
A fair go at work COLLECTIVE BARGAINING FOR AUSTRALIAN WORKERS
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Foreword By The Delegation

In May this year we investigated the collective bargaining systems of a number of countries in order to help promote discussion and policy development for a new system of collective bargaining in Australia.

All unions in Australia are committed to continued economic prosperity, and ensuring that all Australian workers and their families are able to share fairly the benefits of prosperity. Under the Howard Government, too many Australians have missed out. We want improved employment opportunities and living standards. But the Howard Government believes that prosperity can only be achieved at the expense of workers' rights, that fairness must be jettisoned in the face of competition from our trading partners.

The labour movement stands not just for economic prosperity but also for social justice and democratic principle. That is why the right for working people to join together and to bargain collectively is at the heart of our beliefs.

Collective bargaining rights are at the core of the campaign for rights at work. They are essential if working people are to have a say at work, if they are to share in the benefits of economic prosperity, if they are to be treated with respect and dignity.

We hope that this report generates constructive discussion of the issues which it addresses, and forms the basis for a policy that will ultimately become law in Australia.

The report proposes a collective bargaining model which is uniquely Australian, one that draws upon our own experience as well as that of systems overseas. It is informed by important international conventions concerning the right of workers to associate freely in unions, and to collectively bargain. But it is a model for our own country and our own times.

We urge all union officers, activists and members as well as others in the community to carefully consider the proposals and to contribute to the development of a new collective bargaining system in Australia, one that will underpin economic prosperity as well as respect the right of all Australians to decent treatment and a fair share of the nation's wealth.

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1. Background and summary of collective bargaining model

During the second quarter of 2006 a Delegation of the ACTU Executive travelled overseas to examine and report back on the collective bargaining regimes in a number of countries.

The Delegation examined systems in the UK, US, Canada and New Zealand and consulted with senior union leaders on developments in Europe. The Delegation travelled to Ontario, Ottawa, Washington, Brussels, London and Wellington, and met with union leaders, organisers, union and labour lawyers, academics, labour supporters in the community, public servants, members of labour relations tribunals and politicians.

The Delegation was asked to consider whether the ACTU industrial legislation policy should include an enforceable right to bargain collectively, and if so, to identify a model or models that would be suitable in the Australian context, taking into account the need to promote effective and democratic unions and to assist unions to build their capacity within the workplace.

We were charged to develop a fair system for collective bargaining that would form one pillar of workplace laws designed to encourage cooperative industrial relations and would promote the economic prosperity and welfare of the people of Australia.

The ACTU Congress will determine the full industrial legislation policy. It will do so, hopefully, with the benefit of the High Court's ruling on the constitutionality of the current workplace laws. Regardless of the outcome of that case, the model we have developed is one that we think will serve Australia well and would be within the constitutional authority of the Commonwealth.

Background

Australia's system of conciliation and arbitration did not, until 1993, provide a formal legislative framework for collective bargaining. Compulsory conciliation and arbitration was specifically designed as a social reform and an alternative to leaving industrial disputes to be resolved by the law of the jungle.

Unions are registered under the law and are participants in the system along with employers and their organisations. There has never been a requirement that employers and unions collectively bargain with each other or recognise each other for the purpose of bargaining, although compulsory conciliation and the award system did provide rights for unions to represent employees in grievances and to negotiate pay and conditions.

Although Australian law did not provide for collective bargaining prior to 1993, the system was collective in its nature. Collective bargaining occurred informally, through the negotiation of over-award payments. Over-award campaigns in major segments of the economy, often involving industrial action, were regularly the means by which improvements in wages, working hours, occupational superannuation and other benefits were achieved. On the back of these campaigns, applications were made to adjust awards.[1]

Consent awards were available to give legal effect to agreements between employers and unions, although these were subject to the approval of the Commission in accordance with the prevailing wage fixing principles, and did not equate to free collective bargaining in the sense that this is understood in ILO Conventions.

Paid rates awards or single employer awards were often largely the product of negotiations, with only some elements determined by arbitration, although again these were subject to the approval of the Commission.

The Howard Government is now focussed on removing collectivism from the system and to see individual contracts displace collective bargaining. It requires many of its own employees to sign individual

contracts (Australian Workplace Agreements or "AWAs") that preclude collective bargaining to get a job.[2] It makes other employers offer individual contracts through regulation or as a condition of funding. Private sector employers are increasingly adopting this behaviour. The offering of AWAs on a "take it or leave it" basis and the artificial designation of workers as independent contractors make a mockery of the notion of choice. Recent changes to the legislation will give employers a greater capacity to unilaterally determine conditions of employment and to refuse to respect the choice of their workers to bargain collectively.

Collective bargaining, which includes the right to strike, is the primary means by which the power imbalance between workers and employers is addressed, and since 1994 has been the primary means for improving wages and conditions in Australia.

Freedom of association, including the right to strike, and the right to bargain collectively sit alongside abolition of the worst forms of child labour, elimination of forced labour and elimination of discrimination as the four core labour standards that the ILO has declared to be non-negotiable.

Around the world, governments that subscribe to democratic values see it as incumbent upon them to use the weight of the State to enshrine and enforce workers' right to bargain collectively with their employer in pursuit of secure, safe and satisfying work. This includes effective rights for workers to achieve trade union organisation without fear, legal encouragement for collective bargaining, and the right to engage in protected industrial action.

Despite the fact that the right to organise and bargain collectively are internationally recognised core labour standards, and are recognised as fundamental human rights, Australian labour laws contain no mechanism to ensure that employers respect the desire of their workforce to be represented in bargaining towards a collective agreement.

In Australia the only mechanism open to a group of employees who wish to be represented collectively in the face of employer opposition is to take industrial action, and then only within a severely restrictive

legislative framework. In effect, workers' rights to organise and bargain collectively are contingent upon their economic and labour market position, resulting in different rights for different groups of workers.

Our failure to promote and protect these rights for all workers is a failure of our democracy. Freedom to associate, to act in concert, and, to bargain collectively are effective mechanisms that protect workers' interests in the workplace. It is no longer good enough to leave enforcement of this right to the ability of workers to exert economic or labour market pressure upon their employer.

A collective bargaining model for Australia

In deciding to look abroad we recognised that there are limits on the extent to which foreign models can be borrowed and incorporated into domestic law. Cultural, social, economic and political factors will determine whether laws are transplantable between jurisdictions.

We are not recommending that a new system be rebuilt on the old blue-print, based on compulsory conciliation and arbitration as the means to settle industrial disputes and determine wages and employment conditions.

Instead, the primary mechanism to improve wages and conditions of employment, over and above the safety net, should be collective bargaining, with parties obliged to bargain in good faith with each other. Good faith collective bargaining balances flexibility with fairness. It is the means to ensure that workers can contribute to the creation of productive and profitable enterprises and fairly share in the gains that are generated by their efforts. Collective bargaining gives workers a say and a fair go at work.

An effective right to bargain collectively is not the only element in the legal system that guarantees fairness in the labour market, nor is it a panacea for union organisation and growth.

We recognise that there are segments of the labour market that are not well organised, and for whom, even where there is positive

legislative obligation to bargain in good faith, collective bargaining will prove elusive.

In Australia, one in five workers is excluded from either formal or informal bargaining. Informal over-award bargaining tends to favour men, while those who are reliant upon the safety net are disproportionately likely to be female, from a non-English speaking background, live in a regional area and/or work in a low-skilled occupation.[3]

Under the current regime, collective bargaining is significantly more likely to occur in industries that are either male-dominated or have a significant proportion of employees engaged in public sector employment.[4] Award reliance is more common in the female-dominated industries of retail trade (31.3 per cent), hospitality (60.1 per cent) and health & community services (26.6 per cent) (ABS 6305.0.55.001, 2004).

In order to provide decent, fair minimum wages and conditions for those who are not able to bargain effectively, we recommend that there be a decent set of wages and conditions to underpin bargaining,

We recognise that an obligation upon employers to bargain will not translate to gains for workers unless those workers are effectively organised. It is incumbent upon us to continue to build collective strength in workplaces.

We recommend legislation that will permit effective union organisation by including effective protections for the right to organise, ensuring that workers can freely choose collective bargaining, and providing legislative recognition of the role of delegates in the workplace.

The legislative context for collective bargaining

While our terms of reference (set out at Appendix 1) are confined to an examination of collective bargaining, the system of bargaining is located within a broader set of laws and labour market institutions. To place our recommendations in context; our recommendations assume that the ACTU policy will continue to support:

- A decent, relevant and secure safety net of pay and employment conditions contained in awards and/or legislation that is able to be adjusted to take account of community and/or industry standards;

- A system of collective bargaining, over and above the safety net, which is built on the assumption that parties will bargain in good faith and uphold democratic values;

- The prohibition of individual arrangements that can be used to undermine the safety net, collective bargaining or union representation. There should be no statutory individual contracts, and existing legislation that provides for AWAs should be repealed;

- An independent tribunal to maintain and improve the award safety net, to oversee the bargaining system and to guarantee fair treatment in the workplace;

- Rights of union membership and representation. The law should retain union registration and eligibility rules and the representation rights that these confer. The legislation should uphold the role of unions in Australian society;

- Protection from arbitrary or capricious decision-making, and workers must have the right to have their day-to-day grievances heard and determined by an independent body that is accessible and acts in a timely and transparent manner;

- Support for delegates in the workplace; and

- That rights and entitlements apply to all workers without discrimination, and that the law discourage artificial arrangements to exclude workers from the protections of the system.

Within this legislative context, the Delegation proposes a system of good faith collective bargaining for Australia. The model we recommend would legally oblige employers, unions and workers to collectively bargain in good faith, and provide remedies where this is not occurring.

The legislative underpinnings of a good faith collective bargaining system would:

- Include within the Objects of the Act the protection of freedom of association and the promotion of collective bargaining;

- Ensure that all workers have the right to bargain, to union representation in collective bargaining and the right to take industrial action;

- Provide for all workers to have access to information in the workplace;

- Provide that union membership should confer representational rights. Union members should have a statutory right to representation in collective bargaining, and to representation in discussions with their employer about matters including but not limited to grievances, discipline, enforcement of their terms and conditions of employment; and

- Provide that a union's ability to represent a worker should continue to be governed by the union's eligibility and coverage rules.

A good faith bargaining system

The good faith collective bargaining system that we recommend should include the following features:

- The Act must require good faith collective bargaining;

- The making of a claim to collectively bargain should be open to workers, unions or employers;

- The independent Industrial Relations Commission should be empowered to enforce good faith collective bargaining;

- Collective bargaining and agreement-making which is entered into voluntarily on a single business or multi employer level should be available without recourse to the Commission;

- Where a party is not collectively bargaining in good faith, the Commission should be able to make good faith bargaining orders;

- There should be an ability for parties to engage freely in 'pattern bargaining' - that is, to pursue common claims and outcomes in two or more single business agreements;

- Where bargaining has failed, and there is no reasonable prospect of reaching an agreement, or where good faith orders have been breached, the Commission must be able to arbitrate as a last resort to resolve the dispute;

- The obligation of the Commission should be to promote bargaining in good faith towards the making of collective agreements, and employers should not be able refuse to bargain on the grounds that they oppose the making of a collective agreement;

- Where an employer opposes the collective bargaining process and/or the making of a collective agreement, the views of the majority of workers to be covered by the agreement should determine the issue.

The scope of collective agreements

ILO principles and overseas practice recognise the importance of bargaining parties being free to agree to negotiate collective agreements at the workplace, enterprise, multi-employer or industry level, and for employers and unions to pursue common claims and outcomes in single business agreements. The constraints on collective bargaining in Australia would not be tolerated in other democratic societies. For these reasons, the Delegation believes that there is a need for greater flexibility in the scope and the level at which bargaining occurs in Australia.

While collective agreement-making will predominantly continue to be at the level of a single business, employer, or a group of related businesses bargaining as a single business (commonly described as enterprise bargaining), we recommend a greater capacity for the parties to pursue bargaining at different levels. The ability for unions, not just employers, to pursue common claims and outcomes in collective agreements must be a feature of any future collective bargaining system. There must also be a capacity for the making of multi-employer agreements - single agreements which bind more than one employer. Frameworks for dealing with issues such as occupational health and safety, or skill development, are also common overseas at an industry level.

Collective agreements should generally cover all employees performing the work to be covered by the agreement. If the scope of an agreement is contested, the Commission should have the power to settle the matter, guarding against the artificial expansion or fragmentation of the workforce to be covered by the agreement.

Where a collective agreement is sought at the level of a single business (one employer, or a group of related businesses bargaining as a single business), negotiation, bargaining and protected industrial action should all be available without the involvement of the Commission. This would include the pursuit of single business agreements on the basis of making common claims and seeking common outcomes. In these circumstances the role of the Commission, if called upon, should be limited to application of the good faith bargaining procedures set out in the following recommendations, and the agreement approval processes.

Consistent with the principle that parties should be free to determine the level at which they bargain, multi-employer collective agreements (a single agreement binding more than one employer) should be available where the parties agree to bargaining at that level.

Where a multi-employer agreement is proposed but the claim for such an agreement is contested, the Commission should have the power to determine whether a multi-employer bargaining process should proceed, and determine who the bargaining parties will be. The

Commission should apply the following criteria when authorising a multi-employer bargaining process:

- ILO conventions and principles, and the freedom of the parties to determine the level at which they bargain;

- The community of interest of the employees;

- The community of interest of the employers;

- A collective multi-employer agreement covering a site or project involving multiple employers engaged in the same undertaking (e.g. a construction site) should clearly be available without limitation;

- The desirability of promoting collective bargaining, particularly where the employees or the employers lack the capacity to bargain at the single business level, or the size or number of workplaces in a particular industry or industry sector mitigates against collective bargaining at the single business level;

- The needs of lower paid workers and the desirability of promoting bargaining and lifting living standards;

- The history of bargaining; or

- Any potential, demonstrable and long-term negative impact on the viability of a single business.

If the Commission authorises a multi-employer bargaining process, the good faith bargaining procedures of the legislation would apply and protected industrial action would be available.

The legislation should provide for Industry Consultative Councils to facilitate industry-level consultation/negotiations and the development of industry-level framework agreements. The parties should be free to determine their own agenda.

Parties to agreements and the initiation of bargaining

We recommend that unions, workers and employers should have a right to initiate a claim to bargain. The parties to the agreement should be those parties who negotiate the agreement.

We believe there should be a general obligation on all parties to bargain in good faith. The Delegation opposes the establishment of any union membership "threshold" which would trigger a right to initiate a collective bargaining process. The right of union members to representation should not be conditional upon the level of union membership at the workplace. In the Australian context, as a matter of industrial common sense, we believe that bargaining by a union should be based upon the support of employees in the workplace.

We recommend that the two concurrent streams of union and non-union collective agreements should be simplified and streamlined into a single agreement-making process. This approach would still provide for collective agreements to be made without a union. However, where a union has a member it would be entitled to represent the member and be party to the agreement.

While it should not need to be said, we also recommend that there must be parties to a negotiation and an agreement. There should not be employer greenfields agreements. Nor should employers be able to determine who represents their employees in negotiations or oust unions from their legitimate areas of coverage through the use of greenfields agreements.

If there are disagreements about who is a party to the negotiations (including a single bargaining unit) or disagreements about which workers would be covered by the agreement these should be resolved by the Commission, having regard to the right to representation in collective bargaining that union membership confers upon workers, the history at the workplace, the community of interest of the employees, and the need to guard against artificial fragmentation of the workforce.

Employer organisations should be able to represent employers in the negotiation of collective agreements with unions.

How good faith would work

Employers and unions (within their area of coverage) should have the freedom to voluntarily enter into collective bargaining negotiations and to reach agreement, following which approval and certification processes would occur.

The legislation should be established upon the basis and on the assumption that parties will collectively bargain in good faith.

The initiation of the bargaining process, negotiation, and agreement making should all be available without the necessity of accessing Commission involvement in the bargaining process.

A bargaining party, however, would have the right to apply to the Commission for good faith bargaining orders where it was asserted that another party is not bargaining collectively in good faith.

The Commission should be able to facilitate collective bargaining. It should have appropriate powers to ensure:

- the Objects of the legislation are upheld, prominent amongst which would be the promotion of collective bargaining as the principal means of determining pay and employment conditions;

- the right of employees to freely associate in unions and to collectively bargain;

- the obligation on all parties to collectively bargain in good faith and to attempt to reach agreement;

- the right of employees and their union(s) to engage in protected industrial action; and

- where bargaining has failed and there is no reasonable prospect of agreement being reached, or where a party has seriously

undermined the principle of good faith bargaining, "last resort arbitration" is used to resolve bargaining disputes.

Where a party is not bargaining in good faith, the Commission should have the power to make orders to facilitate good faith bargaining.

Whether conduct amounts to a breach of good faith should be for the Commission to decide, subject to some clear guidance. In particular:

- Good faith does not require a bargaining party to agree on any matter for inclusion in an agreement or require a party to enter into, or prevent a party from entering into, an agreement.

- The taking of protected industrial action is not, of itself, a breach of good faith.

- "Pattern bargaining" and the taking of protected industrial action in pursuit of common claims and outcomes in more than one collective agreement is not of itself a breach of good faith.

In determining whether to make a good faith order the Commission should consider the parties' conduct in negotiations, including:

- whether each party has agreed to meet at reasonable times and attended the agreed meetings;

- whether a party has refused or failed to negotiate with one or more of the parties;

- whether a party has refused or failed to negotiate with a union which is entitled to represent an employee(s);

- whether each party has complied with agreed negotiating procedures;

- whether a party has capriciously added or withdrawn items for negotiation;

- whether each party has provided relevant information and documents;

- whether a party has engaged in conduct designed to undermine the bargaining right of another party;

- whether a party is respecting the collective bargaining process;

- the views of the bargaining parties;

- where it is a matter contested between the bargaining parties, the level of support amongst employees for the collective bargaining process.

Good faith orders

Where there is a failure to bargain in good faith the Commission should have discretion, subject to legislative guidance, to grant orders to do, or stop doing, certain things.

The Commission should to be able to make remedial orders to restore the status quo in order to remedy a breach of good faith.

The orders might relate to:

- Orderly bargaining (meetings schedules, exchange of information and proposals, adhering to undertakings, requiring parties to attend conciliation proceedings, time limits etc);

- Respect for the collective bargaining process and the role of representatives (prohibiting action that undermines collective bargaining or the representative role of another party, or that disadvantages workers or discriminates against union membership making; and orders to remedy any unfair practices*;[*]

[*] These orders might include:

- orders to ensure workers have appropriate opportunities to receive advice and information from their union during bargaining, including paid time off for meetings, opportunities for workers to meet with their union representatives individually or in small groups, and access to workplace communication mechanisms;
- orders to ensure delegates have appropriate resources to perform their representative roles; or

- Ascertaining the level of workplace support (in accordance with procedures outlined under "majority support");

- The suspension, or deferral of industrial action for a short period of time (having regard to the right of parties to engage in protected industrial action and that the taking of such action is not of itself contrary to bargaining in good faith) and/or;

- Preservation of the status quo.

A party which is opposed to the collective bargaining process and/or the making of a collective agreement should bear the onus of demonstrating why the Commission should not make a good faith order. Opposition to the making of a collective agreement should not be considered a valid reason.

Majority support

We would expect that in most cases the obligation to bargain collectively in good faith will be complied with, and that employers will respect the rights that accompany union membership. However, over recent years, there has been an increasing number of employers steadfastly refusing to accept the principle of collective bargaining, arguing that they should be able to unilaterally determine the basis upon which they engage with their workforce. These employers often falsely argue that their employees do not want to collectively bargain. This employer strategy has been sanctioned by the Government's WorkChoices laws. Not only does this deny workers' freedom of association, it confers on employers the right to unilaterally determine the form of bargaining, regardless of the views of the workforce. In our view, this is intolerable and an affront to the democratic principles that govern our society. It must be remedied in any new industrial relations legislation, by allowing workers a say.

We therefore recommend that, where good faith bargaining orders are sought and the issue of employee support for the collective bargaining

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- orders that parties retract false or misleading statements made during bargaining.

process is contested between the bargaining parties, the legislation should expressly require the Commission to make good faith bargaining orders where a majority of employees support the collective bargaining process. This means the making of orders would be mandatory.

The orders must facilitate the bargaining process and, to the extent possible, facilitate the making of a collective agreement. Orders would not require a party to make admissions or concessions on the matters proposed to be in the agreement.

The Commission should have discretion as to the means of ascertaining majority employee support. The Commission must ensure that employee opinion is ascertained in a fair manner free of intimidation or inducements. The Commission may:

- consider evidence from employees or their representatives, including evidence of a vote at a workplace or mass meeting;

- consider petitions and/or workplace resolutions from employees;

- consider the result of a ballot conducted by a union(s);

- consider evidence concerning the level of union membership amongst employees; or

- as a last resort, and if the Commission is not satisfied by any of the foregoing measures, order a secret ballot of employees. The Commission would not be able to order a secret ballot unless it had first considered other indicators of majority employee opinion, and only where there was clear evidence contradicting such indicators. If a secret ballot is ordered, majority support should consist a simple majority of those who cast a vote.

A lack of majority employee support would not of itself be grounds for the Commission to refrain from making any good faith bargaining orders. The Commission would still have an obligation and the discretion to promote collective agreement making consistent with the Objects of the legislation.

Industrial action

Legally protected industrial action is integral to bargaining, as it provides the means to balance the economic power of the bargaining parties.

Taking protected industrial action in pursuit of an agreement to cover a single business (including the pursuit of common claims and outcomes at more than one business) should be available without recourse to the Commission. Where a multi-employer agreement is being pursued, protected action should be available where the Commission has noted the consent of the parties to a multi employer bargaining process, or where the Commission has ordered that bargaining for a multi-employer agreement should occur.

Legally protected industrial action should be available to employees during bargaining, without the need for a secret ballot. However, as a matter of good union practice, unions should not take action unless it has been democratically endorsed.

Protected industrial action should not be able to be undermined by use of external replacement labour.

Industrial action by employers (lock-outs) should not be automatically available. ILO jurisprudence does not support an automatic right to employer industrial action. An automatic right to lockout is rare amongst OECD nations, although it is available to employers in Australia. The Delegation advocates the removal of this right for employers.

The law should also enable the lawful conduct of meetings to prepare for bargaining, actions to promote the social or economic views of workers, fair provisions in relation OHS and allow to workers to protest breach of statutory duties. Legally protected industrial action should also be available during the application an agreement where the employer proposes significant organisational change.

Last Resort Arbitration

Where the good faith collective bargaining process fails to result in agreement, the Commission should have the discretion to terminate the bargaining process and commence an arbitration of the bargaining dispute.

"Last Resort Arbitration" would generally only occur as a last resort where there is no reasonable prospect of agreement being reached and:

- where there is a significant risk to the safety, health or welfare of people affected by the bargaining dispute; or

- where there is a risk of significant damage to the economy or an important part of it; and/or

- it is otherwise in the public interest for the Commission to make a Last Resort Arbitration.

In considering the public interest, the Commission should be required to take into account:

- the primary objective of promoting collective agreement-making;

- whether there is a history of bargaining at the workplace and, if not, the desirability of establishing a Last Resort Arbitration which will facilitate future bargaining;

- whether a party has breached good faith bargaining orders;

- whether all of the bargaining parties were trying to reach agreement;

- whether a reasonable period of active bargaining has taken place;

- whether the good faith bargaining process has been genuinely exhausted;

- the views and interests of the bargaining parties and the employees;

- the relative bargaining strengths of the parties, and in particular the needs of the low-paid;

- the rights of the parties to engage in protected industrial action, and that the taking of such action is not of itself contrary to bargaining in good faith or grounds to terminate bargaining and institute a Last Resort Arbitration.

A Last Resort Arbitration would also be available where the parties have agreed to submit for arbitration any outstanding matters which they have not been able to resolve by negotiation.

The legislation should enable the Commission in arbitrating the dispute to take into account issues including:

- the matters at issue in the bargaining process;

- the merits of the arguments;

- the interests of the bargaining parties and the employees;

- the public interest; and

- other relevant issues.

A Last Resort Arbitration should have a maximum term of three years.

A Last Resort Arbitration should also be conducted on the basis that employees not be disadvantaged overall with respect to their existing pay and employment conditions.

Rules relating to Agreements

The matters to be included in an agreement should be for the parties to agree, subject to agreements meeting a genuine "no disadvantage test".

The agreement should be approved by a majority of those employees who vote. Voting should be limited to those who are to be covered by the agreement.

Parties should be bound by agreements and not able to opt out. The system should guard against workforce or corporate restructuring to avoid agreements.

Agreements should continue for their term, and beyond until terminated by the parties or replaced by another agreement. The maximum term for agreements should be three years.

The right to organise and collective bargaining

Freedom of association, the right to organise and the right to collective bargaining are complementary rights. Australia's workplace laws fail to adequately protect workers' freedom of association, in that they do not protect workers' right to organise.

We make three recommendations that are designed to strengthen the protection for workers when organising in the context of collective bargaining.

First, we recommend that the freedom of association provisions in the legislation prohibit conduct by employers designed to undermine collective bargaining, including offering inducements to workers to undermine collective bargaining processes.

Second, we have recommended that the Commission, when dealing with good faith bargaining, is to be empowered to make orders that remedy conduct by an employer which undermines collective bargaining or interferes with the relationship between the union and its members.

Third, we recommend that the legislation should recognise the role of delegates in bargaining.

Authorised delegates should have rights of access to and communication with workers, inspection of the workplace and

documents, reasonable time off to perform, and be to trained in how to perform their representative roles.

The Commission should be able to make orders to ensure that delegates can perform their representative roles.

The Commission should be able to issue interim remedial orders where there is prima facie evidence that a delegate has been subject to unfair interference or disadvantaged for performing their role.

2. The importance of collective bargaining

In this Part we outline the role for collective bargaining in a modern economy. Collective bargaining provides a means to achieve fairness in the labour market, and will deliver more productive, efficient workplaces and more fulfilling, secure jobs.

Organising workers into associations for the purpose of collective bargaining is internationally recognised as the means to address the imbalance of power that exists between employees and employers.

Collective bargaining (which includes the right to organise, to act in concert and to take industrial action) addresses the inequality of bargaining power between most workers and their employers. This inequality exists because, even in a tight labour market, most employees have limited employment alternatives open to them. It is compounded by that fact that individual employees have less power, access to information, resources and skilled negotiators than their employers.

The role of unions in a democratic society

The Declaration of Philadelphia recognised that peace and social stability are dependent upon ensuring that prosperity is fairly shared within societies and that this required that the law and practice addresses inequality in the employer and worker relationship. Unions are essential to this and are key participants in a civil society.

Freedom of association, the right to join a union and bargain collectively, has long been recognised as a human right protected under international conventions by the United Nations' Universal Declaration of Human Rights and the International Labour Organisation (ILO), through Convention No 87 (the Freedom of Association and Protection of the Right to Organise Convention) and Convention No 98 (the Right to Organise and Collective Bargaining Convention).

Although Australia ratified the ILO's Conventions 87 and 98 in 1973, our labour laws have never included an effective obligation on the industrial parties to bargain collectively.

For the past decade, the supervisory structures of the ILO have consistently called for legislative amendment to bring Australian law into line with the Conventions.[5] It is recognition of the fundamental unfairness of the Australian industrial laws and a matter of significant national shame that Australia has been persistently criticised as breaching these Conventions.

In order for Australia to comply with its international obligations, the law needs to do more than establish the possibility of a collective agreement. Our laws need to protect the right to organise and the right for workers to take industrial action in pursuit of their common interests.

Freedom of association includes a right to representation

ILO Convention 87 protects the rights of workers to establish organisations to represent their industrial interests. The Convention protects not only the right to establish and join unions but also the right to organise. The Freedom of Association Convention also confers a right to representation, and to not be treated less favourably for having exercised that right.

It is not only the ILO supervisory mechanisms that recognise that freedom of association includes a right to representation. The European Court of Human Rights has held that freedom of association includes the right of workers to be represented by a trade union in dealing with an employer. The Court held that the essence of the right to join a union is the notion that members "*should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests and on their behalf*". The Court also said that "*the role of the State is to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employer*".[6]

Current Australian labour laws do not adequately protect workers' freedom of association. Under the Howard Government's laws, an employer can require an employee to forego their right to bargain collectively as a condition of employment. Employers can also offer wage increases, advancement or promotion conditional upon opting out of collective bargaining.

Collective bargaining is the corollary of freedom of association

In addition to ensuring that workers can be represented, freedom of association confers a right to bargain collectively. The ILO Committee on Freedom of Association has said that:

The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent.[7]

The Committee has held that employers should recognise organisations that are representative of workers in a particular industry for the purposes of collective bargaining. It has said that recognition by an employer of the main unions represented in the undertaking, or the most representative of these unions, is the very basis for any procedure for collective bargaining on conditions of employment in the undertaking.[8]

The Work Choices laws fail to provide an effective means by which employees can enforce a decision to negotiate collectively through a trade union. There is no positive obligation to negotiate with workers and their unions towards the making of a collective agreement. In fact, unions seeking to negotiate a collective agreement on behalf of their members have less standing in the system than those who seek to be represented by another form of bargaining agent.

While our laws preserve the possibility of collective agreements, collective bargaining is undermined by the primacy given to individual

contracts (AWAs). The laws permit an employer to refuse to bargain (including on grounds that they oppose making a collective agreement) or to offer non-union collective agreements or AWAs during bargaining in order to undermine the bargaining authority of the union.

Currently, while unions (on behalf of their members) can initiate a bargaining period (either formally or informally), there is no mechanism to enforce this. Employers can and do employ a range or strategies to avoid the obligation to bargain collectively. These include:

- threatening or intimidating workers if they consider unionising or organising collectively;

- undermining the union as representative of its members, by holding individual or small group meetings of workers;

- denying or frustrating entry to the employer's premises;

- circumventing the employees' choice by proffering an alternative agreement type; and

- circumventing the collective agreement through off-shoring, outsourcing or the use of contractors / labour hire.

The pursuit of these tactics has led to lengthy disputes and costly litigation that need not have occurred if Australia had the standard of industrial laws that exist in most developed democracies.

If freedom of association and the right to collectively bargain are to be enforceable rights, employers must respect the decision of their employees over how they wish to bargain. Employers should not be able to determine the form of bargaining that occurs at the workplace.

The ability of employers to deny workers an effective right to bargain collectively is not the only deficiency in our labour laws. Australian law fail to promote free and fair collective bargaining, in that it:

- restricts the matters upon which parties can make claims and reach agreement;

- places onerous procedural hurdles in the way of lawful industrial action;

- prohibits protected industrial action in pursuit of common claims against two or more employers;

- provides readily accessible loopholes by which an employer may restructure their operations to avoid the obligations of a collective agreement;

- fails to adequately protect workers against coercion, duress, inducement and other activities that prevent workers exercising genuinely free choice; and

- contravenes ILO conventions by restricting the level of bargaining available to workers.

The role of collective bargaining in a modern economy

As well as meeting our obligations to uphold workers' human and democratic rights, collective bargaining has a vital role to play in ensuring that Australian workers can equitably share in the economic prosperity generated by their work.

In our view the industrial relations system that should serve Australia in the 21st century should promote decent, safe and secure jobs, working arrangements that allow parents and carers to perform their caring roles, and citizens to play a meaningful role in their workplace and in their communities. The system should promote high employment, strong growth and competitive enterprises built on productive and skilled labour and efficient use of capital.

For the past two decades, the economic orthodoxy in Australia has been that decentralisation and deregulation of wage bargaining is the key to strong growth, low employment and more productive

enterprises, and that regulated labour markets are as a cause of high unemployment.

The Howard Government and its supporters have essentially argued that there needs to be a trade-off between the quantity and quality of jobs for lower-skilled and vulnerable workers. Regulated fair labour standards and a decent minimum wage are said to cost jobs. Effective and widespread collective bargaining boosts labour standards; the view of the Howard Government is that its role needs to be reduced.

We disagree with this assessment. In our view we need labour laws that promote the high road to productive employment and economic growth.

In Australia, collective bargaining has been associated with the promotion of high-skilled work, investment in human capital and sustainable jobs built on skill and knowledge transfer within industries.

Australian research has failed to show any link between individual contracts and higher productivity (Peetz 2005). Numerous studies show that individual contracting has been associated with the "low road" to short-term profits, including extended hours of work without additional compensation, cuts to penalty rates, and lack of training or skills development (eg Mitchell and Fetter 2005).

When we looked overseas, we found a similar story.

It has become popular with some economic commentators to associate slow growth and high unemployment with high levels of collective bargaining and a strong commitment to social partnership. The same critics associate highly coordinated bargaining and centralised structures found in continental Europe with poor economic performance.

This is a simplistic and inaccurate assessment. It is true that some European Union nations have under-performed recently, but others have achieved strong growth in GDP, employment and productivity, at levels above the average of nations with deregulated or decentralised systems.[9]

Recent OECD econometric work shows no systematic linkage between collective bargaining, union density and high unemployment. Indeed some studies report that high levels of coordinated collective bargaining is associated with lower unemployment (OECD 2004, 2006).[10]

There is no consistent evidence that correlates the form of bargaining with levels of economic growth. For example, Ireland has a highly centralised wage fixing system and has achieved the highest rate of growth of any OECD nation in the last decade.

There is simply no correlation between levels of collective bargaining, and coordination of wage bargaining, and underperformance against traditional economic indicators. The orthodoxy that underpins Work Choices is not supported by the evidence, and even the conservative Economic Branch of the OECD has now distanced itself from this view (OECD 2006).

In looking overseas, we did not find another case where the argument for individual contracts was promoted with the same fervour than in Australia.

In every country we visited, we asked whether there was any political groundswell in support of individual contracts as a means to economic prosperity. The answer was always no.

In Canada or the United Kingdom neither governments nor employer organisations were promoting individual contracts as an essential feature of a strong economy.

In New Zealand, the period of the Employment Contracts Act is recognised as corresponding with declining productivity.

In Brussels we were advised that the European Social Model, with its strong focus on bipartite and tripartite partnerships and social dialogue, continues to provide institutional support for trade unions and widespread coverage of collective bargaining. In addition, the European Social Model reinforces at a cultural level the importance of unions as part of a functioning democracy.

Our experience confirmed that the Howard Government's zeal for individual contracts at the expense of collective bargaining is not shared in other developed nations.

Collective bargaining and decent work

In contrast, we were able to find strong evidence that collective bargaining is associated with decent work and greater levels of equality within the labour market.

There is consistent evidence that wage inequality is lower where union membership is higher and collective bargaining is more encompassing and/or more centralised or coordinated. The OECD has found some evidence that collective bargaining tends to increase the relative wages of young workers and women (OECD 2004). High union density and bargaining coverage, including the centralisation and co-ordination of wage bargaining, go hand-in-hand with lower wage inequality (OECD 2004, 2006).

The US model, with very low levels of collective bargaining and poor-quality minimum standards, is associated with unacceptable levels of wage inequality and social exclusion (OECD 2006a).[11] In contrast, the model we envisage of collective bargaining underpinned by a decent set of minimum conditions should be associated with high levels of good-quality, secure employment.

The Australian economy has performed well over recent years, largely due to rising commodities prices. The industrialisation of China has benefited the Australian resources sector, as its demand for commodities has lifted prices. At the same time, it has put downward pressure on the price of manufactured goods, which has created challenges for the Australian manufacturing sector. Despite the rise in commodities prices, inflation and interest rate pressure has, until recently, been muted, with household consumption funded by rising debt levels well above those of other OECD nations.

Despite a redistribution of earnings from wages to profit share that has favoured companies,[12] the capacity for improved economic performance and improved productivity has been constrained by a

failure to invest in skills, with labour market shortages appearing in some sectors. This is compounded by lack of investment in infrastructure, including social infrastructure such as schools and post-secondary education institutions.

Simply, we are failing to invest some of the gains associated with our recent strong growth in our future, and at the same time many Australians are missing out on the benefits of this growth.

While in recent years the official unemployment rate has been reasonably low, there have been significant levels of hidden unemployment,[13] under-employment, involuntary part-time work[14] and a rising incidence of workers holding multiple jobs.

A number of the changes in the labour market have fostered growing inequality. These include:

- The growth in precarious employment, including casual employment and dependent contractors, and the shift away from employment to service contracts;[15]

- The growth in the size of the services sector, and the growth of "atypical" modes of employment;

- The dispersion in working hours, where full-time jobs have been increasingly associated with longer hours, while part-time employment is associated with irregular and unsocial hours of work. The growth of irregular pattern of hours places pressures on carers who are in paid employment;

- The size of enterprises has fallen;[16]

- The share of the workforce employed in the public sector has declined, as the delivery of services has been outsourced to private sector providers;

- More recently, there has been increased use of temporary migrant workers whose ongoing resident status is dependent upon continued sponsorship by their employer, leaving these workers vulnerable to exploitation.

Similar changes (not always as pronounced) have been seen in the countries we looked at, and each of these creates challenges for unions in organising workers for the purpose of collective bargaining.

We have been cognisant of these structural changes in the economy as we have developed the model for collective bargaining. We have also been acutely aware that our legislation must provide a secure and decent safety net for those who are unable to bargain effectively.

Collective bargaining through unions can and should be an important mediating instrument within the labour market, reducing income inequality, and promoting safe, secure and decent working arrangements and a more cohesively functioning society.

If collective bargaining is to be the primary method by which workers achieve improvements in living standards, then the system must be inclusive of all workers, regardless of where they are located within the labour market.

The strategies that the ACTU and its affiliates have adopted for union renewal must continue if we are to ensure that the benefits of collective bargaining can be realised in these areas of the economy that have not traditionally enjoyed the benefits of trade unionism.

This will require more than a right to bargain. It will require unions to continue to build their capacity at the workplace level, and it will require unions to build support for their claims within the workplace in the lead-up to initiating a bargaining claim. It will require effective communications with members during bargaining, to ensure that the unions are representing the aspirations of their members at the bargaining table.

This means that workers need to be able to discuss and communicate freely, and be free from employer influence when deciding whether to join a union and undertake legitimate union activities at the workplace. The recommendations that we have made to strengthen the Freedom of Association provisions in our legislation and to support the vital work of delegates will strengthen our laws in this regard.

3. The study tour

Our Delegation spent time with union officials and organisers, lawyers, government bureaucrats, members of employment tribunals and representatives of community organisations. They explained to us how their laws work in practice, and the cultural and economic context within which the laws are applied. A list of the people with whom we met is found at Appendix 2.

We also commissioned the Australian Institute of Employment Rights to prepare a background research report on collective bargaining and union recognition in developed countries.

While our report deals primarily with the legal framework and institutional arrangements that govern collective bargaining in each country we visited, the effectiveness of the legal regime for collective bargaining cannot be considered in isolation from the structural changes to the labour market, or from the effectiveness of the unions operating within that system.

Everywhere we went, workers and their unions faced common economic and labour market challenges.

Workers and their employers in United States, Canada and New Zealand face increased competition in product markets, and the prospect of jobs being moved offshore overhangs the bargaining relationship. Competition was also driving changes in the bargaining outcomes in the European Union, where wages were slowing (and in some cases falling) but in exchange for job-building investment and training.

Many of the economies of the European Union15 (ex-UK) have experienced slow growth and unemployment (although there were exceptions, especially on the growth front, such as Ireland, Greece, Norway, Sweden and Finland). In Canada, the United Kingdom and the USA, there is relatively high employment but persistent low-paid work.

In all countries (with some significant variations in the European Union) there has been a growth in atypical employment (casual, short-term and part-time work), which posed challenges for organising workers whose attendance at the workplace is periodic or unpredictable.

In the UK, US, Canada and New Zealand, work has intensified; in the European Union, a trend towards shorter working weeks has stalled, and in some instances is reversing.

In Canada and New Zealand, government services have been outsourced and privatised, resulting in smaller bargaining units and increased exposure to competitive pressures.

In every country there has been an increased incidence of self-employment and more widespread use of independent (and dependent) contractors. We heard a loud and clear complaint that disguised employment, and the exclusion of sub-contractors, some labour hire and other "leased workers" from the rights to collectively bargain, was undermining collective bargaining as the means to set wages and conditions of work.

Professor Leah Vosko referred to research showing that "dependent" contracting in Canada is more prevalent amongst migrant workers and women workers, and is associated with low pay (Cranford et el 2005).

The difficulties associated with determining whether a worker is legally an employee or engaged under a contract for services permeated each jurisdiction. Former National Labor Relations Board (NRLB) member Sarah Fox referred us to the case in the United States where the Board held that artists' models were not employees because they provided their own robes and slippers. The Human Rights Watch report on bargaining in the United States recommends amendments to the NRL Act, so that the prime contractor or dominant entity having power over the terms and conditions should have an obligation to recognise and bargain.

These developments highlighted for us the need to ensure that sham contracting arrangements should not be available to allow employers to avoid their obligation to bargain, nor should they be available to

undermine bargaining or provide a means to "opt out" of agreements once made. For that reason we recommend, in developing a model for collective bargaining in Australia, that rights and entitlements apply to all workers without discrimination, and that the system discourage artificial arrangements to exclude workers from the protections of the system.

Structural changes to overseas labour markets also mean that some groups of workers are effectively excluded from collective bargaining by virtue of their location within the labour market. In each economy, there were sectors where bargaining is not widespread, including smaller workplaces, female-dominated occupations and the services sectors. As we noted in the introduction, this is also the case in Australia.

In part, our recommendations relating to multi-employer and related-corporation bargaining are designed to overcome this shortcoming and ensure that bargaining is available across the economy, even in small and poorly organised workplaces.

We also noted that in most countries there are mechanisms to ensure that workers who are not formally engaged in collective bargaining are able to achieve improvements in their terms and conditions of employment. Increasingly, the relationship between minimum standards and bargaining outcomes is under scrutiny.

In some of the European Union nations, the system of bargaining guarantees full coverage (e.g. Austria). In others, extension procedures spread the outcomes of bargaining agreements across the economy or an industry.

Similar mechanisms are also found outside the European Union. In Quebec, a system of decrees operates like common rule awards whereby the government can declare that the terms of a collective agreement are of general application within a limited geographic area. The parties to a collective agreement rendered obligatory must form a committee responsible for overseeing and ascertaining compliance with the decree. The committee also advises and informs the employees and employers of the conditions of employment determined in the decree.

In the US, the Davis Bacon Act governs the wages rates and certain benefits payable to construction industry workers employed on projects that attract Federal Government funding. Under this legislation, triennial market rates surveys are conducted within defined regional labour markets. The results of these surveys set the minimum wage rate payable on a site caught by the Act. Thus, the rates set by collective agreements are extended to all worksites, and the collective agreement rates effectively sets the statutory minimum rates across the industry.

We mention these examples to highlight that, contrary to the Howard Government rhetoric, governments in other countries, including governments of similar political outlook to the Howard Government, oversee systems whereby the workers who are unable to bargain collectively are guaranteed that their wages and conditions do not fall behind the 'going rate' in their sectors.

In Australia, until this year, the Award system of minimum wages and conditions has acted as the safety net underpinning bargaining and as an informal extension mechanism. In our view, this should be a continuing feature of the system.

It is for that reason we recommend that there be a decent set of wages and conditions to underpin bargaining, and to provide decent, fair minimum wages and conditions for those who are not able to bargain effectively. And it is for that reason that we recommend that under the new system, awards will need to be able to be adjusted from time to time, taking into account standards that have developed in industry and the community generally to ensure that the safety net is relevant and secure.

The structural changes to the economies have also meant that, in each country we visited, unions were engaged in union renewal strategies, seeking to retain density in areas of the economy where jobs are under pressure and to grow in the emerging areas of the labour market.

Overwhelmingly the unions recognised that the key to effective collective bargaining lies as much in union density as in the design of the labour laws.

The unionists with whom we met were involved in union renewal strategies similar to those of Australian unions ensuring democratic control of the unions supporting and educating delegates and activists and ensuring that unions are responsive to a diverse range of workers including those with caring responsibilities, engaged in casual and part-time work, or from diverse cultural backgrounds (see Jackson 2006).

In addition, unions were taking their campaigns outside the workplace, building community alliances and engaging with firms as corporate citizens as well as employers.

While our report does not focus on these activities, and they have been the subject of previous ACTU reports, we cannot stress enough that ultimately the success of the collective bargaining model that we have recommended will rely heavily on the extent to which we continue to grow and strengthen our unions.

For the remainder of the report we focus on legal systems. Below we set out a summary of the laws that we examined in each jurisdiction. A more detailed description is attached at Appendix 4.

Collective bargaining in North America

In Canada and the United States, employers and unions have a mutual legal obligation to bargain collectively in good faith. This imposes a duty on the parties to meet at reasonable times and confer in "good faith" with respect to the proposed agreement. If agreement is reached, the parties enter into a binding written contract, which governs the working arrangements of all workers employed in the bargaining unit.

The requirement to bargain in good faith includes a requirement to demonstrate an intention to reach agreement, and to conduct bargaining with an open mind. The good faith obligation does not require either party to agree to a proposal or make a concession.

Recognition as representative of the workforce

The obligation of an employer to bargain in good faith with a trade union is linked to the degree to which the union is representative of the workers within the bargaining unit.

The corollary to the right of exclusive representation is the duty of fair representation, which means that unions must represent the views of non-members in bargaining and must act for them in grievances. The right of exclusive representation has been interpreted to require that the union exercise its rights fairly, impartially and in good faith, without arbitrary or discriminatory treatment of represented workers. The duty applies both in the negotiation and the enforcement of collective bargaining agreements.[17]

Unions can apply to the relevant Labor Relations Board for certification to become recognised for the purpose of collective bargaining.

A union that can establish that the majority of workers in a bargaining unit support the union bargaining on their behalf has the authority to act exclusively for all employees in relation to collective bargaining. The employer is required to recognise it and bargain with it.

In Canada, under Federal laws and in some Provinces, unions can establish that they represent the majority by providing to the relevant NLRA cards signed by a majority of workers to be covered by the agreement. Alternatively, if the union can show substantial support (35 per cent under Federal laws), a ballot can be ordered to test whether the union is representative. In certain provinces, including Ontario, there must be a ballot of the workers in the bargaining unit. In the United States, although the National Labor Relations Act technically allows for recognition without a ballot, in practice a ballot is always required. In Ontario, the ballot is held within 5 days; in the US, ballots take several weeks, and can be delayed by employer actions.

Consequences of a breach of good faith

If a party believes that the other party is not bargaining in good faith, the party may file a charge of unfair labour practices with the relevant labour relations board. If the relevant board deems unfair labour practices to have occurred, it may issue an order requiring the offending party to bargain in good faith, or to "cease and desist" from their practices and to take appropriate affirmative action.

In the United States, the NLRB has limited power to prevent and remedy unfair labour practices or to enforce good faith bargaining. The only remedy for a failure to bargain in good faith is an order to bargain in good faith. Other unfair labour practices, including undermining union representatives, intimidation, victimisation or threatening job losses, can attract an order to "cease and desist". Enforcement is through the Courts, and proceedings can take many years. US unions are lobbying for the introduction of financial penalties for unfair labour practices.

While certain forms of union industrial action require the NLRB to apply for interim injunctions, it rarely applies for interim relief where employers are engaged in unfair practices.

By contrast, in Canada the Boards can act quickly, and have enforcement powers as well as arbitral powers. Where unfair labour practices involve dismissal of an activist, the Board will hold an expedited hearing.

Additionally, in Canada, where the parties have not previously made a collective agreement and where bargaining has failed, the labour relations board may arbitrate the first contract. While this power is rarely used, Canadian unionists felt that its existence encouraged parties to bargain and reach an agreement suitable to their workplace.

What we learnt in Canada

Most of our time in Canada was spent examining the recognition system, with less time devoted to how bargaining occurs in workplaces where the issue of collective bargaining is not contested.

Recognition for collective bargaining has been a feature of Canada's laws, both when unionisation and collective bargaining rates were high and more recently, where they have declined. This suggests that a system of recognition does not, in itself, determine union density. Nor does it determine how widespread collective bargaining is within the economy.

Unions in Canada firmly believe that the legislation makes a difference to how effectively the recognition system effectively allows workers to choose to bargain collectively. We were advised that the more that laws provide a neutral environment for employees to decide whether to join a union and initiate collective bargaining, the higher the rate of successful certification applications.

In a neutral environment, unions should achieve very high success rates, as unions will not petition for certification without high levels of confidence that they have majority support.

Canadian unionists compare their laws favourably to those in the United States. The features of Canada's labour laws that are regularly associated with successful organising and collective bargaining are:

- the availability of card-check recognition;
- swift and effective remedies for unfair labour practices, including recognition without a ballot in the face of undue employer interference in employee free choice;
- expedited hearings for dismissed activists; and
- first contract arbitration.

There is reasonably strong evidence that these legislative features do have an impact upon the levels of new recognitions.

During the 1990s, under the more favourable laws, Canadian unions successfully achieved certification in 69 per cent of certification cases. In 92 per cent of these, a collective agreement was achieved.[18] This compares well to the US, where unions achieve certification in as few as 45 to 50 per cent of cases where a ballot is held. Further, in a third of cases where the union is recognised, a collective agreement is never made (Goddard 2004).

Canadian unionists also pointed to the operation of different laws at different times within Canada to argue that the legislative design directly correlates with the number of newly organised workplaces, and the spread of collective bargaining.

In Ontario between 1993 and 1995, the collective bargaining laws provided for card-check recognition, expedited hearings where activists were dismissed and arbitrated recognition where there was evidence of unfair practices by an employer during an organising campaign. In 1995, the laws removed these provisions and introduced mandatory ballots. In 2004 most of the 1995 amendments were overturned, with the exception that mandatory ballots were retained.

Under the most favourable laws (from 1993-95), there were over 1000 applications for union recognition each year, with success rates of 73 per cent (1993-94) and 77 per cent (1994-95).

Since 1995, application rates have fallen to around 700 per year, and the success rate was as low as 45 per cent in 2002-03 (Slinn 2003, Slinn 2005).

In 2004-05, following the most recent improvements to the laws, 644 certification ballots were conducted, with the unions winning 67 per cent of the ballots (OLRB 2005).

Organisation rates in Ontario fell from a high of 30,000 new union members per annum (under the favourable laws of the NDP Government of the mid 1990s) to around 11,000 in 2005.

We talked to the unions about how they manage bargaining under the changing labour market. The unions noted that they are looking at ways to extend bargaining more broadly, to counter the fragmentation of the labour market that has occurred over the last 20 years. For example, some unions have adopted the practice of negotiating neutrality agreements that apply to the employer, its subsidiaries and sub-contractors. In this way, once having signed a collective agreement, an employer must ensure that other work performed under its control or for its benefit will also respect workers' rights to bargain. The employer cannot then use outsourcing, labour hire, contractors or corporate restructuring to avoid collective bargaining.

What we learnt in the United States

Our contacts in the United States were overwhelmingly negative about the operation of their labour laws. Jon Hiatt of the AFL-CIO found it unnerving that anyone would seek to use the United States laws for anything. Overwhelmingly our discussions with unions in the United States focused on countering employer hostility, so that they could organise the workforce. The legislative regime governing the system of union recognition is so dysfunctional that unions are increasingly seeking to avoid the formal system, opting instead for voluntary recognition with employers.

As noted above, unions are successful in obtaining recognition in only about half of the workplaces that they seek to organise (Mayer 2005), and obtaining recognition does not guarantee that an agreement will be reached. This is despite the fact that unions do not initiate a vote until 60-70 per cent of employees have signed an authorisation card indicating their support for the union to represent them in collective bargaining.

The gap between the success rates in the United States and Canada are attributed to the extent of employer hostility towards unions in the United States, the opportunities that the legislation provides for the employers' hostility to impede workers' free and genuine choice, and the ineffectiveness of the regime for curtailing improper employer behaviour. In Washington, we met with Professor Lance Compa,

author of a landmark report by Human Rights Watch documenting the failings of the United States labor laws.

The report notes that workers are routinely fired for taking part in organising campaigns. Obtaining an order for re-instatement can take years, and back-pay is reduced by any earnings between dismissal and reinstatement. There are no penalties or fines for unlawful dismissal, and there is little disincentive for employers to comply with the law. Human Rights Watch recommends that interim reinstatement orders be available pending hearing, with full back-pay regardless of earnings and punitive damages in the face of wilful violations.

There is an imbalance in the opportunities for communication with workers. Employers regularly use compulsory one-on-one meetings with supervisors and captive-audience meetings (closed compulsory meeting) to "convince" workers not to join unions. While employers are not permitted to threaten workers with adverse consequences arising from organising and collective bargaining, employers are permitted to "predict" job losses associated with collective bargaining. One study showed that 71 per cent of employers had "predicted" plant closures as a consequence of unionisation of a workplace, even though only one per cent had actually closed a plant following the collective agreement. Human Rights Watch recommends rights of union access and entry to balance employer influence in the workplace, closer scrutiny by the NRLB, and swifter and stronger remedies for breaches.

Representation ballots are accompanied by acrimony and hostility. Human Rights Watch recommends fairer elections and a move to card-based checks of a union claim to be representative.

The system is riddled with delays, which give employers an opportunity to counter-organise. The conduct of an uncontested certification ballot takes between 4 and 7 weeks, compared to 5 days in Ontario. Delays commonly occur where an employer challenges the bargaining unit proposed by the union, which will delay the ballot by several months.

The process for hearing a charge of unfair labour practices means that it takes on average 2-3 years for enforceable orders to be issued. Unfair labour practice cases involve a complaint to the Board, which is

investigated and after several months heard by an administrative law judge. Several months later a decision is made, which can be appealed to the Board, where 12 –36 months go by before a decision is made. That decision can then be appealed to the Federal courts, which take around 3 years to make a decision.

The remedy for an unfair labour practice is a "cease and desist" order, which the employer must post in the workplace. The primary remedy against failure to bargain in good faith is an order to bargain in good faith. The inadequacy of these remedies means there is no real risk to employers associated with being found to have breached the law. Employers can engage in deliberate and calculated breaches, safe in the knowledge that they will not suffer any adverse consequences.

Unions in the United States have responded to the inadequacies of the compliance regime by campaigning for law reform. They are promoting the Employee Free Choice Bill, which would introduce three amendments to the NLRA. The amendments would see the introduction of card-based certifications, first contract arbitration, and stronger penalties for use of unfair practices during the periods of organising or bargaining a first-contract, including:

- a requirement that the NRLB apply for an injunction when there is reasonable cause to believe the employer has, or has threatened to, dismiss or discriminate against employees or engaged in conduct that significantly interferes with employee rights during an organising or first contract drive;

- treble back-pay for an employee who is dismissed or demoted; and

- civil penalties of up to $20,000 per violation.

In addition, unions are seeking to neutralise employers before they even begin the organising and bargaining campaigns. Unions are using community and corporate campaigns to leveraging companies' desire to be seen as a good corporate citizens. They use these campaigns to encourage employers to sign on to "neutrality agreements" or "private recognition agreements" which are informal agreements that contain a code of conduct whereby the employer and

the union guarantee a fair environment in which the union can organise.

Judy Scott, General Counsel for the SIEU, outlined how these work. Generally, employers and unions agree to the principle that employees can choose for themselves whether or not to have a union. The public announcement of this view may also include a commitment to fully support the decision of the workers, once made.

In some of the agreements, employers agree to restrict the way they communicate their preference for a non-union workplace to the workforce (for example, only in writing, or not using one-on-one meetings). The union and employers may also agree to pre-screen each others' literature, refrain from distributing any objectionable material pending private arbitration of its compliance with the neutrality agreement, and refrain from mud-slinging.

The fact that unions in the United States are forced to obtain a commitment from employers to respect workers' freedom of association and right to collectively bargain before they seek to organise a workforce indicates the extent to which the National Labour Relations Act fails in practice to guarantee and protect the freedoms that are contained in the letter of the law. This highlighted to us the importance of the enforcement and compliance regime in any statutory scheme for collective bargaining.

Collective bargaining in the United Kingdom

Most bargaining in the United Kingdom takes place voluntarily, without any oversight by the industrial relations authorities.

In 2000 the government introduced a limited statutory scheme for recognition of unions in collective bargaining. Under the laws, parties are encouraged in the first instance to reach voluntary agreement on recognised bargaining units. A union may make a written request to the employer seeking recognition in collective bargaining procedures. If such a request is accepted, the union is then entitled to conduct collective bargaining on behalf of the bargaining unit, and there is no threshold for bargaining to take place.

Recognition as representative of the workforce

Where an employer refuses to bargain, the union can apply to the Central Arbitration Committee (CAC) to determine whether the union has reasonable support amongst the workers.

If more than half the workforce are members of the applicant union(s) this will constitute sufficient evidence, although in some circumstances the CAC may order a ballot even in the face of majority union membership.

Additionally, where members of the union (or unions) constitute at least 10 per cent of the workers in the relevant bargaining unit and the union can provide evidence (usually a petition) that a majority of the workers in the bargaining unit are in favour of recognising the union for collective bargaining, the CAC can order a ballot.

If the majority support recognition, and if at least 40 per cent of those eligible to vote support recognition, then the employer must recognise the union for the purpose of collective bargaining.

If the parties cannot reach agreement on a method of bargaining, the CAC may impose a method of collective bargaining. This is an enforceable instrument, and can result in orders to comply.

What we learnt in the United Kingdom

Unlike North America, United Kingdom laws contain incremental rights to representation in the workplace.

The laws include an individual right to representation, including by a union, in grievances and discipline matters in the workplace. In addition, workers in businesses of more a certain size have rights to information and consultation, provided at least 10 per cent of workers have requested that an information and consultation procedure be established. Full collective bargaining rights apply in workplaces by consent, or where the union has the support of the majority of workers.

Professor Keith Ewing described how the information and consultation rights worked to support workplace bargaining from the "bottom up", in workplaces where there was a low level of organisation.

He also saw the need for "top-down" support, meaning greater sectoral-level coordination. He indicated that a first step towards this was contained in the 2004 "Warwick agreement" between unions and the Labour Party, where it was agreed to establish new sectoral forums bringing social partners together in low-paid sectors to discuss strategies for productivity, health and safety, pay, skills and pensions (TULO 2004).

We spent most of our time talking about the operation of the laws in respect to recognition of majority unions for the purpose of collective bargaining.

Our discussions revealed some obvious design flaws that limit the effectiveness of these laws. These include:

- The procedure only applies to firms employing more than 20 employees;

- Applications for recognition can be circumvented by an employer voluntarily recognising an in-house union;

- The CAC can order a ballot to test whether a union represents the majority of the workforce even where the majority of workers are union members;

- Where recognition is achieved, bargaining is for the purpose of determining pay, hours and holidays only, unless other items are agreed;

- Once recognition is achieved there is no obligation on any party to bargain in good faith;[19] and

- There is no arbitrated settlement imposed at the end of the process if recognition and bargaining fails to produce a result.

The unions and their advisers with whom we met were cognisant of the failings of the laws, but cautiously optimistic that they would have an impact on some employers who had steadfastly refused to bargain in the past. There is some evidence that the UK laws have, directly or indirectly, secured bargaining rights for a number of workers.

Although there had only been 150 cases (covering 40,000 workers) in which employers had been forced to recognise a union, a large number of new recognition agreements have been made in the shadow of the laws. The government conciliation service Advisory Conciliation and Arbitration Service (ACAS) has been increasingly involved in assisting parties to mediate recognition issues.[20]

Since the right to recognition came into force in 2000, over 1,100 agreements have been signed (or around 200 per annum) and over 310,000 employees have gained the right to be collectively represented by a trade union (TUC 2006). The proportion of workplaces employing more than 25 employees that recognise unions has risen from 24 per cent to 32 per cent since 1998 (DTI 2006).

In a survey of firms, the rate of new recognitions had increased from 3 per cent between 1985 and 1990, to 11 per cent between 1997 and 2002 (Blanden et el, 2004)

Analysis of 60 case studies concluded that the laws had made a change to the atmosphere in which negotiations were conducted, and most employers have been pragmatic and entered into negotiations where the union has a significant presence. While some employers had strengthened their anti-union position, many had reviewed their policy towards unions, albeit with some more likely to consider which union they would deal with (Oxenbridge et al, 2003).

While the legislation has sped up the recognition process, some argue that the law tends to confirm unions in areas where they are already strong, but does not have any impact where unions are not well established. New recognition agreements showed they were particularly prevalent among large firms, in manufacturing, and in sectors where membership levels were already relatively high. New recognition agreements tended to be more prevalent in sectors where a core of membership already existed, so that pre-existing

membership levels were able to facilitate the new recognition (Blanden et el, 2004).

Whether the laws will promote the extension of bargaining into other sectors of the economy is unclear. Over the year to November 2005, the number of agreements signed with employers fell. The TUC attributes this in part to a hardening of employer attitudes, and in part to the fact that they are campaigning in areas where there has not been a union presence before (see also Gall 2005).

Neither the unions in the United Kingdom nor their advisers claimed that the recognition laws would return union density or collective bargaining rates across the United Kingdom to their pre-Thatcher levels.

As in Australia, education, training and support for delegates, and developing modern campaigning skills were seen as much more important factors in union renewal strategies than the recognition laws. However, in the past year, the number of trade union campaigns for recognition deals has trebled. This might indicate that the existence of the laws has injected an enthusiasm for organising into the unions.

Collective bargaining in New Zealand

The New Zealand system of collective bargaining is regulated by the Employment Relations Act 2000. The objects of the legislation include the promotion of freedom of association and collective bargaining. They expressly recognise the inequality of power between employers and their employees.

Obligation to bargain in good faith

Initiation of bargaining by a registered union or employer obliges the other party to bargain in good faith towards the making of a collective agreement. The obligation applies equally to single or multi-employer bargaining. The obligation to deal in good faith applies not only during bargaining, but continues to apply to matters arising during the life of

an agreement, consultation about change at the workplace, redundancies, and access to the workplace.

During bargaining, the duty of good faith includes a requirement to meet, to exchange information, consider and respond to each other's proposals, and to continue to bargain about matters despite having reached deadlock on other matters. It also includes a prohibition on conduct that would undermine a union as the bargaining agent of its members. Thus, parties must recognise the role and authority of representatives, not seek to bypass representatives or bargain directly, and not do anything that is likely to undermine the bargaining authority of the other party. The duty of good faith also means that an employer must not advise an employee or seek to induce them not to be covered by collective bargaining or a collective agreement.

Employers are also not permitted to undermine collective bargaining or collective agreements by automatically passing on collectively bargained terms and conditions to employees not covered by that collective bargaining or agreement, although the parties can reach agreement to pass on the terms of a collective agreement where employees have voted for a bargaining fee.

Recent amendments to the legislation strengthen the obligation to bargain in good faith by inserting a "duty to conclude", which requires the parties to conclude an agreement unless there is a reasonable ground not to. Opposition, in principle, to being a party to a collective agreement does not constitute a reasonable ground. The effectiveness of this provision has not yet been tested in the Employment Court.

The legislation specifically provides for multi-employer bargaining, which can be initiated by a union provided that it has the support of its members working for the various employers and no existing collective agreement governs the work of the employees to be covered.

Recognition as representative of the workforce

The concept of recognition found in North America and the UK is not applicable in New Zealand. Agreements apply only to members of the

union, and therefore the extent to which the union is broadly representative of the workforce is not relevant to bargaining. Initiation of a claim obliges the employer to bargain in good faith with the union towards the making of a collective agreement. Workers can enjoy the benefits of the collective agreement simply by joining the union. Unions, once registered, are able to bargain on behalf of their members.

Consequences of a breach of good faith

Industrial action is available during facilitation. However, where parties have difficulties concluding a collective agreement, they can seek mediation. Failure to comply with the duty of good faith can result in the Employment Authority stepping in to facilitate the making of an agreement. It can do so in cases where:

- bargaining has been unduly protracted, and extensive efforts (including mediation) have failed to resolve the difficulties; or

- there have been one or more strikes or lockouts, and the strikes or lockouts have been protracted or acrimonious; or

- a party has proposed a strike or lockout that would be likely to affect the public interest substantially (i.e. the strike or lockout is likely to endanger the life, safety, or health of persons; or is likely to disrupt social, environmental, or economic interests, and the effects of the disruption are likely to be widespread, long-term or irreversible).

The Authority may arbitrate the terms of the collective agreement if it is satisfied that there have been serious and sustained breaches of good faith, that all other reasonable alternatives to reach agreement have been exhausted, and that arbitration is the only effective remedy for the breach of good faith. To date, these provisions of the Act have not been used.

In serious cases, the Employment Relations Authority or the Employment Court can also impose a penalty on a party that breaches the duty of good faith while engaged in collective bargaining.

What we learnt in New Zealand

New Zealand unions are working to rebuild their organisations after enduring a very hostile legislative and political environment. The Employment Relations Act and campaigns for improved annual leave, paid parental leave and other employment standards are significant improvements, and have allowed unions to begin re-establishing their position. We heard that unions are re-negotiating conditions such as penalty rates in the construction industry and improved pay in the aged care and private health sectors.

Unions cited legislative arrangements that are supporting their re-establishment including their right of entry to the workplace, capacity to have payroll deductions of dues, paid training leave, and rights to union meetings. They are now increasingly seeking to bargain at the multi-employer level, and the NZCTU is exploring options for extension procedures that would enable unions to spread collective bargaining more broadly.

The key messages from our time in New Zealand were that there is merit in basing a system in an obligation to bargain in good faith, provided that the system is properly designed. However, we also learnt that, whatever the problems of majority recognition systems in other countries, avoiding the issue is not necessarily a better alternative.

The New Zealand system avoids the issue of whether a union can speak with authority on behalf of the workforce by only recognising it to bargain on behalf of its members.

This creates its own problems. Restricting the coverage of collective agreements to members of the union means that different working conditions can apply, based solely on whether an employee is a union member.

This means that bargaining can lead to unequal pay for work of equal value within workplaces. It also encourages artificial distinctions between union members and their co-workers. In some instances employers will offer differentiated conditions to non-union members as a means to undermine bargaining despite this being a breach of good faith.

We recognise only too well the issues of free–riding that the New Zealand laws seek to address, but in our view, the disadvantages of member-only agreements outweigh their benefits. New Zealand unions recognised that where employers tactically offer differential terms and conditions to union and non-union members the ill-will that this generates can hamper ongoing membership growth in that workplace.

Collective bargaining in the European Union

Our examination of bargaining in continental Europe was limited to a high-level overview.

We were informed by the report that unions commissioned by the Australian Institute of Employment Rights, which examined the systems in Sweden, Italy and Germany in more detail than we were able to do so, and by our discussions with EU-level union organisations.

While the national systems across the European Union vary considerably, we noticed a number of common features.

First, collective bargaining is recognised in the laws of most European Union nations.

Second, in the European Union bargaining is more likely to occur on a coordinated or centralised basis, with the level or degree of coordination varying. At one end of the continuum is Ireland, where national tripartite negotiations determine the national wage outcome across the nation. National bargaining is also the dominant, but not the sole form of bargaining in Belgium and Finland. Less centralisation

characterises bargaining in countries such as Denmark and Greece, where some matters are bargained at national level, some at industry or sectoral level, and some at company level. At the other end of the spectrum, in France (as well as the newer European Union States such as the Czech Republic, Estonia, Latvia, Lithuania, Malta and Poland), company-level bargaining dominates.

Over the past decade or so, there has been a trend towards multi-level bargaining, with agreement making at both sectoral and company level. In a number of the original European Union Member States that have long-standing systems of sectoral collective bargaining, there is pressure towards decentralisation, or decentralisation within a framework agreement.

The rise of company-level opt-outs from sectoral-level agreements, and other pressures to devolve all bargaining to the workplace, were seen as regressive.

- In Germany, the 2004 bargaining round saw increased demands for opt-out clauses, particularly regarding working time, at the company level.

- In France, new legislation passed in 2004 overturned the previous hierarchy of collectively agreed norms, and introduced the possibility of company-level agreements departing from sector-level agreements in a way that is unfavourable to employees in some circumstances.

- In Italy, there has been opposition to "reform" of the current two-tier bargaining system to give greater weight to the decentralised level.

The EU unions are resisting decentralisation, with varying success. In Germany for example, most workplace bargaining is conducted by works councils, which can undermine the sectoral agreements.

Third, coverage of collective bargaining in many European Union nations is extended either by government action, or automatically as a result of compulsory membership of employer associations (eg Austria and Slovenia). In Finland, Germany and Greece, the coverage of

agreements can be extended where more than half of the employees in a sector are covered by an agreement.

Fourth, while notions of good faith bargaining are not alien to European collective bargaining, the obligation to bargain derives more from constitutionally guaranteed rights to collectively bargain and the right to take industrial action.

Fifth, collective bargaining in continental Europe is enmeshed with other mechanisms for bi-partite and tripartite involvement of workers/unions in policy debates. Unions and collectivism are not only respected in law, but also in the culture of social partnership and dialogue.

Sixth, framework agreements (sometimes negotiated with government at the table) set the bargaining parameters, allowing unions to consolidate their bargaining position across industries or at the national level.

As noted above, some of these features are under challenge and a number of nations are reviewing their bargaining regimes. It is also noteworthy that - while the European model accords unions greater status as a partner, and extension procedures result in intensively more widespread coverage of agreements than in the Anglo-tradition countries - unions in the European Union have seen a similar fall in membership levels to those experienced in other developed nations. In France, despite single-digit trade union density, national stoppages are not irregular occurrences.

The relocation of manufacturing jobs within the European Union from Western Europe to Central and Eastern Europe accounts for some of this fall.

This underscores the point that, while laws are important, structural changes to the economy and labour market have been a much more significant influence over levels of unionisation than the legal framework for collective bargaining within each country.

4. The model for Australia

The remainder of this report details the way that our understanding of the international systems of collective bargaining informed our decisions and recommendations.

In Part 5 we outline how the requirement to bargain in good faith is defined in the countries we visited.

In Part 6 we describe how, across the developed world, the subject matter about which parties are obliged to deal in good faith is largely unrestricted. This highlights just how out of step with the rest of the world are Australia's laws restricting the subject matter of bargaining by prohibiting pattern bargaining.

Part 7 of the report looks at the enforcement regimes that apply in each jurisdiction. We take a broad view, and look beyond legislation that empowers employment authorities to order parties to bargain in good faith. We look at the mechanisms that ensure that employers respect the bargaining authority of unions, and examine the legislation that prevents victimisation and intimidation of union activists in organising and bargaining. We also describe the legislation that supports workers representatives in bargaining. We conclude this part by describing how last resort arbitration provides a powerful impetus to bargain in good faith and reach agreement.

In Part 8 of the report we look at how the various jurisdictions determine when the obligation to bargain in good faith is triggered. We examine the recognition systems that apply in North America and the UK. We reject the adoption of a North American-style system on three grounds: the systems appear to invite employer opposition and hostility by providing a focal point for exclusion of a union; the systems fail to provide representation rights for workers where the majority of their colleagues do not support collective bargaining; and the models promote competitive unionism.

Instead we propose an alternative, whereby individual workers have a right to representation with their employer and in collective bargaining, there is an obligation on the Commission to promote collective bargaining, and a requirement on the Commission to ensure

bargaining takes place where the majority of employees want a collective agreement.

In Part 9 we outline how each jurisdiction determines which workers are to be covered by the agreement. We deal with two issues: how the employment tribunals determine the scope of the agreement in the event of disagreement; and the issue of multi-employer bargaining. Again we note how the restrictions on multi-employer bargaining in Australia are inconsistent with practices elsewhere.

Part 10 looks briefly at the way in which the countries we visited deal with industrial action.

Part 11 addresses how collective agreements bind the parties to them.

In our final Part 12 we note the difference between jurisdictions in the powers and independence of the tribunals charged with overseeing collective bargaining.

5. A statutory duty to bargain in good faith

We have recommended that collective bargaining in Australia be based upon a mutual obligation for employers, unions and workers to bargain in good faith towards the making of collective agreements.

The notion that parties be obliged to deal with each other in good faith has been endorsed by the ILO's Committee on Freedom of Association, which regards an obligation to negotiate in good faith to be necessary for the maintenance of the harmonious development of labour relations (ILO Digest para 814). The ultimate purpose of this kind of duty is to ensure that the parties have every possible opportunity to reach agreement. Simply, it makes good industrial sense.

As noted above, a mutual obligation to bargain in good faith is the essence of the bargaining systems in Canada, the United States and New Zealand. In the UK, there is no obligation to bargain in good faith, although if the recognition process is invoked, an employer can be bound to comply with a negotiation procedure.

In Canada and the United States, a claim by a certified or recognised union or by the employer establishes a duty to bargain in good faith. In New Zealand, a claim by a registered union or the employer triggers the obligation to bargain in good faith.

An obligation to bargain in good faith is a feature of the Queensland, Western Australian,[21] and South Australian legislation, and the NSW laws provide a remedy if a party does not negotiate in good faith. Good faith bargaining was a feature of Australia's Federal labour laws between 1994 and 1996, when the AIRC was given the power to make orders for the purpose of ensuring that the parties negotiating an agreement did so in good faith.

Elements of the obligation to bargain in good faith

In North America, the elements of good faith have been developed by case law. In New Zealand the legislation codifies the main elements of good faith. The legislation is supplemented by a Code for good faith

bargaining. A separate, detailed code has been enacted for the health sector.

The obligation to bargain in good faith includes an obligation to adhere to reasonable bargaining procedures, and to respect the bargaining authority of representatives involved in bargaining. Industrial action is not considered a breach of the duty to bargain in good faith.
The elements of good faith are common across jurisdictions.

The requirement to bargain in good faith imposes:

- An obligation to evidence a sincere intention of reaching agreement; to consider and not arbitrarily reject proposals. This includes a prohibition on surface bargaining (the practice of going through the motions of bargaining, with no intention of reaching agreement);

- An obligation to meet and confer;

- An obligation to provide information to enable effective bargaining;[22]

- An obligation to refrain from unilateral variation in terms and conditions while bargaining;[23]

- A duty to deal with the other parties' designated representative;

- A duty to not bargain with another party in respect of individuals who are represented; and

- The obligation not to undermine the bargaining parties, including by not offering inducement or making threats.

Good faith bargaining does not require a party to make concessions, to agree to a proposal, or to reach agreement. Good faith bargaining does require bargaining with an open mind in an attempt to reach agreement. In New Zealand, the law has recently been amended to impose an obligation to conclude an agreement unless there are reasonable grounds not to conclude. "In principle" opposition to making a collective agreement is not considered a reasonable ground.

Good faith goes beyond the mechanics of bargaining. It encompasses the requirement to respect and not undermine representative parties or the bargaining process. The New Zealand legislation specifically provides that it is a breach of good faith for an employer to do anything for the purpose of inducing an employee to not be involved in collective bargaining or not be covered by a collective agreement. In 2004 the legislation was amended to introduce penalties for breach of good faith or where conduct is intended to undermine bargaining for and individual or collective agreement [24]

Examples of conduct that have been held to breach an employer's obligation to bargain in good faith in the US include:

- refusing to meet with the employees' representative because the employees are on strike;

- insisting, until bargaining negotiations break down, on a contract provision that all employees will be polled by secret ballot before the union calls a strike;

- refusing to supply the employees' representative with cost and other data concerning a group insurance plan covering the employees;

- announcing a wage increase without consulting the employees' representative; and

- failing to bargain about the effects of a decision to close one of the employer's plants (NRLB 1997).

The duty to bargain in good faith is a mutual obligation, applying to unions as well as employers.

In practice, in the United States and Canada, employers rarely seek orders against unions. In the US in 1998, unions charged employers with failure to bargain in good faith in 7187 cases. Employers charged unions in only 172 cases (Compa 2000). The North American union leaders with whom we met did not consider that the requirement to bargain in good faith had restricted unions' ability to bargain.

In New Zealand, employers have sought orders to require unions to change their behaviour during bargaining. Andrew Cassidy reported that FINSEC had been taken to the Court for alleged breach of good faith. The union had been making derogatory comments regarding an employer during bargaining. The Court held that the union was not undermining the employer in bargaining, as it had a reasonably held belief that the employer was a poor employer.

Taking industrial action is not a breach of the obligation to bargain in good faith

In each of the jurisdictions that we examined, taking industrial action is not a breach of the obligation to bargain in good faith. The New Zealand Employment Relations Act specifically provides that the requirement that a union and an employer must deal with each other in good faith does not preclude strikes and lock-outs being lawful.[25]

Conclusion

In our view a mutual obligation to bargain in good faith will encourage and promote fair industrial relations and foster the settlement of industrial disputes between parties to their mutual benefit. We recommend that the obligation to bargain in good faith towards the making of a collective agreement be an enforceable obligation.

Employers and unions (within their area of coverage) should have the freedom to voluntarily enter into collective bargaining negotiations and to reach agreement, following which approval and certification processes would occur.

The legislation should be established upon the basis and on the assumption that parties will collectively bargain in good faith.

The initiation of the bargaining process, negotiation, and agreement making should all be available without the necessity of accessing Commission involvement in the bargaining process.

A bargaining party, however, would have the right to apply to the Commission for good faith bargaining orders where it was asserted that another party is not collectively bargaining in good faith.

The Commission should be able to facilitate collective bargaining. It should have appropriate powers to ensure:

The Objects of the legislation are upheld, prominent amongst which would be the promotion of collective bargaining as the principal means of determining pay and employment conditions;

The right of employees to freely associate in unions and to collectively bargain;

The obligation on all parties to collectively bargain in good faith and to attempt to reach agreement;

The right of employees and their union(s) to engage in protected industrial action; and

that where bargaining has failed and there is no reasonable prospect of agreement being reached, or where a party has seriously undermined the principle of good faith bargaining, "last resort arbitration" is used to resolve bargaining disputes.

Where a party is not bargaining in good faith, the Commission should have the power to make orders to facilitate good faith bargaining.

Whether conduct amounts to a breach of good faith should be for the Commission to decide, subject to some clear guidance. In particular:

good faith does not require a bargaining party to agree on any matter for inclusion in an agreement or require a party to enter into, or prevent a party from entering into, an agreement;
the taking of protected industrial action is not, of itself, a breach of good faith;
'pattern bargaining' and the taking of protected industrial action in pursuit of common claims and outcomes in more than one collective agreement is not of itself a breach of good faith.

In determining whether to make a good faith order, the Commission should consider the parties' conduct in negotiations, including:

whether each party has agreed to meet at reasonable times and attended the agreed meetings;

whether a party has refused or failed to negotiate with one or more of the parties;

whether a party has refused or failed to negotiate with a union which is entitled to represent an employee(s);

whether each party has complied with agreed negotiating procedures;

whether a party has capriciously added or withdrawn items for negotiation;

whether each party has provided relevant information and documents;

whether a party has engaged in conduct designed to undermine the bargaining right of another party;

whether a party is respecting the collective bargaining process;

the views of the bargaining parties;

where it is a matter contested between the bargaining parties, the level of support amongst employees for the collective bargaining process.

We recommend that the freedom of association provisions in the legislation prohibit conduct by employers designed to undermine collective bargaining, including offering of inducements to workers to undermine collective bargaining processes.

6. The subject matter of good faith bargaining

Free bargaining between parties means that parties to an agreement should be free to regulate their own affairs, subject to certain minimum requirements.

Australian law has traditionally restricted the content of awards and agreements to matters pertaining to the employment relationship. Work Choices restates this restriction and extends it to apply to pre-agreement claims and negotiations. The regulations also list a number of "prohibited matters", some of which were previously held not to pertain to the to employment with relationship together with other matters which were determined to pertain.

The ILO has criticised John Howard's IR laws because they restrict access to protected industrial action in pursuit of certain subjects (eg strike pay). No doubt future scrutiny of the laws will be critical of the notion of "prohibited matters" that further restrict the matters that parties may negotiate and impose fines for pursuing these matters.

We did not encounter any comparable notion overseas. In many countries there is no limit on what may be claimed and bargained other than ensuring that agreements meet minimum labour standards. This is the case in Canada, New Zealand, Sweden, Italy and Germany (AIER 2006).

Under the Canadian Labour Code, agreements must include provisions on specified matters, such as the settlement of disputes over the interpretation and application of the agreement. This is the only prescription on the matters that can be in agreements. Where a claim is made, the obligation to bargain in good faith will arise.

In New Zealand, any matter may be the subject of bargaining, other than a preference clause.

In other countries there is a distinction between issues on which the parties are obliged to negotiate if one of the parties so requests, and issues on which the parties may voluntarily negotiate if they agree.

In the United States, the case law has developed a distinction between mandatory and permitted bargaining topics. The obligation to bargain in good faith applies to mandatory topics, which must be discussed if one of the parties requests it. Mandatory topics include wages and benefits, but also matters related to the mechanics of the contract such as the duration and expiry date. Permissive topics are issues that either party, the union or employer, may ask to discuss, but which the other party is not required to discuss.

There is a limited set of prohibited topics, including a claim to discriminate against people of a particular race or to permit secondary boycotts.

In the UK, where the statutory recognition scheme has been activated, the reluctant employer is only required to bargain about wages, hours and holidays, although it is open for the parties to agree on other matters.

Matters relating to the relationship between unions and employers

In the countries we visited, agreements can and do cover matters related to the relationship between unions and employers as well as matters related to workers.

In North America unions can take industrial action in pursuit of closed shop agreements, preference clauses and payment of union dues by non-members. In North America, bargaining fees "check off" (payroll deductions of union dues) and union security clauses (a clause requiring non-members to pay union dues) are considered an important guarantee of financial viability for unions, who in turn are seen as integral to democratic workplaces. It is ironic that what is outlawed in Australia as antithetical to "individual rights" is seen in the United States and Canada as a component necessary of the freedom to associate and as an outworking of democracy in the workplace.

Under the Canadian Code, closed shop agreements and preference clauses are specifically permitted in agreements.[26] In addition, where a union requests, the agreement is deemed to include a requirement

that the employer compulsorily deduct an amount equal to union dues from every worker, to be paid to the union.[27]

In the United States, State legislation can outlaw closed shop arrangements. However in States that have not done so, it remains lawful to bargain for union dues and for compulsory membership following employment with the employer.

The New Zealand legislation prohibits preference clauses in agreements although the law does not prohibit conferring additional benefits on employees covered by collective agreements.

The New Zealand law specifically permits the parties to agree to include a compulsory bargaining fee but prohibits industrial action in pursuit of such a provision. In addition, a payroll deduction clause may be deemed into an agreement, and the law provides for paid union meetings and time off for delegates.

In the United Kingdom it is lawful for parties to agree to closed shops and union security clauses, and they regularly do so without recourse to industrial action. Many of the matters that are prohibited in Australia (such as time off for union meetings, enshrining union delegates' role in information and consultation, and trade union training) are not only lawful, but promoted in legislation. However, legally protected strike action is limited to similar matters capable of being a "trade dispute", (to a matter pertaining to the employment relationship.) In addition, protected action cannot be taken to advance closed shop practices or to prevent employers using non-union firms as suppliers.

The restrictions on the bargaining agenda that exist under the Workplace Relations Act are clearly inconsistent with practices in other developed nations, and should not be a feature of a new system of collective bargaining in Australia.

The matters to be included in an agreement should be for the parties to agree, subject to agreements meeting a genuine "no disadvantage test".

The agreement should be approved by a majority of those employees who vote. Voting should be limited to those who are to be covered by the agreement.

Parties should be bound by agreements and not able to opt out. The system should guard against workforce or corporate restructuring to avoid agreements.

Agreements should continue for their term, and beyond until terminated by the parties or replaced by another agreement. The maximum term for agreements should be three years.

Common claims across more than one workforce

Under John Howard's WorkChoices legislation, seeking common claims and outcomes across more than one bargaining unit is prohibited as incompatible with genuine bargaining. The legislation renders it impossible for a union to take protective industrial action in pursuit of a common claim across two or more employers. This is not the case in any of the countries we visited.

In the UK, a strike is lawful provided it is properly authorised. There is no restriction on simultaneous industrial action in pursuit of a common claim. On our last day in London, pre-strike ballots were being conducted in each bargaining unit to authorise a strike across the rail industry, in pursuit of claims related to the Railway Pensions Scheme. The strike ballot was being conducted amongst tens of thousands of rail workers in dozens of infrastructure and operating companies, and was being conducted by four separate unions.

In the US, pattern bargaining, including industrial action in pursuit of common outcomes, is considered consistent with good faith bargaining. Unions cannot make the reaching of identical settlements a non-negotiable matter. They must give the employer the opportunity to bargain on the matters, and must not make agreement at one employer conditional upon agreement at another. But unions can seek common claims and common bargaining periods, including commonly timed industrial action, against several employers. The NLRB has said that a prohibition on pattern bargaining would be like asking unions to "bail with a sieve".

In Ontario and Washington, we met with representatives of UNITE HERE, who have been running coordinated campaigns in hotels in the United States. The union has served claims on hotel chains across North America seeking to align the terms of the contracts to enable simultaneous bargaining for the next round of agreements. In a decision endorsing this approach, the National Labour Relations Board said:

… the Unions' demands for two-year contracts, in order to coordinate their future negotiations with those of sister locals in other cities, are lawful. In this regard, we conclude that the Unions' contract demands do not amount to an unlawful attempt to merge their separate bargaining units into a national bargaining unit, because each local's demand has a direct impact on terms and conditions of employment affecting the unit employees it represents, and neither local has conditioned reaching agreement on resolution of any matter outside its bargaining unit. Therefore, even if the Unions were to insist on their contract duration demands to impasse or strike in support of them, this would not be unlawful."[28]

There should be an ability for parties to engage freely in 'pattern bargaining' – that is, to pursue common claims and outcomes in two or more single business agreements.

7. Enforcing the requirement to bargain in good faith

While an important part of our model is the definition of what constitutes good faith in bargaining, the compliance and enforcement regime is the key to whether the obligation to bargain in good faith translates to fair bargaining between employers and unions.

Effective enforcement of the requirement to bargain in good faith rests on a number of legislative provisions: the ability of the tribunal to issue timely and enforceable orders against parties that are failing to bargain in good faith; adequate penalties that dissuade parties from undermining each others bargaining authority and encourage respect for representatives; and the prospect of arbitration in the event of sustained failure to bargain.

Orders to bargain in good faith

In Canada, the US and New Zealand the primary remedy for a breach of good faith is an order to bargain in good faith, made by the relevant employment tribunal.

This is a manifestly inadequate enforcement mechanism, unless the orders can be made promptly and are readily enforced.

In our view the Commission must be able to make enforceable orders to bargain in good faith. These should not be limited to the making of orders related to the mechanics of bargaining, but should also include orders to prevent action that undermines the collective bargaining process, and orders that remedy the impact of such conduct.

The extraordinary legalism and levels of decision-making within the United States labour relations system means that employers can bargain in bad faith with impunity. While the law prohibits "surface bargaining", it is an exceedingly difficult charge to prove. The penalty for bad faith or surface bargaining is typically an order to resume bargaining. Following an order to resume bargaining, recalcitrant

employers frequently resume bad faith bargaining all over again, in the knowledge that the risk of successful, timely prosecution is low.

We were referred to the case of Sparks Nuggett Casino, where it took 18 years and five levels of administrative and judicial review before an enforceable Court order was made against the employer for breach of its obligation to bargain in good faith.

In that case, bargaining commenced in 1974. Three years later, the Board held that the company had been guilty of three years of bad faith negotiations, and ordered that it bargain in good faith. The company continued to bargain in bad faith, and in 1980 the Court enforced the Board's order but the employer did not change its behaviour. In 1984, an administrative judge found continued bad faith, and in 1990 the Board ordered the employer to the table. The Company appealed to the Ninth Circuit District Court of Appeal, which in 1992 enforced the order to bargain.

In Canada and New Zealand, bargaining in good faith was much more likely to occur than in the US. In both those jurisdictions, enforceable orders are obtained in a much shorter time frame than the US, and in Canada and New Zealand bargaining is also backed, at least in some circumstances, by the prospect of arbitration.

Where there is a failure to bargain in good faith, the Commission should have discretion, subject to legislative guidance, to grant orders to do, or stop doing, certain things.

The Commission should to be able to make remedial orders to restore the status quo in order to remedy a breach of good faith.

The orders might relate to:

Orderly bargaining (meetings schedules, exchange of information and proposals, adhering to undertakings and requiring parties to attend conciliation proceedings, time limits etc);

Respect for the collective bargaining process and the role of representatives (prohibiting action that undermines collective bargaining or the representative role of another party, or that

disadvantages workers or discriminates against union membership, and orders to remedy any unfair practices);[†]

Ascertaining the level of workplace support (in accordance with procedures outlined under "majority support");

The suspension or deferral of industrial action for a short period of time (having regard to the right of parties to engage in protected industrial action and that the taking of such action is not of itself contrary to bargaining in good faith) and/or;

Preservation of the status quo.

A party which is opposed to the collective bargaining process and/or the making of a collective agreement should bear the onus of demonstrating why the Commission should not make a good faith order. Opposition to the making of a collective agreement should not be considered a valid reason.

Respecting the authority of representatives

The right to collectively bargain includes a right to bargain without being the subject of intimidation, victimisation or fear of reprisal. While Australia's Freedom of Association provisions outlaw discrimination on the grounds of union membership, they do not adequately protect workers from differential treatment based on their decision to bargain collectively. Nor do they adequately prevent employers seeking to undermine the union as representative by negotiating directly with the workforce during bargaining or offering to pay wage increases during bargaining.

The North American, United Kingdom and New Zealand laws all prevent employers offering inducements to "opt out" of union membership or collective bargaining.

[†] These orders might include:

- orders to ensure workers have appropriate opportunities to receive advice and information from their union during bargaining, including paid time off for meetings, opportunities for workers to meet with their union representatives individually or in small groups, and access to workplace communication mechanisms;
- orders to ensure delegates have appropriate resources to perform their representative roles; or
- orders that parties retract false or misleading statements made during bargaining.

For example, in the United Kingdom, a worker who is a member of a trade union seeking recognition by his employer for collective bargaining purposes, or already covered by a collective agreement, may not be offered inducements if the employer's sole or main purpose in making the offer is to undermine collective bargaining.

We have recommended that the freedom of association provisions be amended to prevent employers inducing workers to opt out of collective bargaining.

In other jurisdictions, the laws also govern the type of communications that employers may have with their workforce during organising and bargaining. The purpose of these laws is to prevent employers engendering fear of reprisal and to prevent employers seeking to undermine representative unions.

In New Zealand an employer may not do anything designed to undermine collective bargaining, including having direct communications with its workforce about matters relating to the bargaining process.

In Canada one-on-one communications, where the employer meets with employees directly, is considered an illegal unfair labour practice.

This is in contrast to the United States, where one-on-one communications are commonplace. In the US, employers routinely write to workers and their spouses arguing against union representation in the workplace. And while American employers may not "threaten" that collective bargaining will result in employees suffering a detriment, they routinely "predict" that unionisation of the workplace will lead to job losses.

In our view the concept of good faith must be broad enough to encompass respect for bargaining representatives. The powers of the Commission must be broad enough to allow it to make orders that dissuade employers from undermining representatives and that restore the position of workers who have been subject to reprisal due to their commitment to collective bargaining.

In both Ontario and the United Kingdom, engaging in behaviour designed to undermine the true wishes of the employees in the bargaining unit can lead to the employment authority making orders that the employer bargain in good faith, even where there has been no test of whether the union is representative of the workers in the workplace.

In Ontario the Labour Relations Board is empowered to hold rapid hearings to reinstate activists who have been dismissed during an organising campaign. We were told that this is a significant deterrent to illegal employer behaviour. Professor Charlotte Yates said that the introduction of expedited hearings on dismissal in Ontario in 2004 was the single most effective law reform that assists organising drives.

We think that the Australian model should include a fast-track hearing and interim reinstatement orders where an authorised delegate is dismissed or otherwise victimised during bargaining.

We also believe that the Commission should have the power to make remedial orders that restore the damage caused by behaviour designed to undermine the worker's right to representation or the making of a collective agreement.

Access to the workplace

Prohibiting unfair behaviour by employers will always be difficult to enforce. It would be far better to prevent the unfair behaviour in the first place. In some jurisdictions the legislature has sought to do so by trying to balance communications in the workplace. These laws recognise the unfair advantage that employers have in communicating with the workforce by providing unions equivalent access to workers in the workplace.

In our view, genuine freedom of association and an effective right to bargain collectively depend upon employees having ready, practical access to advice, information and representation by trade unions in their workplace. In both Italy and Germany, unions have a statutory right of access to the workplace. We need to restore practical and effective right of entry laws in Australia.

The New Zealand legislation provides for right of entry for union officials and for paid union meetings. Unions have access for union business as well as inspection and monitoring of compliance with the Act and agreements. Union members are able to attend two paid union meetings each calendar year, of up to 2 hour's duration each. Unions have to supply a list of members in order for the members to be entitled to attend.

In the United Kingdom, during the period of a recognition ballot, employers have a positive obligation to facilitate access to the workforce so that the union can inform workers and seek their support in the ballot, including: at least one half-hour meeting per day; access to internal communications; and permission to meet members in short, 15-minute one-on-one or small group meetings. More details of how these laws apply are found in Appendix 4.

In Canada, while there is no general right of entry or access to employees, the Federal Code allows the Board to direct that a union have access to communications with off-site employees for the purposes of soliciting members or for bargaining, or when servicing an agreement. In reviewing the Code in the mid 1990s, a Federal Government Task Force recognised that off-site workers are isolated, and risk becoming piece-workers in an electronic age. It also recognised the gendered nature of off-site work. It recommended that the Board should have additional powers to grant a union access to members' email and other communications for organising purposes, provided the Board had power to ensure the privacy of workers was not abused.

We also recommend that, where the Commission has made orders prohibiting conduct designed to undermine bargaining, the Commission should be able to order additional access and communication rights to union representatives designed to counter the imbalance in access to workers that is inherent in the workplace.

The role of delegates

Union delegates are particularly vulnerable to action by a hostile employer. They are also critical to informed bargaining, to democracy in workplaces and to ensuring that workers can have a say.

Having strong and effective delegates in the workplace ensure that bargaining reflects the genuine aspirations of workers, and enhances democratic decision-making within unions.

In New Zealand delegates are entitled to time off for employment-relations education. The amount of time is based on a formula related to the number of employees at the workplace; in large workplaces the union can allocate 35 days for 280 employees, plus 5 days per additional 100 employees. The New Zealand unions said that these provisions were critical to effective collective representation.

In the European Union, including the UK, information and consultation laws ensure that delegates play an active role during the life of an agreement as well as during bargaining. The Australian Institute of Employment Rights drew our attention to the Trade Union Representatives (Status at the Workplace) Act in Sweden, which provides for delegates to be provided with space, time off to perform union duties, and priority treatment during retrenchments.

We recommend that the freedom of association provisions in the legislation prohibit conduct by employers designed to undermine collective bargaining, including offering inducements to workers to undermine collective bargaining processes.

We have recommended that the Commission, when dealing with good faith bargaining, is to be empowered to make orders that remedy conduct by an employer which undermines collective bargaining or interferes with the relationship between the union and its members.

We recommend that the legislation should recognise the role of delegates in bargaining.

Authorised delegates should have access to and communication with workers, inspection of the workplace and documents, reasonable time off to perform, and be trained in how to perform their representative roles.

The Commission should be able to make orders to ensure that delegates can perform their representative roles.

The Commission should be able to issue interim remedial orders where there is prima facie evidence that a delegate has been subject to unfair interference or disadvantage for performing their role.

Last resort arbitration

While an enforceable obligation to bargain in good faith is sufficient incentive for most parties to bargain fairly, commentators we met stressed the need for an additional legal impetus to enforce fair bargaining. Both the Canadian and New Zealand laws provide for conciliation/mediation and, in limited circumstances, for arbitration.

The Canadian Labour Code makes provisions for first contract arbitration. So do the labour codes in British Columbia, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland and Prince Edward Island. These laws provide for arbitration in the event of parties who have not got a history of collective bargaining being unable to reach agreement. The first-contract arbitration is premised on the idea that parties involved in the negotiation of their first collective agreement may experience more difficulties than unions and employers with a longer history of bargaining.

First-contract arbitration is seldom used. It has not been invoked as a standard response to bargaining deadlocks, but rather as a corrective response to employers' refusal to recognise newly organised unions and bargain a first contract.

Nonetheless, the Canadian unions said that the availability of first-contract arbitration gave workers confidence to join a union, because it guaranteed that bargaining would ultimately result in the making of a collective agreement. However, in their view, obtaining a second

contract was difficult if acrimonious bargaining preceded the arbitration. They advocated longer first contracts that would allow parties to live with the outcome and develop more stable relationships.

In the US, Human Rights Watch has recommended the introduction of first-contract arbitration as a means of promoting genuine bargaining. They argue that first-contract arbitration gives workers an opportunity to establish a bargaining relationship that would most likely have taken shape had the employer bargained in good faith. They also argue it provides a reasonable chance for the employer and employees to act responsibly and respectfully under a collective agreement, making good faith negotiations more probable in subsequent bargaining (Compa, 2000).

The New Zealand laws provide for arbitration where there are serious and sustained breaches of good faith. To date this legislation has not been utilised and the New Zealand unions felt that the arbitration of unresolved bargaining was too high.

In the UK the recognition system does not provide for good faith or for arbitration of unresolved bargaining. However, there is a provision in the law that obliges employers to provide trade union representatives with information that is necessary to carry on collective bargaining [29]. If the CAC finds that an employer has failed to disclose necessary information it can arbitrate the terms and conditions to apply at the workplace. This provision is rarely called upon.

In our view, bargaining with an eye to the possibility of arbitration is a significant institutional mechanism that encourages and supports fair and genuine bargaining.

We recommend that, where bargaining has failed, and there is no reasonable prospect of reaching an agreement, or where good faith orders have been breached, the Commission must be able to arbitrate as a last resort to resolve the dispute.

Where the good faith collective bargaining process fails to result in agreement, the Commission should have the discretion to terminate the bargaining process and commence an arbitration of the bargaining dispute.

"Last Resort Arbitration" would generally only occur as a last resort where there is no reasonable prospect of agreement being reached and:

where there is a significant risk to the safety, health or welfare of people affected by the bargaining dispute; or

where there is a risk of significant damage to the economy or an important part of it; and/or

it is otherwise in the public interest for the Commission to make a Last Resort Arbitration.

In considering the public interest, the Commission should be required to take into account:

the primary objective of promoting collective agreement- making;

whether there is a history of bargaining at the workplace and, if not, the desirability of establishing a Last Resort Arbitration which will facilitate future bargaining;

whether a party has breached good faith bargaining orders;

whether all of the bargaining parties were trying to reach agreement;

whether a reasonable period of active bargaining has taken place;

whether the good faith bargaining process has been genuinely exhausted;

the views and interests of the bargaining parties and the employees;

the relative bargaining strengths of the parties, and in particular the needs of the low-paid;

the rights of the parties to engage in protected industrial action, and that the taking of such action is not of itself contrary to bargaining in good faith or grounds to terminate bargaining and institute a Last Resort Arbitration.

A Last Resort Arbitration would also be available where the parties have agreed to submit for arbitration any outstanding matters which they have not been able to resolve by negotiation.

The legislation should enable the Commission in arbitrating the dispute to take into account issues including:

the matters at issue in the bargaining process;
the merits of the arguments;
the interests of the bargaining parties and the employees;
the public interest; and
any other relevant issues.

A Last Resort Arbitration should have a maximum term of three years.

A Last Resort Arbitration should be conducted on the basis that employees not be disadvantaged overall with respect to their existing pay and employment conditions.

8. The parties to the obligation to bargain in good faith

If Australia is to have a system of collective bargaining that rests upon the obligation to bargain in good faith towards the making of a collective agreement, the laws will need to set out who can initiate bargaining, and upon whom an obligation to bargain can be imposed. We examined the detail of the legislative regimes that govern instances where employers refuse to bargain with unions representing workers. These systems are known as recognition systems. Our consideration of these systems has led us to reject the introduction of a recognition system in Australia.

Recognition as a concept to identify the obligation to bargain collectively

According to the ILO, the concept of recognition has been developed to safeguard against the refusal by some employers to negotiate with trade unions representing the employees concerned. The question of whether or not an employer is obliged to recognise a trade union normally depends on the definition established of the representativeness of organisations in relation to those whom they seek to represent.[30]

At its simplest, recognition identifies who is responsible for carrying out collective bargaining. In Australia the system of registration of unions identifies which unions are able to bargain collectively in each sector of the economy, but imposes no obligation on employers to bargain. The New Zealand model imposes obligations to bargain in good faith on all employers and all registered unions in connection with the making of agreements that cover union members. The issue of whether unions represent and have the authority to bargain on behalf of the workforce generally is not relevant, as agreements do not apply to non-members of the union.

At its most complex, as in North America, recognition can confer exclusive rights to bargain on unions and responsibilities to respect the

bargaining authority of the union on employers. While technically it provides all workers the right to make claims and take action in pursuit of their claims, the obligation on the employer to bargain in good faith applies only where the union is recognised as representing more than half the workforce. In workplaces where the union is not recognised as representative, the employer need not recognise the union for any purpose, including grievances and disputes.

The UK system sits between these two ends of the spectrum. In the UK any union has the opportunity to bargain collectively, with the agreement of the employer. Parties can bargain freely without the requirement to meet any pre-bargaining tests. As a supplement to this voluntary bargaining, an employer can be obliged to bargain collectively where the union is recognised as having the support of the majority of workers. Additionally, employers in the UK must recognise and deal with unions in representing their members in grievances and disputes.

In our view, none of these models lend themselves to wholesale adoption into the Australian industrial landscape, but lessons from each are incorporated into the model we have developed.

Recognition for collective bargaining and employer interference in employee free choice

The Delegation is not attracted to the North American or exclusive recognition model for three reasons.

Firstly, it seems that "winner takes all" recognition schemes are associated with excessive employer hostility. Despite efforts to minimise the impact of this, none of the laws we saw did so adequately, and the Delegation is unconvinced that legislative design can effectively guard against employer interference in employee free choice.

Imposing a threshold to trigger the requirement to bargain creates an obvious point for tension, dissent and disputation about the form of the agreement. It has become, in Canada and the United States in

particular, a focus for undue interference in employees' right to choose collective representation.

The extent to which employers have used the certification process as an opportunity to undermine collective bargaining in North America, and to thwart, rather than give effect to, employees' free choice has warned us against such a system.

Canadian research undertaken in the 1990s suggests that over 94 per cent of employers opposed the unionisation of their workforce. In 88 per cent of cases, employers took some action to frustrate the unionisation of their workforce (Bentham, 2002).

The AFL-CIO estimates that US$4 billion is spent each year on anti-union activity. They estimate that in 25 per cent of union campaigns for certification at least one worker is fired, and in 70 per cent of organising campaigns the employer sends a letter to the workers' spouses. In 92 per cent of campaigns for certification the employer holds a meeting on site without a union representative, to argue against the unionisation of the workplace and the introduction of collective bargaining (called a captive-audience meeting).

We believe that a test of majority support should not be necessary to oblige employers to bargain in good faith with their workforce. In that regard, the UK model of voluntary negotiations without reference to the tribunals is more culturally appropriate to Australia's labour relations history. The vast majority of bargaining in the United Kingdom occurs without any involvement of the CAC.

The recommendation that we have made does not provide that employers can routinely test whether a union has bargaining authority. It assumes that parties will generally respect each other's authority, and that it is only where an employer refuses to bargain towards the making of a collective agreement that the issue of representation need be tested. This was the rationale underpinning the statutory recognition system in the United Kingdom, where recognition is available "in a small minority of cases where the employees clearly want it and this can be proved and an employer refuses point blank to concede it." [31]

Recognition and workers' rights to be represented

Our second concern with a North American-style recognition system is that workers have no rights to be represented in grievances or in bargaining unless and until the union has obtained majority support.

Thus, while union membership confers a right on a single member to representation in grievances at unionised workplaces,[32] members in non-unionised workplaces have no rights to be represented with their employer.[33]

The ILO has noted that problems arise when the law stipulates that a trade union must receive the support of 50 per cent of the members of a bargaining unit to be recognised as a bargaining agent. It has noted that a majority union which fails to secure this absolute majority is thus denied the possibility of bargaining. The Committee of Experts has said that that under such a system, if no union covers more than 50 per cent of the workers, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members.[34]

The failure of the North American system to ensure representation for union members in workplaces that are not covered by collective agreements has seen calls for legislated rights of representation for union members (see for example Goddard, 2003).

Across Europe, workers have a right to be represented at work. In Sweden, a union can negotiate with the employer on any issue affecting a member. In Germany, works councils rather than trade unions represent workers in individual matters at the workplace.

In New Zealand, union members have statutory rights to be represented by their union in pursuit of their collective rights and in enforcing their individual rights.[35] These individual rights cover personal grievances, including dismissal, diminution in conditions of employment, sexual or racial harassment, or duress in relation to membership of the union.

Similarly, in the United Kingdom employees have the legislated right to be represented by a union in respect of discipline, dismissal or grievances at work. "Grievance" includes complaints by the workers relating to breach of their contract, including breach of the employer's implied duties. Failure to abide by the procedure can result in a penalty by way of increased compensation to the employee.[36] While the UK unions have criticisms of the detail of the law, the principle that membership confers a right to representation by a union is welcomed.

In our view union membership should confer a right to representation. It is inconsistent with Australia's industrial heritage that a single worker or small group of workers should not be entitled to industrial representation by their union.

It is also consistent with the ILO and other human rights jurisprudence that a single member should have the right to be represented by their union, in both grievances and in collective bargaining. In order to avoid the problem in the United States, this right should be clearly articulated in legislation.

Recognition and union coverage

Our third objection to a complex, North American-style recognition model is that it is used to determine bargaining rights between competing unions. This feature of recognition is foreign to the Australian system of registration of unions and delineated areas of union coverage.

In the UK, if the statutory recognition process is invoked, the application can be blocked by a pre-existing union recognition arrangement. The CAC must reject an application where there is already a recognised union in place at the workplace[37]. While the purpose is to preserve existing demarcation boundaries, there is no requirement that the existing union has members, has majority (or even minority) support, or that it has a history of representing the industrial interests of the workforce.[38] This provision is clearly one that permits employers to circumvent an order to bargain with representative unions and the relative ease with which a non-

representative union can be established and circumvent an application for recognition is a major flaw in the UK laws.

In Canada and the US representation ballots are used not only to enliven the obligation on the employer to bargain, but also to resolve demarcation between unions. This means that in both the United States and Canada, a union can apply for certification as a means of gaining representation rights to the exclusion of another union.

However, the capacity for employers to interfere in the ballot, particularly in the United States, has tainted the system to such an extent as to render it an unreliable and corrupt mechanism for determining rights of workers, or of unions vis-à-vis each other.

The ACTU and its affiliated unions have long been opposed to destructive competitive unionism, and we see no reason to depart from this policy. The Australian system for conferring representational rights upon unions is superior to anything we saw overseas. The potential employer interference in ballots in the United States and Canada warn us off their systems, while the potential for sweetheart deals warns us off the UK model. It is our recommendation that an Australian model for collective bargaining should maintain a very clear distinction between the issue of whether a particular union has rights to organise and represent a group of workers, and the question of whether the employer should be obliged to bargain towards a collective agreement with that union on behalf of its members and potential members.

For these three reasons, the Delegation has not recommended that Australia adopt a North American-style recognition model.

The legislative underpinnings of a good faith collective bargaining system would:

Include within the Objects of the Act the protection of freedom of association and the promotion of collective bargaining.

Ensure that all workers have the right to bargain, to union representation in collective bargaining, and the right to take industrial action.

Provide for all workers to have access to information in the workplace.

Provide that union membership should confer representational rights. Union members should have a statutory right to representation in collective bargaining, and to representation in discussions with their employer about matters including but not limited to grievances, discipline and enforcement of their terms and conditions of employment.

A union's ability to represent a worker should continue to be governed by the union's eligibility and coverage rules.

The alternative to a recognition model that we have developed confers power on the Commission to determine who are the parties to negotiations subject to legislative guidance.

We recommend that unions, workers and employers should have a right to initiate a claim to bargain. The parties to the agreement should be those parties who negotiate the agreement.

We recommend that the two concurrent streams of union and non-union collective agreements should be simplified and streamlined into a single agreement-making process. This approach would still provide for collective agreements to be made without a union. However, where a union has a member, it should be entitled to represent the member and be party to the agreement.

While it should not need to be said, we also recommend that there must be parties to a negotiation and an agreement. There should not be employer "greenfields" agreements. Nor should employers be able to determine who represents their employees in negotiations or oust unions from their legitimate areas of coverage, through the use of greenfield agreements.

If there are disagreements about who is a party to the negotiations (including a single bargaining unit) or disagreements about which workers would be covered by the agreement, these should be resolved by the Commission, having regard to the right to representation in collective bargaining that union membership confers upon workers, the history at the workplace, the community of interest of the employees and the need to guard against artificial fragmentation of the workforce.

Majority support

As we noted in our introduction, we would expect that in most cases the obligation to bargain collectively in good faith will be complied with, and that employers will respect the rights that accompany union membership. We have also recommended that the Commission be generally obliged to facilitate collective bargaining. However, as we noted in our introduction, recent examples where employers have steadfastly refused to bargain with unions in the face of overwhelming support for collective bargaining cannot be tolerated. It is for that reason that we have recommended that workers must have a say in determining whether or not a collective agreement should apply to the workforce.

We recommend that where good faith bargaining orders are sought, and the issue of employee support for the collective bargaining process is contested between the bargaining parties, the legislation should expressly require the Commission to make good faith bargaining orders where a majority of employees support the collective bargaining process. This means the making of orders would be mandatory.

The orders must facilitate the bargaining process and, to the extent possible, facilitate the making of a collective agreement. Orders would not require a party to make admissions or concessions on the matters proposed to be in the agreement.

However, we are wary of including a ballot at the workplace in our legislative regime.

In the UK the CAC can order a ballot, even where the union has majority membership. The CAC must be convinced that this is in the

interests of good industrial relations or have evidence from union members that they do not want the union to conduct collective bargaining, or that raises doubts as to whether the members are seeking collective bargaining. In practice, this had meant a ballot was held in 25 per cent of cases where the union had a majority of union members and technically qualifying for automatic recognition.

The UK unions were especially critical of this provision. They cited examples where it appeared that the evidence from employees was clearly manufactured by employers and the law has recently been changed to require the CAC to now only order a ballot in light of credible evidence. Despite these amendments the unions remain critical of the law, arguing that membership records should normally be adequate evidence of workers desire for collective bargaining.

In North America hostile employers can and will intervene and seek to influence the workers' views. Ballots have become the focus for undue and illegal employer intervention.

Ballots have not proven an effective measure of employees democratic choice. American Rights at Work highlights just how workplace ballots lack the hallmarks of free and fair elections (Lafer, 2005). This appears to be supported by the fact that North American unions said that they frequently lost elections even where, at the time they applied for the ballot, they had support of 60 to 70 per cent of the workforce.

In Ontario, we met a group of organisers from a number of unions. According to the organisers, the week of the ballot is a week of turmoil in the workplace. They told us how they tried to limit the scope for employer interference by clandestine organising, and inoculating the workforce against the employer counter-organising. Vic Mordon from the communications union, the CEP, had adopted the practice of seeking a "protection letter" safeguarding activists' jobs before making application for a ballot.

And, the legislation makes a difference. According to Vic, when the laws allowed for a bargaining right without a ballot, the CEP would routinely get certification with 55 per cent of the workforce indicating support for the union. In contrast, under the ballot system, Vic says

he would not consider filing for a ballot without 65 to 70 per cent of the workforce expressing support.

In both the US and Canada it seems that, far from guaranteeing workers a democratic say, mandatory ballots thwart a democracy by imposing a de facto requirement for a super-majority. We have concluded that open ballots rarely provide a free and fair atmosphere in which employees can make their choice known. For that reason, we have limited the role of ballots in the model we are advocating.

The Commission should have discretion as to the means of ascertaining majority employee support. The Commission must ensure that employee opinion is ascertained in a fair manner free of intimidation or inducements. The Commission may:

consider evidence from employees or their representatives, including evidence of a vote at a workplace or mass meeting;
consider petitions and/or workplace resolutions from employees;
consider the result of a ballot conducted by a union(s);
consider evidence concerning the level of union membership amongst employees; or
as a last resort, and if the Commission is not satisfied by any of the foregoing measures, order a secret ballot of employees.

The Commission would not be able to order a secret ballot unless it had first considered other indicators of majority employee opinion, and only where there was clear evidence contradicting such indicators.

A lack of majority employee support would not of itself be grounds for the Commission to refrain from making any good faith bargaining orders. The Commission would still have an obligation and the discretion to promote collective agreement making consistent with the Objects of the legislation.

9. The scope of good faith bargaining

An enforceable good faith collective bargaining regime also requires identification of the workforce to be covered by the resulting collective agreement.

In this Part we examine the practices overseas that govern which workers are to be covered by an agreement. We look at how the bargaining unit is determined, and multi-employer bargaining.

In North America, particularly in the United States, employers seek to influence the outcome of a representation ballot, or card-based certification, by seeking to dilute or fragment the bargaining power of the workforce. Employers will regularly oppose the scope of the proposed agreement, and argue that certain workers should not be included within the bargaining unit. Under each of the recognition systems, employers frequently seek to shape the boundaries of the bargaining unit in order to undermine the unions' ability to achieve a majority for recognition.

This tactic is not unknown in Australia, and is not strictly related to majority support.[39] But in Canada and the United States, and to some extent in the UK, the legislation has inbuilt incentives for employers to frustrate bargaining at this point.

The first is the existence of statutory exclusions, whereby groups of workers cannot be included in the bargaining unit (such as managerial employees in the United States). The second is that the test for majority support creates an incentive for employers to manipulate the boundaries to dilute the unions' prospects of success and creates an incentive for unions to seek to bargain on behalf of smaller and smaller bargaining units. Both parties have an incentive to describe a bargaining unit that maximises their chances in a ballot, rather than one which is a sensible basis from which to bargain wages and conditions of employment.

This offends workers' freedom of association, which must mean that it is employees, and not their employers, who decide with whom they

wish to associate. In this section, we look at how effectively each jurisdiction confers power on the workers to exercise this right.

Determination of the bargaining unit

In Canada, the legislative assumption is that the bargaining unit nominated by the union is appropriate for bargaining. If the Board believes the unit is appropriate, the Board will conduct the card check or order the representation vote. If there is a challenge to the inclusion or exclusion of certain workers, this will not delay the representation ballot.

In the UK, the CAC is required to determine the appropriate bargaining unit, where this is not agreed between the employer and union. Where the parties do not agree on the appropriate bargaining unit, unions tend to define bargaining units smaller than those proposed by employers, who are likely to argue that all workers in a single-site company or all plants in a multi-plant company should be included.

There is a statutory requirement that the CAC pay particular regard to the need for a bargaining unit to be 'compatible with effective management' and avoid fragmentation. This initially provoked fears amongst unions that it would favour employers. In fact, the TUC said that, by and large, the CAC had not interfered with the bargaining units nominated by the unions.

As in Canada, the CAC will conduct a ballot pending determination of whether certain employees are appropriate for the bargaining unit. This discourages employers from opposing the unions' designation of the bargaining unit simply to delay and frustrate the commencement of bargaining.

These two systems, which give primacy to the bargaining unit designated by the union, are designed to give full effect to workers' freedom of association. In both cases, they appear to fulfil this reasonably well.

By contrast, in the United States, the NLRB does not give primacy to the wishes of the workers, but instead imposes considers whether the workers have sufficient *"community of interest".* There are

prohibitions on professional and non-professional workers being included in the same unit, unless the professional workers have separately agreed to bargain. Managerial employees and supervisors are excluded, and the practice has arisen of designating workers as managers for the purpose of excluding them from bargaining.

In the United States, following the petition from the union, the NLRB Regional Director determines the scope of the bargaining unit. An employer may then seek a review by the Board, and this will delay the holding of the ballot by several months. In the period 1994-2004, almost half (48 per cent) of the decisions of the Regional Director were subject to applications for review.

According to the NRLB, the decision of the Regional Director is rarely overturned. In the same period only 4.2 percent of Regional Director pre-election decisions issued were reversed or modified by the Board. But employers have been able to delay bargaining, and potentially undermine the union's majority during the period of appeal.

In our view, disputes about the scope of proposed agreements need to be resolved promptly, and should not be used to frustrate or delay bargaining.

In addition, bargaining needs be conducted in an efficient manner, without a proliferation of small bargaining units. The lesson that we learnt very clearly from overseas experience is that any legislation should guard against artificial manipulation of the scope of a proposed collective agreement.

We have recommended that at the workplace or single-business level, collective agreements should generally cover all employees. If the scope of an agreement is contested, the Commission should have the power to settle the matter, guarding against the artificial expansion or fragmentation of the workforce to be covered by the agreement.

Multi-employer bargaining

The second issue that arises is the extent to which workers can effectively bargain beyond a single business. This is assuming

increasing importance in the countries we visited, where the structural changes to the economies are fragmenting the bargaining power of workers into smaller and smaller bargaining units. As the average size of workplaces become smaller, through privatisation and outsourcing and the growth of service industries, the balance of bargaining power shifts.

The ILO has consistently criticised Australia's law for the restrictions that it places upon multi-employer agreements, by restricting workers' ability to take industrial action in pursuit of a collective agreement beyond a single business.

In practice, the systems we looked at generally establish a usual or dominant location for bargaining. However, unlike Australia, it is generally possible to bargain at other levels, and bargaining is not restricted to the level of a single business.

As we noted above, the dominant location for bargaining in Europe varies between the national, industry and employer level. In some countries bargaining takes place at each level, with no level truly dominant. Despite the pressures to devolve bargaining to the employer level in some countries, national and sectoral level bargaining still has widespread support, and the European Commission is proposing mechanisms for trans-national collective agreements.

In the United Kingdom, whilst most bargaining occurs on an enterprise level, this is not a universal practice. In some industries (such as the printing industry), bargaining takes place at the sectoral or industry level. As noted above, the UK government has agreed to establish new sectoral forums bringing social partners together in low-paid sectors to discuss strategies for productivity, health and safety, pay, skills and pensions (TULO 2004).

In Canada, the United States and New Zealand where legislation governs the initiation of bargaining, workplace bargaining is the dominant form of bargaining. However multi-employer agreement-making is permitted in each of the countries, and in New Zealand there is growing use of multi-employer agreements.

In New Zealand, the legislation specifically provides for multi-employer bargaining, which can be initiated by a union provided it has the support of the members at the various companies. The union(s) or each union (as the case may require) must hold, in accordance with its rules, separate secret ballots of its members employed by each employer intended to be a party to the bargaining. A ballot may only be held if the workers are not covered by a current collective agreement, or the agreement is due to expire within 60 days. If the members endorse multi-employer bargaining, then the obligation to bargain in good faith will be triggered.

The Canadian Labour Code allows for voluntary multi-party bargaining, including taking industrial action during such bargaining.

Where a trade union has applied for certification of a unit comprised of employees of two or more employers who have formed such an organisation, the Board can designate an employers' organisation to be the employer The Board must be satisfied that each of the employers has granted appropriate authority to the employers' organisation so that it can carry out an employer's duties and responsibilities under the collective bargaining provisions of the Code. The section also permits a member employer to withdraw from the organisation, but with provision for an orderly return to single-employer bargaining.

Canada also has a system of sectoral-level councils formed in the 1980s to coordinate human resource issues within an industry. According to the government, these councils have been successful in their scope of activities, but they are not a substitute for collective bargaining.

Under the NLRA in the US, parties can enter into multi-employer arrangements by consent. The NLRB will also endorse multi-employer bargaining units where there is a history of multi-employer agreement making. The participating employers, or the union, may retire from this multi-employer bargaining relationship only by mutual consent or by a timely submitted withdrawal. Withdrawal from the bargaining unit will otherwise constitute a breach of good faith.

The Human Rights Watch report on the operation of US labour laws called for greater legislative support for multi-employer bargaining units, as a means of ensuring "atypical" or contingent workers are able to participate in collective bargaining. Their report refers in particular to the need to respond to new forms of labour in growth industries such as child and aged care, cleaning and security, high technology occupations, and jobs that were formerly public sector jobs (Compa, 2000).

The restrictions on multi-employer agreements in the Workplace Relations Act are not only inconsistent with ILO conventions, but out of step with the practices in countries with comparable economic and social structures.

Consistent with ILO jurisprudence that parties should be free to determine the nature of their bargaining and the level of bargaining, including enterprise, company, multi-employer or industry bargaining, we have developed a model that provides far greater flexibility to the parties to consensually bargain at whatever level they choose, by removing the requirement that multi-employer bargaining be subject to a public interest test.

We have also recommended that employees can take industrial action in pursuit of an agreement at a single business, or group of related companies, or in pursuit of common claims and common outcomes across 2 or more single businesses.

To facilitate multi-employer bargaining, we have also included a role for the Commission to order that employers bargain in good faith towards the making of a multi-employer agreement if certain criteria are met.

To facilitate consensual bargaining at the industry level we have recommended the establishment of Industry Consultative Councils.

Consistent with the principle that parties should be free to determine the level at which they bargain, multi-employer collective agreements [a single agreement binding more than one employer) should be available where the parties agree to bargaining at that level.

Where a multi-employer agreement is proposed but the claim for such an agreement is contested, the Commission should have the power to determine whether a multi-employer bargaining process should proceed, and determine who the bargaining parties will be. The Commission should apply the following criteria when authorising a multi-employer bargaining process:

ILO conventions and principles, and the freedom of the parties to determine the level at which they bargain;

The community of interest of the employees;

The community of interest of the employers;

A collective multi-employer agreement covering a site or project involving multiple employers engaged in the same undertaking (e.g. a construction site) should clearly be available without limitation;

The desirability of promoting collective bargaining, particularly where the employees or the employers lack the capacity to bargain at the single business level, or the size or number of workplaces in a particular industry or industry sector mitigates against collective bargaining at the single business level;

The needs of lower paid workers and the desirability of promoting bargaining and lifting living standards;

The history of bargaining; or

Any potential, demonstrable and long-term negative impact on the viability of a single business.

If the Commission authorises a multi-employer bargaining process, the good faith bargaining procedures of the legislation would apply and protected industrial action would be available.

The legislation should provide for Industry Consultative Councils to facilitate industry-level consultation/negotiations and the development of industry-level framework agreements. The parties should be free to determine their own agenda.

10. Industrial action in connection with collective bargaining

We were not asked to examine and did not spend much time examining the legal regime governing industrial action in the countries we visited.

However, a report on collective bargaining would not be complete without emphasising that the right to bargain includes the right to strike. In the US, where certain public sector workers can bargain without the right to take industrial action, unions referred to this as "collective begging".

In systems of free collective bargaining, the principle underlying procedures for the settlement of disputes is that the parties should resolve the disputes themselves through negotiation, while still having the ability to take industrial action.

The right to strike is recognised by the ILO's supervisory bodies as an intrinsic corollary of the right to organize protected by Convention No. 87, deriving from the right of workers' organisations to formulate their programs of activities to further and defend the economic and social interests of their members.

In ILO jurisprudence, the right to strike is not absolute, and can be subject to conditions or restrictions, primarily designed to ensure public saftey.[40] However, our current laws impose restrictions on industrial action that are inconsistent with ILO case law, and place hurdles and barriers to the taking of lawful action. These restrictions must be removed.

Three general restrictions were found in the countries we visited: a requirement for notice of industrial action; a requirement for a ballot to authorise industrial action; and, in Canada, a requirement the parties exhaust mediation before action is taken. We make recommendations in relation to these matters.

Authorising industrial action

ACTU policy supports the right of union members to vote on whether or not to take industrial action, and believes such votes are generally taken. A number of unions routinely use secret ballots prior to taking industrial action. The Delegation sees no reason to depart from this policy.

The ILO considers pre-strike ballots to be consistent with workers' freedom of association only where the ballot does not result in significant delay or place undue obstacles in the way of industrial action. It has said that the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice.

The pre-strike processes in Australia are particularly onerous in comparison to the countries we examined. Where ballots were required in Canada and the UK, unions conduct the ballot themselves, obviating the need for the authorities to be provided electoral rolls and so forth.

US unions must give 60 days' notice of proposed industrial action, but a ballot of members is not required.

Ballots are not required in New Zealand.

Industrial action during a contract

In many EU countries, including the UK, industrial action is permitted at any time. Collective agreements do not, of themselves, prevent the making of new claims during the life of the agreement.

In other countries, including New Zealand,[41] the United States and Canada, the making of an agreement is seen as guaranteeing industrial peace for the life of the agreement.

The ILO considers such schemes comply with Convention 87, provided that they provide an effective mechanism to resolve disputes during the life of the contract without recourse to action (binding arbitration).

The presumption underpinning these regimes is that the parties have been able to negotiate the full range of issues that will govern their arrangements for the life of the contract. Australia's labour laws, which restrict the matters for bargaining, and also provide that there can be no protected industrial action during the life of a contract, are in conflict with this underpinning assumption.

Under ILO jurisprudence, workers should be free to engage in protest strikes, in particular when aimed at criticising a government's economic and social policies.

In Canada, the Code permits the parties to re-open negotiations in the event of significant change at the workplace, for the purpose of ameliorating the effect of the change on workers. This would allow industrial action over unexpected restructuring or redundancies that were not contemplated at the time of the agreement.

Replacement labour

The ILO has been critical of the jurisdictions where practice allows enterprises to recruit workers to replace their own employees who are taking part in legal industrial action. The Committee of Experts considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights.[42]

The Canadian Labour Congress is campaigning for legislation to ban the use of replacement workers. In their view, the use of replacement labour upsets the economic balance of power between the bargaining parties, and shifts the original neutral ground of the dispute.

Australian labour laws do not prevent an employer replacing employees who are on strike or taking industrial action with temporary labour, although the workers are entitled to resume their job at the end of the protected action.

In New Zealand, only current employees can agree to do the work of striking workers. Extra staff can only be hired during a strike or lockout if the work is needed for health and safety reasons.

In the United States, there are some limits on the use of replacement labour, but these only apply where workers are taking action in "rights"-based strikes, including industrial action associated with unfair labour practices. Otherwise employers can use permanent replacement labour during strikes over terms and conditions of employment, meaning striking workers must wait for a vacancy before they are re-employed after a strike. Both the ILO and Human Rights Watch have been critical of this aspect of the US laws (Compa 2000).

Similarly in Canada, replacement labour cannot be used where workers are on strike protesting the employers unfair labour practices, but can be used where the strike relates to wages and conditions of employment or other bargaining interests. Some Provinces have gone further, and banned the use of replacement labour during any industrial action.

This Canadian experience demonstrates that a prohibition on replacement labour during industrial action would reduce the duration of industrial action and take the heat out of the action, reducing acrimony on both sides when work returns to normal after industrial action. The year after British Columbia changed its labour code, the province realised a 50% drop in the amount of work time lost to strikes. Under the Quebec labour code, the average number of work days lost each year to labour disputes is about 15, compared to an average of 31 days lost each year under the Canada Labour Code.

Ontario banned the use of replacement workers in 1992, but lifted the ban a few years later following a change of government. The CLC says that, despite the rhetoric used by the opponents of the law, the short period it was in place was characterised by few work stoppages, moderate union demands and picket line peace.

Banning replacement labour is, in our view, essential to an effective right to strike, will promote the speedy settlement of disputes, and promote more harmonious workplace relationships following the settlement of the dispute.

Legally protected industrial action is integral to bargaining, as it provides the means to balance the economic power of the bargaining parties.

Taking protected industrial action in pursuit of an agreement to cover a single business (including the pursuit of common claims and outcomes at more than one single business) should be available without recourse to the Commission. Where a multi-employer agreement is being pursued, protected action should be available where the Commission has noted the consent of the parties to a multi-employer bargaining process, or where the Commission has ordered that bargaining for a multi-employer agreement should occur.

Legally protected industrial action should be available to employees during bargaining, without the need for a secret ballot. However, as a matter of good union practice, unions should not take action unless it has been democratically endorsed.

Protected industrial action should not be able to be undermined by use of external replacement labour.

Industrial action by employers (lock-outs) should not be automatically available. ILO jurisprudence does not support an automatic right to employer industrial action. An automatic right to lock-out is rare amongst OECD nations, although it is available to employers in Australia. The Delegation advocates the removal of this right for employers.

The law should also enable the lawful conduct of meetings to prepare for bargaining, actions to promote the social or economic views of workers, fair provisions in relation to OHS, and allow workers to protest breach of statutory duties. Legally protected industrial action should also be available during an agreement where the employer proposes significant organisational change.

11. The binding nature of agreements

The essence of bargaining is that parties will be bound by the agreement that they make. Yet around the world, we saw very different practices.

In most of Europe (Austria, Belgium, Cyprus, Czech Republic, Denmark, France, Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovakia, Slovenia and Spain), a collective agreement applies to all workers employed by the employer(s) covered by the agreement. The employer is bound, and the agreement covers all the employee employed by the employer.

Under the North American systems, once a union is recognised, the employer is prevented, under most circumstances, from implementing changes in the conditions of work without prior negotiations with the union. The terms of a collective contract continue beyond its expiry date, until impasse (Canada) or until bargaining has broken down (United States).

In North America the making of a collective agreement suspends the common law contract of employment between the employee and the employer. The only contract that governs their relationship is the collective contract. There is no notion that workers should be able to individually contract out of the collective agreement. Individual variations to employment conditions that are inconsistent with the collective contract are unlawful unless the collective bargaining agreement specifically authorises those individual contracts (for example, Hollywood actors or professional athletes are covered by a basic contract that permits the "stars" to negotiate higher pay).

The opposite is true in the UK, where collective bargaining agreements are not considered binding on employers or unions. It may be possible to enforce the terms of an agreement if it is seen to have varied the common law contract between the employer and the employees covered. This will occur if the agreement covers matters that can be incorporated into the employment contract.

The terms of the agreement will determine to what extent an employer may negotiate alternative arrangements with a single member of the bargaining unit. Improved wages or conditions negotiated collectively vary the terms of the employees covered by the agreement, and can be enforced through the employment tribunals or Courts. Other terms of collective agreements, including those related to the relationship between the employer and the union, are not enforceable (i.e. the parties cannot seek orders of specific performance for breach of contract).

New Zealand provided a third model, where agreements apply only to union members.

A collective agreement binds the union members and the union as well as the employer for their duration and a further 12 months. New employees are bound by the agreement for an initial period, and union members remain bound for 60 days following resignation from the union.

Where a person is not covered by a collective agreement, they are covered by an individual employment relationship. It appears that, although the individual contracts are recognised at law, their status is no different from a common law contract. They cannot be used to undermine minimum conditions, and cannot be used to undermine collective bargaining. Where a collective agreement is in place (even if it covers only a few workers at the workplace), an employee can become covered by the collective agreement by simply joining the union.

The system of member-only agreements is associated with a range of complex and conflicting laws that are designed to protect the integrity of the agreement, while ensuring workers are not discriminated in their employment on grounds of membership or non membership of a union.

Once a collective agreement is in place, the employer cannot pass on the benefits of the agreement to non-members of the union if the purpose of, or the effect of, the passing on is to undermine collective bargaining. However an employer can agree to terms and conditions that are similar to those in the collective agreement. In practice, most

employers, having reached an agreement, will offer identical terms to the remainder of their workforce. In our view, this problem would be avoided by ensuring that collectively negotiated agreements cover all members of the workforce, recognising the informal extension practice that operates in most workplaces.

The New Zealand unions recognise that this system has placed them in a predicament. Union leaders explained that their members oppose non-members of the union automatically receiving the same wages as members, on the back of the members' bargaining. However, non-members should not receive higher wages than members, as this would discriminate against union members. Nor should non-members receive inferior wages than members, as their members' industrial interests are best served by extending the union wage to all employees.

The New Zealand system, with its member-only bargaining units, is not in our view appropriate to Australia's labour history. Australia has long recognised the interest that unionised workers have in employment standards being applied to non-unionised workers, and for over 30 years has recognised the importance of equal pay for work of equal value.

The UK system is also not relevant given that agreements are not binding on the parties.

In our view, agreements should bind employers, unions and workers and should set the working arrangements that govern the workforce for their duration, and subsequently replaced with another agreement.

The Howard Government's laws have been criticised by the ILO's Committee of Experts for allowing individual contracts to undermine collective agreements. The Work Choices legislation, which provides that an AWA can override the terms of a collective agreement, means that a deal is never a deal. A union can negotiate a binding agreement governing the wages and conditions to cover certain types of work, only to find the next day that the employer is engaging workers on different conditions. The union remains bound by the agreement, but the employer does not.

The Australian scheme was abhorrent to all the unionists, lawyers and academics with whom we met. In the United States, a nation that is traditionally the champion of individual liberties, the Australian laws were seen as undermining freedom of association. Our laws were seen as antithetical to individual freedom.

In our view collective agreements, made and endorsed by a valid majority of employees, should bind the employer in respect of their workforce for their duration and until replaced or terminated by the parties.

Agreements should be approved by a majority of the employees who vote. Voting should be limited to those who are to be covered by the agreement.

Parties should be bound by agreements and not be able to opt out. The system should guard against workforce or corporate restructuring to avoid agreements.

Agreements should continue for their term, and beyond until terminated by the parties or replaced by another agreement. The maximum term for agreements should be three years.

12. An independent umpire to supervise good faith bargaining

The preceding sections highlight the importance of an effective compliance regime in promoting collective bargaining.

It was apparent to us that the effectiveness of each of the systems we looked at was in large part determined by the confidence that the parties had in the tribunal charged with administering the regime for collective bargaining.

The composition, tenure, experience and procedural requirements of the tribunal have a significant impact on the effectiveness of the system.

The United States system is clearly laughable. A system that takes five levels of decision-making to arrive at enforceable order can barely be regarded as one directed at settling disputes. In addition, the system of fixed-term appointments has led to each administration making partisan appointments.

The problems created by a partisan NLRB are compounded by laws that confer general rights but lack any detail. The NLRA has left open the door to judicial activism that has frustrated and in some cases nullified the clear intent of the words of the Act.

In Canada, by contrast, although appointments are fixed-term, Labour Boards are tripartite in composition and have equal number of members drawn form employer and union ranks. The Canadian Labour Relations Board also has consultation committees, whereby unions and employer can give advice to the Board about how it can discharge its duties effectively. By and large, the Canadian Board has the confidence of the stakeholders in the system.

The Canadian legislation is also superior to the US system, as the Boards are required to act quickly, and they have the power to make self-enforcing decisions.

The Central Arbitration Committee (CAC) in the UK is a permanent independent body with statutory powers. Its membership is similar to the wages boards that operated in Australia. All members of the Committee are appointed by the Secretary of State for Trade and Industry, but determinations are made by panels of three Committee members. These panels are appointed by the Chairman of the Committee, and consist of either the Chairman himself or a Deputy Chairman, one member whose experience is as a representative of employers, and one member whose experience is as a representative of workers. Employee members can include retired or current union officials. This tripartism contributes to stakeholder confidence in the independence and impartiality of the CAC.

In addition, its decisions are subject to legislated timeframes. The UK recognition laws are set out in 60 pages of minute detail, in a deliberate effort to curtail the role of the Courts and explicitly guide the CAC in the performance of its duties. This protective mechanism has backfired somewhat, as a number of applications are rejected each year for minor technical breaches of legislated requirements.

New Zealand unions were reasonably confident that the Employment Authority fairly and effectively administered their laws, although there is a debate within the NZCTU regarding the role of judicial scrutiny of the Employment Authority's decisions. Unions were wary of prosecuting test cases beyond the Employment Authority to exploit potential benefits in the laws, due in part to a fear of judicial conservatism in the Employment Court.

We recognise that the model we have developed relies to a large extent upon the expertise and independence of the Commission in determining whether, and in what manner, to make good faith orders.

Our model is based upon the expectation that there will be an independent tribunal to maintain and improve the award safety net, to oversee the bargaining system and to guarantee fair treatment in the workplace.

We also recommend that, in designing any legislation, there be sufficient detail to guard against "judicial activism", but not such complex law as to create opportunities for technical defects.

Consideration should be given to the Objects of the legislation, and we think that the ACTU and affiliates should continue to debate the desirability of a Human Rights Bill or Charter in Australia.

In New Zealand, CTU Secretary Carol Beaumont said that the Objects of the Employment Relations Act were a strong statement of legislative intent. By incorporating reference to ILO conventions and to the imbalance of power in the workplace, they gave strong guidance the Authority in administering the Act.

The Canadian Code and New Zealand ERA appear to strike a better balance than does the NRLA in the United States. Canada and New Zealand provide guidance to their tribunals which ensures that parties can reasonably predict what is required of them. The New Zealand ERA has codified the common law development of the obligation to bargain in good faith, and is supplemented by a Code which is developed in a tripartite way. Similarly, the UK Code on unfair labour practices and access during recognition ballots provides some certainty for the industrial parties.

These are things we believe should be considered in implementing our model.

Our model envisages that a prominent Object of the legislation would be the promotion of collective bargaining and the right to take protected industrial action as the principal means of determining pay and employment conditions.

13. Conclusion

Collective bargaining and the right to strike are fundamental rights of all workers, accepted internationally as important freedoms and as an instrument for the promotion of decent work and respect for labour. Collective bargaining mediates the labour market, is associated with greater wage equality, and ensures that workers share in the prosperity that their work generates.

Freely made agreements between employees and their employers, whether within an enterprise or across a number of employers, will promote fair and flexible employment arrangements which benefit workers and employers and promote the economic prosperity of the Australian people.

Australia is significantly out of step with the rest of the developed world in not giving legal force to workers' right to collectively bargain.

The model we have developed is, we believe, appropriate to Australia's industrial relations culture, and to the need, in a modern economy, for decent working arrangements that provide flexibility to respond to changing circumstances, balanced with the security that employees need to allow them to participate fully in society.

14. Appendices

Appendix 1: Terms of Reference

ACTU Executive Delegation:
Terms of Reference

The ACTU Executive resolves that:

The Delegation will report to the Executive on the features of the legislation in Canada, the USA, the UK and New Zealand that:

i) Provide for an enforceable right for workers to bargain collectively, including:

- the various mechanisms in each jurisdiction used to test whether the workers in a particular enterprise or industry/group of employees support collective bargaining;

- the regulation of unfair labour practices that ensure workers can make free and informed decisions about whether to bargain collectively; and

- the effectiveness, within each jurisdiction, of the institutional framework for resolving disputes over whether to bargain collectively.

ii) Govern the rights and responsibilities of employers and workers (and their representatives) arising from a decision to engage in collective bargaining including:

- the extent to which the parties are obliged to recognise each others' authorised representatives and to bargain in good faith;

- whether genuine bargaining is promoted through the maintenance of the status quo during bargaining (including prohibitions on employers coercing or offering inducements or individual contracts);

- whether the right to bargain collectively also confers an obligation to represent the views of non members, and the consequences of such an obligation;

- the extent to which a right to bargain confers additional rights of access and consultation during bargaining;

- deadlock resolution mechanisms; and

- the effectiveness, within each jurisdiction, of the institutional framework for resolving disputes during bargaining.

iii) Confer rights and responsibilities on parties during the term of a collective agreement; and

iv) Provide for effective representation of workers in workplaces in which there is not a collective agreement.

The Delegation will report and make recommendations to the Executive on whether the ACTU should amend its industrial legislation policy to include an enforceable right to collective bargaining, and if so, make recommendations on a model or models that would be suitable in the Australian context, taking into account the need to promote effective and democratic unions, and assist unions to build their capacity within the workplace.

Appendix 2: Members of the ACTU Delegation

ACTU

Greg Combet	- Secretary, ACTU
Cath Bowtell	- Industrial Officer, ACTU

Affiliates

Joe De Bruyn	- National Secretary, SDA
Doug Cameron	- National Secretary, AMWU
Susan Hopgood	- National Secretary, AEU
Jeff Lawrence	- National Secretary, LHMU
Bill Shorten	- National Secretary, AWU
David Carey	- Joint National Secretary, CPSU
John Sutton	- National Secretary, CFMEU (Construction Div)
Linda White	- Assistant National Secretary, ASU
Mark Lennon	- Assistant Secretary, Unions NSW

(Also accompanied by Stephen Smith, MP: 2, 3 and 5 May)

Appendix 3: Itinerary

Ontario 24 April

Hosted by Winnie Ng	Canadian Labor Congress

Overview of laws:

Ethan Poskanzer	Labour Lawyer, Sack Goldblatt Mitchell
Kevin Whitaker	Chair, Ontario Labour Relations Board

View from the unions:

Paul Clifford	UNITE HERE, Hotel Workers Rising Campaign
Vic Mordon	National Representative CEP (Communications, Energy & Paperworkers Union of Canada
John Aman	CAW (Canadian Auto Workers)
Andy Somers	ONA (Ontario Nurses Union)

Responses:

Charlotte Yates	Director, Labour Studies, Professor, Political Science, McMaster University
Paula Turtle	Legal Counsel, USW (United Steel Workers)
Judy Fudge	Osgoode University

Ontario 25 April

Leah Vosko	York University

How unions campaign:

Natalie Mehra	Coordinator, Ontario Health Coalition
Paul Bilodeau	Ontario Public Services Employees Union
Cathy Carroll	Service Employees International Union
Chris R Schenk	Research Director, Ontario Federation of Labour, (CLC)

Ottawa 25 April

Ken Georgetti and affiliates (informal)

Ottawa 26 April

Libby Davis	NDP, MP
Elizabeth MacPherson	Director General, Federal Mediation and Conciliation Service
Andrew Jackson	Social and Economic Policy, CLC
Hassan Yussuff	Secretary-Treasurer, CLC

Washington 27 April

John Sweeney	President AFL-CIO
Barbara Shailor	Executive Director, American Center for International Labor Solidarity
Jon Hiatt	General Counsel, AFL-CIO
Sarah Fox	Bredhoff & Kaiser, Counsel; Former Member, National Labor Relations Board
Lance Compa	Senior Lecturer, School of Industrial and Labor Relations, Cornell University
Ken Zinn	Organizing Director, AFL-CIO
Mary Beth Maxwell	Executive Director, American Rights at Work
Ed Sabol	Organizing Director, Communications Workers of America
Paul Booth	Assistant to the President, American Federation of State, County & Municipal Employees

Washington 28 April

Edgar Romney	UNITE HERE
Tom Woodruff	SEIU

The legal landscape:

Pat Szymanski	General Counsel, CTW
Judy Scott	General Counsel, SIEU
Nick Clark	General Counsel UFCWU

The construction industry:

Terry O'Sullivan	President, LIUNA

Political campaigning:

Mike Mathis	Teamsters
Chuck Harple	Teamsters

Organising workers capital:

Bill Patterson	CTW Capital Stewardship Director

Organising around the laws:

Deborah Schneider	Director, Global Organizing Partnerships
Meg Casey	CTW Research Director

London 2 May

Owen Tudor	Head of Department, TUC, European Union and International Relations Dept
Ian Brinkley	Chief Economist, TUC, London
Professor Keith Ewing	Kings College, London

Informal meetings with matched unions.

London 3 May

Bernard Carter	DTI (Department of Trade and Industry)
Brendan Barber	Secretary TUC
Hannah Reid	Employment Rights Department, TUC
Sarah Veale	Employment Rights Department, TUC
Simon Gouldstone	Policy and Operations Director, CAC (Central Arbitration Committee)

John Taylor	Chief Executive, Advisory Conciliation and Arbitration Service (ACAS)

Brussels 4 May

Maarten Keunen	European Trade Union Institute
Guy Ryder	General Secretary, ICFTU
John Monks	General Secretary, ETUC

London 5 May

Ed Cooper	Russell Jones & Walker Solicitors
Victoria Phillips	Thompsons Solicitors
Richard Arthur	Thompsons Solicitors

Wellington 21 June

Mark Gosche	Chair, Transport and Industrial Relations Committee
Helen Kelly	CTU Vice President
Carol Beaumont	CTU Secretary
Peter Conway	CTU Economist
Graeme Buchanan	Department of Labour
Peter Cranney	Lawyer, Oakley Moran
Peter Monteith	NZ Educational Institute Te Riu Roa
Colin Moore	Post Primary Teachers Ass. Te Wehengarua
Ray Bianchi	Amalgamated Workers Union (Northern)
Andrew Cassidy	Finance and Information Workers Union
Basil Prestige	Public Service Association
Paul Tollich	Engineering, Printing and Manufacturing Unions
Rob Huldane	NZ Nurses Organisation
Luci Highfield	Services and Food Workers Union
The Hon. Margaret Wilson	Speaker, previously Minister for Labour
Ruth Dyson	Minister of Labour

Appendix 4: Country reports

Canada

Canada has a federal system of government, and has both national and Provincial labour laws. Our report focuses on the Canadian Labour Code, and to a lesser extent on the Ontario Labour Relations Act.

There are gaps in coverage of the various Provincial bargaining laws. Generally they do not cover agricultural or domestic workers. And in some provinces, public sector and essential service employees have limited access to bargaining and strike action, with their terms of employment set by compulsory arbitration.

The Canadian Labour Code Part 1 is the primary legislation governing collective bargaining in the Federal jurisdiction in Canada. The Canadian Labour Code governs bargaining for Federal employees and employees in the banking, shipping, airports, post and telecommunications and interstate rail, which accounts for about 10 per cent of Canadian workers.

Since 1982, Canadian Labour Law has also been influenced by the judicial interpretation of the rights and obligations contained in the Canadian Charter of Rights and Freedoms. These include freedom of expression and freedom of association. A number of cases have seen workers' rights upheld and extended under the protection of the rights in the Charter.

The Courts have upheld unions' rights to distribute leaflets, the right to picket and the right to picket at secondary locations as rights flowing from the freedom of speech/association.[43] However, not all cases have been successful, with a split decisions and multiple judgments making it difficult to articulate any clear extension of the protections developed by the case law.[44] While the Supreme Court has rejected a law removing collective bargaining rights from agricultural workers,[45] in other cases freedom of association has been read narrowly.

The Canadian system of collective bargaining is underpinned by a set of legislated minimum standards. The minimum standards cover

minimum wages, annual leave, public holidays, parental leave, carer's leave, bereavement leave, sick leave and work-related illness and injury leave, discipline procedures, unjust dismissal, hours of work, terminations and redundancy, wage recovery, sexual harassment, deductions from wages and keeping of records.

The Canadian Labour Congress (CLC) sees these as increasingly important. Collective bargaining agreements cannot undercut the minimum legislated standards, and they set the floor under collective bargaining arrangements and the CLC is calling for tighter legislation enforcing this requirement.

The Canadian Industrial Relations Board administers the Code, which is a tripartite Board comprising a full-time Chair and Vice Chairpersons and part-time members appointed for 5-year terms. When the Board sits, it is comprised of equal employee and employer representatives. The Federal Mediation and Conciliation Service administers the dispute resolution provisions of the Code.

In Ontario, the Ontario Labour Relations Act covers most private sector workers, with certain exceptions, and is administered by the Ontario Labour Relations Board.

Attaining recognition for the purpose of bargaining

Under the Canadian Labour Code, a union and employer may voluntarily agree to enter into an enforceable collective agreement. Where there is no voluntary recognition, a union may apply for recognition as the bargaining agent of workers in a properly comprised bargaining unit. Workers cannot strike to gain recognition (i.e. to get the employer to the bargaining table).

Where there is no collective agreement in place, the union may apply at any time. If a rival union has been recognised as representative, but has failed to implement a collective agreement within 12 months, another union may apply to be recognised as the bargaining union. Where there is an agreement in place, a rival union may not apply to displace it until 3 months before the expiry of the agreement.

An employer must recognise a union that can demonstrate 50 per cent support.[46] Where a union has between 35 and 50 per cent support, the Board may conduct a ballot to decide whether the union is representative of the employees in the bargaining unit.

The Board should approve the union as the bargaining agent for the unit that it has deemed appropriate. However, the Board can exclude certain workers, and can establish separate units for professional employees and supervisory employees. Two or more unions can form a council of unions (or single bargaining unit) and be treated as one union for the purposes of the Code.

If the Board has evidence that between 35 per cent and fifty per cent of the employees are union members, it must order the ballot. At least 35 per cent of the workforce must vote for the ballot to be valid. The result is declared on a majority of those voting.

The Board may order that the employer recognise a union without holding a ballot if it has evidence that the employer has unduly interfered with the employees' free choice to be represented.

The Code provides for multi-employer bargaining. Unions can seek recognition in respect of an employer organisation, representing two or more employers. Provided the Board is satisfied that the employer organisation has the authority of the employers to bargain, there can be a multi-employer bargaining unit, and the employer organisations is treated as the employer for the purpose of the Code, including the taking of industrial action. Any subsequent agreement will bind the employers and the employer organisation. New employers who join the employer organisation can be added to the unit, and become bound by the agreement, provided they have granted to employer organisation the authority to bargain on their behalf.

Once certified, the union has the right to bargain, (and the duty to bargain fairly) for all current and future employees.

Recognition for other purposes

Recognition also confers excusive representation rights on a union. This means that recognition is to the exclusion of other unions, and

that the employer cannot bargain directly with individuals, unless such bargaining is permitted under the collective agreement.

Recognition is both necessary and sufficient for an individual to be represented by their union. The employer must recognise the union for individual grievances as well as collective negotiations. In the absence of recognition, there is no obligation to recognise a union seeking to represent a single member.

The obligation to bargain in good faith

Bargaining for a new agreement can be initiated 4 months before the existing agreement expires. Bargaining parties must "meet and commence to bargain collectively in good faith, and make every reasonable effort to enter into a collective agreement". Failure to negotiate in good faith can result in an order from the Board to consider a matter.

Once a notice to bargain has been served, the employer cannot alter the workers' terms and conditions without consent of the union.

Multi-employer bargaining

The Canadian Labour Code allows for voluntary multi-party bargaining, including industrial action.

Where a trade union has applied for certification of a unit comprised of employees of two or more employers who have formed such an organisation, the law enables the Board to designate an employers' organisation to be the employer

The Board must be satisfied that each of the employers has granted appropriate authority to the employers' organisation so that it can carry out an employer's duties and responsibilities under Part I of the Code. The section also permits a member employer to withdraw from the organisation but with provision for an orderly return to single employer bargaining.

Duration of agreements

Agreements can be of any duration, but are generally no more than 3 years. Where an agreement is silent, the Code deems the agreement to be of 12 months' duration. Agreements are binding upon the employer, the employees and the union.

Content of agreements

The scope of agreements is not restricted. Parties are free to negotiate and agree any subject for inclusion in a collective agreement. All agreements must provide for private arbitration to settle any disputes arising during their life (without recourse to industrial action). Where the arbitration clause is deficient or the parties cannot agree the arbitrator, the Minister may appoint an arbitrator. These disputes procedure apply even after the expiry of the agreement, until impasse has been met. All arbitrations are final and not subject to judicial review.

The Code provides that the parties may negotiate preference or compulsory union membership clauses in agreements. Where a union requests a "check off" clause, it shall be included. A check-off clause is a payroll deduction clause that ensures union dues are deducted from the pay of the entire workforce covered by the agreement, regardless of whether the worker has joined the union. "Check off" clauses became common in Canada following a dispute in 1946 involving Ford employees, who were on strike for over 100 days over a closed shop. The decision in settlement of the dispute, by Justice Ivan Rand, had two components. Firstly, while union membership should not be compulsory, as unions are essential to all workers and responsible to all workers under the duty of fair representation, it was legitimate to guarantee unions the financial means to carry out their programs. Secondly, that while employers could be required to deduct the fees, they could also withhold them during industrial action. This formula, known as the Rand Formula, is enshrined in many of Canada's labour laws.

Conciliation and Arbitration

The Minister for Labour may impose a conciliation process, and industrial action is not permitted during conciliation. Either party may trigger a compulsory conciliation process, which can last for up to 60 days. The Minister can refuse to appoint a conciliator (which will avoid this step), but otherwise conciliation acts as a brake on industrial action, as action cannot be taken until the process is exhausted.

Where there is no collective agreement in place (i.e. in the first contract between the parties), at the end of conciliation, the matter can be referred to a 3-person board for arbitration. The board must consider the extent to which the parties have bargained in good faith, the terms and conditions of employment of employees performing similar work as those in the bargaining unit (i.e. market rates) and any other matters it sees fit. A first-contract determination is binding for 2 years, although the parties may, by agreement, vary its terms.

Industrial action

Strikes and lock-outs are available during the negotiation of a new agreement, including the last four months of the current agreement during which bargaining can occur. The parties have to notify the Minister of Labour of any dispute that they cannot resolve before they acquire the right to strike or lock-out. A strike or lock-out cannot be taken unless they have reached "impasse'" This means that 21 days must have elapsed since a notice to bargain has been served, the parties must have met and negotiated in good faith (or have failed to meet and negotiate in good faith), and the conciliation process (if initiated) has been exhausted.

Industrial action must not threaten the public health and safety. Following the initiation of bargaining, the employer can serve notice on the union as to the essential services that must be maintained, and the parties are encouraged to reach agreement as to how this will occur. In the absence of agreement, the matter can be arbitrated.

Industrial action must be authorised by a secret ballot, conducted by the union (or in the case of multi-employer bargaining, amongst the employers) within the 60 days prior to the action being called. Where

a person alleges an irregularity, the Board may inquire. Only an irregularity that would have affected the outcome of the vote will trigger a new vote. Seventy-two hours' notice of industrial action must be given, and if the action is subsequently not taken, a new notice must accompany any later action.

Provided these requirements are met, the strike is lawful. An employer cannot dismiss employees who took part in a strike, and an employer cannot bring in replacement labour if workers are on strike over the representational capacity of the union or over unfair labour practices.

Unlawful strikes attract a penalty of $1000 per day.

Bargaining (and hence industrial action) is generally not permitted during the life of an agreement. However, the Code contains special provisions to allow the bargaining parties to re-open negotiations in the event of technological change that would result on change to employees' terms and conditions of employment or job security.

Freedom of Association and unfair labour practices

The Code sets out protections against dismissal or detriment for union membership, participating in industrial action and organising. Under the Federal code, the onus is on the employer to rebut an unfair labour practice claim.

Unfair practices include intimidation or coercion of employees, undermining the union and failure to bargain in good faith.

In Canada, one-on-one communications are considered an unfair practice. This includes a prohibition on employers sending letters to employees' homes, and "captive audience" meetings. If the employer has been found in breach, the Ontario LRB may order that the union has right of access to the workplace. In contrast, in the USA these are permitted as employer free speech.

In some Provinces, expedited hearings and interim remedies provide an additional deterrent to employer interference in employee free

choice. This is a major difference between the Canadian system and that in the US, where cases involving dismissal can take years.

Offering wage increases to avoid unionisation or collective bargaining is prohibited, as it undermines the representative capacity of the union. There is a loophole in protracted bargaining whereby the Minister can bypass the union, and order that the employer's last offer during bargaining can be put to the workforce for a vote.

Access to Workers

Canadian laws do not provide a general right of entry, and union access is generally a matter negotiated between the parties. However, the Board may direct that a union has right of entry for the purpose of communicating with remote employees. The Board can also direct that a union have access to communications with off-site employees for the purpose of soliciting members, or for bargaining, or servicing an agreement.

Collective bargaining in Ontario

The Ontario Labour Relations Act is administered by the Ontario Labour Relations Board (OLRB). By and large, at least for our purposes, bargaining in Ontario is governed by similar provisions to the Federal Code, with the exception that in Ontario, the Board cannot certify a union as representative to bargain without conducting a ballot.

Until 1995, a union could make an application for certification if it could file membership cards signed by 55 per cent of the workforce on whose behalf it proposed to bargain.

In 1995, the Conservative government amended the laws to provide that, regardless of the level of support, or of union membership, a ballot must be held. This change has been associated with a decline in the number of applications for a certification, and fewer successful applications.

Today, if the OLRB is satisfied that 40 per cent or more of the individuals in the proposed bargaining unit appear to be members of

the union at the time the application is filed, the Board must direct that a representation vote be taken amongst the voting constituency. The vote must be held within 5 days of the application by the union, and is decisive.

Card-based certification has recently been re-introduced in the construction industry. However, despite the availability of card-check, a ballot is still held in about 70 per cent of certification applications in the construction industry.

United States of America

In the United States there are a myriad of laws governing collective bargaining rights. The most significant law is the Federal law (the National Labor Relations Act, "NRLA" or "Wagner Act") that governs workers' rights to organise in the most parts of the private sector, albeit with some exclusions, including farm workers and domestic labourers. The Federal Act governs private sector bargaining in the States. State laws govern State and local government workers. [47]

There are also various statutory exclusions on occupations (e.g. supervisor, professional) or industries (e.g. agricultural, or domestic labour) that reduce coverage across the workforces. Approximately three-quarters of United States workers (78 per cent of the private sector workforce and 66 per cent of the public sector workforce) have legislated collective bargaining rights. The largest groups without bargaining rights are an estimated 8.5 million independent contractors, 5.5 million employees of certain small businesses, 10.2 million supervisory and managerial employees (including 8.6 million first-line managers), 6.9 million Federal, State and local government workers, over half a million domestic workers and almost 400,000 agricultural workers (GAO 2002).

The Act is administered by the National Labour Relations Board (NRLB); which recognises unions for the purpose of bargaining and hears unfair labour practice complaints. A feature of the United States system is the complexity and legalistic nature of the system, and the partisan nature of the NLRB.

The NLRA contains a strong statement of workers' rights, in particular by asserting the right of workers to engage in concerted activities to protect their industrial interests. Workers have the right to organise unions of their choice and to be free of employer influence and control during organising.

Section 7 of the NRLA provides:

> *Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through*

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)[NLRA section 7]

At face value, the NRLA protects all employees who act in concert, including non-majority unions, who have a right to organise, to make representations to the employer and to be protected from discrimination on the basis of their activities. However, in practice, ballots for recognition are for exclusive recognition.

Attaining majority support in a workplace is not supposed to confer additional obligations on an employer, but supposed to confer bargaining rights to the representative union, exclusive of other unions. That is, the focus on majority unions was originally designed to settle demarcation disputes, not enforce a collective bargaining obligation. The corollary of the right to exclusively represent the workers at a workplace in respect of wages, hours and conditions of employment is a duty on the union to represent all the workers in good faith, in the course of bargaining and during the life of the collective contract.

A union that represents the majority of workers is the granted exclusive and monopoly rights to represent all workers in the workplace. Once a union is the majority union, the employer:

- cannot deal individually with employees (this is an unfair labour practice);
- cannot deal with another organisation;
- must bargain with union, and must do so with a sincere desire to reach agreement;
- cannot make unilateral changes to terms and conditions of employment; and
- has a duty to provide information to the union that is relevant to collective bargaining.

Once a union is recognised as the majority and hence representative union:

- the union can negotiate union security clauses (subject to State laws);

- the workers enjoy a relatively unfettered right to strike; and

- the ability of employers to use permanent replacement labour during a strike is restricted to strikes involving economic matters (i.e. over wages and conditions), not unfair labour practices strikes. This means, employers cannot use economic pressure to force the workers to opt out of collective bargaining.

Attaining recognition for the purpose of collective bargaining

Before the obligation to bargain arises, the union must petition the NRLB for recognition/certification. Once recognised, the obligation on the employer is triggered each time the union serves a notice to bargain, and there is no requirement to continuously re-establish that the union is supported by the workforce.

Recognition can be voluntary, but a ballot is almost always held that supports collective bargaining and that the proposed bargaining unit is appropriate. This is determined by whether the workers to be covered by the agreement have sufficient community of interest. Employers have two opportunities to challenge the union's description of the bargaining unit: by challenging before the ballot is ordered, and then subsequently seeking to exclude certain employees by challenging their vote. A challenge to the unit delays the holding of the ballot, giving the employer time to counter-organise.

A ballot will not be ordered among employees presently covered by a valid collective-bargaining agreement except in accordance with certain rules.[48]

Where the majority of those voting support the union in representing them in bargaining, the employer must bargain with the union in good

faith. Like Canada, the Board can order an employer to recognise a union without a ballot, in the face of egregious interference in the employees' free choice. The test for such an order, known as a Gissel order, is higher in the United States, as the union must show that it previously had support and only lost the support due to the actions of the employer.

Recognition confers the right to negotiate a union security clause, except where such clauses are prohibited by State laws.

Recognition for other purposes

Like in Canada, recognition confers the exclusive right to represent all workers at the workplace, and like Canada, an employer need not recognise the union for the purpose of representing members employed in non-union firms.

Obligation to bargain in good faith

An employer must bargain in good faith with the recognised union. Breach of the obligation constitutes an unfair labour practice, but the primary remedy is an order to negotiate. Obtaining an order can take upwards of three years.

Multi-employer bargaining

Under the NLRA, parties can enter into multi-employer arrangements by consent. The NLRB does not endorse multi-employer bargaining units where this is contested between the parties, unless there is a history of multi-employer agreement-making.

Where there is a history of bargaining between a union and a number of employers acting jointly, in a multi-employer bargaining unit any of the participating employers, or the union, may retire from this multi-employer bargaining relationship only by mutual consent or by a timely submitted withdrawal. Withdrawal from the bargaining unit will otherwise constitute a breach of good faith.

Content of agreements

The obligation to bargain in good faith applies to mandatory topics, pay, hours and conditions of employment. All other topics are permitted topics.

Most agreements contain a private arbitration clause to resolve disputes arising during their life.

Conciliation and Arbitration

The FCMS provides mediation services if the parties wish it, but unlike Canada there is no requirement to exhaust mediation before the right to strike is available. There is no first-contract arbitration in the United States, and therefore no deadlock process in the face of persistent and repeated failures to bargain in good faith.

Industrial Action

Workers and employers can take industrial action against each other in pursuit of their economic interests, but employers cannot lock out workers over representation issues. An employer lock-out designed to prevent workers exercising their collective bargaining rights, or over the issue of whether there is or isn't a collective agreement would be an unlawful unfair labour practice. Employers can use permanent replacement labour during economic strikes, placing striking workers at risk of there being no job available at the end of the strike.

Freedom of association and unfair labour practices

Like Canada, employers cannot coerce, intimidate or unduly interfere with an employee's choice to belong to a union. Actions designed to undermine the union as the workers' representative will be an unfair labour practice. This includes offering inducements, making wage offers during bargaining, setting up staff committees or alternative unions.

As noted above, it is also an unfair labour practice to refuse to bargain in good faith.

Access to Workers

There is no statutory right of entry in the United States. Unions' rights to enter workplaces are contained in collective agreements.

The United Kingdom

Under UK laws collective bargaining is largely unregulated, and collective agreements are not generally enforceable. The agreements are presumed not to give rise to legal obligations between the parties. Unlike Australia, there is no legislation giving statutory force to agreements reached between unions and employers, or between employees and employers.

Bargaining is underpinned by some legislated minimum standards. The past 10 years have seen significant legislation in this area, with the introduction of a minimum wage and improvements in parental leave, care for dependants, flexible work for families, working time, (including annual leave and breaks), unfair dismissal, and protection during transfer of undertakings.

In recent years the laws of the United Kingdom have been shaped by EU Directives, and by the international jurisprudence on the freedom of association. As noted above, the decision of the European Court of Human Rights in the case of *Wilson and Palmer* led to the development of new laws protecting workers' right to representation.

Since 2000 the UK has had a legislated process to require an employer bargain with a union, where the union can show majority support or majority membership. The Act is designed as a fall-back, where the employer resists negotiating with the union. It is not a pre-cursor to bargaining or to industrial action. By far the majority of bargaining occurs without recourse to the legislated procedures. Formal recognition is not necessary in order to bargain, reach agreement or take industrial action.

Obtaining recognition for the purpose of collective bargaining

The legislation that governs employees' right to collective bargaining is the Trade Union and Labour Relations (Consolidation) Act 1992 (enacted in the Employment Relations Act 1999 and amended by the Employment Relations Act 2004). Under the Act, trade unions may

apply to the Central Arbitration Committee (CAC) when the employer is contesting the union's right to bargain on behalf of the workforce.

In the UK, when voluntary recognition is opposed, an employer may be obliged to recognise the union as the legitimate bargaining agent upon the CAC being satisfied that the majority of workers support collective bargaining. Where an employer in the UK is hostile to collective bargaining, a union with a majority of members, or with 10 per cent membership supported by the majority of the workforce who vote in a ballot can oblige the employer to come to the bargaining table.

Where union can show, either through it membership levels or through a ballot that it is representative of the majority of the workforce on whose behalf it intends to bargain, then the employer will be ordered to negotiate a bargaining procedure. If the parties cannot agree a bargaining procedure, a model procedure is imposed upon them. This procedure is to apply for bargaining on pay, hours and holidays (and any other matters agreed between the parties).

Only independent unions may make an application, and applications may only be made in respect of workplaces with more than 20 employees. To make an application, the union must show that:

- it has 10 per cent of the workers to be covered by the agreement enrolled as members. The laws do not set out how unions need to show the support. According to the TUC, unions will usually provide a petition as evidence of majority support; and

- it is likely to receive a majority support for collective bargaining. The TUC suggests that most unions would try for 40 per cent membership before making an application for recognition to bargain.

If the union has more than 50 per cent of the workers as members, the CAC may order the employer to agree a bargaining procedure, although the CAC may order a ballot even if the union has the majority. In 25 per cent of cases where the union has provided evidence of majority membership, the CAC has nonetheless ordered a ballot. A number of these ballots appear to have been required

because the CAC was presented with "evidence" that some members did not wish the union to engage in bargaining on their behalf. The legislation has recently been amended to provided that the CAC should only order a ballot based on credible evidence to this effect.

If the union has fewer than 50 per cent of the workforce as members, the CAC shall conduct a ballot. To succeed, the union must get majority of those voting, and 40 per cent of the workers in the bargaining unit must vote in favour of collective bargaining.

If a union fails to prove it is representative, it cannot make a further application for 3 years.

Employer behaviour during the ballot is governed by a code of conduct, and there is provision for unions to have access to the workplace and communicate with the workforce during the ballot.

The union sets out the group of workers on whose behalf it intends to bargain. The CAC must approve the proposed bargaining unit provided it is appropriate "for effective management relations". The CAC is supposed to take into account the employers view, but is not supposed to entertain alternative proposals by employers.

Recognition for other purposes

The UK model for worker representation is different to the North American model, in that it includes incremental levels of representation - at the individual level (with workers having a right to representation), where 10 per cent of workers request rights to information and consultation at the workplace (with majority workplaces having a right to collectively bargain). Unions are currently considering mechanisms to build a capacity for industry-level representation.

Like United States and Canada, statutory recognition does confer exclusive recognition vis-à-vis another competing union, but unlike the North American model, recognition does not imply that the union is the exclusive representative of the workforce. The employer may negotiate with individuals who are covered by collective agreement.

An employer can, and often will, bargain with a union without meeting any threshold of support. Once an employer has recognised a union, either voluntarily by or, following the statutory process, the union bargains on behalf of all the workers for whom it is recognised, and the collective agreement covers all of the workforce, members and non-members.

At the same time as the statutory recognition procedures were enacted, the UK passed laws to provide a statutory right for a worker to be accompanied at grievance and disciplinary meetings. The right is one to be accompanied, not represented therefore the companion; is limited to addressing the hearing and conferring with the worker, but not asking or answering questions on the worker's behalf. A Code of Practice on Discipline and Grievance Procedure, developed by the ACAS accompanies the law. It recommends that the companion takes a full part in proceedings.

The right to be accompanied is limited to a union official or work colleague. The worker has the right to ask for a postponement of the meeting due to the unavailability of the union official. The ACAS code suggests that the meeting should be arranged at a time and a place convenient to all parties.

The UK has also introduced information and consultation rights in larger workplaces.

Obligation to bargain in good faith

In the UK, neither the common law nor the statutory scheme obliges the employer to bargain in good faith. However, an employer has been compelled to recognise a union, it must establish a procedure to bargain around on pay, hours and leave.

Duration of agreements

As bargaining is largely unregulated, there are no limits on agreements. UK unions, therefore tend to bargain issues as they arise, rather than seeking comprehensive agreements, so that multiple agreements may apply at any time. Wages are re-negotiated approximately every 12 months.

Conciliation and arbitration

The CAC may declare a union recognised without a ballot in the face of undue interference by an employer in the ballot process (see below).

Industrial action

There is no bar on industrial action during the life of an agreement. Strikes and other industrial action short of strike can be used, and employers can lock out workers. Employees have partial protection from dismissal for the first 12 weeks of industrial action, provided that the union has and continues to endorse the action and it has been authorised by a pre-strike ballot. The protection can be removed by the employer if the employer takes reasonable steps to try to resolve the dispute that is causing the industrial action.

Freedom of association and unfair labour practices

The UK laws relating to unfair labour practices only apply during a recognition ballot. However, there are other laws that apply at all times that prevent an employer offering inducement to an employee for the purpose of undermining the workers' right to representation, or undermining collective bargaining or a collective agreement.

In 2004 the UK legislation was amended to implement two important changes. The amendments were necessary following a decision of the European Court of Human Rights, which found that UK laws were in breach of the freedom of association protections in Article 11 of the European Convention on Human Rights. [49]

Firstly, the law prohibits an employer offering inducements to join or not join a union, to not take part in union activities, or to use the services of a union. As well as protecting against inducements to join or not join a union, the amendments protect workers' rights to use the services of their union, i.e. their right to representation.

Secondly, the law now prohibits employers from offering inducements to employees, individually or as a group, to opt out of collective representation.

Employers may not discriminate against employees, in regard to "hire or tenure of employment or any term or condition of employment" for the purpose of encouraging or discouraging membership in a labour organisation. Discrimination within the meaning of the Act includes refusal to employ, dismissal, demotion, assigning to a less desirable shift or job, or withholding benefits. The prohibition on discrimination extends to any banding together of workers, not only recognised or formal unions.

During a ballot, an employer must not actually, or threaten to, dismiss, discipline or impose any other detriment upon a worker. This is not confined to workers eligible to vote.

An employer must not offer to pay, in cash or kind, for a worker to vote in particular way; offer money or other reward if the vote is lost (or won); coerce or attempt to coerce a worker to find out how he or she voted or intends to vote; or use, or attempt to use, undue influence on a worker. If a complaint is successful, the CAC may make a remedial order that mitigates the effect of the unfair practice or order a new ballot (at the cost of the offending party).

In cases of serious or repeated unfair practices, the CAC can cancel the ballot and declare the union recognised. The serious unfair practices are where a union official has been sacked, where violence has occurred, or where a party to a remedial order has breached the order, or has had another well-founded complaint made against them.

Access to Workers

Employers have a positive obligation to facilitate access to the workforce so that the union can inform workers and seek their support in the ballot. Employers must facilitate access to the workplace, meetings of workers, information sessions (called surgeries, whereby workers can meet one-on-one or in small groups with the organiser) and access to internal communication tools (notice boards, emails etc).

A code of practice on access encourages the parties to enter into a written access agreement, identifying appropriate times and venues,

and a dispute resolution procedure. The method of communication and venues for access should correspond to the employer's usual methods of communicating with their workforce, and both parties are expected to inform their delegates and line management of the access agreement. The employer is also expected to outline their planned communication activities during the ballot period, so that the union can amend its planned activities accordingly.

As a minimum, employers should permit unions to hold at least one half-hour meeting per day during the 10 days of the balloting period. In addition, unions should be permitted to meet each employee for 15 minutes one-on-one or in a small group. Where these are not held, longer or more frequent large group meetings would be permitted. Delegates who are employees of the employer should usually have paid time off to conduct these "surgeries".

Employers are expected to respect the privacy of such meetings, and should not attend such meetings, nor record or otherwise monitor the meetings, nor question employees about what was said or done in the meetings.

Employers are prohibited from making offers or inducements to stop workers attending union information sessions or imposing a detriment upon a worker for attending union information sessions.[50] Employers are expected to be receptive to union initiatives to communicate with employees working shifts, part time, from home, on long-term leave (e.g. parental leave) or in remote locations.

These access rights only apply during the conduct of the ballot.

Delegate support

In addition, trade union learning representatives and employees who are information and consultation reps within a workplace have additional time off to perform their duties.

A recently released survey shows employer paid the majority of union representatives (89 per cent) for time spent on representative activities while at work. This figure rose to 96 per cent of trade union representatives who spent five or more hours on representative duties

per week. 55 per cent of delegates were provided with office space, and 91 per cent were supplied with office equipment. Three-fifths (62 per cent) of trade union representatives were able to use e-mail, and 22 per cent were provided with space on the company intranet. [51]

New Zealand

The New Zealand legislation, the Employee Relations Act 2000, applies to all employees in New Zealand, including home-based workers, who are deemed to be employees. Independent contractors are not covered by the legislation, although in deciding whether work is performed under an employment contract, the Court is to have regard to the real relationship between the parties.

The Objects of the Act promote freedom of association and collective bargaining. The Objects include express recognition of the inequality of power between employers and their employees.

The New Zealand Employment Relations Act 2000 is administered by the Employment Authority, and governs collective bargaining and dispute resolution procedures. Bargaining is underpinned by legislated minimum standards, covering annual leave, public holidays, sick leave, bereavement leave, parental leave and leave for defence force volunteers.

Unlike Australia, only a union can be a party to a collective agreement, and unlike all the other countries we looked at agreements, agreements apply only to the members of the union (or for a limited period to new employees, who are covered by the agreement by default pending their decision to join the union and remain within the collective, or not join the union).

Recognition

The concept of recognition found in North America and the UK is not applicable in New Zealand. Unions, once registered, are able to bargain on behalf of their members. Initiation of a claim triggers the obligation on the employer to bargain in good faith with the union towards the making of a collective agreement. Whether the union is representative of the workforce broadly is not relevant to bargaining.

A union can be formed with a minimum of 15 members, and there are no delineated areas of coverage. There has been a significant expansion in small enterprise unions over the past few years, with the

number of unions covering fewer than 1000 members growing from 48 unions with an average of 264 members in 1999 to 133 unions with an average membership of 167 in 2004 (*Industrial Relations Centre Survey*). However, small unions still only account for 6 per cent of all union membership in NZ, with large unions (those with more than 10,000 members) accounting for 70 per cent of all membership. It is these large, well established and better resourced unions that account for most of the membership growth.

There is no test of majority support to trigger the obligation to bargain in good faith, except that, before a union initiates multi-employer bargaining, it must have held separate secret ballot of its members at each employer to be covered by the agreement. The ballots can only be held after the expiry of a current agreement at that workplace, or within the 60 day window before the expiry of the agreement. This requirement only applies for the first multi-employer agreement or if the union seeks to enlarge the coverage of the agreement.

New parties can be joined after bargaining has commenced by consent of the other parties.

Obligation to bargain in good faith

In New Zealand, the initiation of bargaining by registered unions or by employers obliges the other party to bargain in good faith towards the making of a collective agreement.

The Act is founded upon the requirement that parties deal with each other in good faith. The duty of good faith extends beyond bargaining for collective agreements, and is supposed to underpin all relationship that arise in a workplace, including the direct employer-employee relationship, relationships between unions and their members, unions and employers, between unions in the same workplace, and employers engaged in joint or multi-employer bargaining.

The obligation to deal in good faith applies to bargaining, matters arising during the life of an agreement, consultation about change at the workplace, redundancies, and access to the workplace.

The legislation provides that unions and employers can enter in to collective agreements. If a party initiates a claim to bargain, the other party must enter into good faith negotiations, with a view to reaching agreement.

The duty of good faith is codified to include a requirement to meet, to exchange information, consider and respond to each other's proposals, continue to bargain about matters despite having reached deadlock on other matters. It also includes a prohibition on conduct that would undermine a union as the bargaining agent of its members.

A recent amendment strengthens the obligation, by inserting a "duty to conclude" which requires the parties to conclude an agreement unless there is a reasonable ground not to. Opposition, in principle, to being a party to a collective agreement does not constitute a reasonable ground. The effectiveness of this provision has not yet been tested in the Employment Court.

Initiating bargaining

Bargaining may be initiated between a union or unions and an employer and employers. Only unions may collectively bargain on behalf of workers. This in effect confers a right to representation in collective bargaining on any individual who is a union member.

Bargaining for a renewal agreement can be initiated within a window that favours the incumbent union.[52] Provided a union initiates bargaining within the window, the employer cannot initiate bargaining with another union.

An issue has arisen when one party initiates multi-employer bargaining and the other initiates single-employer bargaining, as each initiation of bargaining ignites the obligation to bargain in good faith.

The Employment Authority found that the employer was bound to participate in good faith in the multi-employer negotiations, and the union was equally obliged to participate in good faith in the single-employer negotiations. It is hard to imagine this remaining unresolved into the future.

Multi employer bargaining

The legislation specifically provides for multi-employer bargaining, which can be initiated by a union provided it has the support of the members at the various companies. An employer may be required to participate in bargaining for a multi-employer agreement provided that:

- the members of the union employed by the employer are not already covered by a collective agreement;

- those union members have participated in a secret ballot, and the majority in each workplace has agreed that they wish to be covered by a multi-employer collective agreement;

- notice has been given to the employer of the number of union members employed by the employer, the number who voted, and the number who were in favour; and

- the normal procedures for initiating collective bargaining have been followed.

The union(s) or each union (as the case may require) must hold, in accordance with its rules, separate secret ballots of its members employed by each employer intended to be a party to the bargaining. A ballot may only be held if the workers are not covered by a current collective agreement, or the agreement is due to expire within 60 days.

If the members endorse multi-employer bargaining, then the obligation to bargain in good faith will be triggered.

Unfair labour practices

New Zealand's legislation does not create a new category of unfair labour practices during bargaining.

Freedom of association is protected in much the same way as in Australia.

However, the notion of good faith bargaining is broad. Practices that are designed to undermine the union as representative of its members are a breach of good faith, including one-on-one communications during bargaining.

A party cannot do anything during bargaining that is likely to undermine the bargaining authority of the other party.

This has been held by the Employment Court to mean that employers cannot communicate at all with their employees about matters related to bargaining during the bargaining process. The Association of University Staff is currently before the Court alleging that an employer's communication to its workforce, made in anticipation of the impending initiation of bargaining, is caught by this ruling.[53]

The content of agreements

The only limit on the content of agreements is that they must not undermine the statutory minimum and they cannot contain a preference clause. They can, however, confer a benefit on workers covered by the agreement, and compulsory bargaining fees are expressly permitted.

Conciliation and arbitration

The Employment Authority may facilitate an agreement where, in the course of the bargaining, a party has failed to comply with the duty of good faith, and the failure was serious and sustained and has undermined bargaining. The Authority can also intervene where:

- bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties that

have precluded the parties from entering into a collective agreement;

- in the course of the bargaining, there have been one or more strikes or lock-outs; and the strikes or lock-outs have been protracted or acrimonious;

- in the course of bargaining, a party has proposed a strike or lock-out; which, if it was to occur, would be likely to affect the public interest substantially (i.e. the strike or lock-out is likely to endanger the life, safety, or health of persons; or is likely to disrupt social, environmental, or economic interests and the effects of the disruption are likely to be widespread, long-term, or irreversible).

The Authority may arbitrate the terms of the collective agreement if there has been serious and sustained breaches of good faith, all other reasonable alternatives to reach agreement have been exhausted, and fixing the provision of the agreement is the only effective remedy for the breach of good faith.

To date, these provisions of the Act have not been utilized. We were advised that the hurdle to access arbitration is considered a very high one, and arbitration is clearly a last resort.

Freedom of Association

The legislation prohibits the exertion, directly or indirectly, of undue influence on people to join or not join unions, to resign from a union, or to not act as a delegate or representative.

Preference clauses are outlawed, but the law does not prohibit conferring additional benefits on employees covered by collective agreements.

Right of access and support for activists

The New Zealand legislation provides for right of entry for union officials, and for paid union meetings. Unions have access for union business as well as inspection and monitoring of compliance with the

Act and agreements. Union members are able to attend two paid union meetings each calendar year of up to 2 hours duration each. Unions have to supply a list of members in order for the members to be entitled to attend.

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16. Endnotes

[1] For more detail on the history of the relationship between arbitration and collective bargaining in Australia see Forsyth et el (2006) *Research Report: Collective bargaining & Union recognition Rights: Policy Issues for Australia*.

[2] This policy is enforced at the Office of Employment Advocate, the Office of Workplaces services, the Department of Workplace and Employment Relations and at Telstra.

[3] 31 per cent of women employed in the private sector rely on awards to set their pay. The ABS estimates that only 29 per cent of casual employees are covered by collective bargaining, compared to 44 per cent of permanent and fixed term employees. Casuals are concentrated under awards. ABS 6306.0, 2004.

[4] The industries with high collective bargaining coverage are: Electricity Water & Gas (79.9 per cent); Communication Services (62.6 per cent); Government Administration & Defence (89.3 per cent); Education (83 per cent); and Health & Community Services (54.8 per cent). ABS Cat. No. 6305.0.55.001, 2004.

[5] Since 1997 every report by ILO's Committee of Experts regarding Australia's compliance with the Convention has noted that Australia's labour laws do not comply with Conventions 87 and 98. Australia has been called to account before the Conference Committee on the Application of Standards (which is reserved for the worst breaches) four times in relation to our compliance with Convention 98. This is an indication of the seriousness with which the global community views our non-compliance.

[6] Wilson & The NUJ, Palmer, Wyeth & The National Union of rail, maritime and transport Workers, Doolan & Others v The United Kingdom[2002] IRLR 128.

[7] ILO Digest of Decisions of the Committee on Freedom of Association 1985, para. 583.

[8] ILO Digest of Decisions of the Committee on Freedom of Association 1985, para. 618 and 619.

[9] OECD (2006a). In the period 1993-2005, GDP growth in excess of 3 per cent per annum occurred in countries with relatively low spread of collective bargaining (USA, Canada and New Zealand) and in countries with a relatively high spread of collective bargaining (Ireland, Luxembourg, Greece, Finland and Spain).

[10] OECD Employment Outlook (2006a) p86.

[11] OECD (2006) Economic growth and unemployment rates are imperfect measures of the performance of the labour market institutions, and the

economy. Econometric modelling by the OECD shows the extent to which GDP per capita fails to measure societal wellbeing. In an index that included measures in income inequality, gender pay differentials, years in education, child poverty, suicide and incarceration rates and levels of volunteering, GDP per capita often correlated closely with the nations performance against the social index. However the USA, and to a more limited extent Austria and Canada, rated lower on the social indicator that their GDP per capita would otherwise indicate. Nations such as Czech Republic, Portugal, France, Spain and Italy performed as well on the social index despite much lower levels of GDP per capita than the USA. Japan, Sweden, Denmark, Canada, the Netherlands and Switzerland all had higher ratings on the social index than the US, again despite lower GDP per capita.

[12] ABS 1350.0, July 2005. Since 1996, wages share of total factor income has declined from 56 per cent to 53.6 per cent, while profits share has increased from 22.5 per cent to 27.1 per cent.

[13] ABS 6105.0, April 2005

[14] ABS 6265.0, 2005. In September 2005, there were 2,839,900 part-time workers. Of these, 22 per cent (612,000) would have preferred to work more hours, and this was higher for men (26 per cent) than for women (20 per cent).Of the part-time workers who would prefer to work more hours, the majority (55 per cent) would prefer to work full time. For men, the proportion who preferred to work full time was 67 per cent compared to 49 per cent for women.

[15] ABS 4102.0 2005. Casual employment grew over the period 1993 to 2003 from 22 % (1.3 million) to 26% (1.9 million) of employees, and the level has remained around that level since.

[16] ABS 1301.0 2003. Over the decade 1990-91 to 2000-01, the average annual rate of growth in numbers of businesses saw businesses with 1-4 employees recording the strongest average annual growth (up 3.5 per cent), and workplaces of over 200 employees recording the lowest growth rate of just 1 per cent.

[17] In Canada we heard that this obligation was becoming onerous, and in the United Kingdom we heard that workers were suing unions in instances of alleged poor representation.

[18] On average, the federal Canadian Labour Relations Board certifies 100 bargaining units each year, affecting approximately 11,000 employees. Over the period 1984-1994, the success rate for certification of new bargaining units was approximately 61 per cent, while 68 per cent of applications for desertification or revocation were granted. At the Federal level. Each year between 1984 and 1994, the Canada Labour Relations Board received between 126 and 227 applications for certification and between 19 and 44 applications for revocation each year. Where no representation vote or public hearing was held, it took on average 119 days to deal with a certification

application. Holding a representation took, on average, an extra 36 days. The majority of those bargaining units cover less than 30 employees; less than 10 per cent have over 190 employees.

[19] The Government resisted good faith amendments on the basis that they wanted statutory recognition to resemble voluntary recognition as closely as possible. Consequently neither involves the element of good faith bargaining. See House of Lords Debate 7 June, 1999 pgs 1275 -76 quoted in "Trade Union Recognition" House of Commons Research Paper 00/55 23 May, 2000.

[20] Before the laws were passed, Advisory Conciliation and Arbitration Service (ACAS) had very few requests for assistance in conciliation or mediation of recognition disputes. Between 1998-99 and 1999-2000, just before the statutory recognition laws were enacted, the number of requests rises from 57 to 78. After the legislation came into effect in 2000-01, the number of requests for assistance rose to 384. Although there have been falls since then, the requests for assistance have remained high compared to the period before the laws were enacted, with 236 cases in 2003-04.

[21] The WA legislation provides that parties must state their position on matters at issue, and explain that position; meet at reasonable times, intervals and places for the purpose conducting face-to-face bargaining; disclose relevant and necessary information for bargaining; act honestly and openly, which includes not capriciously adding or withdrawing items for bargaining; recognise legitimate bargaining agents; provide reasonable facilities to employee representatives necessary for them to carry out their functions; bargain genuinely, and dedicate sufficient resources to ensure this occurs; and adhere to agreed outcomes and commitments made by the parties.

The Commission may, having regard to the circumstances in which the industrial action occurs, determine that engaging in industrial action is a breach of the duty to bargain in good faith.

[22] The duty to supply information, on request, information that is "relevant and necessary" to allow the employees' representative to bargain intelligently and effectively with respect to wages, hours, and other conditions of employment. The New Zealand laws govern the obligation on unions where they are in receipt of commercial-in-confidence material.

[23] In the United States and Canada, the initiation of either a representation application or a notice to bargain invokes a freeze on conditions, to ensure that the employer does not undermine the authority of the bargaining union.

[24] Employment Relations Act 2000, Section 4A.

[25] Employment Relations Act 2000, Section 80.

[26] "Nothing in this Part prohibits the parties to a collective agreement from including in the collective agreement a provision (a) requiring, as a condition

of employment, membership in a specified trade union; or (b) granting a preference of employment to members of a specified trade union.

[27] Unless there is a bona fide religious exemption, in which case the dues are remitted to a charity."

[28] UNITE HERE Local 2 (San Francisco Hotels Multi-Employer Group), 20-CB-12268, January 25, 2005

[29] Trade Union and Labour Relations (Consolidation) Act 1992 Section 181.

[30] ILO, Labour legislation Guidelines
http://www.ilo.org/public/english/dialogue/ifpdial/llg/index.htm

[31] Speech by Rt. Hon. Peter Mandelson Former Secretary of State for Trade and Industry The CBI London Region Annual Dinner Thursday, December 10, 1998 http://www.dti.gov.uk/ministers/archived/mandelson101298.html

[32] NLRB v. J. Weingarten Inc., 420 U.S. 251 1975. The employee cannot be punished for making this request, and failure to afford a right to representation is an unfair labour practice.

[33] The NRLB has flip-flopped on whether section 7 of the NLRA, which protects freedom of association, confers a right to representation in non-union shops, or whether representation rights are only conferred through recognition. Until 2000 it seemed settled that there was no right to representation in non-union workplaces, with the weight of authority suggesting that workers in workplaces where fewer than 50 per cent of the worker support collective representation have no right to be represented in discussions with their employer.

In 2000 the Board recognised representation rights are founded in Section 7 of the NLRA, and not in Section 9 of the Act, which recognises the union's right to act as the employees' exclusive bargaining representative (Epilepsy Foundation of Northeast Ohio, 331 NLRB No 92) It held that even in non-union workplaces, a worker has the right to be represented by a co-worker (although not by a union for the purpose of collective bargaining). The decision was enforced by D.C. Circuit, and in June 2002, the Supreme Court denied the Epilepsy Foundation's request to appeal.

However in 2004 the NLRB flip flopped again, and held that there is no right of representation in non unionised shops, relying in part on the fact that a co-worker does not represent the views of the workforce (IBM Corp, 341 NLRB No 148).

[34] ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), General Survey on Freedom of Association and Collective Bargaining, Para 241

[35] Employment Relations Act 2000 NZ s.18.

[36] Employment Relations Act 1999 UK s 10-15.

[37] Unions can apply for formal listing by the relevant authority, but not all unions or employer organisations do so. The laws governing the listing of unions in the UK permit two classes of unions. If a union wishes to be recognised it can apply for a certificate of independence or it can apply to be a listed union. Each status confers different rights. While only an independent union can apply for recognition, a recognition agreement with any listed union will bar an application by an independent union for recognition.

[38] This feature attracted significant adverse comment, with two different explanations as to the origins of this provision. One version (Keith Ewing) attributed the genesis of the provision to lobbying by News Corp Ltd to ensure the existence of the in-house union was able to pre-empt any attempt by other more independent and representative unions. The other version attributed the provision to the need to protect some greenfields recognition deals in the vehicle components industry and protect an existing demarcation deal.

[39] In 1998 the then Kennett Government was proposing a new non-union collective agreement in Victoria's Department of Natural Resources and Energy. The Department employed approximately 3,700 non-executive employees, of whom approximately 1,270 had signed AWAs. The CPSU was opposing the agreement, and members of the CPSU had taken industrial action in support of a union collective agreement covering the Department. Before the ballot of employees to consider the management-proposed agreement, the employer arranged for each of the employees on AWAs to send a notice to their employer terminating their AWA conditional upon the proposed non-union agreement being endorsed. The effect of this was to give the AWA employees the opportunity to vote in the ballot for the non-union agreement. These tactics were held permissible by the Federal Court in *The Community and Public Sector Union & Anor v Crown in Right of the State of Victoria & Anor [1998] 1582 FCA (9 December 1998).*

Similarly, in 1997 non-teaching staff employees employed at Holmesglen College of TAFE voted 132 to 90 to reject a proposed Institute-wide enterprise agreement. Following this, the employer sought to make 6 separate employee collective agreements (under then s170LK of the WRA) with the employees of 6 different departments within the College. The number of workers covered by each agreement ranged from 21 in the largest group, to 3 in the smallest group. In rejecting the College's application for certification of the agreements, Commissioner Smith held that it is unfair where the employer artificially segments the workplace in a manner calculated to exclude the exercise of a valid vote within an enterprise. He also held that the business units were not discrete parts of the college. The decision was upheld on appeal *(Print Q3673, Justice Giudice, President, Justice Munro, Commissioner Holmes Melbourne, 16 July 1998*).

[40] ILO, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Article 3; General Survey on Freedom of Association and Collective Bargaining, para. 151.

[41] New Zealand law allows action in relation to OHS issues.

[42] ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Article 3; General Survey on Freedom of Association and Collective Bargaining, para 175

[43]In November of 1983, employees of the superior courts who were members of the union went on strike. The staff of the British Columbia Supreme Court picketed outside the court house, and only let in a minimum number of people needed for urgent cases. The Chief Justice arrived to see the staff picketing, and issued an order on his own motion to get the staff back to work. The issues before the Supreme Court included whether the order restraining picketing and other activities within the precincts of all court houses in British Columbia infringed or denied the rights and freedoms guaranteed the Canadian Charter of Rights and Freedoms, and if so, whether the order was justified by s. 1 of the Charter. The Court unanimously held that the judge could enjoin the picketers. While his order violated the freedom of expression under section 2(b) of the Charter, it was otherwise justified. *BCGEU v. British Columbia*, [1988] 2 S.C.R. 214

[44] In Lavigne's case, the issue was whether Mr Lavigne should pay the full bargaining fee, in light of the fact that some of the dues were used for party political purposes. In a split decision, the court held that there is a limited right not to associate, which extends only where the union supported causes that went beyond what is necessary for employee representation. Otherwise, freedom of association does not include a right not to associate and compulsory bargaining fees under the Rand formula do not infringe freedom of association. *Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211*

[45] In 1994, the NDP Government of Ontario passed laws giving trade union and collective bargaining rights to Ontario's agricultural workers. The following year, the Conservatives won government, repealed the 1994 Act and terminated any agreements made under it. Dunmore applied on behalf of the agricultural workers of Ontario to challenge the repeal Act as a violation of their right to freedom of association and equality rights under the Charter. The issues before the Supreme Court was whether the repeal Act violated the Charter, and if so, whether it could be saved under section 1. The majority held that the law violated the Charter and could not be justified*. Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016, 2001 SCC 94*

[46] Support for the union is not necessarily union membership. Unions sign up workers to support bargaining and collect a nominal fee ($1.00 to $5.00), but do not commence collecting full union dues until they are in a position to bargain, and usually not until there is a first collective agreement in place. Full union membership follows the making of a collective agreement, and

collective bargaining and union membership are almost synonymous in Canada.

[47] There is separate legislation governing that provides a very limited bargaining right for federal public sector workers (the Federal Labor Relations Act). The FLRA prohibits industrial action, and restricts bargaining to terms and conditions of employment. Wages and benefits are seen as within the province of the government, and therefore not open to collectively bargaining. This legislation has been has been the subject of adverse comment by the ILO. It was referred to by one commentator as "collective begging."

A third Act governing railroad and airline industry bargaining provides for compulsory conciliation and the right to take industrial action restricted unless and until the parties are released from conciliation by the Mediator. Once released from mediation, the employer can legally lock out the workforce, and can unilaterally adjust the terms and conditions of employment. It is also open to the President of the United States can intervene in the dispute and trigger binding arbitration of the dispute.

[47] Note that the card check test of support for the union is not a measure of the level of union membership. Unions sign up workers to support bargaining and collect a nominal fee ($1.00 to $5.00) but do not commence collecting full union dues until they are in a position to bargain, and usually not until there is a first collective agreement in place. Union membership as we understand it is almost a by-product of having reached a collective agreement.

[49] Wilson & the National Union of Journalists, Palmer, Wyeth & the National Union of Rail, Maritime & Transport Workers, Doolan & others v United Kingdom [2002] IRLR 568.

[50] Under the Code, the employer should provide access to a notice board, the unions' website in the same manner as it expressly or tacitly permits employees to access other web-based information, internal email by a nominated job rep, either on the same basis as it expressly or tacitly permits employees to use internal email for other communications, or, alternatively, in proportion to the employers use of email in the campaign about the ballot.

[51] DTI (2006) Inside the Workplace 2004

[52] An employer can initiate bargaining by a union within the last 60 days of an agreement, and within the last 40 days on an agreement.

[53] Association of University Staff v the Vice Chancellor of the University of Auckland.