Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi

to the

Constitutional Advisory Panel

on

New Zealand's consitutional arrangements

P O Box 6645
Wellington

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1. SUMMARY OF RECOMMENDATIONS

Recognition of work rights and wider economic, social and cultural rights (ESCR) in the New Zealand Bill of Rights Act 1990

Recommendation 1: The right to freedom of association in the New Zealand Bill of Rights Act 1990 should be amended to expressly include the right to collectively bargain and the right to strike in conformity with the law.

Recommendation 2: The right to work (including the right to gain one's living by work which is freely chosen or accepted) should be included in the New Zealand Bill of Rights Act 1990.

Recommendation 3: The right to just and favourable conditions of work (as expressed in art 7 of ICESCR) should be included in the New Zealand Bill of Rights Act 1990.

Recommendation 4: Other ESCR should be recognised as rights in the New Zealand Bill of Rights Act 1990. The optional protocol to ICESCR should also be ratified.

The legislative framework

Recommendation 5: Expert subject matter advisors unconnected to the policy development of the legislative proposals should be employed to assist Crown Law in making assessment of consistency. More time is needed to get these assessments right. It may be appropriate to consider whether the vetting function sits better with another body such as the Human Rights Commission or a new Human Rights Select Committee convened for this purpose. Ongoing work on improving regulatory impact statement quality must continue.

Recommendation 6: Responses to section 7 reports should be required from members in charge of Bills.

Recommendation 7: Prior to the third reading, all bills should be subject to a final check for consistency with the Bill of Rights. This will present challenges to the use of urgency to pass legislation but is too important a safeguard to sacrifice. Alternatively, the Select Committees may be required to report on whether provisions in bills appear inconsistent.

Framework for court challenge

Recommendation 8: The courts should be given an express jurisdiction to issue declarations of inconsistency with the rights contained in the New Zealand Bill of Rights Act 1990. Particularly in light of a Bill of Rights that includes recognition of ESCR and an expanded range of CPR this power should be declaratory only.

Recommendation 9: In relation to Bill of Rights issues there is considerable value in enacting a parallel process to that in the Human Rights Review Tribunal. According to section 92K of the Human Rights Act 1993, where the tribunal makes a declaration (and that declaration is not overturned on final appeal) then the responsible Minister must table reports in the House of Representatives bringing the declaration and the Government's response to the House's attention.

2. INTRODUCTION

This submission is made on behalf of the 37 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 340,000 members, the CTU is the one of the largest democratic organisations in New Zealand.

The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers. Te Rūnanga has also made a submission to the constitutional advisory panel which the CTU supports fully.

The CTU advocates for all New Zealand workers to receive fair treatment and recognition of their rights and voice at work. Workers are entitled to be decent, secure work that is healthy and safe and provides adequate remuneration to allow workers to live in dignity.

The CTU attempted to meet with members of the Constitutional Advisory Panel to discuss the content of our submission and to provide our affiliated unions a chance to give their views. This was not possible to accommodate within the Panel's schedule which is a shame. We (and our affiliates) would welcome any opportunity for further discussion on these matters.

An appropriate place to begin our submission is with the most famous words in international labour law:

> The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that:
>
> (a) labour is not a commodity;
>
> (b) freedom of expression and of association are essential to sustained progress;
>
> (c) poverty anywhere constitutes a danger to prosperity everywhere;
>
> (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.[1]

These ringing words begin the International Labour Organisation ('ILO') Declaration of Philidelphia. They were endorsed by the ILO in 1944 as World War II was coming to a close and formally annexed to the constitution in 1946.

The industrial relations framework and employment law framework in New Zealand has been subject to massive upheaval in the past 30 years. In 1983, New Zealand labour law included compulsory unionism, national awards, compulsory arbitration in many sectors and differing legal frameworks for the public and private sector. In less than a decade the pendulum had swung far in the opposite direction toward a system based on individual contracts with little scope for the exercise of collective rights.

Given the changes over the past 30 years and announced further changes, it is important to ask whether New Zealand law still measures up to the goals of the Declaration of

[1] International Labour Organisation Declaration of Philadelphia, 1944 art 1 as annexed to the ILO Constitution.

Philadelphia. How do workers' rights at work fit into New Zealand's human rights framework? What are the sources and content of these rights? Are workers' rights adequately protected from interference under our current framework?

This submission attempts to provide a short introduction to some of these questions.[2] Our underlying premise is that the best way to achieving the principles of the Declaration of Philadelphia is to clearly delineating the content of worker's rights and providing strong protection for them. As we outline in our submission, this has not been the case in New Zealand.

In section three, we set out some of the key international sources of recognition for rights to work, work rights and union rights relevant to New Zealand. Section four of the submission reviews how these rights are interpreted in New Zealand statute and law. Section five compares the New Zealand approach to freedom of association and collective bargaining with recent developments in Canada and Europe. Section six contains three examples of situations where workers' rights have been inadequately recognised and protected through legislative and executive processes. Finally, section seven suggests some constitutional changes to better safeguard workers' rights.

Our submission is narrowly focussed on the question of whether work rights are adequately recognised within New Zealand's consistitutional and law-making framework along with proposed measures to strengthen the recognition of all rights within legislative and judicial processes. The narrow focus of the submission does not mean that the CTU is disinterested in other issues such as the place of Te Tiriti o Waitangi in New Zealand's constitutional framework or New Zealand's electoral arrangements.

3. WORK RIGHTS IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

3.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The 1948 Universal Declaration of Human Rights ("UDHR") is a non-binding instrument that was intended to set an aspirational agenda for the post-war decades.

The UDHR contains numerous connections to the world of work, including freedom from slavery, child labour and discrimination at work. Art 22(3) provides "Everyone has the right to form and join trade unions for the protection of his interests."[3]

Although collective bargaining itself is not included in the UDHR, the Canadian international labour scholar Roy Adams has noted that, "it seems clear that the framers intended that it [collective bargaining] be included as a prime aspect of freedom of association."[4]

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[2] This submission has been developed from a paper written by Jeff Sissons, General Counsel at the CTU, and Edward Miller, Strategic Advisor, First Union. The authors gratefully acknowledge the research assistance of Lily Clark, intern at the Aotearoa Human Rights Lawyers Association.

[3] Roth notes that the UDHR was adopted by the United Nations a few months after C87 was adopted by the ILO and Article 22(4) was based on C87 in Paul Roth (2000) (New Zealand's international treaty obligations and the *ERA NZLS Employment Law Conference 23-24 November 2000* 65)

[4] Roy J Adams (2008) 'From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining' 12 *Just Labour* 48, 49.

3.2 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND POLITICAL RIGHTS

In 1966 the International Human Rights corpus was expanded to give effect to those rights through two legal documents – the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic Cultural and Social Rights ('ICESCR').

These rights were separated documents to account for the ideological difference of UN member states during the Cold War. In Western capitalist democracies civil and political rights ('CPR') were perceived to be of greater importance (that the market was best able to look ensure peoples' livelihoods) while Eastern socialist countries saw the primary role of the state as ensuring an equitable distribution of resources and labour in society leading to Economic, Social and Cultural Rights '(ESCR'). Both sides of this ideological divide sought to justify their political commitments by reference to the purported universality of their position.[5]

A significant distinction between the two covenants is the responsibilities that they place on ratifying countries. The ICCPR is said to be 'self-executing': art 2(1) reads "Each State Party undertakes to respect and to ensure to all individuals within its territory and to subject to its jurisdiction the rights recognised in the present Covenant."

Compare this with the "progressive realisation" of ESC rights under art 2(1) of ICESCR:

> Each State Party to the present Covenant undertakes to take steps individually and through international assistance and cooperation especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

A key element of progressive realisation is the avoidance of retrogression where possible. As Opie notes:[6]

> The flipside of the duty of progressive realisation is the obligation not to take unjustifiable retrogressive measures (that is, measure which reduce the extent to which a right is enjoyed within a State party's jurisdiction) and otherwise not to limit unjustifiably the enjoyment of a Covenant right. ….
>
> Pursuant to art 4 of the Covenant, a retrogressive measure will be unjustifiable unless it is determined by law, compatible with the nature of the right in question, and is for the purpose of promoting the general welfare in a democratic society. A retrogressive measure will also be unjustified unless the responsible State party can show that before adopting the measure it comprehensively examined all alternatives. The State party must also show that the measure is proportionate meaning "that the least restrictive measures must be adopted when several types of limitations may be imposed."

New Zealand ratified both the ICCPR and the ICESCR on 28 December 1978.

On 26 May 1989 NZ ratified the Optional Protocol to ICCPR. Non-compliance with ICCPR rights may allow direct complaints to the Human Rights Committee in the case of serious

[5] For an interesting comparison of the two instruments see Margaret Bedggood (2011) Economic Social and Cultural Rights: The International Background and Karen Meikle (2011) Economic, Social and Cultural Rights Protection in New Zealand-an overview' both in Margaret Bedggood and Kris Gledhill (eds) *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand*, Wellington: Thomson Reuters. Meikle notes at 40 that New Zealand was not part of the 'Western consensus' attaching different importance to ESCR and CPR.

[6] Joss Opie (2012) 'A case for including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990' (2012) 43 *VUWLR* 471, at 474.

breaches. Before this action is available applicants must (among other things) demonstrate that they have exhausted all possible internal appeals procedures.

New Zealand has signed the similar Optional Protocol for ICESCR (in 2008) but is yet to ratify that Protocol. While both ICCPR and ICESR are binding on our legislature, there is no international legal complaints mechanism that may be triggered by non-compliance with the norms contained in ICESCR.

In relation to freedom of associate and trade union rights, art 22 of the ICCPR substantially restates the protections in the UDHR and recognises the primacy of ILO Convention C87 Concerning Freedom of Association and the Right to Organise in this area. No specific mention is made of collective bargaining or the right to strike. Art 22 reads:

> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
>
> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

The ICESCR is more expansive in relation to work rights. As the United Nations Committee on Economic, Social and Cultural Rights states ('the CESCR') has commented:[7]

> The right to work is a fundamental right, recognized in several international legal instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR) deals more comprehensively than any other instrument with this right, as laid down in article 6. The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and since work is freely chosen or accepted, to his/her development and recognition within the community…. The ICESCR proclaims the right to work in a general sense in its article 6, and explicitly develops the individual dimension of the right to work through the recognition in article 7 of the right of everyone to the enjoyment of just and favourable conditions of work, and in particular to safe working conditions. The collective dimension of the right to work is addressed in article 8, which enunciates the right of everyone to form trade unions and join the trade union of his choice, and the right of trade unions to function freely.

Arts 6, 7 and 8 of the ICESCR provide the core work rights:

Article 6

> 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
>
> 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques

[7] CESCR General Comment 18 (24 November 2005)

to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:
  (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
(b) Safe and healthy working conditions;
(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country. …

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

According to Adams, "[t]he UN's covenant oversight committees [the Human Rights Committee and CESCR] have handed down decisions making it clear that both of the core covenants do, in fact, protect the right to bargain collectively as an inherent and inseparable aspect of freedom of association…. From the perspective of the international human rights community, collective bargaining is both an economic right and a civil right."[8]

On ratification, the New Zealand Government placed and has maintained identically worded reservations on art 22 of the ICCPR and art 8 of the ICESCR as follows:

> The Government of New Zealand reserves the right not [to] apply article [8 or 22] to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article.

[8] Adams (2008) citation n 4, 51.

It is important to note the limited nature of the reservation. It did not constitute a blanket 'opt out' of the trade unions rights within the ICCPR and ICESCR only a restriction to 'ensure effective trade union representation' or 'to encourage orderly industrial relations.'[9]

The reservation applied to "existing legislative measures" in 1978. The changes to the employment law framework have arguably removed these restrictions. As Gault J noted in *Eketone v Alliance Textiles (NZ) Ltd* [10] with the passage of the Employment Contracts Act 1991 "there no longer appears disconformity between these international instruments and New Zealand's domestic law." The Government's stated view (in 2001) was that although the original reasons for the reservation had been removed, ongoing maintenance of the reservation permitted new measures to be inconsistent with art 8 of ICESCR. [11] This is a questionable position.

3.3 THE INTERNATIONAL LABOUR ORGANISATION

The ILO is one of the surviving parts of the League of Nations formed by the Treaty of Versailles at the close of World War I. The driving forces for ILO's creation arose from security, humanitarian, political and economic considerations in the aftermath of World War I. Summarizing these considerations, the ILO Constitution's Preamble says the High Contracting Parties were "moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world."[12] Indeed its founders sought to instil the ILO with some measure of political neutrality, "…to arrest the march of socialism and to regulate the excesses of industrial labour markets."[13]

185 of 193 members of the United Nations are also ILO member states. Unlike other United Nations rights bodies the ILO is tripartite with representatives of workers and employers participating in the governance and administration.[14]

The ILO develops and promulgates recommendations, non-binding guidelines, and conventions, binding international treaties that carry legal force when ratified by member states.

The ILO's Governing Body has identified eight fundamental conventions. These usually considered in interrelated pairs:

- C87 Freedom of Association and Protection of the Right to Organise and C98 Right to Organise and Collective Bargaining;
- C29 Forced Labour and C105 Abolition of Forced Labour;
- C138 Minimum Age; and C182 Worst Forms of Child Labour; and
- C100 Equal Remuneration and C111 Discrimination (Employment and Occupation).

[9] Further research is needed on this point but it seems likely that the reservation originally related to compulsory industry-based union membership for the purposes of award coverage and to restrictions on minimum union size. These were expressed as reasons for the original non-ratification of ILO C87 and C98.See (1995) NZPD 49 (6 April 1995).
[10] [1993] 2 ERNZ 783, 794-795 (CA).
[11] Second Periodic Report submitted by States Parties under articles 16 and 17 of the Covenant: New Zealand, 16 October 2001, E/1990/6/Add.33 [30 September 2001] at [183]-[184].
[12] 'ILO Origins and History; http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm.
[13] Guy Standing (2008) 'The ILO: An Agency for Globalization' 39:3 *Development and Change* 355-384, 357.
[14] As the most representative workers' organisation the CTU is the workers' representative to the ILO along with Business New Zealand as the employers' representative.

New Zealand has ratified six of the eight fundamental Conventions, abstaining from ratification on C87 and C138.[15]

Alongside the fundamental conventions, New Zealand has ratified another 45 currently in force conventions covering a wide range of subjects including minimum wage fixing, labour inspection, unemployment provision, migration, occupational safety and health, labour statistics.[16]

From very early on in its history the ILO has recognised the fundamental importance of collective bargaining rights. The Declaration of Philadelphia concerning the aims and purposes of the International Labour Organisation states at art 3(e):[17]

> The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve:
>
> (e) the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;

In 1998, the ILO's annual conference passed the Declaration of Fundamental Principles and Rights at Work. The Declaration passed unanimously with a handful of abstentions. As Adams notes " In the context of the Declaration collective bargaining was clearly deemed to be equivalent in stature and concern with employment equity and freedom from child and forced labour."[18]

The rights conveyed by the International Labour Conventions may be seen as bolstering and particularising the more general rights set out in the UDHR, ICPPR and ICESCR. The ILO is active (due in part to its tripartite nature) and the regular reporting and special complaints systems lead to a more robust discourse and defence of labour rights than many other types of rights.

3.4 FREEDOM OF ASSOCIATION, THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING: ILO C87 AND C98

In 1948 and 1949 the ILO enacted two interrelated conventions respectively C89 Freedom of Association and Protection of the Right to Organise and C98 Right to Organise and Collective Bargaining.

Convention 87 provides the right for workers and employers to establish, join and operate organisations of their choosing (including federations of such organisations) without government interference so long as they follow the law of the land. Art 3 allows "Workers' and employers' organisations… the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes" without any interference that would restrict this right.

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[15] The major stumbling blocks to ratification at this point are the limit on sympathy strikes or striking on economic or social grounds in relation to C87 and the lack of a general statutory minimum age restriction for employment in relation to C138. For a detailed treatment of barriers to ratification of C87 see Roth (2000) citation n 3.

[16] A good introduction is the former Department of Labour's *International Labour Conventions ratified by New Zealand* available here: http://www.dol.govt.nz/services/international/iloconventions/international-labour-conventions-ratified-by-nz-2008.pdf. Note however, that the information on how New Zealand implements the conventions is sometimes out of date.

[17] Adopted by the International Labour Conference in 1944 and annexed to the constitution in 1946.

[18] Adams (2008) citation n 4, 54.

C98 regulates interaction between workers, employers and their organisations. Art 1 protects workers against acts of anti-union discrimination (including as a reason for hiring or dismissal). Art 2 protects workers' and employers' organisations from acts of interference. A particular prohibition is placed on employers setting up or otherwise attempting to gain control of workers' organisations. Art 3 requires countries to establish measures allowing the right to organise.

In relation to collective bargaining art 4 of C98 states that:

Article 4

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

A special committee (the Committee on Freedom of Association or CFA) and complaints process exists. While New Zealand has not ratified C87 the rights of freedom of association and collective bargaining are recognised by the ILO as sufficiently fundamental that membership of the ILO creates obligations to observe and promote these rights. The CFA has stated that:[19]

> **5.** Complaints lodged with the Committee can be submitted whether or not the country concerned has ratified the freedom of association Conventions. …
>
> **15.** When a State decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association.

By way of example, in 1993 the CTU lodged a complaint with the CFA regarding the New Zealand Government's derogation of rights of freedom of association and collective bargaining by the passage of the Employment Contracts Act 1991. Although New Zealand had not then ratified C87 and C98, the CFA investigated the matter and found (among other things) that the Act did not sufficiently promote collective bargaining.[20]

The New Zealand courts may not share the ILO's view of the binding nature of C87 without ratification. In *Ivamy v New Zealand Fire Service*[21], Chief Judge Goddard commented:

> It seems that New Zealand has deliberately refrained from ratifying [C87 and C98] in the meantime solely or mainly because of the possibly contentious reference to employers in the plural in art 4. This is a matter of policy for the Government and I venture no opinion on the gravity of this impediment to ratification, noting only that there seem to exist currently reasons of policy for not ratifying these conventions. Therefore, I do not feel justified in having regard to them for the purpose of interpreting the legislative intention at the time of the passing of the Employment Contracts Act 1991.

[19] The 'Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO' Fifth (revised) edition.
[20] For further detail see Case No 1698 (New Zealand) Report in which the committee requests to be kept informed of development - Report No 295, November 1994. Following the passage of the Employment Relations Act 2000 the Government ratified C98 in 2003.
[21] [1995] 1 ERNZ 724, 769. However note the different tenor of his honour's later comments on the subject in *Kelly v Tranz Rail Ltd* cited in Part 3.3 below.

4. THE NEW ZEALAND LEGAL FRAMEWORK

As a country with a dualist legal system, New Zealand is required to pass legislation to give effect to international law to make it binding at a statutory level. However, this position is qualified by both statute and by common law.

4.1 NEW ZEALAND BILL OF RIGHTS ACT 1990

The rights set out in the New Zealand Bill of Rights Act 1990 are largely CPR drawn from the ICCPR and one of the two objects set out in the preamble is "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights."[22]

Union and work rights are recognised in minimalist terms. The New Zealand Bill of Rights Act 1990 grants rights to:

- Freedom of peaceful assembly (section 16);
- Freedom of association (section 17); and
- Freedom from discrimination (section 19).

Deliberately left out are wider ESCR such as 'just and favourable conditions of work' and 'work freely chosen.'

While the New Zealand Bill of Rights Act 1990 is not supreme law, its effect on law making has been profound. The architect of the Act, Sir Geoffrey Palmer, suggests that it has been "a set of navigation lights for the whole of government to observe."[23] The effect of the Act on Government is complex but is achieved primarily through three mechanisms: a rule of statutory interpretation, a procedural step in the creation of legislation and some limited rights of challenge.

Section 6 of the New Zealand Bill of Rights Act 1990 states that:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Section 7 of the New Zealand Bill of Rights Act 1990 requires the Attorney-General to vet proposed legislation for consistency with the rights and freedoms in the Act. As a result, all legislation must be checked by Crown Law for consistency. This has been perhaps the most valuable step but it could be made stronger. Some proposals for reform are discussed in part 6.2 below.

The rights set out in the New Zealand Bill of Rights Act 1990 are justiciable. As Opie notes:[24]

> As well as having jurisdiction to award damages for breach of those rights and other remedies such as declarations, the courts may indicate that an ordinary enactment is inconsistent with the [New Zealand Bill of Rights Act 1990]. Such an indication does not require Parliament to remedy the inconsistency or give rise to a right to relief, but may be seen as imposing an obligation (of a political or moral nature) on Parliament to reconsider the legislation in question and justify any decision not to rectify it.
>
> Proceedings under the Human Rights Act 1993 (HRA) may also be brought before the Human Rights Review Tribunal (HRRT) alleging that a public act, omission or enactment is inconsistent with the [New

[22] Opie (2012) citation n 6 concisely traces the legislative history of the New Zealand Bill of Rights Act 1990 and the policy rationale for the exclusion of ESCR. He effectively rebuts many of the arguments against the inclusion of these rights.
[23] Geoffrey Palmer (2006) 'The Bill of Rights Fifteen Years on' (Keynote speech to the Ministry of Justice Symposium on the New Zealand Bill of Rights Act 1990, Wellington , 10 February 2006), [38].
[24] Opie (2012) citation n 6, 479-480

> Zealand Bill of Rights Act 1990]'s right to freedom from discrimination. If the HRRT finds an inconsistency, it may grant various remedies including damages (other than when the inconsistency arises as a result of an enactment). In the case of an enactment, the HRRT may only make a declaration of inconsistency. Such a declaration does not bind the Government, but the declaration must be reported to Parliament, along with advice on how the Government intends to respond to the declaration.

4.2 EMPLOYMENT RELATIONS ACT 2000

While it does not affect the interpretation of other Acts, ILO principles are relevant to a purposive interpretation of the primary piece of employment legislation, the Employment Relations Act 2000. The Employment Relations Act 2000 is the primary piece of legislation governing the creation and regulation of trade unions, collective bargaining and industrial action among other matters.[25]

One of the objects of the Employment Relations Act 2000 in section 3 is "to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association [sic], and Convention 98 on the Right to Organise and Bargain Collectively."

It can be seen therefore that although the Employment Relations Act 2000 does not purport to ensure full compliance with C87 and C98 it seeks to "promote observance in New Zealand of the principles underlying" the conventions.

In *Epic Packaging Ltd v New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc*[26], the full Employment Court noted that although New Zealand ratified C98 on 9 June 2003, it has not ratified C87; and that what is addressed by the object in s 3(b) is the promotion of the observance of the underlying principles of the conventions, rather than the adherence to the words themselves or to the way in which they have been interpreted by the CFA. With respect, this is somewhat mysterious.

4.3. COMMON LAW PRESUMPTION OF CONSISTENCY

In instances of ambiguity the courts will seek to interpret legislation in a manner consistent with New Zealand's international obligations. As Richardson P observed in *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc):*[27]

> The well settled approach of the Courts of New Zealand [is as] expressed, for example, in *Governor of Pitcairn and Associated Islands v Sutton* [1994] 2 ERNZ 492, 500; [1995] 1 NZLR 426, 433 (CA), as it happens an employment case: 'Subject to any New Zealand legislation and consideration of any special local circumstances, the Courts of New Zealand will always seek to develop and interpret our laws in accordance with generally accepted international rules and to accord with New Zealand's international obligations.'

In the case of international human rights treaties this presumption may be even stronger. In *Kelly v Tranz Rail Ltd*, Goddard CJ noted:[28]

> I acknowledge at once the traditional common law view that treaties that New Zealand makes with other nations are not, by reason of that fact alone, part of the domestic law of New Zealand but require to be

[25] Much of the employment law is contained in the common law (particularly that relating to dismissal). Many basis legal requirements are contained in the so-called 'minimum code' legislation such as the Wages Protection Act 1983, the Minimum Wage Act 1983 and the Holidays Act 2003.
[26] [2006] ERNZ 617 (EmpC), [41].
[27] [1999] 1 ERNZ 460 (CA), [40].
[28] [[1997] ERNZ 476, 501.

> embodied in an Act of the New Zealand Parliament before they can become such. … However, in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) this view may have been modified, at any rate in relation to treaties establishing international human rights norms, or obligations.
>
> In that case, the Court of Appeal made it clear that such treaties are far more than mere window-dressing. On the contrary, instruments of ratification of international conventions are documents of great solemnity under which, typically, the Government acknowledges that it has considered the convention and "[h]ereby confirms and ratifies the same and undertakes faithfully to observe the provisions and stipulations therein contained" (New Zealand's ILO Treaty Actions as shown in the International Labour Office Official Bulletin 1926-89 compiled in Ministry of Foreign Affairs and Trade, Wellington, June 1996). Of course, none of that can be said of conventions that have not been ratified, including Convention 87 of the International Labour Organisation being the well-known Convention concerning Freedom of Association and Protection of the Right to Organise and Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. However, …by becoming a member of the United Nations Organisation and its agency the International Labour Organisation, New Zealand has, as a matter of international law, accepted a number of fundamental principles including those embodied in the Charter of the United Nations, the Constitution of the International Labour Organisation and the Declaration of Philadelphia. These include freedom of association principles. There are, in addition, United Nations Organisation conventions that New Zealand has ratified and which seem to cover the same ground, albeit in somewhat different terms and in less detail than the International Labour Organisation conventions. I am, of course, referring to the International Covenant on Civil and Political Rights and more especially the International Covenant on Economic, Social and Cultural Rights. Both seem to contain, more or less directly, a guarantee of the right to strike as one of the fundamental freedoms, while recognising that it may be subject to limitations under national law as it is in New Zealand. … The two conventions are plainly treaties establishing human rights norms, or obligations within the contemplation of *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

Opie notes that the presumption of consistency does not appear to have been argued in relation to cases where ICESCR has been raised and that doing so may have affected the outcome.[29]

5. THE CONTESTED BOUNDARY OF FREEDOM OF ASSOCIATION

Despite the specific words of the international instrument and the views of the United Nations bodies (the Human Rights Committee, CESCR and the ILO Committees), it is currently accepted law in New Zealand that the rights of freedom of association in New Zealand do not include rights to collectively bargain (or by extension, to take industrial action).

The case generally cited in support of this proposition is *Eketone v Alliance Textiles (NZ) Ltd*.[30] The facts of *Eketone* are complex but revolve around a (successful) attempt by Alliance Textiles to compel its employees to sign a new collective contract by means of threats of lockouts and direct negotiation with employees behind the union's back.

The workers alleged that 'undue influence' in the Employment Contracts Act 1991 should be given a meaning consistent with Canadian jurisprudence (before the Employment Court) and rights under the ICCPR and ICESCR (before the Court of Appeal).

[29] Opie (2012) citation n 6, 513-516.
[30] [1993] 2 ERNZ 783. See for example, *Human Rights* (Brookers online) at BOR17.06: The right to freedom of association does not confer a right on the association to act collectively. Section 17 does not, for example, confer on a trade union the right to take industrial action: *Eketone v Alliance Textiles (NZ) Ltd*."

On behalf of the full court, Gault J considered the New Zealand Bill of Rights Act 1990, art 22 ICCPR and art 8 ICESCR along with the presumption of consistency. The Court declined to uphold the worker's complaint.

In relation to freedom of association generally his honour stated:[31]

> Freedom of association is, of course, much broader than the rights to join or not to join a trade union. However, in the present context that is what is in issue…. It is not open to the Courts to depart from the plain meaning of the words of the statute by where it can be done (and the Bill of Rights requires it) the statute is to be given meaning consistent with the freedom of association as internationally recognised….
>
> While it is unnecessary to deal with further aspects of the argument in order to dispose of this appeal [having found that freedom of association did not warrant importing strict presumptions into undue influence] there is one other point arising from the judgements of the Employment Court which was argued and which warrants brief comments. It relates to the right of a person to choose whether or not to be represented by another person, group or organisation in negotiation for an employment contract. The rights to elect and pursue collective bargaining arise out of, but generally are not regarded as elements of, the freedom of association. *Colleymore v A-G* [1970] AC 538 (PC). This also is the view taken by the Supreme Court of Canada in *Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (1987) 38 DLR (4th) 161. Nevertheless, that right 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.

Two things important things should be noted about *Eketone*. First, Gault J's statement regarding collective bargaining and freedom of association is non-binding *obiter dictum* since the case was decided on other grounds. More importantly, the question should be asked whether the cases he cites remain relevant and binding.

Whether the decisions of the Privy Council in other jurisdictions are binding on the lower New Zealand courts is an interesting question. In *R v Chilton*[32] the Court of Appeal suggested (also as *obiter dictum*) that the answer was unclear.

Colleymore v A-G remains the law in Trinidad and Tobago and no right to collectively bargain arises from the constitution,[33] however the statutory framework is very different. The appellants were union members employed by an oil company in Trinidad. Bargaining had broken down but legal procedure required that trade disputes be referred to the Minister, who could either promote a settlement through the industrial court (within 21 days), or if after 28 days it was not referred to the court a strike or lockout could take place after a further 14 days' notice.

The appellant argued this procedure undermines the constitutionally-protected right of freedom of association, that the right embraces a right to bargain collectively, and is in turn ineffective unless backed by the right to strike. The court responded that while the freedom to bargain collectively had been abridged this was not tantamount to an abrogation of the freedom to associate. In support it notes that ILO Convention no. 87 defines "freedom of association" without reference to collective bargaining, that those rights proscribed in the Convention are left untouched, and thus that the constitutional protection of freedom of association remains unaffected.

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[31] Citation n 30 ,795-796.
[32] *R v Chilton and Anor* [1 December 2005] (CA) CA333/04, [112]-[113]. Prior to establishment of the Supreme Court on 1 January 2004: thereafter they will be of persuasive value only.
[33] http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158855/lang--en/index.htm.

It is somewhat remarkable that the Privy Council interpretation of the Trinidad and Tobago constitutional right to freedom of association as excluding collective bargaining ought to bind the New Zealand employment law framework. Since this case the ILO Declaration on Fundamental Principles and Rights at Work effectively coupled the rights of freedom of association and collective bargaining, but it was not until more recent decisions in Canada and Europe (including the United Kingdom) that we have seen the tectonic reversals of these prior positions, placing the right of collective bargaining has been squarely within the right of freedom of association.

In the case of Health *Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*[34] (‘*the BC Health Services decision’*) an appeal was brought before the Supreme Court of Canada in which the appellants challenged the constitutionality of Part 2 of the Health and Social Services Delivery Improvement Act SBC 2002 because they considered that it violated the Canadian Charter on Rights and Freedoms.

Part 2 of the act gave employers greater flexibility in organising relations with employees and in some cases even allowed them to do so in ways that would not have been possible under the conditions established in previous and current collective agreements. It introduced changes in transfers, subcontracting, employment security, lay-offs and bumping rights. Section 10 also invalidated any part of a current or future collective agreement that was not in conformity with the new act, and also any collective agreement aiming to amend these restrictions.

The legal issue faced by the Court was to determine whether the guarantee of freedom of association laid down in section 2(d) of the Charter protected collective bargaining rights and, if so, to determine whether these rights had been violated by the approved law. In ruling on the first point, the court made a significant change in its case law because it recognized that the grounds called on in the past to exclude the right to collective bargaining from the guarantee to freedom of association could no longer be supported because it would not be consistent with Canada’s historical recognition of the importance of collective bargaining. Moreover, the Court stated that collective bargaining is an integral part of freedom of association in international law, which can be used in the interpretation of guarantees in the Charter.

The Court stated that the sources most important to the understanding of section 2(d) of the Charter are the ICESCR, the ICCPR, and C87. Because Canada had ratified all three, the Court recognised that these documents reflected not only international consensus, but also principles that Canada had committed itself to uphold.

Adams has said that*:* [35]

> [*BC Health Services*] may be seen by history to be a turning point in the way that collective bargaining is conceived and evaluated in Canada. Although long counted as a human right by experts and advocates, in Canada … prior to the Supreme Court decision, it was neither treated by governments as a human right nor regarding by the public as a human right…. It was treated instead as, if not exactly an ordinary partisan issue, no more than a statutory right; one which political parties of the left might strengthen and expand and parties of the right might contract and fetter.”

[34] 8 June 2007, 2007 SCC 27; [2007] 2 S.C.R. 391. Summaries of the *BC Health Services* and *Demir and Baykara v Turkey* adapted from the ITC’s compendium of court decisions.
[35] Adams (2008) citation n 4, 48.

The reach of this interpretation was clarified in 2011 in *Fraser* when the Canadian Supreme Court returned to the same debate, with Justice Rothstein disagreeing with the majority. While the majority upheld the precedent laid down in *BC Health Services* it framed was in narrow terms – that section 2(d) only requires that unions be able to participate in a meaningful workplace process with an employer, which includes the right to make representations to the employer and have them considered in good faith. Only where legislation "makes good faith resolution of workplace issues between employees and their employer effectively impossible" will there be a violation of section 2(d).[36]

While the majority stated it is too soon to declare that *BC Health Services* is unworkable (as argued by Justice Rothstein) and that it would be inappropriate to reverse the case (because none of the parties or interveners sought this result), it is fair to say that *Fraser* is a considerable retrenchment from the high water mark set in *BC Health Services*. What has followed has been some confusion and subsequent cases have given *Fraser* only a very conservative and legalistic interpretation, concluding that the right turned on whether the parties, "had the opportunity for a meaningful process of collective bargaining."

Despite the attendant confusion, it is clear that the Canadian jurisprudence has extended the content of the right of freedom of association to include some expression of access to collective bargaining. However more dramatic and far-reaching still is the 2008 case of *Demir and Baykara v Turkey.*[37]

In that case, a Turkish trade union of municipal officials reached a collective agreement with a municipality. When the latter failed to fulfil its obligations under this agreement, the trade union initiated proceedings in the District Court. The Court ruled in favour of the union but was subsequently overturned by the Supreme Court. The Supreme Court denied the trade union's right to engage in collective bargaining with a municipality.

The Audit Court, as a result of this decision, ordered the trade union members to repay additional income they had received under the now-defunct collective agreement. Mayors who had concluded collective agreements of this kind were prosecuted in both the criminal and civil courts for abuse of power.

A member of the trade union and its president brought the case before the European Court of Human Rights. After an initial ruling, finding a violation of Article 11 of the European Convention on Human Rights, the case was referred to the Grand Chamber of the Court at the request of the government of the Turkish Republic, which claimed that the Court could not, even in matters of interpretation, put forward against it any international treaties other than the European Convention on Human Rights.

The Grand Chamber of the European Court of Human Rights reversed earlier jurisprudence to hold that the right to collective bargaining is an essential element of the right to freedom of assembly and association in art 11 of the European Convention on Human Rights and Fundamental Freedoms.[38]

[36] *Fraser*, at [98].
[37] *Demir and Baykara v Turke*y, Application No 34503/97, 12 November 2008.
[38] Worded similarly to sections 16 and 17 of the New Zealand Bill of Rights Act 1990

Perhaps more significantly, the Court also embedded the ILO jurisprudence (for example decisions of the CFA) into that right by holding that national systems must be compatible with the requirements of the ILO (and of the European Social Charter).[39]

Ewing and Hendy comment that:[40]

> It is impossible to exaggerate the importance of these developments and implausible to argue that somehow the decisions are wrong or that they will soon be re-examined and reversed. It is equally impossible to exaggerate the scale of the challenge they present for the common law and for judges schooled in the common law tradition. We now appear to have a comprehensive right to bargain and to strike, based on ILO and ESC standards. …
>
> From time to time, a decision is handed down by a court, which for different reasons, may be epoch-making, usually because of the great political consequences that flow in its wake. *Demir and Baykara v Turkey* may be one such case: it is a decision of one of the most important courts in the world, a decision that in principle will have direct implications for the law in at least the 47 countries of the Council of Europe in which some 800 million people live. Perhaps even more importantly, it is a decision in which social and economic rights have been fused permanently with civil and political rights, in a process that is potentially nothing less than a socialisation of civil and political rights. And perhaps even more importantly still, it is a decision in which human rights have achieved their superiority over economical irrationalism and 'competitiveness' in the battle for the soul of labour law, and in which public law has triumphed over private law and public lawyers over private lawyers.

The decision was indeed reinforced by a second ECtHR case, *Enerji Yapi-Yol Sen v Turkey*, in which the court held that the right to strike was an essential part of the right to bargain collectively. While the right was not absolute, the impugned restriction – a prohibition on public sector trade unions taking industrial action – could not be upheld within a democratic society.

Both *Demir and Beykara v Turkey* and *Enerji Yapi-Yol Sen v Turkey* have been given limited application in UK courts as part of the right of freedom of association. In *Metrobus Ltd and Unite the Union* Lord Justice Lloyd outlined the approach of the Court in adopting the precedent of the right to collective bargaining:

> Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the court ensures, the exercise of that right may none the less be subject to certain restrictions.

Given these shifts in comparable jurisdictions, New Zealand's current position in relation to freedom of association appears increasingly out of step. Human rights are a constantly evolving field of law and it may be time for a reappraisal of our law in light of these international developments. We propose below that the right to collectively bargain should be explicitly recognised in the New Zealand Bill of Rights Act 1990.

[39] Compare with the New Zealand approach discussed under section 3.2 above.
[40] K.D. Ewing and John Hendy QC (2010) 'The dramatic implications of *Demir and Baykara*' *Industrial Law Journal* 39(1) March 2010, 1, 20 and 47.

6. CASE STUDIES REGARDING RIGHTS TO WORK AND WORK RIGHTS

Current protections relating to work rights against breaches of CPR, retrogressive measures in terms of ESCR and breaches of International Conventions are insufficiently strong.

This section will discuss three examples of processes affecting wider work rights and ILO Conventions:[41]

- The right to freely choose and accept work under art 6 of the ICESCR and the definition of 'suitable alternative employment' under ILO C44 Unemployment Provision as they relate to the 'suitable alternative employment' test for sanctioning beneficiaries under the Social Security Act 1964.
- The right to a fair wages and a decent living under art 7 of the ICESCR and obligations under ILO C26 Minimum Wage Fixing Machinery as they relate to the 2012 changes to the minimum wage fixing settings and the Minimum Wage (Starting-Out Wage) Amendment Act 2012.
- Freedom of association under section 17 of the New Zealand Bill of Rights Act 1990, art 22 of the ICCPR, art 8 of the ICESCR and ILO C87 and C98. And the effects of the Employment Relations (Film Production Work) Amendment Bill 2010 ('the Hobbit amendment').

6.1 THE RIGHT TO FREELY CHOOSE AND ACCEPT WORK AND 'SUITABLE ALTERNATIVE EMPLOYMENT'

Art 6(1) of ICESCR states that the right to work "includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts…."

New Zealand is bound by ILO C44- Unemployment Provision.[42] Art 10(1) of C44 sets out when employment may be considered suitable for the purpose of benefit sanction:

10(1) A claimant may be disqualified for the receipt of benefit or of an allowance or an appropriate period if he refuses an offer of suitable employment. Employment shall not be deemed to be suitable--

(a) if acceptance of it would involve residence in a district in which suitable accommodation is not available;

(b) if the rate of wages offered is lower, or the other conditions of employment are less favourable:

(i) where the employment offered is employment in the claimant's usual occupation and in the district where he was last ordinarily employed, than those which he might reasonably have expected to obtain, having regard to those which he habitually obtained in his usual occupation in that district or would have obtained if he had continued to be so employed;

(ii) in all other cases, than the standard generally observed at the time in the occupation and district in which the employment is offered;

(c) if the situation offered is vacant in consequence of a stoppage of work due to a trade dispute;

(d) if for any other reason, having regard to all the considerations involved including the personal circumstances of the claimant, its refusal by the claimant is not unreasonable.

Following the enactment of the Social Welfare (Work Focus and Benefit Categories) Amendment Act 2013 the failure to accept any offer of suitable employment will result in

[41] For an excellent discussion of ESC rights relating to work (and several more examples of issues arising) see Amanda Reilly (2011) 'The right to work and rights at work' in Bedggood and Gledhill (2011) citation n 5.

[42] C44 is 'shelved' meaning that regular reporting in accordance with art 22 of the ILO Constitution no longer occurs. C44 was shelved following the establishment of C168 Employment Promotion and Protection against Unemployment as a replacement in 1988. As New Zealand has not signed C168 or otherwise denounced C44 it remains in force.

cancellation of benefit and 13 week stand-down period. Solo parents with dependent children will have benefits abated by 50% only.

In considering whether employment is suitable, Work and Income staff are required to take into account[43] whether the job has appropriate hours, access to childcare, clash with family commitments, clash with religious commitments, whether the job offends an applicant's strongly held views, days of the week worked, the type of employment, the skills required, the experience required, the location of the job, and the wages payable. There appears to be no guidance for Work and Income staff as to how they should weigh or apply these. This gives them significant discretion as to how the test is applied.

Missing from Work and Income's list of factors is the requirement that the job has 'no less favourable wages, terms and conditions than reasonably expected in the occupation type and region.'[44] This is a broader concept than 'wages' and failure to include it is a breach of New Zealand's international obligations.

Cancellation of benefits for refusal to accept work deemed as 'suitable employment' appears contrary to the right to freely choose or accept work in terms of art 6(1) of ICESCR.[45]

The CTU raised the issue of compliance before the Social Services Select Committee and requested amendment to the definition of suitable alternative employment (either in statute or by way of amended guidance to Work and Income.

The Ministry of Social Development's response (by way of Departmental Report to the Select Committee) appears to misunderstand the nature of binding international obligations:[46]

> Individual circumstances of beneficiaries vary considerably and a number of factors combine to determine the suitability of any job. All of these factors need to be taken into consideration when deciding whether a job is suitable. A more specific legislative definition of "suitable employment" is not recommended. A definition in legislation risks being seen as exhaustive, and could unintentionally remove the flexibility to take account of individuals circumstances. The dynamic nature of circumstances and factors that influence whether employment may be suitable for an individual requires flexibility so that case-managers can make the best decisions.
>
> Operational guidance setting out the criteria for determining suitable employment is extensive, and case managers are highly skilled at working with beneficiaries to understand their particular circumstances. … MSD does not agree that guidance to case managers narrows the ILO test to the extent that wages, type of work and other conditions are prevented from being taken into account in assessing suitable employment. The priority of the work focused benefit system remains to encourage people into work and independence from the benefit system.

The restricted ambit of the New Zealand Bill of Rights Act 1990 meant neither obligation was considered by the Ministry of Justice in their report to the Attorney-General. As the workers' representatives to the ILO the CTU may look to make a representation as to the non-compliance with C44 but a more robust constitutional framework would lead to better law-making in these circumstances.

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[43] http://www.workandincome.govt.nz/manuals-and-procedures/income_support/main_benefits/unemployment_benefit/unemployment_benefit-123.htm

[44] Art 10(1)(b) of C44.

[45] Similarly Reilly (2011 citation n 41 at 78) notes that "workfare practices where benefits are tied to compulsory employment schemes or where the level of the benefit is reduced when recipients refuse to participate in employment schemes are situations where work cannot be said to be freely chosen. Similarly requiring solo parents to take part in a certain number of hours of paid work per week has to be seen as coercive."

[46] Ministry of Social Development (2013) 'Departmental Report: Social Security (Benefit Categories and Work Focus) Amendment Bill' [97], [98] and [100].

6.2 THE RIGHT TO A DECENT LIVING AND MINIMUM WAGE FIXING MACHINERY

Art 7(a) of ICESCR holds that everyone has the right to just and favourable conditions of employment including:

(a) Remuneration which provides all workers, as a minimum, with:
  (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

C26 Minimum Wage Fixing art 4(2) holds that workers and employers should be involved in the operation of the wage fixing machinery and consulted before changes to that machinery are implemented.

Section 5 of the Minimum Wage Act 1983 holds that the Minister of Labour shall review the minimum wage every year. The process for doing so is decided by the Government in consultation with the social partners (the CTU and Business New Zealand). In late 2012, without consultation, Cabinet decided to significantly amend the parameters and aims of the Minimum Wage Review from 2012 onwards.[47]

The differences are summarised in the table at appendix 1. The aim, criteria and consultation mechanisms have all changed. The goal of the Minimum Wage Review is now "[t]o keep increasing the minimum wage over time to protect the real income of low-paid workers while minimising job losses." The difficulty created by this 'keeping pace with inflation' approach is that it is predicated on an idea that the minimum wage is sufficient.

The Family Centre Social Policy Research Unit was commissioned by Living Wage Aotearoa New Zealand to ascertain the "income necessary to provide workers and their families with the basic necessities of life… [and to] enable workers to live with dignity and to participate as active citizens in society." Based on 1.5 incomes supporting two adults and two children (and including income from government programmes for low paid workers) the study finds a minimum hourly rate of $18.40 per hour is necessary for a living wage (compared to a current adult minimum wage of $13.75 per hour from 1 April 2013).[48]

While the minimum wage settling machinery does not itself constitute remuneration that provides a decent living for workers and their families it is intrinsically linked to the realisation of this goal for those on the minimum wage.[49]

It is difficult to see how the Government can justify these retrogressive measures. Evidence for negative effects of raising minimum wages is increasingly weak.[50] The Government provided no evidence of the consideration of alternatives let alone choosing the least restrictive measure. Under current constitutional arrangements no effective redress is available.

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[47] EGI Min (12) 26/13.
[48] Peter King and Charles Waldegrave (2013) 'Report of an investigation into defining a living wage for New Zealand' http://anzasw.org.nz/documents/0000/0000/0597/Living_Wage_Investigation_Report_2013.pdf .
[49] The Ministry of Business Innovation and Employment did not model the effects of a rise to $13.75 in the 2012 Minimum Wage Review. However they estimated that 84,400 people earned $13.80 or less. Women, Māori and Pacific workers make up a significant proportion of minimum wage earners compared to the general population.
[50] The CTU prepares a detailed review of the evidence regarding effects of minimum wage adjustments each year. The most recent is here: http://union.org.nz/policy/minimum-wage-review .

6.3 THE RIGHT TO FREEDOM OF ASSOCIATION AND THE HOBBIT AMENDMENT

The events leading to the passing of the Employment Relations (Film Production Work) Amendment Bill 2010 ('the Hobbit amendment') are by now well known.[51] Many of the facts are immaterial for the purposes of this submission and need not be traversed.

It is enough to note that on 28 October 2010, following talks with Warner Brothers, the Government amended the Employment Relations Act 2000 under urgency.

The effect of the changes was to exclude from the definition of employee: "a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer" or "a person engaged in film production work in any other capacity"[52] unless that person has a written employment agreement providing that they are, in fact, an employee.[53]

No regulatory impact statement was prepared for the Hobbit amendment and neither were public submissions heard as it went through all three readings consecutively under urgency.[54] Aside from a summary of the provisions of the Bill, the total of the Ministry of Justice's vet was:

> 1. We have considered whether the Employment Relations (Film Production Work) Amendment Bill (PCO 14860/2.0) (the "Bill") is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that the Bill is likely to be introduced to the House of Representatives today. We only received the Bill yesterday, and as such this advice has been drafted as a matter of urgency. We also understand that the Bill is likely to be subject to further minor amendments before it is introduced to the House. We will provide you with further advice should this prove necessary….
>
> 5 We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

The consequences of effectively excluding an entire industry from employment are wide ranging.

The CTU believes that dependent contractors are permitted to negotiate standard terms despite the restrictions in the Commerce Act 1986.[55] However, if the position of Warner Brothers and their legal advisors is correct and this is prohibited by the Commerce Act 1986 on price fixing grounds then film workers have lost their right to collectively bargain altogether.

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[51] For Helen Kelly's detailed timeline see: http://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm

[52] What is now section 6(1)(d) of the Employment Relations Act 2000.

[53] Pam Nuttall has teased out the interesting circularity of this definition given the requirement in section 6(3) that the court or Authority must take all relevant matters into account and is not to treat statements by the parties describing their relationship as determinative. See Pam Nuttall (20012) "...Where the Shadows lie": Confusion, misunderstanding, and misinformation about workplace status" *NZJER* 2011 36(3) 73-90.

[54] It would be very interesting to see what a regulatory impact statement would have looked like. While the Government has never released the relevant Crown Law opinion a draft letter to Peter Jackson and Fran Walsh from Ministers Brownlee and Finlayson states "Having considered the possibility of amendments to the ERA or Commerce Act carefully, our view following extensive consultation with the Crown Law Office, is that, for the reasons set out below, it would not be appropriate to recommend such amendments. The letter contains a cogent statement of the reasons why the Employment law is fine as it is. The draft letter was released on 26 February 2013 under strong pressure from the Ombudsman.

[55] See, for example, Helen Kelly (2011) 'The Hobbit Dispute' *NZJER* 2011 36(3) 30-33 but note the situation may change with the passage of the Commerce (Cartels and Other Matters) Amendment Bill currently before the House.

It is also clear that:

- Even if able to collectively bargain, contractors do not have a right to take industrial action in pursuit of a collective agreement or access to the various mechanisms intended to help the parties resolve their differences and come to an agreement;
- Contractors lose protections against unfair disadvantage and unjustified dismissal along with several other protections implied by law into employment agreements (these include rights of good faith dealings and many minimum entitlements such as minimum wages and leave provisions). Many (though not all) will be placed in a very weak negotiating position with increased job insecurity and reduced terms as a result.

In many senses, the Hobbit amendment constituted a case study in the worst excesses of our law-making process. Urgency abuse, failure to work through policy options, bowing to external pressures and a weak system of constitutional safeguards all contributed. As Margaret Wilson puts it:[56]

> The Hobbit amendment has identified the fragility of employees" employment rights when faced with an executive that is not prepared to observe constitutional good practice, and a Parliament that is powerless to prevent such action because the majority rules in all matters.

6.4 LESSONS FROM THE CASE STUDIES

There are significant commonalities between the three case studies. In each, workers' rights not recognised in the New Zealand Bill of Rights Act 1990 were compromised by Government decisions. In each case, rights under the IESCR were compromised along with breaches of binding ILO Conventions. In the case of the Hobbit amendment, the ICCPR was also arguably breached.

The three case studies show that these rights are inadequately protected by Parliamentary safeguards that are too easily circumvented or ignored. The Social Welfare (Benefit Categories and Work Focus) Amendment Act 2012 went through full select committee process. The Hobbit amendment was passed without wider consultation (except Warner Brothers) and an inadequate Ministry of Justice vet. As a regulatory power rather than primary legislation, the Minimum Wage Review process was changeable by Cabinet without wider consultation.

7. CONSTITUTIONAL REFORM

The case studies highlight inadequacies in our constitutional system.[57] A number of changes to our constitutional framework would significantly assist in the full recognition of work rights and rights at work. Three sets of changes would assist:

- Incorporating work rights and wider ESCR into New Zealand Bill of Rights Act 1990;
- Strengthening consideration of human rights during the legislative process; and
- Strengthening the courts' powers in instances of inconsistency with recognised rights and codifying the presumption of consistency.

[56] Margaret Wilson 'Constitutional Implications of 'The Hobbit' Legislation' *NZJER* 2011 36(3) 90-98 at 97.
[57] The examples above have been restricted to rights at work. Many other recent examples such as the restriction on offshore protest in the Crown Minerals Act or the restrictions on court challenge to discriminatory treatment of carers in the Public Health and Disability Amendment Act (No 2).

7.1 RECOGNITION OF WORK RIGHTS AND WIDER ESCR IN THE NEW ZEALAND BILL OF RIGHTS ACT 1990

A minimalist version of freedom of association that does not include rights to collectively bargain is out of step with our international obligations under the ICPPR, ICESCR, C98 and the Fundamental Declaration of Human Rights along with persuasive jurisprudence from some of the most important international courts.

Given this, the New Zealand courts may follow the lead of the Canadian Supreme Court in *BC Health Services* and find for a wider meaning of freedom of association in the New Zealand Bill of Rights Act 1990 given the right set of pleadings. However, it would be much better for the recognition of New Zealand's human rights obligations to come first from Parliament.

Recommendation 1: The right to freedom of association in the New Zealand Bill of Rights Act 1990 should be amended to expressly include the right to collectively bargaining and the right to strike in conformity with the law.[58]

Moreover, wider work rights in accordance with ICESCR arts 6 and 7 ought also to be recognised in the New Zealand Bill of Rights Act 1990.

Recommendation 2: The right to work (including the right to gain one's living by work which is freely chosen or accepted) should be included in the New Zealand Bill of Rights Act 1990.

Recommendation 3: The right to just and favourable conditions of work (as expressed in art 7 of ICESCR) should be included in the New Zealand Bill of Rights Act 1990.

Though discussion is outside of the scope of this submission, the other ESCR that the Government has committed to progressive realisation of ought to be enacted in the New Zealand Bill of Rights Act 1990. The arguments against their inclusion are weak.[59]

Recommendation 4: Other ESCR should be recognised as rights in the New Zealand Bill of Rights Act 1990. The optional protocol to ICESCR should also be ratified.

7.2 THE LAW MAKING FRAMEWORK

There is value in the Attorney-General's legislative 'vet' under section 7 of the New Zealand Bill of Rights Act 1990 (and particularly the assessment by Crown Law for legislative consistency with the Bill of Rights) in bringing rights considerations to the forefront of policy makers minds. However, the system ought to be significantly more robust.

First, the assessment of consistency by Crown Law is often cursory. Timeframes for assessment are often extremely short and the quality of regulatory impact statements identifying options (including options which may be less rights limiting) may be low. The test for compliance with rights is that identified by the Supreme Court in *R v Hansen*[60]

> (1) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

[58] See ICESCR art 8(d).
[59] And are demolished by Opie (2012) in his article, citation n 6, 502-514.
[60] [2007] 3 NZLR 1 (NZSC) per Tipping J at [104].

(2) (a) Is the limiting measure rationally connected with its purpose?

(b) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

(c) Is the limit in due proportion to the importance of the objective?

Too often the assessment is seemingly undertaken without sufficient policy knowledge or briefing to assess the elements of this test.

Recommendation 5: Expert subject matter advisors unconnected to the policy development of the legislative proposals should be employed to assist Crown Law in making assessment of consistency. More time is needed to get these assessments right. It may be appropriate to consider whether the vetting function sits better with another body such as the Human Rights Commission or a new Human Rights Select Committee convened for this purpose. Ongoing work on improving regulatory impact statement quality must continue.

Second, in many cases the Attorney-General report on inconsistency has been seemingly not engaged with by Parliament or Select Committees. Bromwich identifies this as a particular concern. Her suggestion to address it is a good one:[61]

> One possibility is to require members in charge of bills subject to s 7 reports to table responses to the Attorney-General's concerns. In particular, responses could be expected to explain fully why the member considers the breach justified.

Recommendation 6: Responses to section 7 reports should be required from responsible Members as per Bromwich's suggestion.

Third, the responsibility for assessing bills against human rights criteria ends at the first reading. This is problematic in relation to bills that are substantially amended by supplementary order papers or during the committee stages.

Recommendation 7: Prior to the third reading, all bills should be subject to a final check for consistency with the Bill of Rights. This will present challenges to the use of urgency to pass legislation but is too important a safeguard to sacrifice. Alternatively, the Select Committees may be required to report on whether provisions in bills appear inconsistent.

7.3 FRAMEWORK FOR COURT CHALLENGE

The judiciary has an important role in interpreting legislation in a way that is consistent with human rights and New Zealand's international obligations.

Particularly important in this respect is a court's ability to issue a declaration of incompatibility with the rights contained in the New Zealand Bill of Rights Act 1990. This is not an express power under the Act and has been developed judicially.[62]

Geiringer[63] usefully reviews the developing jurisprudence around declarations of inconsistency and notes that the developing case law tightly circumscribes the use of declarations. One of her conclusions is very relevant:

[61] Tessa Bromwich 'Parliament rights-vetting under the NZBORA' [2009] NZLJ 189, 193
[62] Following the principles initially set out in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) and developed particularly by the Supreme Court in *R v Hansen* [2007] 3 NZLR 1 (NZSC).

> The early evidence … suggests that the courts have not embraced with enthusiasm the licence given in *Hansen* to examine legislation against human rights standards and to indicate any resulting inconsistency. We should not find this surprising. The question of legislative compatibility with the NZ Bill of Rights – particularly in cases that hinge on the justifiability criteria in section 5 – occupies a territory on the border of law and policy that courts are generally reluctant to enter. The jurisprudential hoops involved in conducting a section 5 inquiry, as articulated by the *Moonen* and *Hansen* Courts, are (sometimes needlessly) complex and can require the resolution of difficult and unfamiliar kinds of evidential questions. More generally, and as already suggested above, many New Zealand judges are simply not comfortable with being placed in the role of critic of the legislative branch.
>
> For these reasons and no doubt others, it is hard to shift the judicial mindset towards a self-conscious and routine dialogue with the legislative branch of the kind that declarations of inconsistency are thought to facilitate. The easiest way to effect this shift in mindset is to provide clear legislative authority for the courts to grant formal declaratory relief. The experience in the United Kingdom and the limited experience to date under the NZ Human Rights Act suggest that once such express legislative authorisation is given, adjudicative bodies are quick to rise to the challenge and slow to exercise their undoubted discretion to refuse relief.

Recommendation 8: The courts should be given an express jurisdiction to issue declarations of inconsistency with the rights contained in the New Zealand Bill of Rights Act 1990. Particularly in light of a Bill of Rights that includes recognition of ESCR and an expanded range of CPR this power should be declaratory only.

Recommendation 9: There is considerable value in enacting a parallel process to that in the Human Rights Review Tribunal. According to section 92K of the Human Rights Act 1993, where the tribunal makes a declaration (and that declaration is not overturned on final appeal) then the responsible Minister must table reports in the House of Representatives bringing the declaration and the Government's response to the House's attention.

[63] Claudia Geiringer 'On a road to nowhere: implied declarations of inconsistency and the New Zealand Bill of Rights Act' (2009) 40 *VUWLR* 613. Her article raises several important technical issues that are outside of the scope of this submission.

Appendix 1: *Comparison of Minimum Wage setting mechanisms 2008-2012 and 2012-*

	2008-2012	**2012 onwards**
Objective for the minimum wage	To set a wage floor that balances protection of the lowest paid with employment impacts, in the context of current and forecasted labour market and economic conditions and social impacts.	To keep increasing the minimum wage over time to protect the real income of low-paid workers while minimising job losses.
Factors to be considered	Each year the minimum wage is assessed on two criteria. 1. The extent to which the minimum wage would produce gains that are more significant than losses. Relevant factors are: ○ Consistency with principles of fairness, protection, income distribution and work incentives; ○ Comparison against international/OECD benchmarks; ○ Comparison against other income benchmarks (benefit rates, minimum average rate of wages in collective agreements, producers price index, median wages and average wages); ○ Consideration of forecast social and economic impacts including impact on those likely to be low paid (women, new migrants, Māori, Pasifika, part-time workers, those with a disability, young people), the net effect including withdrawal of social assistance and impacts on the gender pay gap; ○ Consideration of the forecast labour market conditions and impacts relevant to minimum wage (including earnings and wage bill, employment and unemployment, labour productivity, number of employees and the hours they work, industry sectors, GDP and inflation). ○ Potential impact on the rates of non-compliance. 2. Consideration of whether a change to the minimum wage would be the best way to protect the lowest paid in the context of the broader package of income and employment related interventions and would meet the broader objectives of government. The principles of fairness, protection, income distribution and work incentives are also defined. For further detail see appendix 1 to 2011 Minimum Wage Review (pp 53-54). http://www.dol.govt.nz/er/pay/backgroundpapers/2011/minimum-wage-review-2011.pdf	Three of every four years using the following four factors: • Inflation (using CPI as the indicator); • Wage growth (using median wage as the indicator); • Restraint on employment; • Other relevant factors. Every fourth year: A more comprehensive assessment based on the pre-2012 criteria/
Consultation	Relevant stakeholders (including the social partners) and Government departments invited to contribute each year. In 2011, 51 stakeholders invited and 32 made submissions.	Three of every four years: Social partners and relevant Government agencies only. Every fourth year: Wider stakeholders invited.