Cooke therein stating that: "Under section 8 an employer remains free, by means short of undue influence, to try and persuade a person to cease to be a member of an employees' organization or not to become a member. But section 12 imposes ... an obligation while negotiations for an employment contract are being undertaken to recognize the authority of an organization ...".

90. The complainant further believes that *Dunollie* and *Capital Coast Health* are "considerably out of step with the clearly held views of the Court of Appeal" and that "they cannot be relied upon as offering any certain protection".

91. Moreover, the NZCTU contends there are other means of undermining the authorized representative such as offering a contract only if the workers have not authorized (or, presumably, withdrawn an authorization from), a representative, or setting up a rival organization with employer support (see above discussion).

92. Many examples were given to the mission by member unions of the NZCTU illustrating what they considered to be recognition abuses in the context of bargaining. These included the Department of Social Welfare (bypassing the union to offer individual employment contracts), Housing New Zealand (offers in bargaining made direct to staff, thereby bypassing the union), Katies (offering a contract to workers independently of the union during negotiations), Ajax Spurway (bypassing the bargaining agent) Aeraki Polytech (direct approaches to staff outside of bargaining), Tai Poutine Polytech (bypassing of union by negotiating directly with staff), and South Pacific Hotels (company developed a collective employment contract and refused to negotiate with the authorized union).