An Assessment of Government Policy

*MARGARET WILSON

INTRODUCTION:

There are certain issues in the field of industrial relations in New Zealand that periodically rise to prominence. One such issue is the question of union membership, which has been once again thrust into the limelight by a statement the Minister of Labour made earlier this year⁽¹⁾. The Minister announced that during 1976 legislation would be introduced to provide for a ballot amongst workers to determine whether union membership in their particular trade, industry or occupation should be voluntary or compulsory. This announcement was in accordance with the National Party's election policy statement on industrial relations, that stated:⁽²⁾

"A National Government will change the law to give workers an effective means to decide whether their unions should be compulsory or voluntary."

Not surprisingly, the Minister's announcement has provoked much comment and vigorous debate amongst persons concerned with industrial relations in New Zealand. It is the purpose of this short article to analyse briefly the various statutory provisions that have related to union membership, then to examine the Government's proposed scheme for amending the existing statutory union membership provisions, and finally to suggest some implications of voluntary unionism upon the present industrial relations system in New Zealand.

HISTORICAL ASPECTS

The statutory framework of industrial relations in New Zealand, as originally incorporated in the Industrial Conciliation and Arbitration Act 1894 (hereinafter referred to as the I.C. & A. Act), and presently incorporated in the Industrial Relations Act 1973, is founded upon the realistic premise that conflict at work is inherent in the relationship between workers and employers.

The purpose of industrial legislation has been to ensure that such conflict is constructively resolved through the procedures laid down by legislation. Woods succinctly described the role of legislation in industrial relations in New Zealand when he wrote:(3)

"The main role of legislation is not to remove conflict, but to influence the way in which it is expressed."

The effectiveness of the disputes pro-

cedures is dependent upon the willingness of the parties in dispute to abide by the procedures, and to accept whatever decision results. In order to ensure acceptability of the statutory procedural framework, it is essential to have a viable trade union movement. Unless employers can negotiate with an identifiable representative organisation of workers, the present system of dispute settlement would break down, and result in industrial chaos.

The importance of a viable trade union movement to the whole system of industrial relations in New Zealand was recognised in the first I.C. & A. Act of 1894. One of the primary purposes of this Act was to "encourage the Formation of Industrial Unions and Associations." (4) William Pember Reeves(5) realised that the statutory system of peaceful dispute settlement could not succeed without the support and co-opera-

^{*} MARGARET WILSON is Letcurer in Industrial Law, Faculty of Law, University of Auckland.

⁽¹⁾ The Minister of Labour's announcement was reported in the Auckland Star, 30 January, 1976.

⁽²⁾ National Party Policy Statement — Industrial Relations, (1975), 5.

⁽³⁾ Noel S. Woods, Industrial Relations: A Search for Understanding (1975), 5.

⁽⁴⁾ I.C. & A. Act 1894, Preamble.,

⁽⁵⁾ Minister of Labour 1892-1896.

I tion of the trade unions. In order therefore to make the system attractive to the trade unions, the statutory system included several obvious advantages to unions that decided to register under the I.C. & A. Act laid down. These advantages, which did in in so far as employers were under no obligation to negotiate with an unregistered union; the extension of the award negotiated by the immediate parties to all employers connected with or engaged in the industry within the locality to which the award related; and finally the advantage of being able to negotiate a favourable union membership clause, which was incorporated into the current award.

The importance to the unions of the question of union membership became apparent very soon after the first I.C. & A. Act came into force(6). The coal miners in the Denniston mines(7) and the Canterbury bootmakers(8) were amongst the first unions to negotiate a union preference clause in their awards. The legality of the action on the part of the Arbitration Court in permitting the inclusion of preference clauses in awards was first tested in 1900(9), when the Court of Appeal upheld a decision of the Supreme Court which decided the inclusion of preference clauses was within the jurisdiction of the Arbitration Court. This question was put beyond doubt when in 1900 an amendment to the I.C. & A. Act was passed, which amended the definition of "industrial matters" to include "the claim of members of industrial unions of workers to be employed in preference to non-members."(10)

While the courts were prepared to accept the inclusion of preference clauses, they were not prepared to accept a clause which made union membership a prerequisite to employment. The position of the court on this question was made very clear in Magner v. Gohns, (11) and the courts continued to refuse to accept the concept of compul-

sory union membership until the Labour Government intervened in 1936 and through an amendment to the I.C. & A. Act introduced compulsory union membership, (12) Although it is not intended in this article and accept the dispute procedure therein to analyse the reasons that prompted the introduction of compulsory union memberfact result in unions registering under the ship in 1936, it is important to remember I.C. & A. Act, included protection of the that the legislation was in part the result registered union from rival organisations, of a severe deterioration in trade union organisation and strength that had been caused by the effects of the economic depression of the 1930s, and the suspension of compulsory arbitration that resulted from an amendment to the I.C. & A. Act in 1932. Since the effectiveness of the system of conciliation and arbitration depends upon an equality of bargaining strength between unions and employers, it was essential to the continuation of the statutory system of industrial relations that the balance be restored, and compulusory union membership was seen at the time as one method to restore the equality of bargaining V

It is very questionable whether statutory provision for compulsory union membership should have remained in force for a period of 25 years. It is interesting however to note that when in 1960 the National Party made an election issue out of the question of union membership, many employers and trade unions resisted any change to the law. This attitude towards amending the legislation was probably occasioned by the fact that the only alternative to compulsory union membership was initially seen as voluntary union membership. Thus while compulsory union membership was not considered a desirable concept, voluntary union membership was seen as an even greater threat to the existing industrial relations system. The legislation eventually passed by the National Government in 1961,(13) which repealed the law relating to compulsory union membership and replaced it with the present qualified and unqualified preference clauses, was a masterly compromise between two opposing posi-

Under the present provisions in the 1973 Industrial Relations Act relating to union membership, the Industrial Commission shall insert into an award or agreement an unqualified clause if such a clause is agreed to by all the assessors in conciliation, or if not less than 50% of the workers bound by the award desire to become or an unqualified preference clause. remain members of the union.(14) Since almost invariably there is agreement in conciliation to include an unqualified preference clause, the matter is settled in conciliation. If however there was no such agreement, then the Registrar of Industrial Unions may conduct a ballot amongst the workers to determine whether or not less than 50% of them want to be union members.(15) In the event that there is no held, or more than 50% of those balloted did not want to be union members, then the Industrial Commission shall insert in the award or agreement a qualified preference clause.(16) There are also provisions in the Industrial Relations Act for a worker to be exempt from union membership on conscientious grounds.(17)

The effect of an unqualified preference clause is that every adult worker who is covered by an award or agreement containing such a clause must become a member of the union within 14 days after his or her engagement.(18) If there is a qualified preference clause in the award or agreement then the adult worker must become a member of the union within 14 days after his or her engagement, if requested by an officer or authorised representative of the union, and there is a union member equally qualified to perform the particular work to be done and is ready and willing to do the work. (19) The legal effect of the unqualified and qualified preference clauses is that statutory compulsory union membership is no longer required, but that the parties may themselves decide to include provision for compulsory union membership in their award or agreement.

Since in practice qualified preference clauses are rare, New Zealand now has a state negotiated compulsory union membership. Although it may be labouring the obvious, there does seem to be some public misunderstanding as to the legality of union membership. There is nothing in law to prevent the parties agreeing to a qualified preference clause as opposed to

It is the statutory provisions relating to qualified and unqualified preference clauses that the Government has pledged itself to repeal, and to replace them with what could result in widespread voluntary unionism. In order to understand the Government's proposals for union membership, it is necessary to examine its election policy statement on industrial relations, and in particular the section entitled 'Industrial Haragreement in conciliation, and no ballot is mony,' which outlines the proposals for giving workers the opportunity to vote upon whether they desire voluntary or compulsory union membership. It is always dangerous to take any political party's election policy statements too literally, but since the Government makes frequent reference to the fact that they were elected to implement its industrial relations policy contained in their manifesto, and intend to ensure that policy is implemented, (20) it would be unwise to totally ignore the proposals in the election manifesto.

GOVERNMENT PROPOSALS

Under the Government's scheme to change the statutory basis of union membership,(21) legislation is to be introduced to provide that within three years from the enactment of the legislation, a compulsory secret ballot is to be conducted amongst all workers of each trade, industry or occupation, in a geographical area to be defined, to determine whether they want their union membership to be voluntary or compulsory. The decision resulting from this ballot is to remain in force for three years, when a further ballot will be held on the same question by the Department of Labour, and after a further three year period, another ballot may be held if not

QUALIFIED AND UNQUALIFIED PREFERENCE CLAUSES

⁽⁶⁾ See A. Szakats, "Compulsory Unionism: A Strength or Weakness? The New Zealand System Compared with Union Security Agreements in Great Britain and in the United States" (1972) Vol. X, Alberta Law Review 313, for a detailed discussion of the whole queston of union membership.

^{(7) 1} BK AW. 175.

^{(8) 1} BK Aw. 203. 71. Taylor and Oakley v. Mr Justice Edwards & Ors (1900) 18 N.Z.L.R. 876.

⁽¹⁰⁾ I.C. & A. Act, 1900, s. 2. (1T) (1916) N.Z.L.R. 529.

⁽¹²⁾ I.C. & A. Amendment Act 1936, s. 18. (13) I.C. & A. Amendment Act 1961, s. 2.

⁽¹⁴⁾ Industrial Relations Act 1973, s. 99.

⁽¹⁵⁾ Ibid, s. 100. (16) Ibid, s. 102.

⁽¹⁷⁾ Ibid, s. 105.

⁽¹⁸⁾ Ibid, s. 98.

⁽¹⁹⁾ Ibid, s. 98.

⁽²⁰⁾ The Prime Minister was reported in New Zealand Herald, 22 March 1976, as stating, "the position is we were elected on a certain policy and we will carry it out."

⁽²¹⁾ Details of the Government's proposals are contained in National Party Policy Statement - Industrial Relations, (1975) Appendix A.

less than 10% of those covered by the award or agreement, or of all persons employed in that industry, petition the Department of Labour. It is perhaps ironic to note that in order to obtain voluntary unionism, the workers must be forced to participate in the initial ballot and presumably all subsequent ballots. More importantly the prospect of regular ballots, while satisfying the desire that an individual worker have an opportunity to change his or her mind, will do little to promote a viable trace union organisation. It must be pointed out also that under the present legislation, the individual workers through their assessors have the opportunity to change the form of union membership every time the award or agreement is re-negotiated, which may be every 12 months.

If the majority of the workers vote for compulsory union membership, then a clause to this effect is written into the award or agreement. Although the majority of workers may have voted for compulsory unionism, there will still be an opportunity for an individual to be exempt from union membership on what is presumed to be similar grounds to those already contained in the section relating to exemption from union membership in the 1973 Industrial Relations Act. The effect of compulsory union membership under the Government's scheme is that, whereas at the moment every time the award or agreement is negotiated there is an opportunity to change the basis of union membership, in future compulsory union membership will remain in force for at least three years.

If the majority of the workers voted for voluntary union membership, then it is illegal to insert a clause in the award or agreement requiring union membership. It is however lawful for workers to form their own union or join an existing union, or form a voluntary unregistered society that is concerned with only social, welfare and similar services. A voluntary union can register as an industrial union if it can show it has a membership of 25% of the potential workforce for that trade, industry or occupation. If there are two unions competing for registration, then the union with numerically the greatest number of members will be registered. This aspect of the Government's proposal appears to be likely to create a great deal of industrial trouble. It is almost an invitation to the rival unions to fight it out amongst themselves, with the

victory of registration going to whichever union survives with the greatest number of members. It seems a retrograde step to introduce into the New Zealand industrial relations system at this stage a problem we have always prided ourselves upon having avoided, namely the problems associated with the concept of a 'closed shop.' A particularly novel aspect of the Govern-

ment's scheme is the idea of an industrial

advocacy service, which would represent

at negotiations for an award or agreement,

all workers who are not members of a registered union. At conciliation, therefore, the parties present would include the employer assessors, assessors representing whatever voluntary union is registered, and a representative from the industrial advocacy service. An interesting aspect of this service, which would be a division of the Labour Department, is that it would be financed by the state, but so that the unions in negotiations would not be at a disadvantage, and in recognition of their contribution to the negotiations, the state will also pay an equivalent amount on a per capita basis to all unions involved in negotiations. While it was probably not intended, this idea of paying those bodies representing the workers at award or agreement negotiations, raises the whole concept of state funded trade unions. The implications of such an idea are very interesting but unfortunately beyond the scope of this short article. Apart from the financial aspects of this part of the Government's proposals, difficulties can be foreseen for any scheme that necessitates a three-sided argument. While it could be imagined that employers may benefit from friction between the collective representative of the workers, the success of any settlement gained at negotiations depends upon its acceptability by all parties. It is to be hoped that before the Government enacted this aspect of their scheme they would make some attempt to ensure it would not make an already long and complex award or agreement negotiation process even more lengthy and complicated for all con-

IMPLICATIONS OF CHANGES - THE BASIS OF UNION MEMBERSHIP

The above points are the essence of the Government's proposal on voluntary unionism. It is obvious that the Government has no intention simply to legislate for voluntary unionism in the same way as the

Labour Government legislated for compulsory unionism in 1936. What the Government seems to be trying to do is to give individual workers the opportunity through a compulsory ballot to decide for themselves whether they want to belong to a union. At the same time as ensuring the individual's right to choose between compulsory or voluntary union membership, the Government also recognises the right and freedom of unions to organise.(22) In trying to balance these two competing interests in the context of an industrial relations system, the Government is attempting to achieve what has been described by Grunfield as(23) "... one of the most intractable problems posed for the law by modern industrial relations." It is too early to predict whether this Government has found the solution to this intractable problem. It does appear obvious at this stage, however, that the Government's scheme is doing little to further harmony. In 1974 Woods observed when commenting upon the concept of voluntary unionism,

"The advocates of voluntary unionism have yet to show that on balance it would be to the benefit of the community as a whole. There is certainly no reason to believe that it would bring greater industrial peace."

The accuracy of Woods's observation has been borne out by the Federation of Labour President, Sir Thomas Skinner, who is reported as stating that(25) "Unionists affiliated to the Federation of Labour will be urged to boycott any ballot on compulsory union membership instigated by the Government." There has also been some indication of international trade union support for the stand taken by the Federation of Labour. If the Federation of Labour remains adam-

outlines in its election policy statement, then the implications for New Zealand's industrial relations system are very serious.

It may be argued that it is worth running the risk of inter-union rivalry disrupting industry; of radically altering the nature of the award or agreement negotiation process; of drastically cutting back the membership of the white-collar unions, while allowing the already strong active unions to continue with compulsory union membership; of altering the balance of power in the Federation of Labour because of the cutback in membership of the white-collar unions; the possibility of all or any of these consequences occurring is worth risking so that the rights of the individual are protected and in particular, the right to vote in a ballot not to join a union. It is true that the rights of the individual must always be protected, that is why there is provision in the 1973 Industrial Relations Act for a person to apply for exemption from union membership. It is also why the rules of a union must be submitted to the Registrar of Industrial Unions before being recorded, so that the Registrar can ensure no rule is unreasonable or oppressive.(26)

If the Government is concerned primarily with protecting the individual then it may be able to achieve this objective more effectively by improving the existing provisions in the Industrial Relations Act, rather than by radically interfering with the foundations of the existing system of industrial relations. It is all too easy to upset the balance between protecting the rights of individuals, and maintaining the stability of society as a whole. In an effort to protect the rights of the individual, a state of chaos may be created in society. It is however for the Government to maintain the balance of interests in society. It is to be hoped that the Government will seriously consider ant in its rejection of the Government's the consequences of its present proposals ballot, and the Government goes ahead for voluntary union membership before and introduces legislation based upon the implementing them.(27) Perhaps the best

⁽²²⁾ See in particular National Party Policy Statement, op.cit., 5.

⁽²³⁾ Grunfeld, "The Future Role of the Law," an essay in Labour Market Issues of the 1970s, ed. Robertson and Hunter, (1970), 94.

⁽²⁴⁾ Woods, op.cit., 33.

⁽²⁵⁾ The New Zealand Herald, 22 March 1976.

⁽²⁶⁾ Industrial Relations Act 1973, ss. 175-181, which relate to the requirements for union rules.

⁽²⁷⁾ It has been reported in The New Zealand Herald, 24 March 1976, that the Minister of Labour may visit countries overseas to look at voluntary unionism in action.

advice that has been given to anyone who wishes to interfere with the existing system of industrial relations came from Woods, who wrote:(28)

"It is . . . because the system is not something on its own, but part of a way of life as a whole . . . that it should not be tinkered with by amateur hands or turned into the cat's-paw of political opportunists. It is capable of improvement, but improvement should come through the hands of those who appreciate the depth and the spread of its roots, both backward into history and tradition and onwards into the workplaces and the activities, feelings, and aspirations of men and women."

(28) Woods, Industrial Conciliation and Arbitration in New Zealand (1963), 201.

NEWS and VIEWS

WELLINGTON: B. H. Holt*
JANUARY:

A meeting of 1500 Wellington City Council employees instructed their combined trade unions to take "whatever action might be needed" to make up the shortfall in the Government's cost-of-living adjustment. The Trades Council referred the matter to the F.O.L. and Sir Thomas Skinner stated that "key unions such as transport and building and large unions such as engineering and clerical" would be called together to agree on a procedure to have the wage bargaining regulations repealed. This is a clear example of the difficult function that the F.O.L. attempts to perform of co-ordinating the aims and activities of the militants with the others who make up the majority of trade unionists in New Zealand. A further example is the series of stopwork meetings being organised in the major centres by the trades councils. The aim of these meetings is described by the F.O.L. Executive as the creation of "a well-informed membership fully aware of the economic situation," not the disruption of industry.

FEBRUARY:

The Wellington Drivers Union held secret ballots at stopwork meetings in all parts of the region and reported that more than 90% of members were in favour of a continua-

* B. H. HOLT is a Staff Training Officer in the Public Service.

tion of the unqualified preference clause in their award. I was in Britain when trade unions there resisted the legal requirement to register under the Industrial Relations Act 1971 and witnessed the huge demonstration they held in Trafalgar Square ('Kill the Bill'). My view is that the effort unions here would need to make to produce a successful strategy on the same lines could only benefit them in the long run.

MARCH:

I was surprised to walk down town at lunch-time and find a parade of armoured vehicles and soldiers in Lambton Quay. "It's Muldoon's answer to the P.S.A.," replied one of its research staff, when I asked him what he thought was the reason for it. The previous few weeks had been very lively ones for the P.S.A. The Government suspended Meat Inspectors at Whakatu and employees of the New Plymouth Power Station for failure to carry out their "normal duties." Powers to suspend employees (including employees not actually involved in a dispute but whose work is disrupted by one) were given to Government by Regulations introduced in 1972 by the Labour Government. That Government never used those powers, however, neither did they repeal them, despite strong opposition from the P.S.A. over their introduction without consultation. Their use by the present Government gave rise to the charge of "lockout" and did not appear to aid in the solution of disputes of the kind where employees were objecting to working in noisy (Whakatu) and dangerous (New Plymouth) conditions.

The death in March of Dan Long, General Secretary of the P.S.A. since 1960, will be felt in many areas but particularly perhaps in the area of relationships between the CSSO and the FOL. In February he was reported as saying that discussions had taken place about a joint approach to Government on the issue of wages. He said the State Services were not asking that the wage regulations be repealed but that the next wage order in July should make up the shortfall in the January order. In the September 1975 "N.Z. Journal of Public Administration" Long mentioned an idea Norman Kirk spoke about in August 1973 (recently refloated by Prime Minister Muldoon) of a single wage-fixing tribunal to deal with the claims of "the public service and the trade unions." Long expressed no dislike for this idea but said that the