

Collective Bargaining & Union Recognition Rights: Policy Issues for Australia

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Date: April 2006



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First published 2006 by
The Australian Institute of Employment Rights (AIER)
Faculty of Businesses and Economics
Monash University
900 Dandenong Road, Caulfield East, VIC 3145

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National Library of Australia
Cataloguing-in-publication data

Collective Bargaining and Union Recognition Rights. Policy
Issues for Australia

1st Australian edition

ISBN 0-9775397-0-9

1. Unions – Industrial relations
2. I. [First author Forsyth/FN], d.o.b- .

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This Research Report was a collaborative effort involving the input of a number of people in a variety of capacities; some as researchers gathering the data on systems in individual countries examined in this research, some acting as reviewers in the tradition of peer review, others as editors and proof readers. The output is a significantly better one for their contributions. We would particularly like to thank : Rob Durbridge, Executive Director, AIER, Professor Keith Ewing, Kings College London and Institute of Employment Rights, Professor Richard Mitchell, Faculty of Law, University of Melbourne, and Department of Business Law and Taxation, Monash University, Professor Christopher Nyland, Department of Management, Monash University, Anne O'Rourke, Business Law and Taxation, Monash, and Professor Julian Teicher, Department of Management, Monash University.

Financial Support

The funding for this research project was secured by the Australian Institute of Employment Rights, Faculty of Business and Law, Monash University, Melbourne.

We would like to thank the following organisations for their financial contribution to this project:

Australian Council of Trade Unions.

Australian Education Union.

Australian Manufacturing Workers Union.

Australian Services Union.

Community and Public Sector Union (SPSF Group).

Liquor, Hospitality and Miscellaneous Union.

Shop Distributive and Allied Employees Association.

ABBREVIATIONS

ACAS	Advisory Conciliation and Arbitration Service (UK)
AWA	Australian Workplace Agreement
CA	Certified Agreement
CAC	Central Arbitration Committee
<i>CCA Act 1904</i>	<i>Commonwealth Conciliation and Arbitration Act 1904 (Commonwealth)</i>
EFA	Enterprise Flexibility Agreement
FSLMRS	<i>Federal Service Labor Management Relations Statute (United States)</i>
<i>IR Act 1988</i>	<i>Industrial Relations Act 1988 (Commonwealth)</i>
<i>IR Reform Act 1993</i>	<i>Industrial Relations Reform Act 1993 (Commonwealth)</i>
<i>IRA Act 1990</i>	<i>Industrial Relations Amendment Act 1990 (Commonwealth)</i>
NLRA	<i>National Labour Relations Act 1934 (United States)</i>
NLRB	National Labor Relations Board (USA)
TURA	<i>Trade Union Representatives (Status at the Workplace) Act (Sweden)</i>
ULPs	Unfair labour practices
US	United States of America
<i>Work Choices Act 2006</i>	<i>Workplace Relations Amendment (Work Choices) Act 2005 (Commonwealth)</i>
<i>WR Act 1996</i>	<i>Workplace Relations Act 1996 (Commonwealth)</i>

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Executive Summary

1. The central question considered in this Research Report is:

'What is the most appropriate system to provide statutory recognition and protection of collective bargaining rights in the Australian context?'

2. This Report is not intended to make any recommendation on a preferred model of union recognition or system of collective bargaining for Australia.
3. Instead, our core objectives are to:
 - (i) Provide an overview of systems of collective bargaining and union recognition in seven industrialised countries.
 - (ii) Identify the alternative options that might be available for consideration for Australia, and
 - (iii) Highlight the range of complex issues that need to be considered in the design of any statutory system of union recognition and collective bargaining in the Australian context.
4. This Report is divided into four parts:

Part 1 describes the evolution of statutory arrangements governing union recognition in Australia.

Part 2 considers the various forms of union recognition which, together, provide unions with rights to exist as organisations and legitimately carry out their representative and industrial functions.

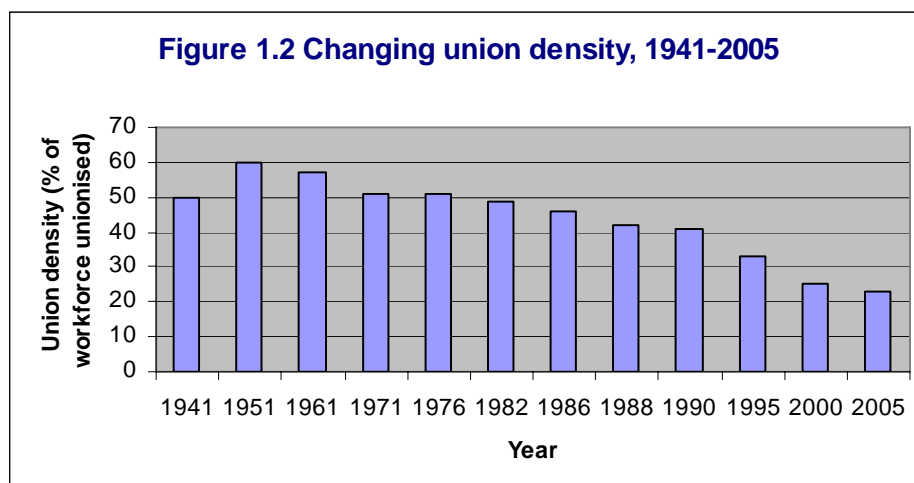
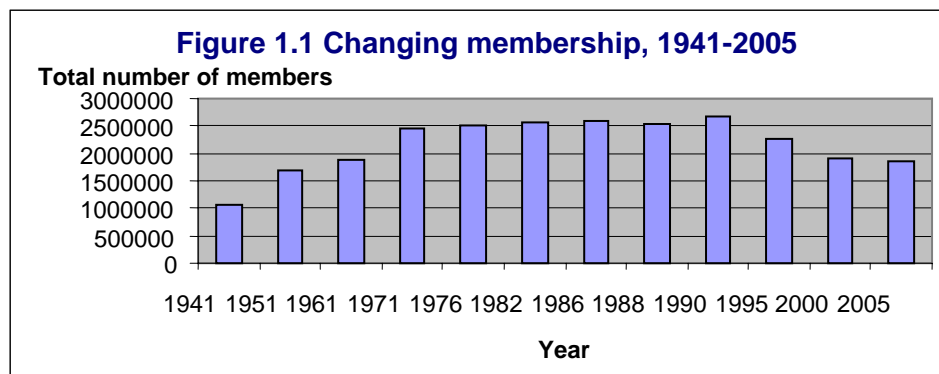
Part 3 identifies the core characteristics of systems recognition and collective bargaining in seven industrialised economies (US, Canada, Sweden, Italy, Germany, UK and New Zealand). Here we identify three alternative approaches: Certification, Constitutional and Hybrid models of recognition and collective bargaining.

Part 4 considers how these three alternative approaches, along with the traditional model of union recognition in Australia might be adapted for the Australian context.

Introduction: The Evolution of Union Recognition in Australia (Part 1 of the Report)

5. This part outlines the evolution of union recognition that has traditionally been provided through the Australian industrial relations system.
6. This part highlights a number of key points:

- Australian unions have been provided with three different forms of recognition, which together enabled them to function as organisations, represent members, and achieve industrial objectives through arbitration and bargaining:
 - *Industrial recognition* was provided through the system of compulsory arbitration and the role of unions in award regulation. In this traditional system, unions were 'joint regulators of industry'.
 - *Political recognition* was provided through less formal channels, but unions achieved a degree of institutional involvement in economic and social policy formulation during the Accord. Australian unions do not enjoy the political and social recognition enjoyed by unions in most European countries.
 - *Legal Recognition* through registration provided unions with a form of legal personality which allowed them to function as organisations, to trade, enter into agreements with other legal parties and so on.
- While each of these are distinctive and separate forms of recognition, the inter-relationship between these various elements together shaped the capacity of Australian unions to operate as organisations and effectively carry out their activities. This also means that any change in one element may affect the part played by other elements of recognition.
- This is in part reflected in declining membership and union density. Figures 1.1 and 1.2 show union membership and density over the period 1941 to 2005.



- Various elements of union recognition have been altered and withdrawn over an extended period of time. The *WR Act 1996* and now the *Work Choices Act 2005* have involved the most significant and most fundamental winding back of union recognition rights – in terms of the industrial, political and legal aspects of recognition.
 - These changes leave employees without adequate statutory protection to choose whether or not they wish to be represented by a union in workplace matters, for the purposes of collective bargaining and dispute settlement.
 - The introduction of the Work Choices legislation will have a profound impact on the role of trade unions. Australia has moved from its traditional system grounded in compulsory arbitration to one where unions have been marginalised and the focus is squarely on individual employees and their capacity to bargain for themselves.
7. Just how this can be rectified is a complex question which involves many difficult issues and potentially a number of “trade-offs”.
- The starting point for addressing this question, however, is to consider the range of options from which it is realistic to design a statutory arrangement intended to provide unions with adequate recognition and to protect collective bargaining.
 - Australian unions are not alone in debating these issues. There has been considerable debate in many countries extending over the last decade. There is much to learn from these debates and the experiences of those countries which have introduced changes intended to provide unions with these rights. The United Kingdom and New Zealand are the prime examples where new systems have been introduced after a period of anti-union government. There has also been considerable debate in the US and Canada about how to reform systems beset by declining union density and (particularly in the US) growing employer hostility towards unions.
 - The international experience points to three possible ‘models’ for union recognition:
 - a Certification model, based on the experience of the US and Canada;
 - a Constitutional model based on the experience of European countries; or
 - a Hybrid model based on the more eclectic approaches adopted in the UK and NZ.
 - In addition to these, Australia also has over 100 years of its own experience to draw upon, based on recognition through the arbitration system. There is ample scope for re-invigorating the traditional arbitral model and grafting onto it rights that take account of the greater reliance on collective bargaining, but still retain a productive role for arbitration.
8. Whatever model is adopted (and adapted), there are a range of fundamental questions which need to be considered, including:

- **What process should determine how and when a union is recognised or de-recognised?**
- **What are the rights that should flow from formal recognition?** This question includes a range of subsidiary questions concerning, for instance, how each of these different rights of recognition might be activated, by whom, and the relationship between the different forms of recognition.
- **What rights/obligations in relation to collective bargaining should be attached to recognition?** Among the key issues are:
 - the range of issues an employer is legally required to negotiate over;
 - the legal capacity of unions to seek to extend the scope of bargaining beyond these 'mandated' issues for collective bargaining;
 - the nature of the rights and obligations placed on both unions and employers to conduct bargaining according to principles of 'good faith';
 - the legal capacity for unions to pursue multi-employer (or industry framework) agreements;
 - the process by which breaches of collective bargaining rights are determined and the nature of any remedy or sanction that is to be imposed against such breaches; and
 - the extent to which employers (or rival unions) can act to displace a formally recognised union.
- **Should recognition be 'exclusive' or allow for competing recognition?**
- **What limits should be placed on the right to strike?** In no industrialised country do unions enjoy a completely unfettered right to take strike action:
 - in most collective bargaining systems, it is usual to limit the right to strike during the term of a collective agreement;
 - in some cases, unions must observe procedural requirements (including ballots) before strike action can be initiated;
 - in some cases, political strikes are illegal;
 - in some cases, the right to strike is an individual right, while in other countries a strike can only be triggered by union membership and collective bargaining.

The Concept of Union Recognition: A Framework for Discussion (Part 2 of the Report)

9. This part builds on the framework for constructing union recognition rights outlined by Professor Keith Ewing in the UK context. Here we highlight the multi-dimensional nature of 'union recognition'. We distinguish between five elements of union recognition:
 - as a representative of individual members in workplace matters;

- as a collective representative in workplace matters;
 - as a representative in collective bargaining;
 - as a representative in social and economic policy deliberation; and
 - as a legal person.
10. Union effectiveness – as well the effectiveness of a system of collective bargaining – is dependent on how each of these elements works as a system. We think that a consideration of the inter-relationships between these elements is critical particularly in the context of the range of contemporary policy debates, and unions’ views on approaches adopted in the past:
- For example, work and family balance concerns highlight the relationships between industrial outcomes (through collective bargaining) and policy instruments designed to provide for access to child care; welfare payments particularly for low wage workers; and the impact of taxation arrangements on patterns of work.
 - Labour market flexibility undermines the effectiveness of traditional policy settings, and may require consideration of innovative policy arrangements designed to facilitate more efficient and equitable labour market transitions;
 - Low unionisation in many workplaces may preclude unions from legitimately asserting a right to recognise all employees for the purposes of collective bargaining, but recognition for the purposes of representing individuals in workplace matters, and if there is sufficient support, recognition for consultation and representation over larger workplace changes, may provide an intermediate form of recognition on which unions may build greater support and legitimacy for recognition for the purpose of concluding a collective agreement.

A Cross National Comparison of Union Recognition (Part 3 of the Report)

11. This part examines alternative approaches to regulating union recognition and collective bargaining by examining the systems of seven industrialised countries: the US, Canada, Sweden, Italy, Germany, United Kingdom and New Zealand
12. These countries represent three alternative approaches to providing statutory union recognition and collective bargaining rights: Certification, Constitutional and Hybrid models. Table 3.2 highlights the main characteristics of each of these three models, and sets out in summary form a comparison of those countries on certain key elements of an effective collective bargaining system.

Table 3.2 Main Features of Alternative Models of Recognition

Model	Characteristic
Australian	<ul style="list-style-type: none"> ▪ Registration of unions and regulation of their internal affairs. ▪ Arbitration and conciliation of disputes by an independent industrial tribunal; <i>de facto</i> recognition rights flow through these processes, effective as long as tribunal has powers of compulsion. ▪ Core minimum standards (ie awards) which underpin collective and individual agreements.
Certification	<ul style="list-style-type: none"> ▪ Statutory recognition of a union with majority support among bargaining unit. ▪ Support established by either secret ballot or card check. ▪ Recognition results in exclusive representation in respect of consultation and collective bargaining. ▪ Parties are bound by good faith obligation/protection against unfair labour practices (ULPs).
Constitutional	<ul style="list-style-type: none"> ▪ Constitutional recognition of trade unions. ▪ Enabling legislation to establish a regime for the protection for trade union activities. ▪ Framework agreements between employers and unions to govern collective bargaining. ▪ Political recognition of trade unions outside of industrial relations through institutions.
Hybrid	<p>United Kingdom</p> <ul style="list-style-type: none"> ▪ Majority support of bargaining unit through a secret ballot or card check to determine recognition ▪ Provisions for voluntary recognition by employers ▪ Recognition only results in collective bargaining rights, while consultation rights exist apart from recognition ▪ No scope for multi-employer bargaining units. ▪ Social partnership initiatives between employers and unions.
	<p>New Zealand</p> <ul style="list-style-type: none"> ▪ Registration of unions which meet base criteria. ▪ Registration results in collective bargaining rights only – consultation is with individual employees. ▪ Parties are bound by obligation to deal with each other in good faith – including any codes of good faith issued by the Minister. ▪ Parties which begin negotiations must conclude an agreement unless there is a good reason not to do so.

13. Each of these three models offers Australian unions a possible option that can be pursued. But as this part of the Research Report points out, in practice there are a range of strengths and weaknesses attached to each of these models. These are summarised in Table 3.3 below:

Table 3.3 Strengths and Weakness of Alternative Models of Recognition

Model of recognition	Strengths	Weaknesses
<i>Certification models</i>	<ul style="list-style-type: none"> • Exclusive coverage • Union independence • Specific rights that flow from recognition. • Subordination of individual agreement to collective agreements. • Guaranteed periods of recognition. 	<ul style="list-style-type: none"> • Resource intensive process. • Excessive legalism • Potential for harmful delays in process. • Considerable scope for employer intimidation. • No guaranteed representation rights at the workplace. • Certification can stigmatise union workplaces. • Weak remedies and enforcement of ULP obligations. • Difficult to extend recognition to non-traditional sectors.
<i>Constitutional models</i>	<ul style="list-style-type: none"> • Constitutional guarantees for rights to organise, collectively bargain and take industrial action. • Recognition automatic. • Recognition extended by enabling legislation. • Recognition extends to laws intended to provide greater labour market flexibility. 	<ul style="list-style-type: none"> • Difficult to transplant <i>in toto</i>.
<i>Hybrid (UK)</i>	<ul style="list-style-type: none"> • Overcomes many of the traditional problems associated with certification processes in the US. • Incentives for reaching voluntary recognition. 	<ul style="list-style-type: none"> • Limits on eligibility (i.e., exclusion of small workplaces) is overly restrictive. • Simply formalised existing practice rather than extends union recognition. • Has not been associated with increased membership. • Prohibits multi-employer bargaining.
<i>Hybrid (New Zealand)</i>	<ul style="list-style-type: none"> • Avoids the difficulties of certification processes. • Consensus approach to development of Code of Good faith Bargaining. • Recognition is default position, with employer required to justify why it should not recognise a union. 	<ul style="list-style-type: none"> • Weak right of recognition. • Code of Good faith not enforceable, although Courts take account of it. • Narrow interpretation of union independence requirement for registration.

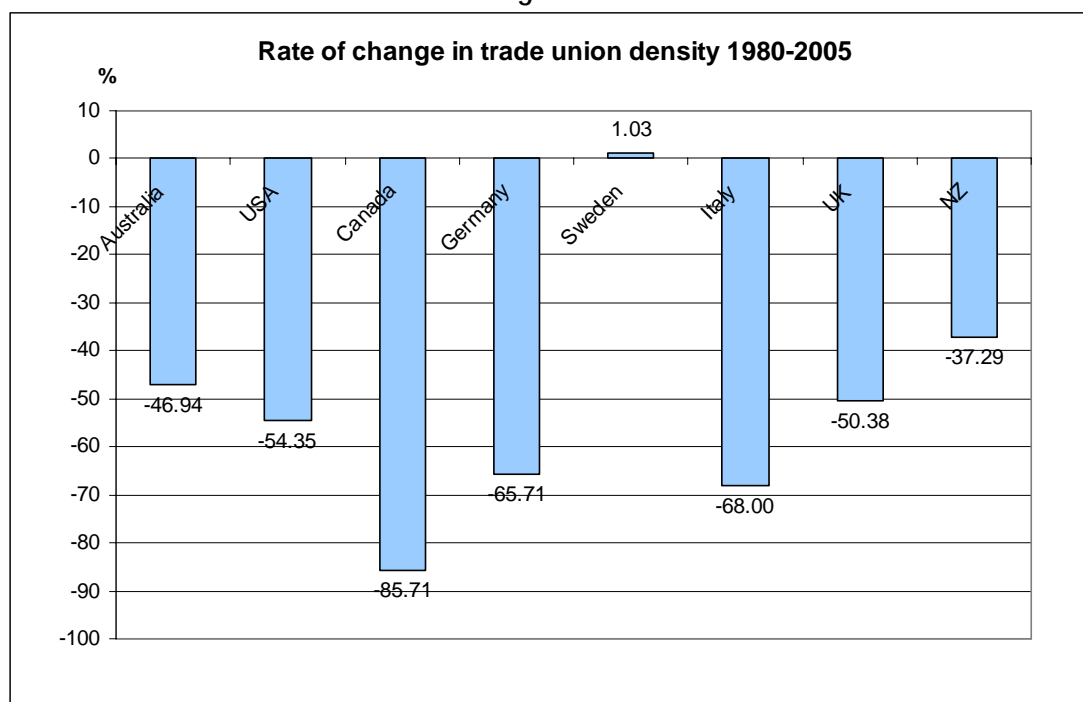
14. In the discussion of the US certification model, the Report identifies the rise of ‘neutrality agreements’ and card check recognition agreements which by-pass the formal statutory procedure. Based on the available evidence, these agreements are growing in importance,

and have proved effective in overcoming some of the problems associated with the certification procedure. There is scope for adapting this tactic in the Australian context.

15. This section of the Report also considers the evidence on the effectiveness of these alternative models.

- Figure 3.2 graphs changes in union density for each of the seven countries for the period 1980 to 2005. The evidence suggests no relationship between systems of recognition and union density.

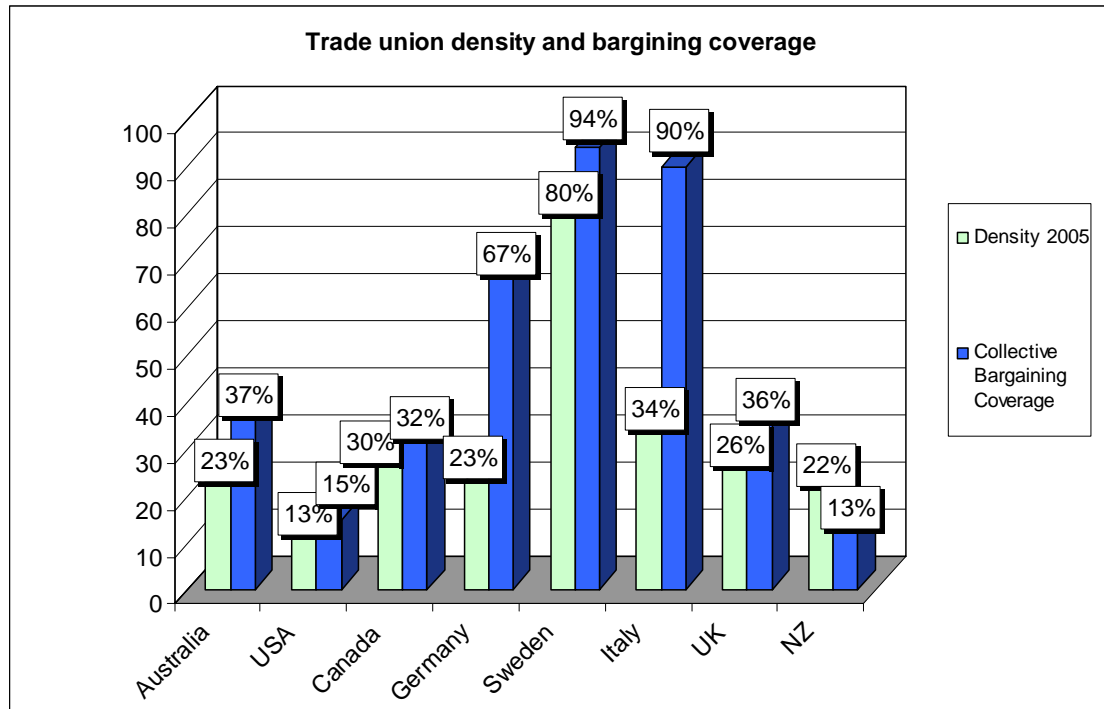
Figure 3.2



- Figure 3.3 graphs both union density (2005) and collective bargaining coverage (2003). Here, a clearer picture emerges.
 - Union density does not provide a strong indicator of whether the collective bargaining system is likely to be strong or not.
 - The US has lowest union density and the second lowest coverage of collective bargaining.
 - Sweden has the highest union density and coverage of collective bargaining of the countries included in this study.
 - With the exception of New Zealand, all other countries have a rate of coverage higher than union density. (Although in certification countries, union density and collective bargaining coverage are approximately the same.)

- Those countries with a constitutional model of recognition and a centralised system of collective bargaining have significantly higher collective bargaining coverage than either countries with certification or hybrid models of recognition.

Figure 3.3



Alternative Approaches in the Australian Context: Issues for Consideration (Part 4 of the Report)

16. The final part considers the adaptability of each of these models to the Australian context in light of the range of characteristics, strengths and weaknesses highlighted in Part 3.

- The constitutional model is clearly not adaptable in the sense that the Australian Constitution does not explicitly include provisions for recognition or collective bargaining rights, or the right to strike. Nonetheless, there are elements worthy of consideration.
 - The enabling legislation which gives life to constitutional rights provide extensive rights and protections, which could be adaptable in the Australian context. We have highlighted in particular the Swedish legislation and included the text of the TUR Act 1974 as Appendix 2 of this Report.
 - Works councils or committees offer a structured and regulated environment in which trade unions can become involved in the workplace. This raises debates around single or dual channels of worker representation, which have already been subject to debate in Australia.

- Finally, the framework agreements in place in the Constitutional countries might operate successfully in Australia to encourage agreement between unions and employers without legislative interference.
- The Certification Models of Canada and the US could conceivably be adapted for the Australian system.
 - If this were pursued, the Canadian provisions provide ways to overcome some of the key shortcomings of the US procedure, particularly in relation to employer intimidation and delays in the procedure.
 - The adoption of a Certification model would require the establishment of rules which prescribe the following:
 - (i) the mechanism for establishing majority support for union recognition;
 - (ii) the process for determining which employees are to be covered by any recognised union (the bargaining unit);
 - (iii) the time limits within which recognition should be determined;
 - (iv) the scope for employers to influence employee decisions, the determination of what constitutes a bargaining unit, and whether these appeals can delay the process;
 - (v) the nature of any sanctions against employers unfairly seeking to subvert the exercise of employee choice over union recognition;
 - (vi) a choice as to whether certification provides exclusive recognition for the purposes of collective bargaining only, or provides a broader industrial recognition which includes workplace representation, information sharing and consultation rights.
- The Report does not explicitly canvass the possibility of adopting either of the hybrid models. Both could conceivably be adapted to the Australian context.
 - The UK model will require consideration of many of the issues highlighted in relation to the certification models. As well, explicit consideration of the nature of exclusions which apply in the UK system would need to be addressed.
 - The New Zealand model has some advantages over the UK system – particularly the presumption of recognition and avoiding a ballot procedure. Further, the concept of a Code of Good faith Bargaining, determined jointly with employer representatives, which has some standing in legal proceedings could be considered.
- Finally, this part of the Report considers the issue of re-invigorating the traditional Australian model. The starting point here was our observation that Australia has 100

years of jurisprudence dealing with these issues in a way that has proved effective (although it has been under significant attack in the last two decades).

- The system could be re-invigorated through a reconsideration of the rights that flow from registration.
- There is scope for a 'ratcheting-up' model of union recognition proposed by professor Keith Ewing:
 - Where an employee is a member of a given union, an employer could be automatically required to recognise that union as a bargaining agent in individual employment matters;
 - Where a union is able to demonstrate a significant but not majority support for recognition, then this might confer on an employer some additional obligations to recognise the union for collective purposes: for instance, advanced notification of major workplace changes, consultation over such changes and their effects on employment;
 - Where a union is able to demonstrate majority support, this could be taken as conferring a right to be recognised for collective bargaining as well as these other purposes.
- Union recognition could be based on existing "conveniently belong" provisions which seek to recognise constitutional coverage rights contained in union rules.
- The principle of good faith bargaining, introduced in the *IR Reform Act 1993*, could be re-established in some form, perhaps along the lines of the Code of Good Faith Bargaining adopted in NZ. The enforcement of such a principle would naturally fall within the jurisdiction of the AIRC. Amendments would be needed to overcome the limits of the 1993 good faith bargaining provisions.
- Awards and the (pre-*Work Choices Act*) concept of allowable matters could be used as the basis on which mandatory bargaining matters are established.

1. INTRODUCTION: THE EVOLUTION OF UNION RECOGNITION IN AUSTRALIA

- 1.1 Historically, trade unions have served as the primary institution for representing the interests of Australian workers. Unions represent employees in individual workplace matters, collectively take their concerns to employers over workplace change, job security, occupational health and safety and other matters, and protect wages and conditions of employment through various mechanisms including collective bargaining and awards.

Forms of union recognition in Australia

- 1.2 In the Australian context, unions have not traditionally enjoyed statutory 'recognition' rights of the type that operate in many other industrialised countries (and which are explored in detail in this Report). However, it is possible to identify three different forms of 'recognition' that Australian unions have obtained and benefited from since the commencement of the conciliation and arbitration system.

Recognition for industrial purposes

- 1.3 Unions were a cornerstone of the traditional Australian regulatory framework of awards and arbitration. The conciliation and arbitration system sought to incorporate unions as 'joint regulators of industry', not simply representative organisations of employees. In particular, unions served as an important vehicle for the effective implementation of employment standards, 'policing' legislation and award conditions.¹
- 1.4 The significance of unions to the Australian system of industrial relations was reflected in the extent to which unions were legally protected.² These protections were explicitly linked to the system of union registration under both federal and state industrial laws.
- 1.5 Importantly, registered unions obtained *de facto* recognition and bargaining status before industrial tribunals. The capacity of tribunals to use their compulsory arbitration powers over disputes between employers and unions obligated employers to recognise unions – in the sense that an employer was compelled to respond to a union's demands as formulated in a 'log of claims', by participating in the conciliation and arbitration process or having an award made without the employer's involvement or input.³ Once made a respondent to an award, an employer would then need to address industrial issues covered by that award which may arise from time to time, and deal with the union respondent(s) to the award in respect of those issues.
- 1.6 In addition, the conciliation and arbitration system provided unions with security in the form of union 'preference' rights, giving advantages to unionists over non-unionists in the

labour market, which formed the legal basis for closed shop agreements. Union organisation was further aided by legal protections against victimisation for union officers and members.⁴

- 1.7 Exclusive coverage to organise workers in a particular occupational group or industry was another of the key benefits that flowed to unions as a result of their role in the arbitration system. This was facilitated by, for example, the scope of union 'eligibility rules', and the 'conveniently belong' provision in industrial legislation (which prevented newly established unions seeking registration to cover employees already covered by a registered union).⁵
- 1.8 At the same time, the arbitration system imposed greater restrictions on unions than were imposed on their counterparts in many other countries, primarily in the form of detailed regulation of their internal affairs and considerable restrictions on the right to take industrial action. This trade-off between protection and autonomy entailed both advantages (eg a strong basis for unions to organise workers and protect their interests) and disadvantages (eg limits on their freedom to determine their own internal rules and processes).⁶
- 1.9 More recently, unions have obtained further (albeit limited) recognition rights for industrial purposes under federal law, through the introduction in 1993 of a statutory bargaining framework and the right to take industrial action for bargaining purposes.

Recognition for social, economic and political purposes

- 1.10 Australian unions have also been accorded with recognition as the representative agents of their members and the broader workforce in various economic and social policy forums. This form of recognition found its greatest expression in the 'Accord' process in the 1980s-early 1990s, through which the Australian Council of Trade Unions (ACTU) and many affiliated unions were incorporated into a range of institutionalised mechanisms for determining national economic and social policy (eg the Economic Planning and Advisory Council).⁷
- 1.11 Unlike unions in other national contexts such as the United States (US), Australian unions have also played a significant and direct political role through their affiliation with the Australian Labor Party. In this capacity, unions have provided a primary means through which working people have exercised a voice in the Australian political system and policy deliberations over a wide range of issues of direct and indirect concern to union members and working people generally.

Legal recognition

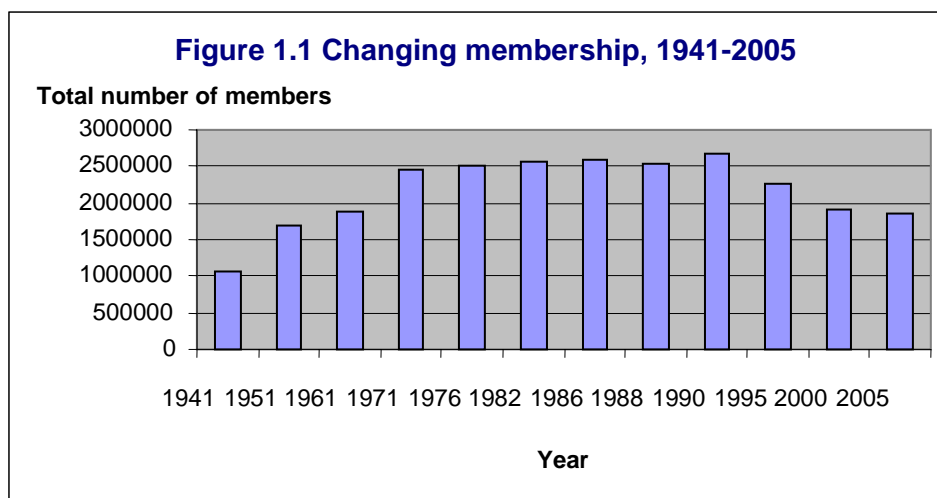
- 1.12 Registration and participation in the conciliation and arbitration system brought with it another considerable benefit for Australian unions: legal personality. That is, a registered union obtained quasi-corporate status, and the capacity to own and deal with property and sue or be sued in its own name. The recognition of registered unions as 'legal

persons' therefore enabled them to enter into industrial, commercial and legal relationships, and overcame many of the uncertainties surrounding the legal status of trade unions under earlier English law.⁸

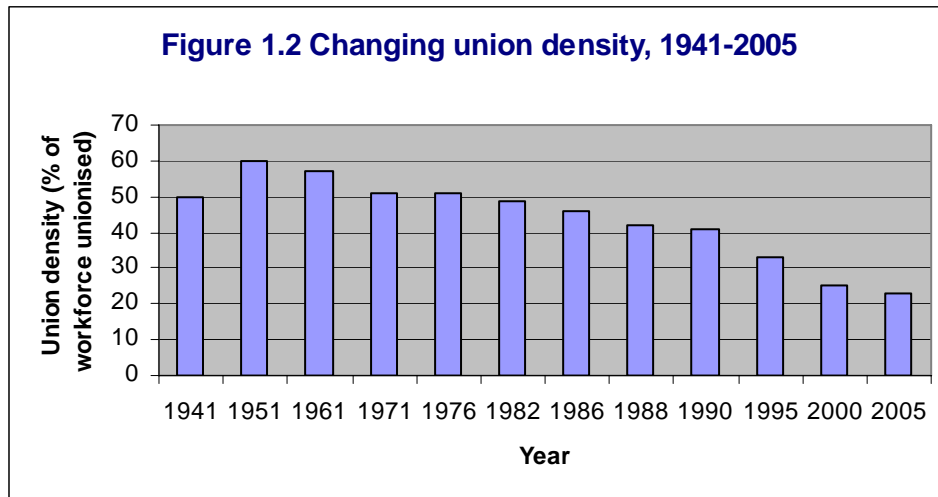
- 1.13 The system of union registration under federal industrial law maintained the approach adopted in the *Trade Union Acts* passed by various colonial administrations in Australia after 1880. Prior to that, the legal status of the early forms of unions that were active in the colonies was unclear – they were not corporations, nor friendly societies, although many unions performed these functions. Their attempts to organise workers and engage in various forms of industrial action were subject to common law crimes of conspiracy and tort damages for economic loss. The *Trade Union Acts* not only gave them a form of corporate entity – they also provided important exemptions for registered unions from criminal and tort liability for damages caused by industrial action.⁹
- 1.14 Once union registration was tied to the conciliation and arbitration system, registration gave unions a number of benefits which formed the basis of more extensive recognition, including (as indicated above) recognition before industrial tribunals, exclusive coverage rights, preference in employment and other forms of union security, and rights to enter workplaces for the purposes of representing members and enforcing awards.

The rise and fall of union membership levels

- 1.15 The three forms of recognition discussed above and, in particular, the central role occupied by unions in the Australian conciliation and arbitration system, contributed significantly to their growth over the course of the twentieth century.
- 1.16 **Figure 1.1** shows the changing number of total union members over the period 1941 to 2005.



1.17 Figure 1.2 shows the proportion of the workforce unionised (union density) for the same period. The table shows union density reaching 60 percent by 1951, but subsequently falling to around 50 by 1971, where it remained until the early 1980s.¹⁰ Since then, however, the level of trade union membership in Australia has more than halved: according to the latest ABS figures (for August 2005), union density has fallen to 22.4% of the total workforce and only 16.8% in the private sector (although overall membership numbers have increased by approximately 70,000 since 2004).¹¹



1.18 The reasons for this are varied, but principal among them are:¹²

- the structural shifts in employment growth, with traditional sectors of union strength experiencing relative decline (full time workers employed in manufacturing), while areas of traditional weakness have experienced greater employment growth (casual employees working in the service sector);
- the growth in part-time, contingent and non-standard forms of employment;
- growing employer hostility towards unions, both in traditionally unionised sectors and emerging sectors;
- the diffusion of human resource management practices designed to promote de-unionisation and individualised employment arrangements; and
- the withdrawal of legal support for union recognition for industrial purposes, designed to undermine the rights of unions to act as representatives in workplace matters and collective bargaining;
- a steady erosion of many of the rights and protections that traditionally flowed to registered unions (eg preference, right of entry), and a concomitant increase in the levels of regulation applicable to unions (eg increased financial accountability for unions and individual office-holders).

Declining legal support for the Australian forms of union recognition

- 1.19 The significance of changes to the legal framework in ‘winding back’ the basis for union recognition for *industrial* purposes cannot be understated, and is explored in further detail below. It should also be noted that, since 1996, recognition of unions for *social and economic* purposes at the federal level has been almost totally withdrawn (eg through the abolition of many of the Accord-era consultative structures). *Legal* recognition of unions has essentially remained intact, although the benefits of registration under industrial legislation (through which legal personality is obtained) have been substantially reduced.
- 1.20 Successive legislative reforms by federal and state conservative governments over the last fifteen years have sought to ‘de-collectivise’ Australia’s industrial relations systems by:
- opening up non-union and individual agreement-making options;
 - abolishing union preference rights in favour of ‘voluntary unionism’; and
 - tightening constraints on union recruitment and organisational activity, and the right to strike.
- 1.21 At the federal level, the first moves away from the conciliation and arbitration system began with the shift to enterprise bargaining under Labor governments in the late 1980s-early 1990s. Although Labor was responsible for the introduction of non-union agreements under federal law, the subsequent ‘waves’ of legislative reform of the Howard Coalition Government have most significantly undermined the capacity of Australian unions to obtain recognition for industrial purposes.
- 1.22 The *Workplace Relations Act 1996* limited the scope and content of award regulation and the arbitral powers of the Australian Industrial Relations Commission (AIRC) – and in doing so, the legislation limited the extent of the *de facto* recognition rights of unions that had previously flowed from participation in the arbitration system. The *Workplace Relations Amendment (Work Choices) Act 2005*¹³ goes considerably further, abolishing (apart from some limited exceptions) the processes of dispute notification and award-making through which unions had previously obtained *de facto* recognition by employers.
- 1.23 The 1996 and 2005 laws have also reduced the collective bargaining rights of unions, for example by giving primacy to individual bargaining, imposing major constraints on the capacity to take ‘protected’ industrial action, and removing the legal basis for ‘good faith bargaining’ obligations. Most importantly, there is no mechanism under the federal bargaining framework for requiring employers to recognise unions for bargaining purposes.
- 1.24 The main steps in the process by which union recognition rights for industrial purposes have been progressively curtailed under federal law since the late 1980s, will now be examined in closer detail.

Industrial Relations Act 1988 (IR Act 1988)

- 1.25 The initial encroachment on the traditional recognition 'rights' of Australian unions came, although in a relatively minor way, via several statutory amendments introduced by the *IR Act 1988*. The most important amendment concerned the criteria for registration of unions. A primary objective of the *IR Act 1988* was to facilitate the rationalisation of unions through amalgamations, with the intended aim of reducing the numbers of unions and demarcation disputes between unions.¹⁴
- 1.26 The principal means by which this was achieved was the change to the minimum membership criteria. While traditionally this criteria had been set at a low threshold (50 members), the *IR Act 1988* raised the minimum membership level to 1000.¹⁵ Section 118 of the *IR Act 1988* also provided the AIRC with the power to impose union restructuring through changes in membership eligibility rules in order to settle a demarcation dispute. Under these provisions, the AIRC assumed a significant role in determining which union would gain representational rights to cover specific categories of workers (an important feature of the traditional Australian notion of union recognition for industrial purposes).

Industrial Relations Amendment Act 1990 (IRA Act 1990)

- 1.27 Further amendments introduced as part of the *IRA Act 1990* were intended to intensify the union amalgamation process.¹⁶ These amendments to the *IR Act 1988* increased the minimum membership number to 10,000,¹⁷ and extended the demarcation dispute powers through the new section 118A to allow the AIRC to make orders to allocate and re-allocate members for union rationalisation purposes, not simply to resolve a demarcation dispute.¹⁸
- 1.28 These amendments not only proved to be a significant change in terms of the powers of the AIRC to determine the representative rights of unions, but also provided scope for *employers* to influence the allocation of those rights. The *IRA Act 1990* provided employers with the capacity to initiate a review of union coverage rights at an employer's workplace or business, on grounds going beyond any matters that might have been in dispute between an employer and its employees.¹⁹ Employers were also able to gain single union coverage of all employees in a workplace.²⁰ While not achieved through a process of determining employee preference via a ballot, this provision in effect provided increased capacity for exclusive coverage outcomes similar to that provided by the North American models of union certification (see further section 3 below).
- 1.29 Unions and the IR Minister could also initiate a review of union coverage rights under section 118A, and the provisions required the AIRC to consider the ACTU's views before making any decisions disturbing established patterns of union constitutional coverage.²¹

Industrial Relations Reform Act 1993 (IR Reform Act 1993)

- 1.30 Amendments introduced by the *IR Reform Act 1993* were the first to impact more directly on traditional Australian arrangements for union recognition for industrial purposes. The 1993 amendments built on earlier statutory provisions that had sought to establish a formalised basis for 'enterprise bargaining' under the federal industrial relations system.²²
- 1.31 The *IR Reform Act 1993* introduced two 'streams' for agreement-making:²³ enterprise or 'Certified Agreements' (CAs) between an employer and one or more unions; and 'Enterprise Flexibility Agreements' (EFAs), which could be made between an employer and its employees directly, without the involvement of a union as a representative agent in the negotiating process – as long as the employer took reasonable steps to consult with employees covered by the agreement and explain its terms, and the majority of employees genuinely agreed to be bound by the EFA.
- 1.32 Clearly, EFAs represented a significant *threat* to established union rights of recognition for industrial purposes – employers could now negotiate outside the traditional award framework (although awards provided a 'safety net' for bargaining, through the operation of the 'no disadvantage test'). However, several safeguards for unions were built into these provisions. For instance, in order for the AIRC to approve an EFA, the legislation required that it be satisfied that the EFA did not discriminate between unionists and non-unionists; that those employees wishing to be represented by a union were provided with the opportunity to do so; and that the employer had notified relevant unions about the proposed EFA, and provided them with an opportunity to review and engage in negotiation over the agreement. In practice, the EFA provisions were not utilised to any great extent during the three or so years of their operation.²⁴
- 1.33 At the same time, the *IR Reform Act 1993* also involved an *extension* of unions' industrial recognition rights, in two main ways. First, the legislation provided a legal basis for unions (and employers) to engage in 'protected' industrial action in support of claims made in a 'bargaining period' for the negotiation of a CA.²⁵ Although the relevant provisions imposed considerable procedural hurdles and limits on the taking of protected industrial action, they constituted the first ever statutory protection of the 'right to strike' under Australian federal law.
- 1.34 Secondly, as part of the introduction of a framework to facilitate a more structured approach to enterprise bargaining, the *IR Reform Act 1993* provided the AIRC with powers to terminate bargaining periods on specified grounds, and (more importantly) to require parties to conduct bargaining negotiations *in good faith*.²⁶ Specifically, the AIRC was empowered to assist negotiating parties to reach agreement by conciliation, and (if necessary) to make orders under section 170QK of the *IR Act* to ensure that the parties negotiated in good faith, or to promote the efficient conduct of negotiations, or to otherwise facilitate the making of an agreement. However, the AIRC could not exercise its arbitration powers to resolve a bargaining impasse between negotiating parties.
- 1.35 Case law relating to the AIRC's good faith bargaining (GFB) powers under section 170QK tended to adopt a restrictive view of the extent to which it provided a basis for the AIRC to

compel GFB.²⁷ For example, in the *ABC Case*,²⁸ while it was found that protected industrial action by a union was not at odds with the GFB obligation, the Full Bench also determined that the AIRC's powers to make GFB orders were limited to the negotiating *process*, and that the AIRC's role was only facilitative (not interventionist). Of even greater importance was the ruling in the *Asahi Test Case*²⁹ that a union with no members in a workplace could not use the GFB provisions to require an employer to enter into an agreement – section 170QK did not allow the AIRC to make orders compelling a party to negotiate, but only to regulate the fairness of negotiating processes once commenced under the legislation.

- 1.36 In summary, the *IR Reform Act 1993* preserved unions' industrial recognition rights by retaining the conciliation and arbitration and award systems; infringed on those rights to some degree, by creating a non-union bargaining option that permitted a move away from the award system; and extended those rights through institutionalised (albeit limited) supports for collective bargaining (ie the new provisions for protected industrial action and GFB).

Workplace Relations Act 1996 (WR Act 1996)

- 1.37 The real 'assault' on the rights of Australian unions to recognition for industrial purposes commenced with the passage of the *WR Act 1996*. The main ways in which the 1996 legislation sought to achieve this objective included:

- limiting the arbitral powers of the AIRC, and the scope of award regulation, to 20 'allowable' matters;³⁰
- introducing the option, alongside union and non-union CAs (the latter replacing EFAs), of *individual* Australian Workplace Agreements (AWAs)³¹ – accompanied by aggressive 'pushing' of AWAs through various avenues (eg the Office of the Employment Advocate (OEA), and in the federal public sector and higher education);
- removing the AIRC's powers to make GFB orders, and limiting its powers of intervention in a bargaining period to conciliation, but not arbitration;³²
- further restricting rights to take protected industrial action, and providing new remedies against 'unlawful' industrial action (eg 'section 127 orders');³³
- an array of measures aimed at destabilising established union structures, encouraging competition between unions, and bolstering the rights of non-unionists, including the following:³⁴
 - provisions for the creation of new 'enterprise unions', and for disaffected union members to 'disamalgamate' from large industry unions;
 - weakening the monopoly representation rights that unions long held under the 'conveniently belong' rule;

- banning award and enterprise agreement provisions for preference, 'closed shops', or other forms of union security;
- limiting union rights of entry for recruitment and enforcement purposes through the introduction of permit and notice requirements;
- extending the legal protections available to union members under 'freedom of association' provisions to *non*-unionists;
- further, since 1996, the Coalition Government has pursued various other policy and legislative initiatives directed at breaking the strength of unions in specific industry sectors (eg the 1998 waterfront dispute, and the Cole Royal Commission leading to the *Building and Construction Industry Improvement Act 2005* (Cth));
- in addition, union officials have been subjected to increased levels of financial accountability through the new Registration and Accountability of Organisations Schedule, introduced in 2002; and further amendments were passed in 2003 to counter union 'bargaining fee' strategies, designed to persuade non-union 'free riders' to take up union membership.

1.38 Space does not permit a detailed analysis of the effects of this multitude of statutory and policy measures since 1996 on the industrial recognition rights of Australian unions. In summary, it is possible to say that those rights have been undermined to a very considerable extent. The bargaining framework has unambiguously prioritised individualised bargaining over collective agreement-making. There have been many protracted disputes over the last 10 years in which employers have refused to negotiate collective agreements, instead insisting that employees enter into AWAs (or other individual agreements) and utilising 'lockouts' to achieve that objective.³⁵

1.39 Employers have also exploited two other central failures of the *WR Act 1996*: the absence of any obligation on employers to recognise a union for bargaining purposes, and the removal of the AIRC's powers to make GFB orders. For example, in the recent Boeing dispute, aircraft maintenance workers for the RAAF spent almost 12 months on a picket line asserting the right to have their union negotiate a collective agreement on their behalf. In determining that the NSW Industrial Relations Commission could not deal with the dispute, even though the AIRC had no effective powers to assist the parties to reach an agreement, the AIRC Full Bench commented that:

'It may also be true that there is no statutory or other machinery for according recognition to unions at the enterprise level, nor any duty on employers to bargain collectively, but that is the system which the Australian Parliament has decided should apply.'³⁶

1.40 The long-running refusal by Sensis, the directory arm of Telstra, to acknowledge the CPSU as the legitimate agent of its workers in agreement negotiations also starkly exposed these failings of the federal bargaining regime. While the Federal Court

ultimately found that Sensis had acted unreasonably,³⁷ efforts along the way by the AIRC to 'imply' GFB obligations into the statutory bargaining scheme proved unsuccessful.³⁸

- 1.41 In addition to the AIRC's powerlessness to intervene in bargaining disputes, the limits on its arbitral powers introduced in 1996 have resulted in a 'shrinking' of the domain over which union rights of industrial recognition had previously extended. The capacity of unions to obtain an award on behalf of their members remained, but only in respect of a limited range of employment terms and conditions.
- 1.42 In some respects, the *WR Act 1996* has not intruded on unions' industrial recognition rights to the extent that might have been expected, partly due to the failure of certain aspects of the legislation to fulfil the Government's intended purposes. For example, there have been very few applications, and even less that have succeeded, under either the enterprise union or disamalgamation provisions.³⁹ The Government's vision of competitive unionism and a membership 'free-for-all' has therefore not been realised. Further, in several notable cases, unions have creatively utilised the freedom of association provisions to thwart employer restructuring and individualisation strategies⁴⁰ – albeit that the Government intended the provisions to operate primarily for the benefit of *non*-unionists.
- 1.43 That said, the limits on union right of entry, and prohibitions on union preference and related arrangements (aggressively policed by the OEA) have presented significant challenges to union organisation and recruitment strategies.⁴¹ Overall, the Coalition Government's attack on the role and legitimacy of Australian unions since 1996 has been relentless. Of course, it has reached a new level of intensity with the recent passage of the 'Work Choices' legislation.

The Workplace Relations Amendment (Work Choices) Act 2005 (Work Choices Act 2005)

- 1.44 The *Work Choices Act 2005* strips away virtually all remaining supports for the *industrial* recognition rights of Australian unions, and calls into question the value to unions of their rights to *legal* recognition.⁴²
- 1.45 Again, space limitations preclude a detailed examination of the manner in which the *Work Choices Act 2005* effects a radical departure from traditional Australian arrangements for ordering industrial regulation, which were founded on collectivism, egalitarianism, and the representative function of unions. The key aspects of the 2005 legislation that further undermine union rights of recognition for industrial purposes are as follows:
 - abolition of the century-old processes of dispute notification and conciliation and arbitration of industrial disputes by the AIRC;⁴³
 - extensive further limits on the 'allowable' content of awards, and restrictions on the AIRC's powers to make and vary awards;
 - agreement-making processes that subvert collective bargaining and the role of unions in the following ways:⁴⁴

- workplace agreements totally and permanently displace the operation of awards – award conditions such as penalty rates and shift loadings can therefore be excluded by agreements;
- employers can unilaterally determine employment conditions through ‘Employer Greenfields Agreements’;
- AWAs prevail over both awards and collective agreements – with the effect that an employer can offer and enter into AWAs with its employees, even when a collective agreement is in force;
- far-reaching restrictions on the permissible content of workplace agreements, backed up by civil penalties for parties that seek to include any prohibited terms in agreements – among the list of ‘prohibited content’ provisions are those providing various forms of involvement or support for union activism in the workplace or in respect of the agreement;
- parties can unilaterally terminate workplace agreements (after expiry) on 90 days’ notice – an employer could use this provision to end a collective agreement, and force employees onto the minimal Australian Fair Pay and Conditions Standard (plus any applicable ‘protected award conditions’) as the basis for subsequent bargaining negotiations;
- employers remain free to ignore the preference of employees to bargain collectively, and can still refuse to recognise a union seeking to negotiate a collective agreement on behalf of employees – and, as has been the case since 1996, parties are under no obligation to bargain in good faith;
- a new ‘right of entry’ regime, imposing substantial constraints on union rights to enter workplaces for enforcement and recruitment purposes, and enabling employers to set real limits on the frequency and objectives of union presence at the workplace;⁴⁵
- changes to the freedom of association provisions aimed at restricting the capacity of unions to engage in various tactics to support the collective representation of workers’ interests, and preventing unions from obtaining injunctions to block de-unionisation and individualisation strategies by employers;⁴⁶
- a further contraction of the rights of employees and unions to take protected industrial action in support of bargaining claims, including new limits on ‘pattern bargaining’ and mandatory ‘secret ballots’ of employees;⁴⁷
- quicker and easier access for employers and other affected parties to legal remedies to address unprotected industrial action – eg the AIRC must determine applications for section 496 (formerly section 127) orders within 48 hours, or issue an interim order stopping the relevant industrial action;
- enhanced scope for the AIRC to terminate bargaining periods (thus ending protected action rights), and new provisions permitting direct Ministerial intervention where industrial action is affecting ‘essential services’.

1.46 In summary, the *Work Choices Act 2005* leaves Australian workers without adequate statutory protection to choose union representation in workplace matters, to provide a voice for their concerns in matters relating to workplace change, occupational health and safety and other issues, or to perform the industrial functions associated with collective bargaining.

A new policy debate: protecting collective bargaining and union recognition rights

1.47 Given concerns over the nature of these legislative changes, there is growing interest among Australian unions in considering ways that future legislation might be used to create mechanisms for union recognition for industrial purposes, and (especially) collective bargaining rights.

1.48 In order to inform this discussion, the ACTU will send a delegation of union representatives on a Study Mission to investigate alternative approaches to protection of union recognition and collective bargaining rights. This delegation will visit the US, Canada, the UK and NZ during late April-early May 2006. This delegation will then report back on findings to unions and the ACTU executive.

The purpose of this Research Report

1.49 This Report provides a background to these policy debates on how best to provide a statutory framework for facilitating union recognition and collective bargaining rights.

1.50 This Report is intended to canvass the range of issues which will need to be considered in determining the most appropriate model of union recognition and collective bargaining in the Australian context. In order to inform these debates, the Report:

- sketches a conceptual framework for considering the range of issues related to union recognition and collective bargaining (**Section 2**)
- outlines alternative approaches to regulating union recognition in other industrialised economies, and their relative strengths and weaknesses (**Section 3**) (more detailed country summaries are provided in an **Appendix** at the end of the Report)
- considers whether these alternative approaches might provide useful models for the Australian context, and the range of issues that would need to be explored if any particular approach were to be adopted in Australia (**Section 4**).

Australian debates in an international context

1.51 In the last decade or so, there has been renewed interest internationally in the question of how to best provide for union recognition, protect the capacity of employees to choose collective representation and for unions to engage in collective bargaining. This renewed interest is evident in all of the countries included in the Study Mission's program.

1.52 The United States and Canada are sometimes seen as good models for determining union recognition and collective bargaining rights. Yet, employers faced with a more challenging economic environment have been more effective in undermining recognition

campaigns and overturning collective bargaining arrangements. Many unions and industrial relations commentators have questioned the effectiveness of existing North American legal recognition certification procedures and good faith bargaining laws in protecting the right to join a union and collective bargaining.⁴⁸

- 1.53 In the United Kingdom (UK), collective bargaining has been based on a tradition of 'voluntarism' rather than statutory protection of union recognition. During the 1970s a statutory model of union recognition was introduced, but proved to be short-lived.⁴⁹ Then, following the election of the Blair Labour Government in 1997, there was interest in revisiting the question and re-introducing a union recognition procedure.⁵⁰ Many unions were wary of taking the path of statutory enforcement of union recognition, based on problems associated with short-lived statutory arrangements in the 1970s.⁵¹
- 1.54 However, with the support of the British Trades Union Congress (TUC), the Labour Government introduced a statutory provision for union recognition as part of the *Employment Relations Act 1999 (ER Act 1999)*.⁵² Although the UK model is influenced by the North American models, it is also viewed (from a European perspective) as a foundation for the development of social partnership based on cooperation between unions and employers.⁵³
- 1.55 The new UK statutory arrangements have been heavily criticised by many unions who have found the various exceptions and provisions 'watered-down' from the original proposal to have undermined the effectiveness of the system.⁵⁴ While some amendments have been made to the union recognition provisions of the *ER Act 1999* to address some of these concerns, there are still calls for further reforms.⁵⁵
- 1.56 In New Zealand, union recognition and collective bargaining rights have been subject of policy debate over the last two decades. Historically, New Zealand industrial relations were regulated by a system of compulsory arbitration similar in nature to the Australian system.⁵⁶ Following the dismantling of the arbitration system in the 1990s, and withdrawal of statutory protection for union recognition and collective bargaining through the *Employment Contracts Act 1991 (EC Act 1991)*, New Zealand unions experienced precipitous falls in membership and collective bargaining coverage.⁵⁷
- 1.57 Following the return of a Labour Government in 1999, the *Employment Relations Act 2000 (ER Act 2000)* established a hybrid model of recognition based on union registration and the enshrinement of 'good faith bargaining' concepts under statute and a 'code'. Again, the approach adopted by the *ER Act 2000* has been subject to considerable debate and some criticism, and was the subject of 'fine-tuning' amendments in 2004.⁵⁸

Designing a system to protect collective bargaining and union recognition

- 1.58 In light of these recent overseas experiences (which are explored in further detail, along with other examples, in section 3 of this Report), it is clear that *any* statutory system of recognition intended to extend collective bargaining brings a host of difficult policy questions. There are many choices to be made from a range of alternative

arrangements, each one involving consideration of a number of trade-offs and value judgements.

1.59 The primary focus of this Report is on identifying potential models for designing a system of union recognition to replace traditional Australian arrangements for union recognition rights for *industrial* purposes (as identified above) – although the discussion also covers the rights of recognition for *economic, social and political* purposes, and *legal* recognition, that might flow from this. Key questions to be addressed by unions, and that are canvassed in this Report, include:

- **What process should determine how and when a union is recognised or de-recognised?** There is a choice among existing models found in other industrialised economies, a re-invented ‘arbitral model’ or some ‘hybrid’ form of recognition and collective bargaining which draws on different systems. Each of these options presents potential difficulties, requiring some compromises to be made on the potential benefits for unions and workers.
- **What are the rights that should flow from formal recognition?** As we discuss further below, recognition may be provided for various purposes, including gaining the benefits of legal personality, rights to represent individual workers in workplace matters, information and consultation rights, recognition for collective bargaining purposes, or to exercise influence over economic and social policy formulation and political representation. This question includes a range of subsidiary questions concerning, for instance, how each of these different rights of recognition might be activated, by whom, and the relationship between these different forms of recognition (see eg the further issues raised in paras 2.23, 2.33 and 2.38 below).
- **What rights/obligations in relation to collective bargaining should be attached to recognition?** One of the key areas for which recognition is provided is to establish the right for a union to be recognised by an employer or employers as a legitimate agent in collective bargaining. In different countries, these rights have been configured in significantly different ways. Among the key issues are:
 - the range of issues an employer is legally required to negotiate over;
 - the legal capacity of unions to seek to extend the scope of bargaining beyond these ‘mandated’ issues for collective bargaining;
 - the nature of the rights and obligations placed on both unions and employers to conduct bargaining according to principles of ‘good faith’;
 - the legal capacity for unions to pursue multi-employer (or industry framework) agreements;
 - the process by which breaches of collective bargaining rights are determined and the nature of any remedy or sanction that is to be imposed against such breaches; and

- the extent to which employers (or rival unions) can act to displace a formally recognised union.
 - **Should recognition be 'exclusive' or allow for competing recognition?** A choice between a system of union recognition that provides for 'exclusive recognition' to a single union in a given workplace (or bargaining unit), some capacity for unions to compete for membership, or an open choice for individual members to choose which union they join.
 - **What limits should be placed on the right to strike?** In no industrialised country do unions enjoy a completely unfettered right to take strike action:
 - in most collective bargaining systems, it is usual to limit the right to strike during the term of a collective agreement;
 - in some cases, unions must observe procedural requirements (including ballots) before strike action can be initiated;
 - in some cases, political strikes are illegal;
 - in some cases, the right to strike is an individual right, while in other countries a strike can only be triggered by union membership and collective bargaining.
- 1.60 Our objective is to contribute to the process of examining what type of union recognition system might be adopted in the Australian context. We hope the information, analysis and discussion in this Report will provide a basis on which many of these questions can be addressed. In the next section, we seek to frame the discussion by defining union recognition and sketching a framework of various elements of different systems of union recognition.

2. THE CONCEPT OF UNION RECOGNITION: A FRAMEWORK FOR DISCUSSION

- 2.1 In section 1 of this Report, we identified three forms of 'recognition' that Australian unions obtained and benefited from under the traditional conciliation and arbitration system: recognition for *industrial* purposes; recognition for *social, economic and political* purposes; and *legal* recognition. We will now explore the concept of 'union recognition' in a broader sense, in order to introduce different conceptual understandings of the term that arise from its use and application in the industrial and legal systems of certain other industrialized countries that are explored in this Report.
- 2.2 While the focus of this Report is on industrial forms of recognition, it should be clear that this form of recognition, and the extent to which unions can gain recognition from employers and effectively engage in collective bargaining, results from the interaction between these various elements of recognition. Legal recognition, for instance, will impact the ability to organize members and take industrial actions. Political and social recognition help define the extent to which unions are viewed as legitimate and acting in the interests of working people or society as a whole, rather than acting in the interests of unions as organizations and the individuals holding office.
- 2.3 Generally, we define union recognition as the various rights that a union may legitimately lay claim to in order to best advance the interests of its members. From this perspective, the definition of what constitutes recognition depends on the various purposes for which unions may be recognised.⁵⁹
- 2.4 Within this broad definition, the concept of union recognition is most commonly associated with recognition for the purposes of collective bargaining. This is hardly surprising given the centrality of collective agreements in determining the effectiveness of unions as representative organizations for workers. It is hard to imagine unions playing any significant role in industrial relations without having rights in relation to bargaining and agreement making.
- 2.5 Yet, unions are involved in far more activities than simply the processes by which collective agreements are negotiated with employers. For instance, as we have seen, Australian unions are recognised as legal persons through registration under federal and state industrial laws – similar to, but distinctively different from, the legal personality enjoyed by corporations. Recognition as a form of incorporated body brings with it a range of legal rights (and immunities) that have clarified union status and the use of certain types of industrial action as lawful.⁶⁰
- 2.6 Unions also undertake a range of representative and enforcement functions outside of negotiating collective agreements, including representing individual members in

grievance matters, dealing with disputes over the interpretation of specific clauses in agreements or new issues that arise while a collective agreement is still in operation.

- 2.7 Further, as we have already suggested, unions also play important roles in providing a collective voice for workers in economic and social policy determination, and the political process.
- 2.8 The fact that unions can be recognized in different ways raises a number of important questions which frame the terms of our discussion of union recognition:
- From whom is 'recognition' sought?
 - What is the scope and nature of the rights that flow from recognition?
 - Who 'owns' the rights that flow from recognition – individual employees, or unions as a collective entity?
- 2.9 The purpose of this section of the Report is to outline a conceptual schema of different forms of union recognition, only some of which relate to the establishment of legal rights for the purposes of collective bargaining.⁶¹ This framework is important in that it provides the basis for considering a range of 'design issues' that will need to be addressed in any assessment of options for the future regulation of union recognition in Australia and the possible adoption of aspects of other countries' union recognition systems.
- 2.10 Here, we distinguish between **five elements of union recognition**:⁶²
- as a representative of *individual* members in workplace matters;
 - as a *collective* representative for members in workplace matters;
 - as a representative in collective bargaining;
 - as a representative in social and economic policy deliberation; and
 - as a legal person.

Recognition as representative of individual members in workplace matters.

- 2.11 A core function of any trade union is to represent individual members' interests in the workplace. In its most basic form this involves a union representing an *individual* employee in *individual* employment matters, such as grievance procedures or disciplinary matters.
- 2.12 This right stems from a range of sources, but is based on the general principle that a worker has the right to be a member of a trade union, to take part in union activities without discrimination or victimization, and to be represented by a union in workplace matters dealing with individual grievances, dismissal and other disciplinary issues.⁶³
- 2.13 In the Australian context, these individual rights are legally provided for, albeit imperfectly, through a number of instruments. For instance, the right to join a union is intended to be guaranteed by the freedom of association provisions of the *Workplace Relations Act*.⁶⁴ The right to join and participate in union activities is also protected under anti-

discrimination laws. These laws typically prevent employers from discriminating against employees on the grounds of their union membership or activism, and enable employees to obtain remedies such as compensation or reinstatement where such breaches occur.

- 2.14 The right for a union to be recognised for the purposes of representing an individual member is, however, limited by restrictions placed on unions at the workplace level. For instance, while a dispute settlement procedure is an allowable award matter and must be contained in a workplace agreement, the *WR Act* prohibits any such procedure that involves a union as the representative of employees, unless the choice of union is made by the employee.⁶⁵ The *WR Act* also prohibits an employer or agreement from limiting the freedom of an individual to choose their union representative.
- 2.15 Here a problem arises where an employee seeks to exercise the right to be represented by a union not otherwise recognised for the purposes of collective bargaining. Under existing arrangements, the right of the individual to choose which union provides representation may override the preference of a majority of employees to be represented by another union in collective bargaining.
- 2.16 In most other jurisdictions, the right to representation does not automatically translate into an unfettered choice of which union an individual may join and have represent them in workplace matters.⁶⁶ Moreover, there are different approaches as to whether an employee's right to choose a particular union as their representative agent should be tied to collective bargaining rights.
- 2.17 In the traditional Australian context, an individual's right to be represented by a union of choice was dependent on whether that worker fell within the union's rights of constitutional coverage, as determined by the union's eligibility rule, which was in turn reinforced by the 'conveniently belong' rule and by formal and informal closed shop arrangements that prescribed which union any employee must belong to (see paras 1.6-1.7 above).
- 2.18 This situation is similar to the US, where union certification processes work to provide exclusive coverage to a single union, both for the purpose of individual representation and for collective bargaining purposes. In the UK, in contrast, the choice of which union a worker may join and be represented by, was less dependent on whether that union had rights of recognition for collective bargaining purposes, or whether there was an existing rival union representing other workers within that workplace.
- 2.19 This observation in turn raises two important subsidiary concerns which need to be considered in determining the ways in which the right of representation should be incorporated in different systems of union recognition:
 - Should individual workers be unrestricted in choosing the union which will represent them in workplace matters?
 - How should a refusal by an employer to accept a union as a legitimate bargaining agent be sanctioned? A breach of any laws establishing recognition and representation rights could be viewed as both a breach of the individual's right to

representation, and the right of the union as an organization to represent its members.

Recognition as collective representation for members in the workplace.

- 2.20 In addition to the representation of individuals over matters such as grievance and disciplinary procedures, unions may also be provided with rights to represent workers' collective interests in workplace matters. This right stands apart from processes of collective bargaining and relates to recognition for the purposes of being notified of significant changes affecting workers, and rights to share information and consult with management over such matters.
- 2.21 Since the mid 1980s, most federal awards dealt with the subject of technological change and redundancy, placing obligations on employers to notify employees and their unions of impending workplace changes resulting from technological change and to consult with them over the process through which such changes were to be implemented.⁶⁷ Various State laws have also imposed similar obligations on employers to notify and consult with employees and unions, and extended such right to matters relating to redundancy.⁶⁸
- 2.22 The scope of this right to consultation under federal law, however, was narrowed by the restrictions placed on allowable award matters in 1996. Although periods of notification for termination and redundancy were retained as allowable matters, the more expansive provisions which specified employer obligations to consult with employees and unions about these matters were removed.⁶⁹ Statutory rights for unions to access information and consultation over large-scale redundancies, introduced in 1993, have been partly removed and the remaining provisions watered down by the *Work Choices Act 2005*.
- 2.23 Legal mechanisms establishing rights for employees or their representatives to be informed and consulted over workplace change constitute an important feature that differentiates the various systems of union recognition reviewed in this Report. In Germany, for instance, legislation providing for the creation of a works council at the workplace level actually curtails union recognition rights for these purposes. Instead, the German system creates a dual channel of representation: unions are confined to collective bargaining matters, while works councils are responsible for workplace matters outside of collective bargaining. In Sweden, by contrast, co-determination laws provide unions with wide ranging rights at the workplace, quite apart from the role of unions in collective bargaining, and impose unambiguous requirements on employers to inform and consult with union representatives.
- 2.24 Any consideration of adopting European-style information and consultation rights for employees and their representatives under Australian law would need to address the question of union involvement in such processes, for example:
- should unions be the automatic vehicle for representing workers for information and consultation purposes?

- should a non-union representative body, such as a 'works council', play such a role, either generally or only in those workplaces where unions do not have a strong presence?⁷⁰
- if any alternative employee representative bodies are to be established, should clear boundaries be set around their role and functions, to ensure they do not intrude upon the collective bargaining functions of unions?

Recognition as an agent in collective bargaining

- 2.25 The question of recognition is often associated with the capacity of organized workers to compel employers to bargain. As we have already noted, in the Australian context, the arbitration system was traditionally the primary means through which unions were able to enforce these rights.
- 2.26 However, it is clear that this approach was relatively unique among industrialized economies. In much of the remainder of this Report, we explore alternative legal mechanisms which provide unions with recognition rights for the purpose of collective bargaining. It will become evident that very different approaches can be found in various overseas systems to the establishment and enforcement of collective bargaining rights.
- 2.27 In the US and Canada for instance, collective bargaining rights which flow from union certification do not directly obligate an employer to negotiate until a collective agreement is settled. Rather, they simply imply that an employer must bargain 'in good faith' without resort to 'unfair labour practices'. In Sweden, there is no comparable duty to bargaining in good faith. The right to bargain derives from both constitutional rights guaranteed to collective organizations and the right to take industrial action.
- 2.28 Like employers in the US, German employers are not under an obligation to settle an agreement. However, where negotiations fail to settle matters, there is a legislative provision for compulsory mediation. In Germany, the right to engage in collective bargaining also derives from the constitutional right to strike.⁷¹ While this right is generally exercised at the industry-level through peak industry bodies, there is also scope for individual employers to opt out of industry agreements and make their own arrangements.
- 2.29 Both New Zealand and the UK have sought to take a hybrid approach which borrows from the American and European traditions.

Recognition for economic and social policy purposes

- 2.30 The right to represent workers' interests in policy deliberations seems a foreign concept to the Anglo-American systems of union recognition, where the focus of attention centres on workplace matters. But of course politics can have a significant impact on material outcomes at the workplace level and shape the capacity of workers to exercise their rights at work.

- 2.31 For example, contemporary debates around work-and-family balance pre-suppose that individual workers have adequate access to childcare, and can insist on working 'reasonable hours' or hours which accord with their family circumstances. Taxation arrangements play a significant role in shaping the incentives for individual members of a household or family to engage in additional hours work. These types of issues illustrate that the capacity of unions to voice worker interests in the political sphere can represent a form of union recognition.
- 2.32 In many European economies, union involvement in politics and policy deliberation is institutionalized in various tripartite decision-making bodies, as well as more general rights for unions to engage in political protests.
- 2.33 Again, as indicated earlier in this Report, these rights have existed in various forms in the Australian context. The Prices and Incomes Accord which dominated policy making during the Hawke-Keating years was an attempt to create tripartitism in national economic and social policy making, albeit in a less *permanently* institutionalized way than has existed in some European countries.
- 2.34 The studies of European systems in this Report raise various issues as to how Australian unions should seek to obtain greater rights of recognition for economic, social and political purposes, and perhaps more broadly – for example:
- should unions push for adaptation of the European 'social partnership' model, in which unions, employer bodies and governments contribute through a process of 'social dialogue' to the development and implementation of regulatory mechanisms for ordering employment and welfare policy, labour laws, and social and citizenship rights for workers?⁷²
 - should notions of partnership filter down from the 'macro' level (ie national policy-making), to play a role at the industry or workplace level, eg in shaping the nature of collective bargaining or firm-level information and consultation structures?⁷³
 - in particular, would Australian unions be prepared to accept the shift to a more *cooperative* framework (and away from traditional *adversarial* relations with employers) that any embracing of workplace partnership would necessarily entail?
 - in this respect, does the recent experience of UK unions (ie the TUC's strong support for the Blair Government's various partnership initiatives) indicate that this would be a positive step for unions in Australia to take?⁷⁴
 - what lessons can be learned from past Australian experience of partnership-oriented arrangements, such as the Accord-era institutions, the Best Practice Demonstration Program of the early 1990s, and more recent State Labor government initiatives (eg Victoria's 'Partners at Work' funding scheme)?

Recognition as a legal person

- 2.35 As indicated in section 1 of this Report, Australian unions have long enjoyed a form of *legal* recognition through the legal personality they obtained via registration under federal industrial legislation. In other countries, as the country reports in the Appendix note, legal personality is provided through other mechanisms.
- 2.36 The statutory provisions for the registration and regulation of unions (and employer organisations) are retained in the *WR Act* by the *Work Choices Act 2005* – although with significant amendments to reflect the changed constitutional underpinnings of the legislation. This may cast doubt on the validity of the registration of some unions (eg some may have difficulty meeting the new requirement that the majority of their members must be ‘federal system employees’).⁷⁵
- 2.37 Overall, however, the legal personality and quasi-corporate status of registered unions are left untouched by the 2005 reforms. On the other hand, the new legislation’s near-obliteration of the traditional legal supports for union organisation, activism, and the capacity to perform their representative functions for workers, must call into question the value to unions of remaining registered and participating in the formal system of industrial regulation.
- 2.38 The traditional ‘trade off’ between protection and regulation of the internal affairs of unions has now become profoundly imbalanced. While the statutory provisions according an array of industrial recognition rights for Australian unions have been substantially diminished, unions face ever-increasing levels of state interference in their internal affairs and external activities. These regulations have become more restrictive and punitive over time, as evidenced most clearly by the *Work Choices Act 2005*. Therefore, some unions are no doubt considering the option of *de*-registering and operating outside the federal workplace relations system.
- 2.39 More generally, the union movement must consider what kind of regulatory framework for *legal* recognition of unions (ie legal personality) might accompany any future move to adopt union recognition and collective bargaining arrangements based on overseas models – for example, should a mechanism be provided for the independent legal status and corporate personality of unions outside of industrial legislation? (eg under State associations incorporation legislation, or legislation specially designed to address the unique characteristics of trade unions).⁷⁶

Concluding comment

- 2.40 The central purpose of this section of the Report was to describe in a systematic way the various elements that, together, constitute the concept of ‘union recognition’ in a broad sense.
- 2.41 Not all systems provide a *statutory* or legal basis for all of the elements of recognition included in our framework. But elements exist in various forms in the different national

systems, either by virtue of the extensive rights set out in legislation, or by attempts to limit union recognition in a particular way.

- 2.42 Union recognition is not only a matter of providing recognition for collective bargaining purposes, although this is a fundamental feature of the union recognition systems operating in many market economies.⁷⁷ Union recognition encompasses a range of rights at the workplace level that go beyond the relationship between unions and government institutions, both in terms of union roles in representing individual workers and in collective relations with employers.
- 2.43 Union recognition also extends to the institutional (often tripartite) processes through which unions are drawn into economic and social policy formulation in many systems. It can also be viewed in terms of the legal personality accorded to unions under some systems.
- 2.44 In section 1 of the Report, we explored how Australia's conciliation and arbitration system provided unions with three forms of recognition – ie recognition for *industrial* purposes; for *social, economic and political* purposes; and *legal* recognition. We also detailed the retreat from legal support for union recognition that has occurred since the early 1990s, culminating in the aggressively anti-union *Work Choices Act 2005*.
- 2.45 In our view, Australian law is now seriously deficient in the extent of its failure to provide a regime of rights and responsibilities for industrial parties to engage in genuine collective bargaining. The *WR Act*, as amended by the *Work Choices Act*.
- does not provide adequate capacity for employees to choose to be represented by a union in the workplace for a range of purposes;
 - does not sufficiently support the capacity of unions to choose the most appropriate ways in which they can effectively represent the interests of employees who prefer to be represented by a union and covered by a collective agreement; and
 - does not provide employers with the freedom to choose how they might work productively with unions to manage their workforces in ways that meet business needs.
- 2.46 The state of union recognition and collective bargaining rights places Australian labour law at odds with that of all other industrialized countries including the United States. Indeed, many of the newly industrialising economies of Asia have paid greater attention to the creation and protection of such rights than appears to be the case in Australia.
- 2.47 This observation gives rise to two questions which occupy the attention of the remainder of this Report:
- first, what alternative models of union recognition are employed in other countries?
 - secondly, do these overseas systems provide Australia with appropriate models for legislative reforms to enhance union recognition and collective bargaining rights?

- 2.48 In order to answer these questions, the next section of the Report provides an overview of the various approaches to union recognition laws found in other industrialized economies. Examples of these models in practice can be found in the Appendix, where the systems of collective bargaining and union recognition are outlined for seven industrialized economies.
- 2.49 The final section of the Report will then consider how these alternative models might provide the basis for formulating new approaches to union recognition and collective bargaining in Australia.

3. A CROSS NATIONAL COMPARISON OF UNION RECOGNITION

- 3.1 The previous section of this Report provided an overview of the Australian model of union recognition. Our analysis identified the ways in which union recognition was gradually (and then more rapidly after 1996) undermined by successive legislative amendments.
- 3.2 In this section our intention is to review other possible models that might be adapted to the Australian context. This review is based on our study of seven industrialised countries: the United States, Canada, Germany, Italy, Sweden, the United Kingdom and New Zealand.
- 3.3 More detailed overviews of the system of bargaining and union recognition in each of these countries is provided as an Appendix to this Research Report. Each system is summarised in **Table 3.1**.
- 3.4 From this larger set of countries, we distinguish between three broad models (or approaches) of union recognition:
 - The 'Certification model', associated with the United States and Canada;
 - The 'Constitutional model' associated with Western European countries; and
 - 'Hybrid models' which borrow elements from each of the above two models. Examples of Hybrid type models are found in the UK and New Zealand.
- 3.5 Each of these models of union recognition is associated with a number of core attributes. The manner in which each model is designed and operates may vary from country to country, but these core features are common. A summary of the main features of each model of recognition and the collective bargaining arrangements in each system is provided in **Table 3.2**.
- 3.6 It should be noted that the models presented here do not represent the only approaches to regulating union recognition and collective bargaining rights. We have not, for instance, considered how union recognition operates in a range of emerging countries in Asia and Eastern Europe. There may indeed be something to be learned from the experiences in these countries, but the set of feasible options for Australia most likely consists of the models that operate in the range of countries we have reviewed for this Research Report.

Table 3.1 Union Recognition and Collective Bargaining: A Cross National Comparison

	USA	Canada	United Kingdom	New Zealand	Sweden	Italy	Germany
<i>System of Collective Bargaining</i>							
Level of coordination/ centralisation	Highly decentralised – based on workplace / enterprise level bargaining.	Highly decentralised – based on workplace / enterprise level bargaining.	Highly decentralised – most agreements are negotiated at workplace / enterprise level.	Decentralised / enterprise based due to the existence of a number of workplace specific unions.	Industry level Framework agreements coordinated with enterprise agreements.	Industry level Framework agreements coordinated with enterprise agreements.	Centralized at industry level but moving towards decentralised bargaining.
Scope of issues included in bargaining.	Statutory requirement to bargain in good faith over 'mandatory issues', viz., pay, hours and other conditions of employment such as pensions, bonuses, and grievance procedures.	No restrictions; no statutory 'mandatory issues'.	Unless otherwise agreed by the parties, the scope of negotiations under statutory procedure confined to pay, hours, and holidays. Scope of voluntarily concluded agreements not constrained.	Agreements must contain a coverage clause, an end date, a variation clause, dispute resolution clause and an employee protection clause.	No restrictions unless set out by a framework agreement.	No restrictions unless set out by a framework agreement.	No restrictions.
Use of industrial action	Strikes can only be taken for economic concessions from the employer or in response to unfair labour practices. In both cases, striking workers can be replaced by non union labour. Also, agreements typically include a no strike clause.	Strikes prohibited during the life of a collective agreement. Otherwise, a number of criteria must be met for a strike to be legal (such as failed negotiations, provision of notice etc)	Strikes can only be used if a number of conditions are met, including the existence of a trade dispute and evidence of majority support is established by a secret ballot.	Strikes and lockouts can only be used during collective bargaining or on OH&S issues.	Strikes and lockouts are constitutionally mandated but cannot take place during the life of a collective agreement.	Constitutionally mandated and not restricted by statutes (except in relation to essential services).	Only legal during collective bargaining.

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	USA	Canada	United Kingdom	New Zealand	Sweden	Italy	Germany
Third party involvement to resolve collective bargaining disputes	NLRB involvement to resolve disputes over recognition and unfair labour practices. No statutory provision for third party involvement to resolve impasse in collective bargaining. Most collective agreements include provisions for arbitration where there is an impasse over interpretation of agreement terms.	LRB involvement to resolve disputes in recognition process and unfair labour practices. All Canadian jurisdictions provide voluntary conciliation services for collective bargaining disputes. Statutory provisions for "First Agreement Arbitration" in majority of jurisdictions.	Conciliation at various stages during recognition procedure. Conciliation and information services provided through ACAS for bargaining disputes. No provisions for compulsory arbitration over collective bargaining disputes. Collective agreements may include binding arbitration over interpretation disputes.	Parties can request the assistance of the Employment Relations Authority, however it is not compulsory.	Mandatory involvement of the Mediation Institute can be displaced by an alternative dispute resolution procedure contained in a collective agreement.	Capacity to use courts to enforce constitutional rights to organise and engage in collective bargaining.	Capacity to use courts to enforce constitutional rights to organise and engage in collective bargaining. The parties to collective agreements may have an inter parties mediation arrangement.
Recognition for collective bargaining							
Procedure for recognition	Provision for both voluntary and statutory recognition. A petition for 'certification of representative' is filed with the National Labour Relations Board (NLRB), after which the NLRB investigates the petition to determine whether a question of representation exists. If it is found to exist, then a secret ballot is held to determine whether a majority of votes in the bargaining union vote in favour of union recognition.	Provision for both voluntary and statutory recognition. Application is filed with Labour Relations Board, after which a hearing is conducted where evidence of union membership is heard. There must be around 30% support amongst the proposed bargaining unit. Then the process differs between provinces but involves either a secret ballot or card check mechanism if membership exceeds a certain limit.	Provision for both voluntary and statutory recognition. Application for statutory recognition made to Central Arbitration Committee (CAC). Application valid if CAC satisfied that a majority of workers in the bargaining unit would favour recognition and the union has at least 10% membership in the bargaining unit.	Unions must establish that they satisfy key criteria (independence, 15 members, set of rules, aim to protect members interests etc), after which they are registered by the Registrar of Unions	No formal procedure. Unions have capacity to enforce constitutional rights to organise and there are statutory protections for <i>bona fide</i> unions. A union must charge itself with ' <i>safeguarding the interests of the employees in relation to the employer</i> '	No formal procedure. Recognition guaranteed by constitution.	No formal procedure, although courts have determined that to participate in collective bargaining unions must exist at the supra company level, be independent and have social power to bargain effectively (evinced, <i>inter alia</i> , by membership and previously concluded agreements). The question of union "existence" mainly arises in inter-union disputes.

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	USA	Canada	United Kingdom	New Zealand	Sweden	Italy	Germany
Exclusivity	Recognition results in exclusive representation of the bargaining unit.	Recognition results in exclusive representation of the bargaining unit.	Recognition results in exclusive representation of the bargaining unit. (Recognition does not preclude an employer from individually negotiating with members of the bargaining unit.)	As unions need only have 15 members, there can be more than one union at a workplace	In practice, unions are affiliated along white collar, blue collar and professional lines therefore one workplace can have up to three unions	Multiple union representation reflecting ideological and occupational structure of unions. Usually however, workplace committees ensure a 'single desk' bargaining committee between unions.	Industry unions ensure exclusive coverage in most workplaces, although there are inter-union demarcation problems from time to time.
Limits on application	Representation extends to individual or collective issues and collective bargaining.	Representation extends to individual or collective issues and collective bargaining.	Recognition only for the purposes of collective bargaining.	Registration entitles the union to participate in collective bargaining but generally unions can represent collective or individual interests.	N/a	N/a	While unions are primarily concerned with collectively negotiating terms and conditions of employment, works councils represent individuals at the workplace level. Works councils can determine matters where the union has agreed to devolve authority to bargain over union matters.
De-recognition	Certification is valid for one year and petitions for further elections in the bargaining unit will be dismissed if filed during this one year period. Applications for decertification can be made by employees or someone acting on their behalf	In most jurisdictions certification is valid for one year. Eligibility to apply for decertification differs between jurisdictions. Irrespective of who brings the application, decertification must be supported by either majority or significant proportion of employees in the bargaining unit.	Can only occur after three year recognition period expires. Methods depend on how the union was initially recognised.	An application can be made if the union no longer meets registration criteria	N/a	N/a	N/a

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	USA	Canada	United Kingdom	New Zealand	Sweden	Italy	Germany
<i>Impact on Unions & collective bargaining</i>							
Remedies against unfair labour practices (ULPs)	Five types of ULPs are defined by s 8 (a) of the <i>NLRA</i> . Examples of behaviours that constitute ULPs include threatening employees with job loss and bad faith bargaining. Orders are remedial as opposed to punitive. Good faith bargaining does not extend to non mandatory bargaining issues.	Sanctions against ULPs are primarily remedial in nature. There is limited ability to impose punitive remedies on ULPs.. In 6 of the 11 jurisdictions the board may award “automatic” recognition as a remedy where employer actions have adversely influenced workers’ true level of support for recognition.	Once a union begins the recognition process, the employer has a number of duties such as cooperation in connection with the ballot. Also more general provisions exist against unfair labour practices during the ballot.	Parties are bound by the obligation to deal with each other in good faith, including specifically during bargaining. As part of this the Minister of Labour can issue and has issued a Code of Good Faith in Collective Bargaining to guide the courts and parties.	Protection of constitutional and statutory rights through court orders.	Protection of constitutional and statutory rights through court orders.	Protection of constitutional and statutory rights through court orders.
Regulation of employer involvement in recognition and collective bargaining	Employer and recognised union are required to bargain “in good faith”, but there is no requirement to actually reach an agreement. Employers commonly use a range of tactics, both legal and illegal, to avoid, delay, and undermine recognition campaigns and bargaining processes.	Employers and recognised union are required to bargain “in good faith”. While there is no requirement to actually reach an agreement, systemic features (available in some jurisdictions) such as “First Contract Arbitration”, and “automatic recognition” as a remedy where employer actions have adversely influenced workers’ true level of support for recognition, facilitate collective agreement making.	While there is no scope for employers to legally intervene in the statutory recognition process, there is no obligation on them to conclude an agreement with a recognised union. Statutory recognition requires the parties to agree on a method of collective bargaining rather than to reach a collective agreement.	There is no scope to intervene in registration however parties are required to reach an agreement unless there is a good reason not to. Employers are also prevented from undermining collective agreements by offering their terms in individual contracts or other agreements.	Employers are generally given equivalent rights to unions such as in respect of lockouts. Under the <i>Co-Determination Act</i> collective bargaining must be conducted in a speedy manner, which complements timelines set out in the various framework agreements. In addition, Swedish employers cannot enter into contracts which are inconsistent with a collective agreement they have signed.	Under previous fascist regimes, employers had wide powers to suppress unions. However, this is no longer case with employers being regulated by the terms of the framework agreements.	Employers can seek to negotiate “opening clauses” in national / sectoral agreements which allow them to locally negotiate terms that are inferior to those of national agreement.

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	USA	Canada	United Kingdom	New Zealand	Sweden	Italy	Germany
Effectiveness	<p>Union density: 12.5 %, collective bargaining coverage: 13.8 %.</p> <p>The ineffectiveness of sanctions as a deterrent to union busting and avoidance of collective bargaining obligations is seen to weaken the system of statutory recognition.</p>	<p>Union density: 30 % Collective bargaining coverage: 32%.</p> <p>The Canadian system has a number of features that are conducive to its relatively effective functioning, including:</p> <ul style="list-style-type: none"> • availability of "card check", • short time frames between application and balloting • "First Agreement Arbitration"; and • "Automatic certification" as a remedy against employer adversely influencing ballot. 	<p>Union density: 26%. Collective bargaining coverage: 36%</p> <p>Only a small number of applications for statutory recognition have been made. In addition, the complexity, limited scope of bargaining, and weaknesses of sanctions for employer misbehaviour are shortcomings of the statutory system of union recognition.</p>	<p>Union density 22% Collective bargaining coverage: 36%.</p> <p>The requirement of independence is narrowly interpreted such that employers can finance the establishment of a union and not breach the independence requirement. The low membership threshold has lead to the proliferation of small unions who do not identify as such and are only registered to access collective bargaining.</p>	<p>Union density: 80% Collective bargaining coverage: 94%</p> <p>The Swedish employers and unions have always resisted government intervention by reaching agreement amongst themselves, which has been successful in regulating their relationship.</p>	<p>Union density: 34% Collective bargaining coverage: 90%</p>	<p>Union density: 23% Collective bargaining coverage: 67% Works councils are only found in about 10 per cent of eligible workplaces.</p> <p>Although the German collective bargaining system has traditionally been robust, its effectiveness has to some extent hinged on employer willingness to bargain as part of an employer organisation. Employer "flight" from employer organisation has weakened the system.</p>
Recognition at the workplace							
Capacity to represent individuals	Recognition confers right to represent individual member's interests as well as collective interests.	Recognition confers right to represent individual member's interests as well as collective.	An employee subject to a disciplinary/ grievance hearing can be accompanied by a union official or co-worker.	Unions are able to represent members before the courts.	Can negotiate with the employer on any issue affecting a member.		At the workplace, Germany has a system of Works Councils which represent employees at that level.
Consultation	Employers only have to consult in instances of plant closure but must provide information relevant to the bargaining process if requested.	Consultation obligations differ between provinces, however it is usually dealt with in agreements.	Employers have duties to consult with employees in relation to collective dismissals, business transfers and health and safety issues. Also organisations with more than 150 employees have broader consultation rights if requested by an employee.	Unions should be consulted as part of the good faith obligation. Also, consultation provisions can be included in a collective agreement.	Employers must consult with unions in instances of change and collective dismissal	Employers with more than 20 employees must consult with unions in the case of collective dismissal. Also regulated in collective agreements	Rights of information, consultation and codetermination are given to Works Councils in relation to social policy, personal issues, and financial and economic matters. The extent to which these participatory rights apply depends on the subject under consideration.

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	USA	Canada	United Kingdom	New Zealand	Sweden	Italy	Germany
Right of entry	There is no right of entry for organisers.	No right of entry generally although there are some small exceptions such as in relation to employees in isolated areas.	Right of union to enter the workplace only once CAC is notified that a ballot is to occur. This ends once ballot is conducted.	Granted for union business or for issues related to the employment of a member	Not regulated although the Trade Union Representatives (Status in the Workplace) Act (TURA) protects activities in the workplace	Protected by the Worker's Statute – section 14	Unions have a right to enter a workplace, even where they have no members
Protection of trade union representatives	US labour legislation contains an ULP regime that prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights to organize, collectively bargain, and strike. Thus, the activities of union representatives are protected under the ULP regime.	The Canadian system prohibits employers from engaging in a range of anti-union behaviours that constitute ULPs. Union representatives are afforded protection under ULP regimes, which vary between jurisdictions. In general terms, threats, coercion, intimidation, or discrimination in hiring due to union membership or activity are employer actions constituting ULPs.	Legislation prohibits employers from subjecting individuals to detriment for trade union activity. Representatives of trade unions also have rights to time of work for trade union duties.	The good faith obligation extends to all dealings between unions and employers	The TURA protects the activities of representatives	Section 14 of the Workers' Statute protects union activities	Works Council members enjoy special protection of their jobs such as maintenance of grading and protection against dismissal

Table 3.2 Main Features of Alternative Models of Recognition

Model	Characteristic
Australian	<ul style="list-style-type: none"> ▪ Registration of unions and regulation of their internal affairs. ▪ Arbitration and conciliation of disputes by an independent third party. ▪ Core minimum standards (either awards or Fair Pay and Conditions Standard) which underpin collective and individual agreements.
Certification	<ul style="list-style-type: none"> ▪ Statutory recognition of a union with majority support among the selected bargaining unit. ▪ Support established by either secret ballot or card check. ▪ Recognition results in exclusive representation in respect of consultation and collective bargaining. ▪ Parties are bound by good faith obligation/protection against unfair labour practices.
Constitutional	<ul style="list-style-type: none"> ▪ Constitutional recognition of trade unions. ▪ Enabling legislation to establish a regime for the protection for trade union activities. ▪ Framework agreements between employers and unions to govern collective bargaining. ▪ Political recognition of trade unions outside of industrial relations through institutions.
Hybrid	<p>United Kingdom</p> <ul style="list-style-type: none"> ▪ Statutory recognition of unions who establish majority support of the selected bargaining unit through a secret ballot. ▪ Provisions for voluntary recognition by employers (most common recognition used). ▪ Recognition only results in collective bargaining rights, while consultation obligations are to individual employees. ▪ No scope for multi employer bargaining units. ▪ Social partnership initiatives between employers and unions.
	<p>New Zealand</p> <ul style="list-style-type: none"> ▪ Registration of unions which meet base criteria. ▪ Registration results in collective bargaining rights only – consultation is with individual employees. ▪ Parties are bound by obligation to deal with each other in good faith – including any codes of good faith issued by the Minister. ▪ Parties which begin negotiations must conclude an agreement unless there is a good reason not to do so.

The Certification Model of Union Recognition

- 3.7 The collective bargaining systems of the US and Canada are founded on three broad principles.
- The first principle is that the decision of whether or not they are to be collectively represented by a union – and if so, which union is to be recognised as a representative agent for employees in collective bargaining – should rest with employees.
 - The second principle is that collective bargaining (and representation) is likely to be most effective where employees covered by a union have a ‘community of interests’ that can be collectively voiced by this representative union. Without

this community of interests, unions cannot effectively represent those employees to whom they are supposed to be responsible.

- The third principle is that collective bargaining (and dispute settlement more broadly) will be fair and effective where employers and employees deal with each other 'in good faith'.

3.8 These three principles are operationalised through a number of elements which together form the institutional arrangement to certify unions as bargaining agents for a group of employees.

- The first of these principles is embodied in the use of a **balloting procedure** whereby employees have the opportunity to vote for or against representation by a union seeking to claim representative status.
- The second of these principles is given effect through the granting of representative status to a defined '**bargaining unit**' – or group of employees who, by virtue of the common workplace or occupational grouping, can be said to have a '**community of interests**', which can be coherently voiced and represented by a certified union.
- The third principle is enforced through a **good faith bargaining** requirement and prohibitions on using of specified '**unfair labour practices**' (defined by a the relevant statute, NLRB rulings or Courts).

3.9 In practice, these deceptively simple principles and the generic mechanism which defines the certification process have given rise to a considerable variety in the procedure of certification. There has been considerable research comparing the variations on the general model, identifying a range of strengths and weaknesses and impacts on the effectiveness of the recognition procedure and on the capacity of unions to bargain with employers.

The typical process for certification

3.10 The typical process required for a certification election is summarized in Table 3.1 below. This summary suggests that from the commencement of an organizing drive through to the election ballot day can typically take around 80 days. Around 20 percent of all petitions for certification filed with the NLRB take considerably longer than this.

3.11 Table 3.2 provides a summary of the typical time-line for a certification process in the US.

- Under NLRB rules, a union may request an election if at least 30 percent of employees in an appropriate bargaining union sign authorization cards (i.e., delegating representation rights to the relevant union). Typically, most unions actually wait until they have signed at least 60 percent of employees before filing a petition for recognition. Even before filing a petition, most unions will seek voluntary recognition, which is typically refused.

- Once the petition for recognition has been filed, there will be a hearing to before the NLRB to contest the appropriateness of the bargaining unit, the Board’s jurisdiction, or the union’s status as a labour organization.
- Following the hearing the regional NLRB Director will make a determination concerning the issues contested at the initial hearing, and in the absence of agreement, set a date for the election.
- Both sides are free to campaign for the ‘yes’ or ‘no’ vote, with the period between when the petition for recognition is filed and the election often being referred to as the campaign period. There are some limits on what an employer may do in this period. The Act specifically seeks to guarantee that an employee can freely exercise a choice for or against representation. Specifically an employer may not:
 - Threaten
 - Interrogate
 - Make promises
 - Engage in surveillance of employees
 - Solicit grievances
 - Confer benefits

Table 3.2 Chronology of Events in Typical Certification Campaign in the US

Event	Days between events	Cumulative number of days
Union meetings and card signing of new members.	-	-
Union files petition for election with NLRB	14 days	14 days
Hearing on determination objections to the proposed bargaining unit.	14 days	28 days
Written argument to NLRB on unit determination	7 days	35 days
NLRB issues “Decisions and Direction of Election”	14 days	49 days
Excelsior list of employees eligible to vote & their addresses provided by the employer to the NLRB.	7 days	56 days
Certification election.	23 days	79 days

Source: Stoles, Murphy, Wagner and Sherwyn (2001), p. 96.

Variations in the certification procedure

- 3.12 In both the US and Canada, there are two avenues for formal union recognition: voluntary and statutory certification.
- 3.13 As the term suggests **voluntary recognition** results from an employer voluntarily opting to recognise a union as the bargaining agent for employees in a defined “bargaining unit”.
- 3.14 Voluntary recognition is rare; although it should be noted that an increasing number of US unions have opted to pursue voluntary recognition campaigns rather than take the litigious and costly path of formal certification. This is discussed in detail below.

- 3.15 Typically, a union gains recognition through **statutory certification**. It is therefore appropriate to describe the industrial relations systems of Canada and the US as “certification models” of union recognition.
- 3.16 The procedure to determine whether a union is certified or not is administered by an independent agency, or labour relations board (LRB). A union seeking certification invokes the procedure by filing an application with the relevant LRB. The application must:
- *identify* the “bargaining unit”, or group of workers the union seeks to represent, and
 - be accompanied by evidence showing that a proportion (e.g. 30 %) of the workers in the proposed bargaining unit favour recognition.
- 3.17 If the union seeking certification can demonstrate the required level of support, then the LRB accepts the application, and determines the final composition of the bargaining unit based on the extent to which its constituents share a common interest in bargaining outcomes (for example in relation to wages, hours, and working conditions).

Variations in the balloting procedures

- 3.18 Having established a *bona fide* case of *representativeness*, the LRB is then left to determine whether a majority of employees who make up the bargaining unit are in favour of that union being certified.
- 3.19 There is some variation between jurisdictions as to how the LRB will make this determination of majority support for the union’s application.
- 3.20 In some provinces of Canada, there is provision for a ‘**card check**’. That is, the union must produce evidence to demonstrate that a specified majority of employees are members of the union seeking certification. This is taken as evidence of majority support for the unions application to be certified. This threshold varies from jurisdiction to jurisdiction. In most jurisdictions, a simple majority of employees in the bargaining unit need to be union members; while in Manitoba, the threshold is set at 65 percent of employees in the bargaining unit.
- 3.21 In those Canadian jurisdictions where the card check procedure is available, but the minimum threshold level of membership cannot be demonstrated, then the procedure reverts to a **secret ballot** of all employees in the bargaining unit. The secret ballot method of determining majority support is used in all Canadian provinces and at the federal level, and in the US system.
- 3.22 The secret ballot procedure is conducted by the relevant Labor Relations Board (LRB). In all cases, a simple majority of employees in that bargaining unit need to vote in favour of certification for the union to be recognised as the certified bargaining agent.
- 3.23 In six of the eleven Canadian provinces there is also provision for arbitration to determine whether a union is certified. This option, which is available where the LRB determines an employer has adversely influenced workers’ true level of support for the

union. Where the LRB finds this has occurred, then it may certify recognition without recourse to a secret ballot.

The consequences of certification

- 3.24 Certification provides a union with **exclusive representation rights** for employees within the bargaining unit, usually for a specified period of time. These representation rights extend to individual workplace issues, collective workplace matters, and collective bargaining. The principle of exclusivity means that the employer is prohibited from bargaining with individual members of the bargaining unit or with other unions in relation to a bargaining unit already represented by a union.
- 3.25 Once certified as the exclusive representative of employees in the bargaining unit, the union has the right to compel the employer to **'bargain in good faith'**. Good faith bargaining essentially requires an employer to enter into negotiation for a collective agreement and to behave in an ethical way. Here, labour boards have emphasized the manner in which negotiations have been conducted, considering criteria such as the obligation to meet with the other party, circumvention of the bargaining agent, mutual communication, the duty to supply information, the untimely use of economic sanctions, and the duty to complete negotiations. Occasionally, labour relations boards have considered the content of bargaining, e.g. legality of demands.
- 3.26 It is important to note that good faith bargaining does not usually require the parties to reach agreement. In other words, recognition does not automatically result in a collective agreement. In the US in particular, the incidence of unsuccessful contract negotiations is surprisingly high, with almost one-half of all new certifications failing to gain a first agreement.⁷⁸
- 3.27 In order to overcome this problem of establishing a first agreement, in some Canadian jurisdictions there is provisions for **first contract arbitration**. Where a newly certified union is unable to reach an agreement with an employer for a first collective agreement, the parties are able to refer unresolved matters to arbitration for resolution. While compulsory arbitration does not apply to subsequent agreements, most Canadian jurisdictions do provide conciliation and voluntary arbitration services and encourage employers and unions to use them in the event of *impasse* in negotiations.
- 3.28 Good faith bargaining also requires both parties to refrain from using **unfair labour practices (ULPs)**. ULPs are actions that infringe the rights of workers to organize and to collectively bargain. ULPs are prohibited expressly in the relevant legislation or as a result of a LRB ruling. In the US for instance, the *National Labor Relations Act* identifies five employer behaviours that constitute unfair labour practices (see the country summaries in the Appendix for a detailed discussion). In the context of certification and collective bargaining, dismissal of union activists for lawful union activity and failure to bargain "in good faith" are examples of employer acts that constitute ULPs.

The scope of collective bargaining

- 3.29 In the US context, the obligation to bargain in good faith is usually limited by the mandatory scope of bargaining. That is, the relevant legislation usually specified that both union and employer have a duty to bargain in good faith over “**mandatory subjects of bargaining**”, including pay, wages, hours of employment, or other conditions of employment.
- 3.30 The duty does not extend to “permissive” subjects, over which the parties may agree to bargain. In the US for example, the duty to bargaining in good faith does not extend to an employer’s decision to close facilities or the merger of bargaining units. These are viewed as managerial prerogative; i.e., business issues over which an employer has exclusive decision making rights.
- 3.31 This is not to say that such issues are not allowable matters for the purpose of collective bargaining. Rather the decision to negotiate is entirely at the discretion of management and the right not to negotiate over non-mandatory issues can be enforced.

The right to strike

- 3.32 Both the US and the various Canadian jurisdictions establish legal right to strike. The right to strike is limited to collective bargaining negotiations. In a manner similar to the Australian system, strike action only becomes legal once a collective agreement has expired, even if negotiations for a new agreement commenced before the expiry date. Political strikes are deemed illegal in all Certification jurisdictions.

Rights at the workplace

- 3.33 Overwhelmingly, basic employee entitlements, such as the right to be notified and/or consulted by the employer about various workplace matters, or access to a grievance procedure, flow from recognition and provisions contained in collective agreements.
- 3.34 Generally speaking, certification guarantees union the right to represent an individual in workplace issues such as grievance or disciplinary matters. Compared with European countries, consultation and information sharing rights are extremely limited. Rights to be notified about plant closures, for instance, are covered by federal laws in the US (the WARN Act). To the extent that these rights exist, they are usually contained within the terms of collective agreements. Similarly, grievance procedures and dispute settlement procedures in collective agreement typically provide for union involvement.
- 3.35 None of the Certification jurisdictions grant union rights of entry to a workplace for the purpose of communicating with members, investigating breaches of agreements or legal requirements or for the purpose of undertaking union business. Again, however, collective agreement may contain provisions which grant certain rights of access to union representatives for the purposes of monitoring whether a collective agreement is observed and to undertake union business.

- 3.36 The lack of access to workplaces is consequently most evident in the case of unions seeking certification. Beyond legal requirements to provide union representatives with an opportunity to make a case for certification, the lack of workplace access clearly limits the capacity of unions during certification campaigns. This is one area where employers, particularly large ones, have successfully stymied union attempts to organise and gain certification.

Decertification

- 3.37 The procedures for Decertification typically mirror those of recognition. Generally, a certified union is quarantined from applications for decertification for a minimum period of time (usually 12 months). A ban on initiating a decertification also applies where a collective agreement is in force.
- 3.38 In order to initiate the decertification procedure, an employer (or rival union) must make an application to the relevant LRB. An application for decertification must be supported by a significant proportion of workers in the bargaining unit. If this criterion is satisfied, a vote on decertification is generally required, decided on the basis of majority support.

Sanctions against non-recognition

- 3.39 Sanctions against employers who fail to recognise a duly certified union or engage in unfair labour practices typically involve the use of what are remedial rather than punitive sanctions. That is remedies are used to restore the status quo prior to the breach rather than penalise or provide any disincentive for an employer to breach good faith provisions.
- 3.40 Dismissal for union activity has proved a major problem for US unions over the decade. Between 1955 and 1980, for instance, it is estimated that there was a six fold increase in unlawful terminations for union activity.⁷⁹ While it is difficult to get data which allows us to track this trend after 1980, the chance of being dismissed for involvement in union activities is one in twenty.
- 3.41 Remedies against unlawful termination for union activities have proved difficult to enforce effectively, particularly in the US system. This is largely seen as a consequence of the individual (rather than collective) nature of remedies. Chief among them are provisions for interim relief against dismissal for union activity; however, this remedy is invoked in few cases.

Strengths of certification models of union recognition

- 3.42 We now turn to a consideration of the more general strengths and weaknesses that apply to both systems. Certification models of union recognition have three features which can be regarded as significant strengths:

- Exclusivity of representation rights;
- Union independence
- Specific rights that flow from certification
- Subordination of individual agreements to collective rights;
- Minimum periods of guaranteed certification

Exclusivity

- 3.43 We have already noted that Certification models provide the certified union with exclusive representation rights for all employees included in the bargaining unit.
- 3.44 The employer is thus prohibited from bypassing a recognized union to bargain with rival unions aspiring to gain certification for that bargaining unit.
- 3.45 In short, exclusivity restricts union competition and potential demarcation disputes which might arise where the membership eligibility rules enable more than one union to legitimately claim a right to represent that bargaining unit.

Union independence.

- 3.46 If exclusive coverage prevents demarcation and unproductive competition between unions, it can also be said to limit the capacity of an employer to use a 'beauty contest' to favour a union willing to behave in a compliant manner. This conduct has been a problem in some jurisdictions where employers can have a greater influence on who gets representation rights.
- 3.47 Certification models also generally outlaw attempts by employers to avoid unions by creating and 'recognising' bogus union organisations. Again, while this does not appear to have been a significant problem in the Australian context, the current arrangements which encourage the formation and registration of enterprise unions provide some incentive for employers to engage in this practice.

Specific rights that flow from recognition

- 3.48 The rights that flow from union certification are well-defined. A recognized union has the right to compel an employer to bargain "in good faith" with it in relation to the represented bargaining unit. Although the concept of "good faith bargaining" is somewhat vague and its utility contended, it does impose on the employer minimum behavioural requirements / standards that govern negotiations with the union.
- 3.49 The concept of mandatory bargaining matters also defines the scope of bargaining and compels an employer to negotiate over matters which they perhaps would not otherwise be willing to negotiate.

3.50 Here we recognise the creation of mandatory bargaining matters as strength in that it provides certainty to what employees and unions can expect an employer to negotiate over. We are also conscious, however, that the concept of mandatory bargaining matters can also be viewed as a weakness in that it may place restrictive limits on the range of issues a union can raise in bargaining. This is most evident say in the Australian context in the way the scope and number of allowable award matters has been altered, and the regulations providing the Minister with wide powers to reject a Workplace Agreement if it contains matters which he deems not appropriate.

Subordination of individual agreements to collective rights.

3.51 While there are many weaknesses with Certification models (see below), it could be argued that these systems are noteworthy for the fact they provide legislative force to the idea that *collective* bargaining (where employees prefer it and a union can reach an agreement) cannot be displaced by arrangements made directly with individual employees.

Guaranteed periods of recognition.

3.52 Recognition is granted to a union for a minimum period, typically twelve months. This quarantines the recognized union from applications for recognition by other unions in relation to the represented bargaining unit, as well as from applications for decertification (initiated by either the employer or a rival union). Moreover, certification systems generally impose a bar on both types of application during the life of a collective agreement. Thus, a recognized union enjoys guaranteed periods of institutional stability.

Weaknesses

3.53 These benefits associated with the certification mode of union recognition need to be balanced against a number of weaknesses, which are generally recognised as being associated with certification processes. It should be emphasised, however, that the extent to which these weaknesses represent a problem depends on the specific rules which govern the procedure. Below we attempt to explore this issue of the effects of relatively small changes in the procedure (see our comparison of the US and Canadian systems below), we outline a number of general weakness associated with certification procedures.

3.54 Unions generally claim that the certification process described above (Table XX) gives rise to a number of generic problems which undermine recognition and collective bargaining:

- Resource intensiveness and excessive legalism
- Harmful delays through litigation and appeals against a union's application;

- Employer intimidation
- Inadequate access to employees to communicate and make their case for certification; and
- No guaranteed representation rights
- An inability to secure a first contract.

Resource-intensive and excessive legalism

- 3.55 We have noted that when a union seeks certification it is to represent employees in a specific bargaining unit. Typically, a bargaining unit is confined to a single plant or enterprise, making for a decentralized bargaining structure. This feature renders the bargaining structure decentralised. Moreover, unions have rights to access a workplace without certification, irrespective of whether it has members at that workplace.
- 3.56 The highly decentralised system of representation and bargaining gives rise to resource-intensive organising and certification campaigns, especially in sites with low or no union membership. These campaigns can also be highly litigious as employers seek to prevent unions gaining membership and unions are forced to prosecute employers for committing unfair labour practices. Some unions have also resorted to legal strategies such as 'salting;' which involve having union activists gain employment or seek employment in order to prosecute an employer to be charged with unfair labour practices.⁸⁰
- 3.57 For each individual site, a union must replicate the process of managing a certification / recognition campaign, and, if successful in gaining recognition, negotiate and administer a collective agreement.

Harmful delays through appeals against a union's application

- 3.58 The excessive legalism creates a considerable capacity for an employer to delay the certification process by appealing various aspects of a union's application for certification. This is a problem specific to the US, however (see discussion below) where there is no time limit on the process for certification. Nonetheless, the evidence suggests that these delays are associated with a significantly lower probability of certification election win for the union.
- 3.59 These appeals typically relate to objection concerning:
- the union's definition of what constitutes the bargaining unit and claims that the community of interest test is not met.
 - the jurisdiction of the Board to accept the petition for certification and proceed with an election;
 - the *bone fides* of the union itself as an independent labour organisation;
 - the genuineness of signed cards and whether a union exercised duress to gain delegation form individual employees.

Employer intimidation

- 3.60 While there are wide ranging limits on what employers can and cannot do during the campaign period, unions report widespread breaches of these requirements. Employers who are intent on remaining union free typically hire an external consultant (typically lawyers) specializing in union busting. Generally, the greater amount of employer communication during the campaign period, the lower is the probability that a union will prevail in a certification election. Numerous studies have found that an active campaign against unionization, involving lawful acts and, often, borderline or outright prohibited acts, have a significant impact on the election result. These tactics include:
- Captive audience speeches to employees.
 - Direct or indirect threats concerning the potential effects of union membership or union certification.
 - Personal campaigns by supervisors.
 - Salting (i.e., hiring non-union labour into the bargaining unit) prior to the certification election
 - Firing active or prominent union supporters.

No guaranteed representation rights

- 3.61 It will be recalled that union recognition and collective agreements are the principal sources of employee representation rights in North America, and that recognition is the prerequisite for a union to represent workers in collective bargaining. This means that where a union is unable to gain recognition, employees who are union members are denied the benefits of *representation rights* in workplace matters. This holds even where a significant proportion of employees are union members (e.g. 45 percent) but do not constitute the required proportion to initiate a certification procedure, even where a card check procedure is available.
- 3.62 Moreover, the use of a minimum membership threshold requirement to initiate a certification ballot or certification under a card check procedure provides strong incentives for employers to campaign against union organising in order to keep membership below that threshold.

Certification stigmatises unionised workplaces.

- 3.63 A number of commentators have also suggested that under a certification procedure, when a union is successfully certified as a representative agent, it can be interpreted as an indication of poor labour management within the organisation. In this sense, certification is often interpreted as an aberration, rather than a normal state of affairs in

the workplace or a legitimate *expression / manifestation* of workers' wishes to gain independent representation at work.

- 3.64 Many employers go to great lengths to avoid unions becoming established, and workers who seek to unionise are seen as disloyal for “breaking” the implicit understanding of a “union-free” employment relationship. The potential costs to workers supporting a union are high, since they risk being punished by the employer for their “disloyalty”, with victimization of union activists common. For workers, the risks associated with unionising for certification may thus outweigh the benefits of achieving union representation.

Canada and the US compared

- 3.65 Although the industrial relations systems of Canada and the US are both based on the certification model of recognition, there are important differences in how the model operates in each of these countries. A number of these differences have already been highlighted. Here we briefly outline some of the operational differences between the Canadian and the US variants of the certification model, and the impact on effectiveness of the procedure

Card check v secret ballots

- 3.66 The majority of Canadian jurisdictions make some provision for a card check procedure to determine recognition. Card check arrangements have been associated with higher rates of success in applications for certification.
- 3.67 This is often interpreted as indicating a more effective procedure with fewer opportunities for employer interference in employees exercising the right to choose union representation.
- 3.68 Procedurally this is true in the sense that it provides employers with fewer opportunities to subvert the process. However, there is no evidence that a card check arrangement has been associated with a greater capacity to organise and gain certification outside of workplaces/sectors where unions are strong. Higher rates of success may simply reflect the fact that unions are stronger, not that the procedure is superior. From this perspective, it is not clear that unions would be less likely to gain certification in these workplaces under a balloting procedure.

First contract arbitration

- 3.69 The majority of Canadian jurisdictions provide for “first agreement arbitration”. The “threat” of first contract arbitration provides an incentive for employers to negotiate with unions with a view to actually concluding agreements.

- 3.70 The absence of first contract arbitration in the US is reflected in relatively poor capacity of newly certified unions to gain a first agreement. First contract arbitration provides a significant advantage for ongoing support for union recognition after initial certification.

Replacement of employees engaged in strike action

- 3.71 Employers in the US can replace striking workers permanently (i.e., beyond the end of a dispute), while the Canadian jurisdictions generally prohibits employers from using permanent strike replacements.
- 3.72 The capacity use strike replacements provides a strong disincentive to participate in industrial action. It also undermines the capability of unions successfully concluding collective agreements.
- 3.73 In the US, these effects are significantly greater with the ability of an employer to use permanent strike replacements. With the prospect that union activity and representation may in fact be associated with replacement, it is also likely to be associated with a disincentive to support union representation in the first place.
- 3.74 While strike replace rules are disadvantageous to unions generally,. The use of permanent replacements represents a significant advantage for the Canadian unions over their US counterparts.

Expeditious certification procedures

- 3.75 Compared with the certification procedure in the US system, the procedure in Canadian jurisdictions generally provides for a speedy process to determine the outcome of applications for certification.
- 3.76 As we have seen, there are no time restrictions placed on the certification process in the US. Moreover any employer objections need to be finalised before a ballot is taken. On average certification procedures take less than 50 to be finalised; with 20 percent of cases elections are held more than 8 weeks after the initial application was submitted. From a union perspective, a typical certification campaign is reported to take around 80 days from the commencement of recruitment of members to the actual election day.⁸¹
- 3.77 Compared with the US, the procedure is significantly shorter in Canada. In Canada, where a ballot is required, certification procedures take 10 days or less from the date the application is first made and the ballot for certification. Moreover, if a LRB is concerned about employer interference, then it can opt to conduct a pre-hearing vote within 2 or 3 days of an application for certification. In these cases the pre hearing ballot results count as the final ballot, with the capacity for the LRB to adjust the official vote based on any subsequent determination of the composition of the bargaining unit.
- 3.78 These different procedures provider Canadian employers with fewer incentives and opportunities to appeal certification applications (for instance, appeals against the composition of the bargaining unit). The shorter time period between lodging an

application for certification and the final certification ballot or determination also limits the opportunity for an employer to undermine workers' support for a union seeking recognition in the lead-up to certification vote.

Is the Certification Model conducive to union renewal?

- 3.79 The Certification Model of union recognition has a number of characteristics that render it poorly suited for organising non-union workplaces or poorly unionized sectors. In the main, it has proved useful in ensuring union recognition in those workplaces and industries where union presence was strong, but provided little relief to poorly organisations sectors and workplaces where employers have reed on aggressive anti-union tactics.
- 3.80 To begin with the high membership threshold required for initiating recognition procedures reduce the incentives for individual to join and increase the costs associated with running a certification campaign. These thresholds, we have already noted provide some incentives for employers to campaign against union organising, sometime through aggressive anti-union tactics and victimization of workplace union activists. Under the most conducive conditions, certification can be a difficult process, particularly in the US system.
- 3.81 Some commentators have also suggested that North American certification models have in some respects become victims of their own success. In the post-war period, in the absence of wholesale employer opposition, unions were successful in prosecuting certification campaigns. Where employers engaged in anti-union and unfair labour practices, courts (and the NLRB) amassed an impressive body of case law which effectively prescribes a range of behaviours. Irrespective of whether the certification process was intended to be informal and avoid legalism, these processes inevitably lead to greater formalism and use of legal method to resolve conflicts over recognition issues.
- 3.82 This perceived lack of managerial prerogative (flexibility) and growing legalism creates even stronger incentives for employer resistance. This has clearly been evident over time. Union certification, it has been suggested, not only introduces a union and collective bargaining, but along with it, a *pre-determined set of arrangements for managing industrial relations* determined by the NLRB.
- 3.83 Thus a key issue for any proposed system of recognition based on the Certification Model would require consideration to how the procedure could retain informalism and prevent legalistic approaches which inhibit the capacity of employers and (unions) to operate effectively within it.

Neutrality Agreements and Card Check Recognition in the US

- 3.84 Earlier in Section 3 we noted that there has been a growth in the use of voluntary recognition. The last decade has in fact seen a growing challenge to the statutory process through the use of neutrality agreements, struck between a union and an employer prior to union recognition being determined.
- 3.85 Neutrality agreements typically involve negotiating an agreement with a relevant employer that requires an employer to
- remain neutral during a union organizing campaign,
 - recognise a union as an exclusive representative if a majority of employees sign authorization cards delegating representation to the relevant union; and
 - engage in collective bargaining.
- 3.86 Around 2/3 of all such agreements provide for union access to the workplace. Most (around 90 percent of all neutrality agreements) also provide for binding arbitration to deal with disputes over the determination of the bargaining unit, allegations of non-neutral conduct by one party and other alleged breaches of the agreement.
- 3.87 Neutrality agreements were pioneered in the mid 1970s, but for many unions had become the dominant organisation by the late 1990s. Unions that regularly rely on neutrality agreements include the SEIU, UAW, UNITE-HERE and the CWA. They have emerged in a wide range of sectors, covering more traditionally unionized areas as well as areas of low union density. By 2005, NLRB elections no longer provide the dominant mechanism for determining whether employees gain union coverage or not. It is estimated that of the three million new union members organized between 1998 and 2003, less than 1/5 were signed up through certification organizing campaigns.
- 3.88 Why have neutrality agreements become so important? In essence these private agreements allow unions to overcome the main weaknesses associated with the certification processes.
- Neutrality agreements have proved far more successful than statutory certification. Comparative success rates by workplace (employer) size are as follows:
 - Between 1999 and 2003 unions won statutory certification elections in 60 percent of cases involving workplaces with less than 50 employees; in 42 percent of cases involving workplaces with between 100-499 employees; and in just 37 percent of cases involving workplace with 500 or more employees.
 - Overall, neutrality agreements have ended in union recognition around 78 percent of cases, with considerable success in larger workplaces., compared with around 40 percent for statutory certification in workplaces .
- 3.89 It will also be recalled that statutory certification does not guarantee a union will conclude a collective bargaining with an employer. Approximately 40 percent of cases do not conclude a first collective agreement following certification. The available

evidence suggests that where a neutrality agreement results in union recognition, an agreement is concluded in almost 100 percent of cases.

The Constitutional Model of union recognition

- 3.90 The three European economies reviewed for this report (Germany, Italy and Sweden) adopt what we term a 'Constitutional Model' of union recognition.
- 3.91 Although there are significant differences between some elements of union recognition found in each of these countries, the approach adopted nonetheless share a number of common features which distinguish them in fundamental ways from the certification models found in North America. Constitutional models of union recognition are defined by the following characteristics:
- The right to organise and engage in collective bargaining are rights which are enshrined in national constitutions,
 - These constitutional rights are given effect through enabling statutes, court established principles and collective bargaining arrangements.
 - Constitutional models of recognition are accompanied by more extensive recognition as political representatives for employees, incorporated formally in a range of government decision making institutions.
- 3.92 A critical difference is the extent to which unions are recognised at the workplace for purposes outside of collective bargaining and political decision making. In all three countries some form of works council or committee is the primary mechanisms for representing employee interests; but not all three forms of works council recognise trade unions. In Sweden and Italy unions enjoy statutory recognition as the primary representative agent of employee interests on works committees. In Germany, however, unions do not enjoy formal recognition on works councils, which are the primary mechanism for employee representation in individual grievance matters and collective workplace matters not covered by collective agreements. While unions are recognised for the purpose of collective bargaining, works councils are the primary institution of worker representation over workplace matters.

Constitutional Guarantees

- 3.93 The Constitutions of Italy, Germany and Sweden all include a protection of freedom of association in one form or another.
- The German Constitution protects the establishment of associations to safeguard working conditions (thereby defining what a union is for the purposes of German labour law).

- Italy specifically protects both the freedom of union organisation to conclude collective agreements that apply to all employees and freedom of association; while the Swedish Constitution protects freedom of association.
 - The Swedish and Italian constitutions also contain protections of the right to strike.
- 3.94 In all three cases, the constitutional right to organise is accompanied by either an explicit or implied constitutional right to take strike action.
- Although there is no explicit constitutional protection of the right to strike in the German constitution, Courts have been willing to interpret the freedom of association provisions broadly to include an activities associated with that right. Thus, it is seen to protect strike action and collective bargaining.
 - In the case of Italy, the right to strike is a constitutional right that can be exercised by both *individual citizens* and trade unions. Protection accorded the right to strike in Italy is very exhaustive and political strikes are permitted; and
 - In Sweden this right to strike is also explicitly protected, but is vested in trade union organisations rather than individuals.

Statute and case law

- 3.95 In all three countries adopting a Constitutional model of recognition, the fundamental protections enshrined in the Constitution are supplemented by statutes, which enable these fundamental constitutional protections by further elaborating protections for unions and their activities. In addition to these primary statutes, constitutional rights of recognition run through a range of other statutes regulating aspects of labour market arrangements. For instance, laws regulating the use of part-time and casual work, typically contain provisions requiring employers to recognise unions and negotiate over how such practices and used.
- 3.96 While none of the three countries provide for formal registration of unions – the legal status is presumed by the constitutional protections provided to employee organisations – both Sweden and Germany have attempted to establish a legal definition (and therefore personality) of a trade union (see discussion below).
- 3.97 Through legislation, Sweden has regulated the right of unions to represent workers, including representation on company boards and be informed and consulted in situations of collective dismissal. While there are no specific provisions prohibiting anti union conduct, in most cases such conduct will constitute a breach of a collective agreement and will be remedied accordingly. Importantly, most provisions of Swedish industrial relations legislation can be displaced by the provisions of a collective agreement.
- 3.98 Similarly, Italy's Workers' Statute of Workers Rights contains a number of protections for unions such as the ability to convene meetings, conduct secret ballots and have paid time off for union duties. It also established specific workplace level representation

through a form of works' council, which was later replaced by a new system agreed between employers and unions, and to which all relevant provisions of the Workers' Statute apply. Anti union activity is specifically prohibited by the Workers' Statute. In addition, Act 223/1991 requires unions to be consulted in the event of collective dismissal.

- 3.99 However, the most unique aspect of the Italian system is that legislation introducing flexibility practices (i.e., part-time, fixed term and casual contracts) also compels employers to negotiate with unions over the use of these legal instruments.
- 3.100 Social pacts are also important in regulating of union activities, in particular collective bargaining (see discussion below). Numerous social pacts have been negotiated over the years, their content broadening in scope of late.
- 3.101 German legislation enshrines its unique model of dualism where works' councils exist alongside unions as a complementary form of worker representation – works councils are the local incarnation of worker representation, while unions operate on a national scale. In reality however, the works councils comprise mainly union members (and therefore are merely vehicles for local activism by unions) and are found only in large companies. Other legislative protections include union rights of entry and the process for collective bargaining (see discussion below). There is also scope for employee representative on company boards, depending on the size of the company. Ultimately, protection of trade union activities flows from the fact that unions, and by extension, their activities are protected by the Constitution.
- 3.102 In addition to the core statutes which regulate the role of unions as workplace representatives, the constitution provides the foundation for the establishment of statutory recognition in other, subsidiary laws. For instance laws regulating collective dismissals and more recently, laws regulating the use of part time and casual work. These laws set out the rights and obligations of employers in relation to these types of employment decisions. Similarly to the Italian context, these laws include an obligation to consult and in many circumstances negotiate with the relevant union(s) over how such decisions are made and implemented in the workplace.

Collective bargaining institutions and union recognition

- 3.103 The collective bargaining arrangements in Germany, Italy and Sweden can be characterised as multi-layered. That is to say, collective bargaining occurs at a number of levels and, usually through some form of framework agreement, coordinated across levels.
- 3.104 In all countries reviewed for this study (but not all countries represented by the Constitutional Model of recognition) there is national/sectoral agreement negotiated through peak union and employer associations. These sectoral level agreements set the parameters within which bargaining at a regional and/or workplace level takes place. In both German and Sweden there is capacity for employers to opt out of sectoral level

agreements (once the current agreement has expired), either by withdrawing from the relevant employer association, or by agreement with the relevant union.

- 3.105 The gradual unwinding of highly centralised bargaining arrangements towards loosely coordinated bargaining at different levels has been a growing trend in all three cases. While there are important local variations, it reflects employer demands for flexibility, and a willingness of unions to sacrifice binding centralised bargaining or in exchange for continued recognition and influence in both the workplace and more generally. This is described greater detail in the Appendix.

Recognition as a legitimate social partner

- 3.106 The relevance of unions in Germany, Italy and Sweden extend beyond the boundaries of traditional industrial relations to issues which directly or indirectly impact on the lives of workers. It is this form of social corporatism which is characteristic of these three countries (but not necessarily all countries represented by Constitutional forms of union recognition).
- 3.107 The relevant constitutional protections are couched in rights based language, incorporating freedoms set out in the relevant international human rights documents. This perhaps stems from the traditional influence of social democratic politicians in each of the countries. From this basis, the right to exist as a trade union has not only ensured a union's presence in a workplace, but an ongoing relevance to society as a whole.

Strengths and Weaknesses

- 3.108 The obvious key strength of the constitutional model is its constitutional provisions. Constitutional protection of the right to form a union, engage in collective bargaining and take strike action generally means that unions do not need to engage in workplace by workplace battles characteristic of the Certification model countries described above. The social democratic tradition of much of Europe has led to a general acceptance of unions as a legitimate social partner.
- 3.109 The obvious strength associated with the Constitutional Model of recognition is that there is limited scope for statutes or agreements to explicitly undermine these rights, as more recent legislation concerning labour market flexibility arrangements suggest.
- 3.110 This does not mean however that unions do not face a challenge of securing ongoing recognition. However, there are other key features, which complement such protections and ensure the high level of support and safeguard unions and their activities.
- 3.111 The systems in Germany, Italy and Sweden afford various rights of representation to unions simply by virtue of the fact that they are a union. There are no restrictive requirements placed on unions in order to access these rights – they apply if the organisation is a trade union, which, in the case of Sweden and Germany is defined in

the legislation. This allows for collective bargaining coverage to remain at a very significant level despite a declining trend in union membership (density).

- 3.112 All countries have enacted legislation which complements the constitutional protections and gives effect to the broader ideas that the constitutional provisions express. Such rights include the right to collectively bargain, to carry on union activities in the workplace without recrimination, to convene meetings, to be consulted over technological change and restructuring and in Sweden and Germany, to be represented on the boards of certain companies. Accordingly, these automatic rights are a significant boost for unions in these countries who do not have to battle to be recognised for various purposes.
- 3.113 The existence of works councils or works committees in Italy and Germany have in effect facilitated union activity in the workplace by allowing worker representatives to act collectively. While not a union body per se (although reports suggest that most works councils largely comprise unions members), works councils represent a forum in which issues concerning the workplace are discussed and decisions are made on action to be taken. In Germany's case, works councils can even conclude collective agreements on certain issues. Accordingly, works councils act to legitimise activism in the workplace by providing an official forum in which it can occur.
- 3.114 Finally, framework agreements – either between unions and employers or occasionally including the government - form a significant part of collective bargaining regulation in the constitutional model countries. These agreements have allowed the parties to set the parameters for how collective bargaining takes place, in the process limiting government interference. This has meant that the parties are bound by a procedure with which they agree and, in theory at least, which they can amend to suit changing conditions without being constrained by the procedures of legislative change. Such agreements have arguably been able to contain the trend towards decentralisation of collective bargaining.
- 3.115 However, it is important to note that perhaps the underlying strength of framework agreements comes from the constitutional protection of the right to strike, which poses a significant incentive for employer organisation to engage with the union movement.

Hybrid Models of union recognition

- 3.116 In this section we consider models of union recognition that contain elements drawn from more than one traditional type of union recognition. This in part reflects attempts to overcome weaknesses associated with each of the two approaches.
- 3.117 Typically hybrid systems of recognition are of more recent origin and reflect significant shifts in principles of labour law in a specific country. Moreover, hybrid models are characterised by more complexity and variation than examples of either the Certification or Constitutional models. Here we review two relevant cases: The United Kingdom and New Zealand.

The United Kingdom

- 3.118 The UK system of industrial relations has historically been based on a tradition of 'voluntarism' with very little legal regulation of industrial matters. In response to high unemployment, wage and price inflation in the 1970s, however, there have been various attempts to regulate different aspects of industrial relations.
- 3.119 In the 1970s and 1980s, the UK government experimented with different schemes of formal union recognition based on the US model of certification. These were highly criticised by unions and other commentators and both experiments were abandoned. Following the election of the Labour government in 1997, debate around union recognition re-emerged and the current hybrid statutory recognition procedure became effective in June 2000 via provisions contained in the *Employment Relations Act 1999* (ERA).
- 3.120 While formal union recognition is an important conduit to employee representation rights in the UK for the purposes of collective bargaining, the system also provides more universal channels of employee representation irrespective of whether a union is recognized or not.
- 3.121 As in North America, the UK system provides for formal recognition of unions for the purposes of collective bargaining. There are three ways in which a union can achieve recognition in the UK:
- A union can establish a **voluntary recognition** agreement with an employer.
 - **Semi-voluntary recognition** refers to a situation where the union has made an application for statutory recognition, but the employer has subsequently agreed to voluntarily recognise the union before any formal determination by the CAC. If the parties are unable to agree to a method of bargaining, the CAC is required to assist them with reaching an agreement. If this fails and no agreement is forthcoming, the CAC is required to specify the method of bargaining to the parties.
 - **Statutory recognition** refers to those cases where an employer does not voluntarily agree to recognise a union and a determination needs to be made, which will involve a secret ballot where less than fifty percent of employees in the bargaining unit are union members.
- 3.122 The overwhelming majority of recognition is through voluntary agreement, with a secret ballot process proving a last resort mechanism to determine recognition. This reflects the philosophical underpinnings of the procedure. While the procedure adopts the language of the Certification models of North America, it is also based on the European notion of "social partnership" and consensus.
- 3.123 Where an employer refuses to voluntarily recognise the relevant union, the card check system operates as the default process to determine recognition. If more than fifty percent of employees in a bargaining unit are union members, the CAC is obliged to declare the union recognised.⁸² If however one of the exceptions to the default rule is

invoked, or if less than fifty percent of employees in the bargaining union are union members, then the CAC will conduct a secret ballot. If more than half of those voting, and at least forty percent of all employees in the bargaining unit vote in favour of recognition then the CAC will issue a declaration of recognition.

Figure 3.1 The UK Statutory Procedure

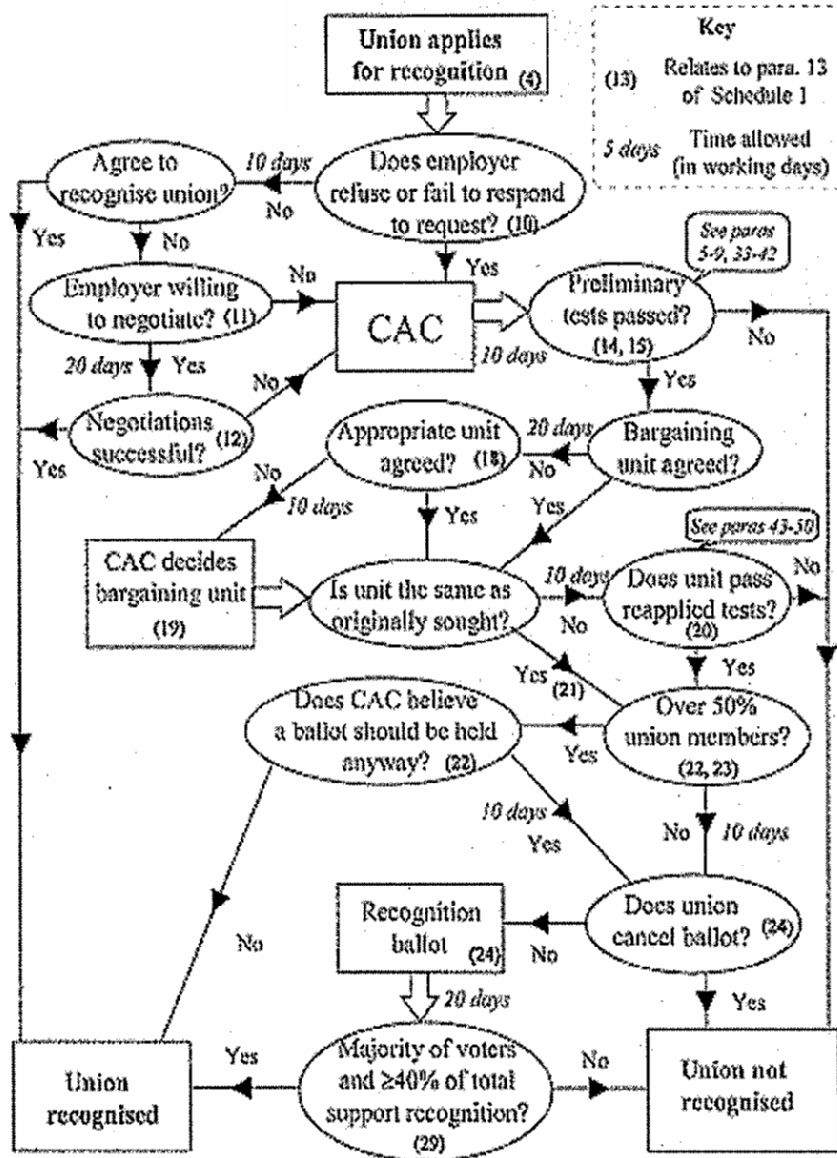


Figure 1: Statutory recognition procedure

Source: Explanatory Notes to the Employment Relations Act 1999. HMSO London

3.124 Consistent with the intention that it should be a last resort option, the statutory procedure is a burdensome, technical and multi-stage process. This reduces its attractiveness to the bargaining parties; and reinforces the tradition of voluntarism. Indeed, even once invoked, the procedure is designed to encourage employers and unions to make voluntary arrangements before it runs its entire course (“semi-voluntary” recognition). **Figure 3.1** provides a graphical summary of the various paths to statutory recognition. What is immediately obvious is the complexity of the procedure. As this figure shows, the procedure is potentially drawn-out. In 2004-2005, the average duration of recognition cases (excluding the final bargaining method stage) was about 20 weeks.⁸³

3.125 The UK model of recognition adopts a number of important elements of the North American system:

- The statutory procedure is based on majority support relying on either a card check or secret ballot to determine whether a union is recognised
- A union must be able to demonstrate worker support above specified thresholds before it can invoke the statutory procedure.
- Recognition is given to a union in relation to a specified “bargaining unit”,
- Recent amendments to the ER Act 2000 prohibit certain “unfair practices” in relation to recognition ballots.⁸⁴

3.126 Although the UK statutory recognition procedure appears very much like that of the North American jurisdictions, there are nonetheless significant differences between the UK system and those of North America:

- Unlike the North American systems, most unions gain recognition in the UK through the voluntary procedure;
- a UK employer who has recognised a union can negotiate individually with workers in the bargaining unit represented by that union. The employer has this right even after she has concluded a collective agreement with the relevant union.
- The statutory recognition procedure in the UK prohibits multi-employer bargaining units.
- The UK legislation excludes employees in small firms (ie, 20 employees or less) from invoking the statutory recognition procedure. It has been estimated that this threshold requirements excludes approximately 31 percent of the workforce from the recognition procedure.⁸⁵
- the UK systems provides for voluntary recognition agreements with employer-sponsored, non-independent unions.
- The UK system provides unions with some degree of recognition independently of the statutory recognition procedure. These rights, strictly speaking, are individual rights, but in some cases extend to union recognition over workplace matters.

- employees have a right (albeit narrowly circumscribed) to be accompanied by a co-worker or union official to a disciplinary / grievance hearing.⁸⁶
- Employees also have rights to be informed and consulted by employers over matters such as collective redundancies, business transfers, and health and safety matters.
- Further, employers with at least 1000 employees in European Union (EU) member states, and at least 150 employees in two or more EU member states are obligated to institute European Works Councils (EWCs) if requested to do so by their employees.
- More recently, employees in businesses with more than 150 employees gained additional rights to information and consultation over important workplace issues, such as the economic situation of the organisation or substantial changes in work organisation or contractual relations. Although rights to information (e.g. WARN in the US), and to a lesser extent consultation (e.g. OHS in Canada), can also be found in North America, the British arrangements are more comprehensive.

The UK Hybrid model and union renewal

- 3.127 The UK system has some advantages over the certification models of North America, particularly in terms of the incentives for employers to voluntarily recognise unions. However, as the preceding paragraphs suggest, there are some significant differences which many British commentators (including the UK Institute of Employment Rights) suggest undermine its effectiveness.
- 3.128 Since the statutory procedure came into force in 2000 there does appear to have been a significant “bounce” in rates of recognition. Many commentators have, however, suggested that this has simply served to formalise recognition where informally it had already existed, rather than to provide the basis to *extend* recognition to new workplaces. On this basis, it is reasonable to conclude that the introduction of statutory recognition in the UK has been a positive step, but no panacea for union renewal.

The New Zealand model of good faith bargaining

- 3.129 Historically, union recognition in New Zealand was based on a similar model to Australia. The arbitral tradition, however, was abandoned in the 1980s.
- 3.130 For the period 1991 to 2000, New Zealand industrial relations was regulated by the *Employment Contracts Act 1991 (EC Act 1991)*. This legislation as is well known involved a whole sale dismantling of arbitration and collective bargaining rights.
- 3.131 In 2000, the Clark Government introduced the *Employment Rights Act (ER Act 2000)*, which sought to re-institute regulation providing for collective bargaining and union recognition. The new Zealand model is included here as a “Hybrid model” because it

contains some elements of the old arbitral system (namely, union registration) and borrows the North American idea of 'good faith bargaining' as the primary mechanism to regulate collective bargaining and provide for union recognition.

Registration

3.132 The process for union registration under the *ER Act 2000* is a relatively simple process whereby a union must demonstrate they can meet a number of qualifying criteria. The union must demonstrate it:

- has at least 15 members.
- has been being incorporated and has a set of rules.
- operates at arms length from the employer, a requirement that has been narrowly interpreted by the Courts.

3.133 The membership requirement is sufficiently small to allow a number of workplace level unions to be established. In a number of cases this has included , some of which have been funded by employers to compete with the larger, traditional unions.

3.134 The *ER Act 2000A* also provides for deregistration where a union no longer meets the criteria for registration.

Benefits of registration

3.135 Once a union is registered it is bound by obligation to bargain in good faith. It should be noted that the duty applies to both collective bargaining and the ongoing relationship between a union and the employer. This obligation was recently extended to cover conduct designed to undermine collective agreements, and also prohibits misleading conduct and providing false information. However, the good faith obligation does not prohibit strikes or lock outs, which are specifically protected and regulated by the ERA, which limits their use to collective bargaining.

3.136 Collective bargaining can only be conducted by a registered union and the resulting agreement can only apply to union members. Once bargaining has been initiated, the parties are obliged to conclude an agreement unless there is a good reason why they have not done so. Parties are bound to bargain in good faith and must follow the procedures set out in the ERA, including as to provision of information. There is no restriction on what a collective agreement can contain, but there are certain clauses it must include such as a coverage clause, an end date and provisions for variation. As with other countries covered in this paper, collective bargaining in New Zealand is decentralised, but this is more a symptom of the system under the ECA, where bargaining was conducted by workplace specific employee associations.

3.137 All consultation rights, outside of collective bargaining, vest in individual employees, and as such there is no role for unions. However, it has become common for unions to provide for such consultation rights in a collective agreement.

3.138 Finally, the ERA provides protection for certain trade union activities such as meetings and rights of entry.

Strengths and Weaknesses

3.139 The New Zealand example shows how a country can attempt to rebuild a system from which unions had effectively been excluded by entrenching a number of union protections.

3.140 The importation of good faith into New Zealand industrial relations dealings offers protection from otherwise unfair labour practices both during and outside of collective bargaining. Not only does the ERA recognise unions as the sole organisation competent to conclude a collective agreement with an employer, thereby protecting their status and encouraging membership, but it also forces employers to show cause why an agreement could not be reached if negotiations do not produce an agreement.

3.141 However, the narrow interpretation of the arms length requirement has allowed employers to fund the establishment of unions at the workplace which might be more sympathetic than the traditional unions. It has been reported that such workplace unions do not necessarily identify with traditional union values and see themselves more as only a vehicle for negotiating a collective agreement.

Effectiveness of collective bargaining and recognition procedures.

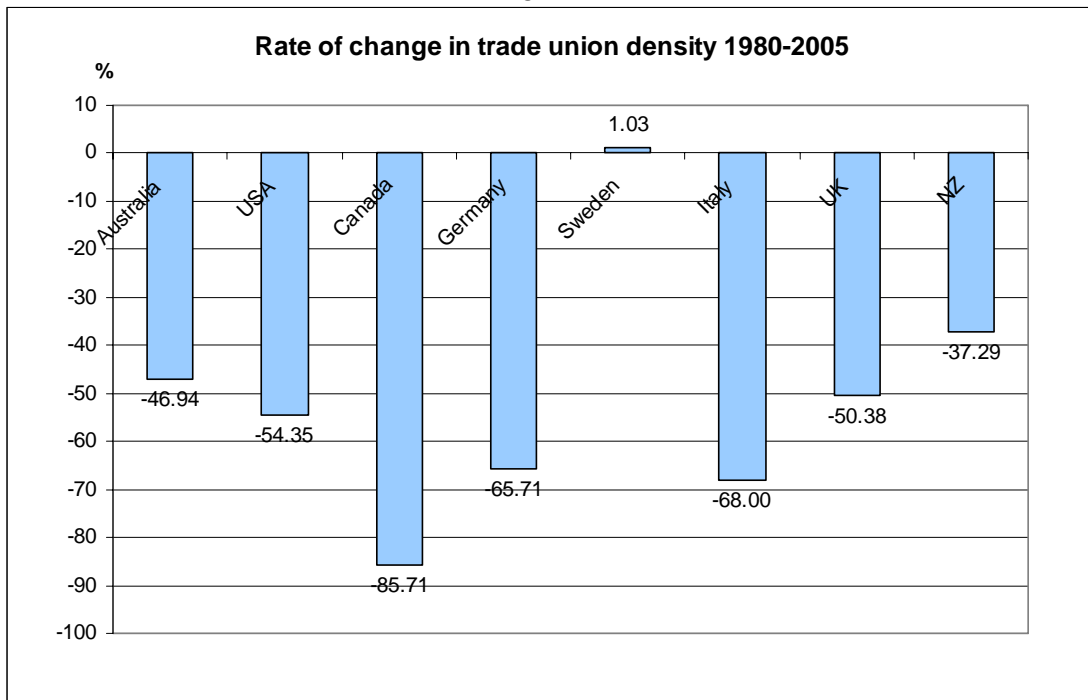
3.142 Can anything be said about the effects of different approaches on union membership and capacity to enforce collective bargaining rights? The general consensus answer to this question in the comparative research is in some ways surprising.

Recognition, collective bargaining and union density

3.143 **Figure 3.2** graphs changes in union density for each of the seven countries included in this study. Here no clear pattern between types of recognition model or collective bargaining arrangement and union density levels is evident.

- Canada, Germany, Italy and New Zealand have all experienced extremely large declines in membership over this fifteen year period.
- Australia, the US and the UK have all experienced largely (but slightly more modest declines).
- Sweden is the only case where union membership has actually risen in this period, albeit slightly. This is due to the fact that access to unemployment insurance is usually provided through union membership.

Figure 3.2



Recognition, structure of collective bargaining and collective bargaining coverage

3.144 Figure 3. XX summarised the relationship between bargaining structures and models of union recognition.

- The most notable pattern is that constitutional models of recognition have proved more conducive to centralised or coordinated collective bargaining structures than either certification or hybrid models (or the arbitration system).

Table 3.3 Models of recognition and collective bargaining structures

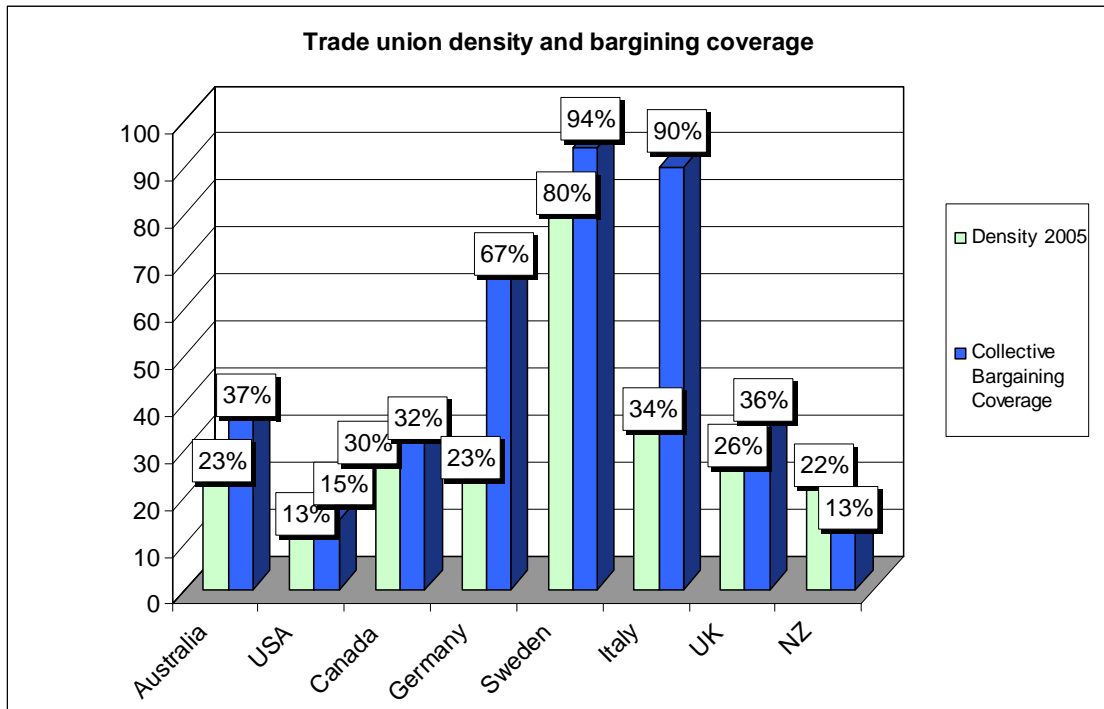
<i>Country</i>	<i>Model of Union Recognition</i>	<i>Collective bargaining structure (Centralisation/ Coordination)</i>
Australia	Arbitral	Decentralised/Enterprise
USA	Certification	Decentralised/Enterprise
Canada	Certification	Decentralised/Enterprise
New Zealand	Hybrid	Decentralised/Enterprise
UK	Hybrid	Decentralised/Enterprise
Germany	Constitutional	Centralised- Industry/Enterprise
Italy	Constitutional	Centralised- Industry/Enterprise
Sweden	Constitutional	Centralised- Industry/Enterprise

Union recognition, bargaining structure and collective bargaining coverage.

3.145 **Figure 3.3** provides a picture of union density levels (2005) and collective bargaining coverage (in 2002) for each of the countries included in this study.

- This figure clearly illustrates that countries with constitutional models of union recognition and centralised (or coordinated) bargaining structures have all retained comparatively high levels of collective bargaining coverage.
- Sweden is the only case where union density has proved resilient to the general trend of membership decline, and retained high union density and collective bargaining
- Both Germany and Italy have union density levels similar to the UK, but unions in the UK have not been able to maintain high levels of collective bargaining coverage.
- Australia and the UK have similar patterns of union density and collective bargaining coverage, with New Zealand being slightly less effective in retaining coverage.
- While Canadian unions have been able to retain high membership, like the US, collective bargaining coverage has largely shrunk to union membership only.

Figure 3.3



3.146 In summary, the evidence suggests no clear relationship between types of union recognition and union membership. However, it is clear that union recognition is associated with more centralised or coordinated bargaining structures, which in turn, is associated with more extensive collective bargaining coverage.

4. Alternative Approaches for the Australian Context: Issues for Consideration

- 4.1 The previous section has provided an overview of the range of alternative models for union recognition. Our selective review of seven countries suggest that, in addition to the Australian model of arbitral recognition (also shared with New Zealand until the 1990s), there are a number of alternative possibilities. For our purposes, we have categorised these approaches as falling into one of three other generic models: the Certification model, the Constitutional model and various Hybrid models. Each of these could, potentially, be applied to the Australian situation, along with aspects of the traditional arbitral model.
- 4.2 For instance, there is no reason why Australia could not adopt a Certification model of union recognition. But would this be the most desirable choice? We do not make this judgement here. But there are some elements which are commendable, and other elements which, in our view, do not provide adequate protection for unions or undermine the effectiveness of the certification procedure. Other elements do not provide employees with a capacity to choose union representation uninhibited by employer coercion.
- 4.3 In our view it would be extremely difficult for the Australian system to accommodate all elements of the Constitutional model. The fact is the Australian Constitution does not contain provisions protecting the right to organise and engage in collective action. But, even in the absence of explicit constitutional protections, are there elements which could provide some basis for a model similar to a constitutional approach? We believe this is a possibility.
- 4.4 We are also of the view that there is a great deal to learn from the experiences of the UK and New Zealand, who have tried to refine more traditional models by incorporating elements drawn from their own traditional systems, and borrowing liberally from a range of models found in many of the countries we review here. But at the same time, there are a number of problems associated with these which it is best to avoid.
- 4.5 Finally, in the process of looking for better solutions elsewhere, there is always a danger of 'throwing the baby out with the bath water'. The arbitral system still has a great deal to commend to it. To start with, the system provides more than 100 years of jurisprudence dealing with these issues. It would seem curious to us if any model of union recognition did not use elements of the traditional model of recognition in Australia to build an effective system for the future.
- 4.6 In this section of the Research Report we seek to outline how each of the following models – Constitutional, Certification and Arbitral – might be used in the Australian context, without advocating one model over the other. Nonetheless, we would suggest that something can be learned from the experiences of each of these, and a Hybrid approach, which also draws on the experiences of New Zealand and the UK, is likely to

provide a possible solution. Again, we do not wish to close off consideration of any particular approach, but we seek to sketch the broad elements of a workable hybrid solution for the Australian context.

A public policy perspective

- 4.7 Before we discuss each of the potential approaches, it is important to be clear about the basis we use for evaluating alternative approaches. Essentially, this basis is to apply a public policy perspective to the task. By this we refer to the range of criteria we use to evaluate options.
- 4.8 Public policy researchers take the perspective that any public policy intervention needs to balance out three considerations:
- **Effectiveness.** A policy should provide a mechanism to achieve its objectives, whatever these objectives are. In terms of a policy designed to facilitate a choice to be represented by a union at the workplace and in collective bargaining, then, the policy should be evaluated on whether it provides employees with the capacity to choose union representation without concern for victimisation and discrimination in employment.
 - **Responsiveness.** Refers the extent to which a policy is responsive to changing circumstances and the needs of the parties regulated by that instrument. In terms of a union recognition procedure, this criterion implies that the rules governing access to a statutory procedure should at least be responsive enough to enable both individuals and unions to enforce the rights it intends to provide. In circumstances where, say, employer strategies designed to circumvent recognition and the obligation to bargain do not breach the letter of the law, then the rules should be alterable to ensure the intention is achieved.
 - **Coherence.** In the process of being responsive, changing rules can lead to its own problems. The regulatory framework may as a consequence respond to a particular need but generate its own internal tension, undermine some of its other objectives, or have unintended consequences. In the US for instance, the accumulation of NLRB rulings have been associated with a degree of inflexibility in collective bargaining processes to such an extent that it has created added incentives for employers to avoid formal recognition and collective bargaining. Similarly, employer capacity to delay recognition procedures through litigious action has made using formal certification costly for both employees and unions. We saw some unions have circumvented the formal procedure altogether and looked to informal voluntary recognition agreements with employers.
- 4.9 Having outlined these criteria, we now turn to the question of how each of the general models of union recognition could be applied in the Australian context. We start with a consideration of a certification model, and then deal with a constitutional, arbitral and hybrid model in turn.

The Constitutional model of union recognition: lessons for Australia

- 4.10 We have already indicated that we do not think that the Constitutional model can be applied in a coherent way in the Australian context. This is because the rights of recognition are founded on immutable rights specified in a national Constitution. These are not rights which are explicitly provided for in the Australian context.
- 4.11 For instance there is no explicit provision in the Australian Constitution that provides for a right to associate, or organise for collective purposes, or to take strike action. Yet these are basic rights recognised in a range of international covenants, such as the *International Covenant on Civil and Political Rights 1966*,⁸⁷ and the *International Covenant on Economic, Social and Cultural Rights*.⁸⁸
- 4.12 Notwithstanding this obvious absence, there are several elements of a Constitutional system that might be successfully integrated into an Australian model of union recognition. In particular, we draw attention to a number of the legislative provisions which might nonetheless offer guidance as to how unions and their activities could be better protected in Australia, even without the underlying support of the Constitution.⁸⁹
- 4.13 One of the most important aspects of a Constitutional model is the *automatic* recognition of unions as the representatives of employees who have chosen to be union members. Although these rights generally flow from the protection of unions in the Constitution, a similar effect might be achieved through legislation. Accordingly, an analysis of the supplementary legislation which offers the substantive protection reveals provisions which could be implemented in Australia.
- 4.14 The best example of such enacting legislation is the *Trade Union Representatives (Status at the Workplace) Act 1974 (TUR Act 1974)* in Sweden. It clearly protects trade union representatives at the workplace from discriminatory treatment based on their activities, and explicitly prohibits employers from hindering the duties of trade union representatives as long as their work is not unduly impacted. In addition, the *TUR Act 1974* provides for paid time off for trade union duties at the place of work and prioritises representatives for continued employment in cases of redundancy, in order to maintain union presence at the workplace. A full text of this Act is provided in the Appendix to this Research Report.
- 4.15 The other notable and unique aspect of the Swedish Constitutional model is the ability of unions (and employers) to opt out of certain legislative provisions if they can agree on *replacement* provisions to be included in a collective agreement. This encourages the parties to negotiate their own terms which might better suit their conditions. This type of arrangement provides an inbuilt responsiveness in regulatory arrangements to the needs of the parties, without either compromising the effectiveness or cohesiveness of the statutory protections in place.
- 4.16 The use of workplace committees and works councils as a mechanism for worker voice was identified as a core feature of the Constitutional model. These councils present an additional opportunity for dialogue and consultation with employers, and an opportunity to

access business information that might otherwise be unavailable to employees and their representatives. Depending on how such arrangements were established, we believe they might provide an effective means to promote union representation over workplace matters. In making this observation, we note that the integration of workplace union representation through works committees in Sweden and Italy is probably more consistent with this objective than the dual system of representation in Germany. Moreover, the use of workplace consultative committees and other arrangements already in existence in some Australian workplaces might provide the basis for such an institution to be fostered. Some consideration will have to be given, however, to whether alternative worker representative structures (like works councils) should be established for information and consultation purposes, in workplaces with no union presence or no existing employee representative structures (eg enterprise bargaining or OHS committees).

- 4.17 Another feature of the Constitutional systems that could be adopted in the Australian context is legislation that enhances flexibility *and simultaneously*, union recognition rights to bargain over such changes. We have noted that in Italy, Sweden and Germany regulatory provisions that increased the employers ability to 'flexibly' utilise the workforce have been accompanied by safeguards that compel firms to recognise unions and bargain with them over the conditions of flexibility terms.
- 4.18 Finally, effective union recognition may be enhanced by arrangements that facilitate coordinated bargaining through framework collective agreements. As was evident in the cases of both Italy and Sweden, these framework agreements do not preclude workplace collective agreement making, but may in fact be a useful institution to facilitate it. It is reasonable to anticipate considerable employer opposition to such an arrangement. Unlike many European countries, Australian employers are not represented by unified peak associations; typical of Anglo-American countries, employer associations are fragmented and relatively unorganised. This may of course impact the political feasibility of framework agreements at a national level. More conceivably, labour law reforms could be considered to promote industry level or sectoral framework agreements.
- 4.19 In summary, while the Constitutional model could not be transplanted *in toto*, there are several protections afforded to unions which could be implemented in Australia without the Constitutional foundation and support that is found in the countries analysed.

The Certification Model of union recognition: a model for Australia?

- 4.20 In this section of the Report we consider how the certification models of union recognition of North America might work in the Australian context.
- 4.21 It will be recalled that there are important differences in how the model operates in Canada and the US. We earlier suggested the Canadian variant of the certification model is superior to that operating in the US, and have identified some of the principal reasons for its superiority.

- 4.22 Nevertheless, the Canadian version is far from perfect, and any Australian adaptation of the certification model ought to consider the North American experience with, and, more generally, the inherent weaknesses of, the model as a basis for union recognition.
- 4.23 Certification models require the establishment of rules which prescribe the following:
- (i) the mechanism for establishing majority support for union recognition;
 - (ii) the process for determining which employees are to be covered by any recognised union (the bargaining unit);
 - (iii) the time limits within which recognition should be determined;
 - (iv) the scope for employers to influence employee decisions, the determination of what constitutes a bargaining unit, and whether these appeals can delay the process;
 - (v) the nature of any sanctions against employers unfairly seeking to subvert the exercise of employee choice over union recognition;
 - (vi) a choice as to whether certification provides exclusive recognition for the purposes of collective bargaining only, or provides a broader industrial recognition which includes workplace representation, information sharing and consultation rights.

The procedure to determine employee support for union recognition

- 4.24 The procedure should be free of legalism, or ability for the process to be delayed once an application for recognition has been made. Here the role of industrial tribunals is important – by their nature, they provide a capability to avoid legalism in making determinations.
- 4.25 The method by which support for recognition is determined should limit the ability of an employer to intimidate employees in their exercise of choice. A central feature of the certification model is its reliance on an electoral mechanism to determine whether there is majority support for the recognition of a union. This electoral mechanism involves a secret ballot as the default method. The main problem associated with ballot procedures concerns the inherent delays between any application for recognition and the ballot. These delays provide opportunities for employers to unfairly discourage workers from voting in favour of union recognition. The US experience demonstrates that employers are only too willing to use these opportunities.
- 4.26 As is the case in the UK hybrid model, there is also a case to support a procedure in which the secret ballot is a method of last resort.
- 4.27 There are other procedures, consistent with the certification model, to determine whether a majority of employees support union recognition.
- As we have noted, a card check of union members is more effective than a secret ballot arrangement as it avoids opportunities for employer interference.

- A formal petition signed by workers favouring recognition could replace a secret ballot. The availability of “recognition by petition” could help to eliminate the climate of adversity and employer intimidation of workers so commonly associated with North American recognition ballots. The petition option would be especially attractive in sites with low union density where the prospect of gaining recognition on the basis of union membership is remote.
- The British hybrid model indicates that the use of petitions in relation to recognition is a feasible concept. In Britain, petitions can constitute part of the evidence which demonstrate that the majority of workers are likely to favour recognition and that a determination of recognition should be made.

4.28 A different approach could see the Australian version modelled more closely on the Canadian jurisdictions that provide for recognition by ballot as well as card check. As in Canada, the timeframe between a union’s application for recognition and the ballot should be prescribed and short, thereby strictly limiting the time available in which an employer can potentially undermine a union’s recognition campaign.

4.29 The card check method could be imported directly from Canada, although here too variations could be imagined. A union unable to meet the threshold required for a card check (say, fifty percent of employees in the bargaining unit), but nonetheless can demonstrate significant levels of membership could be granted a less comprehensive range of recognition rights. Guaranteed rights to consultation, for example, could be conferred on a union that can demonstrate at least 30 percent membership. This would change the nature of the certification procedure, modifying it from an “all or nothing” contest into a guarantor of at least some recognition rights where a union has substantial (albeit not majority) membership.

Determining the ‘bargaining unit’.

4.30 The determination of which employees are to be covered by a bargaining unit – *at least for the purposes of collective bargaining* – should reflect the extent to which employees have a ‘community of interests’. In many regards, the concept of ‘conveniently belong to’ is one means by which this could be determined.

4.31 This may cover only some parts of the workforce employed within a single workplace, all employees in a single workplace, or, where an employer is constituted by a multi-establishment operation, then there should be capacity to have a bargaining unit that extends to more than one workplace within a business.

4.32 There may also be a case to consider circumstances under which a bargaining unit could be defined as including more than one workplace not owned and operated by a single employer. This for instance, might reflect, supply chain arrangements in which firms at the end of the supply chain are able to exercise considerable influence over the production and work arrangements in a supplier firm.

Time limits

- 4.33 Procedures without time limits act against effectiveness. Extended timelines for determining recognition provide an employer with the capacity to use appeals in a “war of attrition”, such that workers who would otherwise favour recognition are discouraged from supporting union recognition.
- 4.34 For this reason, employer appeals against an application for recognition or determination of the bargaining unit should not provide a basis for delay in instigating whatever procedure is used to determine support for recognition. These appeals can follow the procedure (say, the ballot of employees) and adjustments could be made to account for the outcome of those appeals.
- 4.35 Again these appeal processes should provide for a minimum of legalism in their application.

Capacity of employers to intervene

- 4.36 Employer capacity to intervene is a vexed question for union recognition procedures. On the one hand the overriding principle should be that employee choice about recognition should be the primary factor in determining both the coverage of a bargaining unit (i.e. employees should be able to determine the question of whether a community of interests exists), and whether a union should be recognised.
- 4.37 Nonetheless, there are several potential grounds on which employer intervention in the procedure might be warranted.
- Where the employer has evidence to suggest employees are coerced into union membership or supporting an application for recognition;
 - Where an employer has evidence to believe that employees are not *bone fide* union members or were provided with inducements to join for the purposes of making an application for union membership;
 - Where a union seeking recognition engages in unfair practices which are likely to influence the nature of employee choices (for instance, distributing false and misleading information);
 - Where in the employer view there is no community of interests between all groups in the proposed bargaining unit.
- 4.38 Again however, these appeals should not provide the basis for delaying the procedure to determine recognition; but may provide a basis for a review of the outcome and potentially to overturn a recognition result, where genuine concerns of the type described above can be made out.
- 4.39 Finally, there is considerable scope in the Australian context for unions to consider using some form of neutrality agreement as both an organising and bargaining strategy. This

however would require some adaptation in the current context to ensure such agreement met the provisions and regulations under the *Work Choices Act*.

Sanctions

- 4.40 It will be recalled from Part 3 of this Report that Certification systems relied principally on restorative or remedial sanctions: that is, remedies which restore the status quo prior to the breach or require an employer (or union) to do what the law required of them in the first place. Generally these systems do not provide punitive remedies by imposing costs on the offending party. Arguably, this provides no positive incentive to observe recognition procedures or respect the obligations that arise as a consequence of recognition.
- 4.41 A more traditional regulatory regime would suggest more punitive sanctions that impose costs and act to deter employers' using such tactics. This in turn is reliant on the risk of being prosecuted and convicted for any breach. We are of the view that consideration of more punitive sanctions to back recognition procedures is warranted.
- 4.42 At the same time, we are conscious of a great deal of research on effective regulation, dealing with a variety of similar problems (for instance, environmental regulation) which has found traditional punitive sanctions are not so effective in eliciting compliance. This research suggests that forms of co-regulation can provide a stronger basis to ensure compliance. This is reflected, for instance, in the process by which the New Zealand Code of Good Faith Bargaining was developed.

Exclusivity

- 4.43 It will be recalled that the Certification model granted exclusive rights of representation for all employees within a bargaining unit, irrespective of whether those employees voted in favour of recognition. Exclusivity implied that no other union could initiate certification or claim to represent some grouping within the bargaining unit.
- 4.44 In the UK case, we also saw that recognition did not preclude the right of employees to be represented by another union in relation to workplace issues; recognition was for collective bargaining purposes.
- 4.45 While the "conveniently belong" provisions in the federal legislation were an integral part of the Australian system, in practice these did not prevent (for example) large workplaces in Australia being covered by more than one union.
- 4.46 The adoption of a certification model challenges this approach. Again, however, it is possible to reconcile exclusivity principles of certification models with the Australian tradition of multiple union representation. This again might require unions to establish workplace structures to provide for a unified channel of representation in collective bargaining (such as a joint union committee), or legislative provisions which give powers to the AIRC to make orders in relation to coverage for the purposes of bargaining.

The scope of bargaining.

- 4.47 It will be recalled that the US system provided that the duty to bargain in good faith applied only to mandatory bargaining matters. If Australia were to introduce a certification model of recognition, should legislation define the scope of bargaining? International experience suggests that this has both advantages and disadvantages.
- On the one hand, where the scope of bargaining is defined, recognition gives a union a guaranteed range of matters over which it can compel the employer to bargain.
 - On the other hand, employers may refuse to bargain over matters above and beyond those they are legally required to as a result of a union becoming recognized.
- 4.48 One way of reconciling this dilemma may be to introduce an expansive list of mandatory subjects of bargaining building on the pre-Work Choices Act 2005 provisions relating to “allowable matters” in awards. While the concept of allowable award matters may have served to limit the scope of bargaining over the last 10 years, this approach could in fact be beneficial to unions with limited industrial muscle who could seek intervention from the AIRC (for example) to direct an employer to negotiate over the guaranteed, expanded range of “allowable bargaining matters”.

The obligation to conclude an agreement

- 4.49 Where a union has achieved recognition for collective bargaining purposes, this is of little value unless recognition translates into a collective agreement. This is most clearly evident in the case of the US where a large proportion of union certifications are not matched by collective agreement outcomes.
- 4.50 The Canadian policy of first contract arbitration suggests that it may be desirable to, say, extend the arbitral powers of the AIRC at least in relation to first contract negotiations.
- 4.51 One question is whether the arbitration option should be confined to first agreements, or be made available also in negotiations for subsequent agreements. Again, this raises the question of when and under what conditions the AIRC should be capable of exercising its arbitral powers (see further paras 4.63-4.66 below).

Revitalising the traditional model of union recognition in Australia

- 4.52 In Parts 1 and 2 of this Report, we analysed the traditional Australian model of union recognition and how it has changed in the last 20 years or so. Our conclusion was that the protections afforded to unions have to a large extent been eroded by successive legislative changes since 1988 – especially those implemented by the Coalition Government since 1996.

4.53 An important issue to address in considering how best to provide statutory protection for union recognition and collective bargaining rights into the future, is whether the traditional model of union recognition might in fact provide the most appropriate basis. That is to say, are the elements of the traditional model able to be revitalised to deal with the challenges unions face today? Again, we do not intend to provide any definitive view on this question, but we do hope to raise issues which might inform just how this question is addressed.

Union registration

- 4.54 As we saw in Part 1 above, union registration is a core element in the provision of both legal and industrial recognition in the Australian context. The current regime however, is focussed less on acknowledging the legitimacy of unions to represent their members in various capacities, and more on regulating the aims and activities of trade unions in Australia. Therefore, registration provisions could be amended to shift the focus away from monitoring the activities of a registered union to providing unions with an avenue of formal recognition in relation to broad collective bargaining and workplace issues.
- 4.55 We also saw in our discussion of the New Zealand model in Part 3 that this Hybrid model of recognition re-established a registration procedure for the purposes of enabling union recognition and good faith bargaining. This could provide a good starting point for Australia. So long as unions satisfy basic criteria (independence from the employer, incorporation, minimum membership levels, etc) a union may be registered. Registration binds a union to the good faith obligations, and entitles a union to engage in collective bargaining and industrial action, and to a basic level of consultation with employers. Unions can be de-registered if they cease to meet the requirements of registration.
- 4.56 Union registration under Australian federal industrial legislation could be re-fashioned for this purpose. The “conveniently belong” provision of the *WR Act* remains in place (albeit in a slightly different form), along with capacity for the AIRC to issue orders relating to coverage and seek changes in eligibility rules as a pre-condition for registration.⁹⁰
- 4.57 ***It is not so much registration provisions that require a major re-think in the Australian context, as provisions concerning the rights and obligations that are attached to recognition.*** In particular, we draw attention to the following issues:
- (i) representativeness and exclusivity,
 - (ii) the role of conciliation and arbitration in a bargaining regime and the obligation to bargain in good faith; and
 - (iii) rights of entry.

Representativeness and exclusivity

4.58 We do not have any definitive view on this issue, but recognition for the purpose of collective bargaining might require some consideration of whether a union seeking to be

recognised by an employer is a representative agent capable of concluding an agreement on behalf of employees within a workplace.

- 4.59 In the Australian context there is also the vexed question of whether representation rights are somehow endowed on one union to the exclusion of others, at least in relation to a single workplace.
- 4.60 In the UK, Professor Keith Ewing has proposed an incremental set of representation rights that are attached to the extent to which a union can legitimately claim to represent employees.
- Where an employee is a member of a given union, an employer could be automatically required to recognise that union as a bargaining agent in individual employment matters;
 - Where a union is able to demonstrate a significant but not majority support for recognition, then this might confer on an employer some additional obligations to recognise the union for collective purposes: for instance, advanced notification of major workplace changes, consultation over such changes and their effects on employment;
 - Where a union is able to demonstrate majority support, this could be taken as conferring a right to be recognised for collective bargaining as well as for the other purposes outlined above.
- 4.61 Taking up such a proposal would not require the use of a secret ballot, but perhaps one of the alternative mechanisms (eg, card check, petition) highlighted in the discussion on certification models.
- 4.62 There remains a question of whether recognition in this third sense might imply exclusive rights of representation. Again, in the Australian context, multiple union representation in a given workplace has been a persistent feature of the system and could be accommodated.

Compulsory arbitration and good faith bargaining

- 4.63 One critical element concerns the narrowing of the compulsory arbitration powers of the AIRC since 1996 (see Part 1 above). Utilising the experience of other countries, there are perhaps a number of available options which involve restoring (some of) the AIRC's arbitral powers.
- 4.64 The first option might be use the Canadian example and provide greater access to workplaces which do not have a Workplace Agreement in place, or have not previously concluded an agreement with the union in question. For instance, where there is a genuine attempt by the parties to reach an agreement then there should be provision at least for the AIRC to use its traditional conciliation and arbitral powers to resolve outstanding issues.

- 4.65 If the AIRC does not have more complete compulsory arbitration powers, provisions based on the *IR Reform Act 1993* could be applied to first and subsequent negotiations to reach a Workplace Agreement. These provisions could be refined to more closely specify the meaning of 'good faith bargaining'. Adherence to these provisions could determine when and how the AIRC might intervene in a bargaining dispute. Where there is a case to show that one or the other party has not observed good faith obligations, the AIRC could be empowered to call compulsory conferences to settle matters by conciliation and, if the dispute could not be settled with a specified time frame (determined by the AIRC or established by statute) then it might use its arbitral powers. These provisions should also be designed to overcome a fundamental weakness of the 1993 provisions identified in the *Asahi Test Case* – ie they should ensure that the AIRC's good faith bargaining powers include the capacity to *require* an employer to conclude an agreement, or this obligation could be directly imposed on employers by statute (with enforcement through proceedings in the AIRC). 2004 amendments to the New Zealand legislation present a potential model in this respect.
- 4.66 Alternatively, the legislation could specify a range of criteria which, if met, could be used to trigger compulsory arbitration.

The role of awards, agreements and AWAs

- 4.67 Turning to collective bargaining under an arbitration based system, one of the first considerations should be the role of arbitrated awards.
- 4.68 As it stands, the system of awards is to be revised and consolidated by the *Award Review Taskforce* (possibly on an "industry sector" basis), such that it could form the basis of a collective bargaining system which allows for bargaining at the workplace level through collective agreements.
- 4.69 A question remains whether there is an ongoing role for AWAs as an additional level of industrial agreement. If so, then the current relationship between Awards, Workplace Agreements, and AWAs would need to be reversed for collective bargaining rights to be adequately protected – so as to prioritise collective agreements over AWAs, rather than the reverse (as has now been made definitively clear under the *Work Choices Act 2005*).
- 4.70 A further consideration centres on whether the concept of "allowable award matters" should be retained or whether Australia might instead move towards the concept of mandatory bargaining issues as a set of minima, similar to the mandatory provisions for collective agreements in New Zealand.
- 4.71 In summary, there are a number of features of the Australian arbitration system (both past and present) which might form the basis for a revised Australian scheme for collective bargaining and union recognition. From this basis, an Australian version of a hybrid system could be developed, borrowing not only from its own traditions, but also importing key concepts discussed earlier from constitutional and certification systems.

Concluding Comment

- 4.72 This Research Report has quite explicitly avoided making any strong recommendations as to which of the alternative systems should be pursued as a policy objective for Australian unions. In our view, these remain questions for unions to determine themselves.
- 4.73 We do, however, use this opportunity to outline the major issues that unions will need to work through in the process of addressing the question as to what is the best approach to protecting the rights of working people to be represented by unions, and the capacity of unions to engage in collective bargaining with employers.
- 4.74 The reality is, these outcomes can be obtained through a number of alternative approaches. This is demonstrated by our review of the alternative models in Part 3 above, and in our overview of the recognition and bargaining systems operating in a selection of industrialised countries (see the Appendix to this Report).

Select References

- Accardo, P, De Matteis, A and Mammone, G '*National Labour Law Profile: Italy* International Labour Organisation, Social Dialogue, Labour Law and Labour Administration Department – Accessed on 10 March 2006 at <http://www.oit.org/public/english/dialogue/ifpdial/II/observatory/profiles/it.htm>
- Adams, Roy J '*The North American model of employee representational participation: "A Hollow Mockery"*' (1993-4) 15 Comparative Labor Law Journal 4
- Ahlberg K and Brum, N '*Sweden: Transition through collective bargaining* in Blanpain, R (ed) '*Collective Bargaining and Wages in Comparative Perspective – Germany, France, the Netherlands, Sweden and the United Kingdom*' 2005 Kluwer Law International, The Netherlands
- Anderson, G '*Transplanting and growing good faith in New Zealand labour law*' (2006) 19 Australian Journal of Labour Law 1
- Arthurs, Professor HW, Carter, Professor DD, Fudge, Professor J, Glasbeek, Professor HJ and Trudeau, Professor G '*Labour law and Industrial Relations in Canada*' 1993 Kluwer Butterworths, Deventer The Netherlands
- Bamber, G J, Lansbury, R D and Wailes, N (ed) '*International and Comparative Employment Relations: Globalisation and the developed market economies*' (4th edition), 2004, Allen & Unwin, Sydney
- Barry, M and May R '*New employee representation – Legal Developments and New Zealand Unions*' (2003) 26 (2) Employee Relations 203
- Blackgood, L, Feinberg-Danieli, G and Lafferty G '*Unions and Union membership in New Zealand: Annual Review for 2004*' (February 2005) Victoria University Industrial Relations Centre. Accessed at <http://www.vms.vuw.ac.nz/vuw/fca/vms/files/Unions%202004%20final.doc>
- Blanpain, R (ed) '*Collective Bargaining and Wages in Comparative Perspective- Germany, France, the Netherlands, Sweden and the United Kingdom*' (2005) 56 Bulletin of Comparative International Relations 2005, Kluwer Law International The Hague, The Netherlands
- Blanpain, R (ed) '*Comparative Labour law and Industrial Relations in Industrialized Market Economies* (8th edition)' 2004 Kluwer Law International
- Blanpain, R (ed) '*The Actors of Collective Bargaining – a World Report*' (2004) 51 Bulletin of Comparative Labour Relations 2004 Kluwer, The Hague, The Netherlands
- Blanpain, R (ed) '*The Evolving Employment Relationship and the New Economy- the role of Labour Law and Industrial Relations*' (2001) 41 Bulletin of Comparative Labour Relations 2001, Kluwer International, The Hague, The Netherlands
- Brudney, JJ '*Neutrality agreements and card check recognition: Prospects for changing paradigms*' (2005) 90 Iowa Law Review 819
- Catanzariti, J and Youl, F '*Industrial relations legislation in 1990*' (1991) 33 The Journal of Industrial Relations 80
- Cohen, CI and Fritts, JC '*The developing law of neutrality agreements*' (2003) 54 Labor Law Journal 278
- Creighton, B and Stewart, A '*Labour Law*' (4th edition) 2005, The Federation Press, Sydney
- Creighton, WB, Ford, WJ and Mitchell, RJ '*Labour Law: Text and Materials*' (2nd edition) 1993, The Law Book Company Limited, Sydney
- Eaton, AE and Kriesky, J '*Union organizing under neutrality and card check agreements*' (2001) 55 Industrial & Labor Relations Review 42
- Eaton, J '*Comparative Employment Relations – An Introduction*' 2000 Polity Press Oxford, United Kingdom
- Elvander, N '*The New Swedish Regime for Collective Bargaining and Conflict Resolution: A Comparative Perspective*' (2002) 8 European Journal of Industrial Relations 197
- Fahlbeck, R '*Trade Unionism in Sweden*' International Institute for Labour Studies Discussion Paper DP/109/1999 Accessed at <http://www.ilo.org/public/english/bureau/inst/download/dp10999.pdf>
- Ferner, A and Hyman, R (ed) '*Changing Industrial Relations in Europe*' (2nd edition) 1998, Blackwell Business, Oxford

- Forsyth, A 'Giving employees a voice over business restructuring issues: A role for Works Councils in Australia' in Gollan, P and Patmore, G (eds) *Partnership at Work... the challenge of employee democracy* 2003 Pluto Press Melbourne
- Forsyth, A 'Proposals for statutory union recognition rights in Britain and implication for Australia' (1999) 12 Australian Journal of Labour Law 1
- Forsyth, A 'Works Councils in Germany - Are they 'transplantable' to Australia?' in Gollan, P, Markey, R and Ross, I (eds) *Works Councils in Australia – Future Prospects in Australia* 2002 Federation Press Sydney
- Foster B and Jeffery, G 'Government curbs on union influence in New Zealand: has anything changed in the last twenty years?' (2005) Paper presented at the 5th Conference of the International Employment Relations Association, Aalborg University Denmark. Paper accessed at <http://www.socsci.auc.dk/leo/iera/papers/Workshopnr2/GlynJeffreyBarryFoster.pdf>
- Friedman, S and Wood, S (eds) 'Employers' unfair advantage in the United States of America: Symposium on the Human Rights Watch Report on the state of worker's freedom of association in the United States, continued' (2002) 40 British Journal of Industrial Relations 113
- Friedman, S and Wood, S (eds) 'Employers' unfair advantage in the United States of America: Symposium on the Human Rights Watch Report on the state of worker's freedom of association in the United States' (2001) 39 British Journal of Industrial Relations 585
- Garren, B 'The high road to section 7 rights: The law of voluntary recognition agreements' (2003) 54 Labor Law Journal 263
- Godard, J 'Labour unions, workplace rights and Canadian public policy' (2003) 29 Canadian Public Policy 449
- Goddard J and Wood, S 'The Statutory Union Recognition Procedure in the Employment Relations Bill: A Comparative Analysis' (1999) 32 British Journal of Industrial Relations 203
- Goddard, J 'Trade Union Recognition: statutory unfair labour practice regimes in the USA and Canada' 2004 Employment Relations Research Series No 29 Accessed at www.dti.gov.uk/er/emar
- Hartley, RC 'Non-legislative labor law reform and pre-recognition labor neutrality agreements: The newest civil rights movement' (2001) 22 Berkeley Journal of Employment & Labor Law 369
- Hassel, A 'The Erosion of the German System of Industrial Relations' (2000) 37 British Journal of Industrial Relations 483
- Human Rights Watch 'Chapter IV – Freedom of Association under US labor law' in 'UNFAIR ADVANTAGE – Workers' Freedom of Association in the United States under International Human Rights Standards' (2000) Accessed at <http://www.hrw.org/reports/2000/uslabor/index.htm#TopOfPage>
- Katz, Harry C, Lee, W and Lee J 'The New Structure of Labour Relations: Tripartism and Decentralization' 2004 Cornell University, USA
- Lewis, R (ed) 'Labour Law in Britain' 1986, Basil Blackwell, Oxford
- Lingemann, S, Mengel A, and von Steinau-Steinrück 'Employment and Labour Law in Germany' 2003 Verlag CH Beck oHG Munich/Ant Sakkoulas, Athens
- Logan, J 'Consultants, lawyers and the 'union free' movement in the USA since the 1970's' (2002) 32 Industrial Relations Journal 197
- MacDermott, T 'Industrial legislation in 1996: The reform agenda' (1997) 39 The Journal of Industrial Relations 52
- McArthur, B 'The Efficacy of Statutory Union Recognition under New Labour: A Comparative Review' (2004) 20 International Journal of Comparative Labour Law and Industrial Relations 399
- McArthur, B 'The Efficacy of Statutory Union Recognition under New Labour: A Comparative Review (Part II)' (2004) 20 International Journal of Comparative Labour Law and Industrial Relations 563
- Miller, K 'Union Exclusivity Arrangements: a Comparative Overview' (2000) 16 International Journal of Comparative Labour Law and Industrial Relations 387
- Muller – Jentsch, W and Weitbrecht, H (eds) 'The Changing Contours of German Industrial Relations' 2003 Rainer Hampp Verlag Munich
- National Labor Relations Board 'Basic Guide to the National Labor Relations Act' (1997). Accessed at http://www.nlr.gov/nlr/shared_files/brochures/basicguide.pdf

AIER Research Report

- Rasmussen, Erling (ed) '*Employment Relationships: New Zealand's Employment Relations Act 2004*', Auckland University Press, Auckland
- Reitano, R '*Legislative change in 1993*' (1994) 36 *The Journal of Industrial Relations* 57
- Romo, O. '*Political Exchange and Bargaining Reform in Italy and Spain*' (2005) 11 *European Journal of Industrial Relations* 7
- Sciarra, S '*The Evolution of Labour Law (1992 – 2003) – Report on Italy*' (2005) European Commission Directorate General for Employment, Social Affairs and Equal Opportunity. Accessed at http://europa.eu.int/comm/employment_social/labour_law/docs/ell_italy.pdf
- Shaw, J '*Observations on trade union recognition in Britain and Australia*' (2001) 24 *UNSW Law Journal* 214
- Spooner, K '*Australian trade unionism in 1988*' (1989) 31 *The Journal of Industrial Relations* 118
- Stackpool, JE '*Industrial relations legislation in 1988*' (1989) 31 *The Journal of Industrial Relations* 93
- Stokes, A, Murphy, RL, Wagner, PE and Sherwyn, DS '*How unions organize new hotels without an employee ballot*' (2001) 42 *Cornell Hotel and Restaurant Administration Quarterly*
- Stokke, T and Thormqvist '*Strikes and Collective Bargaining in the Nordic Countries*' (2001) 7 *European Journal of Industrial Relations* 245
- Swedish Institute '*Labour Relations in Sweden*' (February 2005) Accessed at http://www.sweden.se/templates/cs/FactSheet_11012.aspx
- Townley, B '*Union recognition: A comparative analysis of the pros and cons of a legal procedure*' (1987) 25 *British Journal of Industrial Relations* 177
- Traxler, F and Behrens, M '*Collective bargaining coverage and extension procedures*' (2002) European Industrial Relations Observatory On-line, Downloaded March 2006 from: <http://www.eiro.eurofound.ie/2002/12/study/tn0212102s.html>
- Wedderburn, Lord '*Consultation and collective bargaining in Europe: Success or ideology?*' (1997) 26 *Industrial Law Journal* 1
- Wedderburn, Lord '*The new structure of labour law in Britain*' (1978) 13 *Israel Law Review* 435

Appendix 1

Summaries of National Systems of Union recognition and Regulation of Collective Bargaining Rights

A. The United States of America

The industrial relations system

The United States (US) is a federal republic constituted by 50 states and one district. In contrast to Canada, where provincial level systems play a far more significant role, industrial relations in the US is primarily governed by federal law. The principal federal statute is the *National Labour Relations Act 1934* (NLRA), which regulates collective bargaining for most of the private sector. This legislation was subsequently supplemented by the *Taft Hartley Act 1947*, which outlawed a range of union tactics; and the *Landrum Griffin Act 1959*, which introduced regulation of the internal affairs of unions. States may enact labour legislation that is not pre-empted by federal law, and many have chosen to cover specific areas, such as the controversial 'right to work' laws providing for employment at will.

Several States have adopted legislation modelled on the NLRA to authorise collective bargaining in the public sector. Since 1997, all but nine states provide at least some state and local employees with the right to organise and collectively bargain. Most federal public sector employees are granted collective bargaining rights under the *Federal Service Labor Management Relations Statute* (FSLMRS). Overall, however, there are significant differences in collective bargaining rights and processes between the public and private sectors.

The NLRA is administered and enforced by the National Labour Relations Board (NLRB), an independent federal agency.⁹¹ The NLRB's two principal functions are to determine questions of union recognition and to process charges of unfair labour practices. Both functions are directly linked to the collective bargaining process: union recognition is the prerequisite to bargaining, and failure to bargain "in good faith" constitutes an unfair labour practice.

Collective bargaining as the primary institution for determining wages and conditions dominated industrial relations in the post-war period until the 1980s. While it has always been enterprise based, some sectors were covered by industry level or regional multi-employer agreements. Today the system is highly decentralised and fragmented. In many sectors unions are weak and, consequently, collective bargaining coverage is poor. As in the Australian case, US unions remain strong in a number of 'traditional sectors' such as manufacturing, stevedoring and mining, but have struggled to establish a strong presence in newer, non-traditional sectors. Historically, employer opposition to collective bargaining and trade unions has been greater in the US than most other industrialised countries. This remains the case, and since the 1980s, employer hostility has intensified. As a consequence unions have faced a significant increase in union-busting tactics and difficulties in organising workers.

Procedures for union recognition

The US collective bargaining framework is similar to that of Canada. It provides for both voluntary and statutory recognition of a trade union as the representative of a group of workers comprising a "bargaining unit" (defined below). Because voluntary recognition by an employer is rare, a union seeking to represent a bargaining unit is typically required to invoke the statutory recognition procedure.

A union sets the statutory procedure in motion by filing a petition for certification with the NLRB. It must be able to demonstrate, on the basis of signed union cards, that at least 30 percent of employees in the bargaining unit support recognition. Where this requirement is satisfied, the NLRB conducts a secret ballot election for determining whether a union is recognized or not. If a majority of votes cast in the

secret ballot favour recognition, the union is formally declared as the representative union of the bargaining unit. In contrast to Canada, however, a card check option, whereby recognition is determined without a secret ballot on the basis of worker support alone, is not available in the US system.

A union is certified as the bargaining agent for a "bargaining unit". A bargaining unit must be a group of two or more employees who share a "community of interest". While there is no precise definition of this concept, a similarity of interests with regard to wages, hours, and working conditions are important considerations. The appropriateness of a bargaining unit for collective bargaining purposes is determined by the NLRB. Most commonly, bargaining units do not exceed the confines of a plant or enterprise, although some exist at more centralized levels, encompassing multiple employers.

The nature of union recognition

Recognition gives a union the right to require an employer to bargain with it as the exclusive representative of the relevant bargaining unit. The principle of exclusivity means that recognition provides a trade union with monopoly rights to represent the relevant bargaining unit. The employer is thus prohibited from bypassing a recognized union to bargain either with individual employees in the bargaining unit or with other unions with regards to the same bargaining unit.

In the US, like in Canada, employee representation rights flow from union recognition and collective agreements. In other words, certification as a bargaining agent provides unions with exclusive rights of representation of employees within the defined bargaining unit. This exclusive right of representation includes representation for individual workplace issues, collective workplace matters, and collective bargaining. Unlike most European economies, there are few obligations imposed on employers to notify or consult with unions or employees. The most significant is the requirement to provide advance warning of an impending plant closure.

Union security is an important aspect of union recognition in North America; it refers to legal provisions that allow a union to make compulsory membership and / or compulsory payment of dues the subjects of collective bargaining. The US provisions for union security are less comprehensive than those operating in Canada. The first point to note is that the NLRA, unlike Canadian law, expressly prohibits making employment dependent on union membership. The US is closer to Canada with regard to compulsory union dues, with 28 of the 50 US states permitting union security arrangements that require the individuals comprising the bargaining unit, irrespective of whether or not they are union members, to pay union dues; however, workers who are not union members can opt to pay only the proportion of union dues that relates to union representation. Moreover, it should be remembered that almost half (22 of 50) the US states have passed so-called "Right to work" (RTW) laws, which prohibit unions from negotiating collective agreements that require non-members to pay union dues.

There is evidence to suggest that some of the divergence in union density between the US and Canada is attributable to differences in provisions for union security. One estimate suggests that in the US, union membership in states with RTW laws is 5 to 8 percent lower than in those states that permit compulsory dues check-off. In view of this finding, it is likely that at least a proportion of Canadian union density is attributable to her - comparatively more benign - union security provisions.

Collective Bargaining Arrangements

Since the 1980s, many employers in the US have actively pursued a shift from centralized to decentralized bargaining structures. There are still sectors and industries that retain more centralized arrangements (e.g. coal, postal service, some craft unions), although bargaining at the workplace level is the norm. There is also a growing tendency for employers to side step collective bargaining through various tactics intended to frustrate recognition and the finalisation of collective agreements. For, instance, of all unions certified as a bargaining agent by the NLRB, less than half are able to finalise a collective agreement. Some firms have also pursued alternative strategies such as running down unionised plants or re-locating operations elsewhere.

Upon recognition, both union and employer have a duty to bargain “in good faith” over “mandatory” subjects of bargaining. These include pay, wages, hours of employment, or other conditions of employment. The duty does not extend to “permissive” subjects, over which the parties may agree to bargain. Examples include an employer’s right to close facilities or the merger of bargaining units. The concept of “good faith” bargaining is not specified in detail by legislation, but essentially centres on a willingness to negotiate.

Good faith bargaining is also tied to the concept of “unfair labour practices”. The NLRA explicitly identifies and prohibits certain types of conduct by employers and unions as “unfair labour practices”; sections 8 (a)(5) and 8 (b)(3) make a refusal by either party to bargain in good faith an unfair labour practice. While the NLRA identifies five employer behaviours that constitute unfair labour practices, it is rulings by the NLRB and the courts provide guidance as to the specific activities that represent employer unfair labour practices. In the context of union recognition, examples of employer behaviours that constitute unfair labour practices include: threatening employees with plant closure should they select union representation, disciplining or dismissing employees in whole or part for legitimate union activities, or promising employees benefits to discourage them from supporting the union. ⁹²

In the US, a distinction is made between lawful and unlawful strikes; the purpose of a strike is an important consideration in determining its lawfulness. There are two types of lawful strikes: “economic strikes” and “unfair labour practice strikes”. The purpose of the first is to obtain economic concessions from an employer; the second seeks to protest an unfair labour practice committed by an employer. While an employer can permanently replace “economic strikers”, she may only replace “unfair labour practice” strikers for the duration of a strike. Typically, collective agreements contain “no strike” provisions, making industrial action unlawful during the life of an agreement.

Enforcement and remedies

The unfair labour practices provisions are designed to protect the rights of employees to organize, bargain collectively, and strike. Sanctions are remedial, not punitive, and widely regarded as a poor deterrent to union-busting attempts by employers. The NLRB relies on “make-whole” remedies, which require the offending employer to refrain from the unlawful conduct and restore the status quo *ante*. For example, reinstating workers dismissed for lawful union activity with back-pay.

Under certain circumstances, the NLRB may require an employer to recognize a union that has lost a recognition election as a remedy against unfair labour practices. This remedy, known as a “Gissel” order, is available only if the unfair labour practices committed by the employer have the effect of undermining what was initially majority support for recognition; it requires the union to provide evidence that it had majority support on the basis of signed union cards. The use of Gissel orders is rare and thus a weak deterrent to union-busting.

Effectiveness

The US framework for protecting collective bargaining and union recognition is of limited effectiveness in ensuring that workers are able to gain representation rights at work. Several aspects of the US system impede union efforts to expand collective bargaining coverage, including:

- i) No time limit requirements on the period of time between a union lodging an application for recognition and a certification ballot taking place, thus providing employer with opportunities to actively counter a union’s organising efforts;
- ii) weak sanctions for union-busting;
- iii) no provisions for first-agreement arbitration (first agreement arbitration refers to the existence of legal requirements that would provide an incentive for an employer to bargain in ‘good faith’ once recognition has been obtained – for more detail see the discussion on Canada below);
- iv) the right for employers to use permanent strike replacements, which undermines the effectiveness of strikes
- v) a requirement for a recognition ballot irrespective of level of union support

The limited effectiveness of the US system is reflected in union membership statistics, which show that union density has been declining since the 1980s. In 2004, union density stood at 12.5 percent, down from 23 percent in 1980. In the US, collective bargaining coverage closely trails union density; it declined from 25.7 percent to 13.8 percent between 1980 and 2004.

B. Canada

The industrial relations system

Canada is a federation, comprising ten provinces and three territories. Labour legislation is primarily a provincial responsibility; federal labour law applies only in the three territories, the federal civil service, and selected industries of national or international character (e.g. shipping, railways, banks, telecommunications). While there are 11 jurisdictions (10 provincial government and a federal government), there is a high degree of conformity in institutional arrangements across all jurisdictions.

In general, Canadian labour relations is founded on a system of collective bargaining similar to that of the US. Many unions operate across national borders, covering workers in both the United States and Canada. Labour laws establish an agency and a procedure to determine union recognition, and provide for collective bargaining on the principle of "good faith".

There are, however, a number of key differences between the US and Canadian systems. Most notably, in relation to the statutory procedure for union recognition, the statutory scope of bargaining, and the use of conciliation and arbitration to resolve industrial disputes.

Procedures for union recognition

There are two avenues for formal union recognition. One is for an employer to voluntarily recognise a union as the bargaining agent for employees in a "bargaining unit" (defined below). Voluntary recognition is, however, rare. More commonly, a union can gain recognition through a statutory certification process administered by a provincial Labour Relations Board or Commission (LRB).

In all jurisdictions the statutory procedure is invoked by a union filing an application for recognition with the relevant Labour Relations Board. The union must be able to produce evidence to demonstrate a minimum proportion of all workers in the defined bargaining unit support recognition. This minimum requirement varies from jurisdiction to jurisdiction, but is generally around 30-40% of all workers in the bargaining unit. If this level of support cannot be demonstrated, then the application will be dismissed.

Where the level of support for recognition in the bargaining unit exceeds the minimum requirements, there are two possible methods of determining recognition. In four provinces, a secret ballot must be held irrespective of the level of support demonstrated in the union's application. This means that a union must obtain majority support from workers in a secret ballot to become recognized. In all other jurisdictions there are provisions for union recognition to be determined on the basis of union membership alone. This mechanism, commonly known as "card check", is available *provided that* support for the union exceeds a specified threshold. This is taken as evidence of majority support for the union's application to be certified. This threshold varies from jurisdiction to jurisdiction. In most jurisdictions, a simple majority of employees in the bargaining unit need to be union members; while in Manitoba, the threshold is set at 65 percent of employees in the bargaining unit. If support is insufficient, the process reverts back to the balloting procedure found in the first group of jurisdictions.

Six of the 11 provinces also allow for arbitrated recognition. Where the respective provincial LRB determines an employer has adversely influenced workers' true level of support for the union, then it may certify recognition without recourse to a secret ballot.

Where a union gains recognition, it is related to a specified "bargaining unit", or group of workers the union represents. Generally, a bargaining unit must consist of at least two employees and, like the US, its constituents must share a common interest in bargaining outcomes. Unless agreed by the parties, the composition of the bargaining unit is determined by the LRB. Typically, the bargaining unit is defined within the parameters of a single enterprise or single employer.

The nature of union recognition

Formal recognition provides a union with the right to oblige an employer to recognise the union for the purposes of collective bargaining. Again, like the US system, recognition is provided exclusively to a single union to represent employees in a defined bargaining unit. The employer is consequently prohibited from bargaining with individual members of the bargaining unit, or other rival unions seeking to cover a bargaining unit already represented by a union.

Overwhelmingly, formal recognition is also the basis for the establishment of individual representation rights and rights to information and consultation, often through provisions within collective agreements. Some provinces require an employer to include a consultation clause if requested by the union. However, recognition beyond the purposes of bargaining is limited in scope, usually to advanced notice requirements.

A notable exception is the area of occupational health and safety. Almost all jurisdictions have statutory provisions that require the appointment of OHS representatives in small workplaces, and joint OHS committees in larger workplaces. In the Federal jurisdiction, for example, an OHS committee must be established in workplaces with more than 20 employees, while an OHS representative must be appointed in establishments with less than 20 employees. Typically, employers are required to respond in writing to recommendations made by either of the above OHS bodies. Commentary from within the Canadian union movement suggests that the effective functioning of OHS committees is dependant on a union presence in the workplace.

The Canadian provisions for union security are more extensive than those available in the US. As noted above, union security refers to legal provisions that allow a union to make compulsory membership and / or compulsory payment of dues the subjects of collective bargaining. Firstly, the majority of Canadian jurisdictions provide for compulsory dues check-off (commonly known as the "Rand formula"). This requires the employer to include - upon the union's request - a clause in the collective agreement obliging him to deduct union dues from the pay of the individuals comprising the bargaining unit, irrespective of whether or not they are union members, and pay them to the union. Secondly, all Canadian jurisdictions allow unions to negotiate clauses making union membership a condition of employment in collective agreements. As noted above there is evidence to suggest that some of the divergence in union density between the US and Canada is attributable to differences in provisions for union security.

Collective bargaining arrangements

Generally, collective bargaining is de-centralised and enterprise based, with little scope for multi-employer agreements. The construction sector is one exception, where industry wide collective agreements are the norm.

Once a union is recognised, an employer has a duty to bargain “in good faith”. Failure to do so constitutes an unfair labour practice. LRBs have remedial powers to sanction employers who commit unfair labour practices (see below).

Collective bargaining arrangements also define the extent to which unions can freely exercise the right to strike. Generally, the right to strike is restricted to the period of negotiation before a new agreement has been signed, but after the existing agreement has formally expired. Moreover, the right to strike is restricted during bargaining by a number of procedural requirements, most notably a requirement in some provinces for mediation or conciliation before strike action is taken. Conciliation may be initiated by the LRB or at the request of one or both parties. Strikes are prohibited during the term of a collective agreement; and almost all sympathy and political strikes are unlawful.

Two major differences between the US and Canadian systems are worth noting. The first is the use of ‘first contract arbitration’ in Canada. In 8 of the 11 jurisdictions, the first collective agreement with an employer may be determined by binding arbitration (usually determined by the LRB) if no settlement can be reached through negotiations. Second, unlike the US legislation which sets out the range of issues that an employer is required to negotiate, the Canadian system provides no legal restrictions on the scope of issues that can be subject to bargaining. Overwhelmingly, employee rights, such as those to information and consultation, flow from provisions in collective agreements.

Enforcement and remedies

The relevant LRB has the capacity to determine whether a union or employer has engaged in an unfair labour practice. If it does so, it primarily imposes make-whole remedies, which are designed to restore the status quo ante. There are some important differences, however, from the US. The LRB may award damages if it finds that an employer has engaged in “bad faith” bargaining. In some circumstances other available remedies against ULP’s by employers include criminal prosecution (rare), the issuing of punitive damages, and contempt of court charges. Further, in 6 of the 11 jurisdictions the board may award “automatic” recognition as a remedy where employer actions have adversely influenced workers’ true level of support for recognition.

Effectiveness

The Canadian system is generally seen to be superior to US arrangements. This is so for a number of including (i) the card check procedure for union recognition provides fewer opportunities for employer interference than a secret ballot; (ii) employer attempts to influence the outcome of secret ballots is generally more restricted in Canada due to shorter time frames over which the procedure is conducted and the willingness of an LRB to undertake a ballot without waiting for employer appeals to be heard;

and (iii) the prospect of first contract arbitration provides that recognition is more likely to translate into collective bargaining outcomes compared to the US.

Like the US system, the effectiveness of the Canadian recognition framework has been dependent on general economic conditions being favourable to unions, and providing an environment conducive to employer acceptance of unions who could demonstrate employee support. In both senses, the last two decades have not been favourable to US unions. Overall union density is approximately 30 percent, down from 35 percent in 1995. There is an even more pronounced difference in union density between the public and private sectors than exists in Australia, with 75 percent of public sector workers being union members, as opposed to fewer than 20 percent in the private sector.

Traditionally, the health of the collective bargain system was viewed as more robust than union membership levels alone suggest. This reflects the fact that collective bargaining coverage was significantly higher than union membership. Today, however, union density and collective bargaining coverage are roughly the same. This parallels developments in the US. Taking into account these figures, a number of Canadian commentators have suggested the effectiveness of the Canadian system is in fact little better than the US. Like the US, Canadian unions have struggled to make gains in emerging sectors where unionisation is low, and have struggled to retain traditionally strong areas as employment shrinks and employers have become more active. Moreover, the limited scope for enforcement of good faith bargaining and the limited nature of remedies against unlawful employer behaviour do not generate positive incentives for employer compliance with the law.

C. Germany

The industrial relations system

Germany is a federal republic, comprising 16 states. Federal law governs collective bargaining and overrides any state legislation in this area.

“Dualism” is the defining feature of the German industrial relations system. This concept refers to the division of the rights to represent workers between trade unions and works councils. Fundamentally, trade unions alone have the right to conclude collective agreements. Works councils can conclude agreements at the workplace level over matters that are not covered by collective agreements; they also have certain legal rights to information, consultation and codetermination on workplace matters. The extent to which these rights apply depends on the nature of the issue under consideration, ranging from codetermination rights on matters of social policy to mere information rights on financial and economic subjects. A works council can be elected in establishments with more than 5 employees, and it exists to represent all employees irrespective of trade union membership. While works councils are under a peace obligation, trade unions can call for strike action. Although legally distinct institutions of employee representation, trade unions and works councils typically have a symbiotic relationship. Trade unions provide works counsellors with training and advice while works councils monitor the implementation of collective agreements at the plant level and provide access to information via their participation rights. Outside of the immediate realm of collective bargaining, German law provides for an additional form of employee participation through provisions for employee representation on company boards.

Procedures for union recognition

In Germany, there is no equivalent to the concept of union recognition in the Anglo-American countries. The German Constitution gives individuals freedom of association and, by extension, the right to bargain collectively and to strike. There is no legal duty upon the parties to bargain and thus the Anglo-American concept of “good faith” bargaining is alien to German industrial relations.

There is no direct state intervention in bargaining in the form of compulsory mediation or arbitration in Germany.

Traditionally, the German system has been characterised by sectoral (industry)-level bargaining between trade unions and employer associations. An agreement with an employers’ association is binding on both the union and all the members of the employers’ association. Collective agreements can also be negotiated between a single employer and a union. Upon the expiry of a collective agreement, conditions contained in the agreement prevail until a new agreement is finalized. Legally, the terms and conditions of collective agreements apply only to employees who are union members. However, the majority of employers extend the conditions to all employees, irrespective of union membership so as to remove the incentive to unionize.

Only a trade union can conclude a valid collective agreement, but to do so it must actually have the legal status of a trade union; this requires it to have a “capacity to bargain”. Jurisprudence has established a set of criteria a union needs to meet to be deemed to have this capacity; examples include the requirement to be organized on a supra-company level and the need to have a certain degree of “social power” in order to exert effective pressure in bargaining. Questions concerning the capacity to bargain have arisen mainly in the context of disputes between unions affiliated with different peak union

associations, where one union disputes the status of another to prevent it from introducing what the former consider to be sub-standard agreements. Union commentary indicates that employers have not used the legal question of “capacity to bargain” as a way of attacking unions.

The nature of union recognition

The dual system for representation is unique to Germany. German unions enjoy far greater rights than most other union movements included in this study (with the possible exception of Sweden). At the workplace level, however, union recognition rights are more limited than in any of the countries reviewed here. This is because works councils, rather than unions, deal with individual grievance issues and other collective workplace matters not contained in collective agreements. In practice, we have already noted, unions and works councils usually work together in a cooperative relationship, with most works councillors being union members and workplace activists.

Collective bargaining arrangements.

As already noted above, collective agreements have traditionally covered industry sectors or a sector within a region. Geographically, this type of agreement applied either nationally or on a regional basis. In recent years there has been a trend to more decentralized bargaining arrangements, driven by two main developments. First, employers are increasingly looking to divorce themselves from sectoral bargaining frameworks by withdrawing from employer organisations, or, in the case of new employers, not joining them in the first place. While an employer leaving an employers’ association continues to be bound by the terms and conditions of existing collective agreements, leaving an employer association positions a firm to negotiate a new agreement at the enterprise level or to attempt the introduction of individual contracts.

Second, the inclusion of “opening clauses” in collective agreements allows individual employers to introduce conditions at the enterprise level that are inferior to those contained in relevant industry based collective agreements. These “opening clauses” devolve bargaining authority to works councils over matters traditionally reserved for union bargaining, e.g. wages. Together, these two mechanisms are acting to decentralize collective bargaining arrangements in Germany.

There are no legal restrictions as to the content of collective agreements. Typically, different types of agreements govern specific aspects of the relationship, with separate agreements concluded for pay rates and other work and employment conditions. While pay agreements are often re-negotiated annually, others tend to be longer in duration.

Strikes are only legal in the context of collective bargaining, and there is no right to strike during the life of a collective agreement. Political strikes are unlawful, and sympathy strikes are lawful only in limited circumstances. As has been noted above, works councils are prohibited from striking.

Effectiveness

About one third of all German employees are union members. As in most other industrialized economies, union density has been declining in recent years. Between 1993 and 2003, membership in unions

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affiliated with the DGB (the principal German peak union body, representing about 80 percent of all union membership) declined by 28.4 percent, dropping from 10 290 152 to 6 778 638 members.

Bargaining coverage is greater than union density, with about 67 percent of employees working for employers actually bound by collective agreements. Since non-bound employers often use the relevant sectoral agreements as a point of reference for setting terms and conditions, the proportion of employees whose conditions are fully or predominantly set by collective agreements is approximately 84 percent.

Works councils are only found in about 10 percent of eligible workplaces, and they tend to be concentrated in larger workplaces. It is estimated that 47 percent of employees in western Germany and 38 % of employees in eastern Germany were covered by a works council in 2004.

As mentioned above, works councils and trade unions often interact closely, and in 2000 approximately 75 percent of work council delegates were members of DGB unions.

D. Sweden

The industrial relations system

Sweden is a small economy with a single labour law jurisdiction. Like the rest of Scandinavia, Sweden retains a strong corporatist system based on social partnership. This has rested on stable social democratic government which has retained political power almost continuously since the 1920s. Since the mid 1980s there have been periods of conservative rule. However, the Social Democratic Party (SDP) has held office continuously for the last decade.

The Swedish industrial relations system is regulated by a mix of regulatory instruments including both Constitutional and statutory provisions. In particular, statutes regulate a range of aspects of collective bargaining and the role of unions at the workplace. The collective bargaining system is governed by a number of framework agreements based on two important 'social pacts' between the three main union federations and the peak employer federation. These social pacts (the *Saltsjobaden* Agreement of 1932 and the 1997 Industry Agreement, which applies to the industrial sector only and covers around 60 percent of the workforce) have traditionally provided for centralised collective bargaining. Peak agreements set the main parameters within which industry and workplace bargaining takes place.

Unlike Germany, Sweden does not have a tradition of dual representation through works councils. Consultation over workplace matters is through unions and is governed by statutory protection of these rights (*Co-determination Act 1977*). However, Sweden has implemented the *European Directive on Work Councils* which have largely provided a vehicle for information exchange between an employer and employees rather than employee democracy or European collective bargaining.

Procedures for union recognition

There is no procedural equivalent to the North American systems for union recognition. Union recognition derives from different sources depending on the purpose for which unions are recognised. The right to engage in collective bargaining effectively derives from the Constitutional right of unions (and employer organisations) to take industrial action in the pursuit of their objectives.

Nor is there any statutory procedure for registration before a union can represent individual members in workplace matters. Like many other European systems, union recognition derives from unions having members. The right to represent workers both collectively and individually is granted by the *Trade Union Representatives (Status at the Workplace) Act 1974*, and the *Co-determination Act (1977)*. The *Trade Unions Representatives Act* requires an employer to recognise a trade union representative appointed by an employee organisation. Similarly, the *Co-determination Act* protects the right of employees' organisations to be informed, consulted and to "co-determine" (ie negotiate) workplace matters which affect "employee interests in relation to the employer". So long as a union's constitution aims to safeguard employee interests, the union is a protected "employees' organisation" for the purpose of the Act.

The nature of union recognition

The Swedish system provides a definitive example of how European models of union recognition differ from Anglo-American approaches. To begin with, unions have a right to exist and to undertake activities in pursuit of members' interests by virtue of the Swedish constitution. This right is not dependent on any procedure to establish a majority representation. These rights have since the 1970s deepened through a

number of laws enacted from the 1970s, most notably the *Trade Union Representatives Act 1974* and the *Co-determination Act 1977*, which compels employers to recognise a union for the purposes of negotiation and consultation over a range of matters including any major workplace change.

Other arrangements have also fortified the ability of unions to effectively force recognition and engage in collective bargaining. The Swedish approach has retained unions as the exclusive channel of worker representation and involvement in workplace issues. Beyond traditional industrial relations, Swedish unions are also involved in the administration of the Unemployment Benefit Insurance Scheme, which is government funded (Similar systems can be found in Denmark, Finland and partly Belgium). This is generally recognised as an important selective incentive for individuals to retain union membership. Such schemes also retain a link between individual employers and unions.

Union recognition is also embedded in political institutions. Unions are represented widely on national institutions and a range of tri-partite bodies. They consequently play a role in shaping a range of policy areas with direct and indirect consequences for working people.

What rights are attached to recognition/registration?

The rights of unions to represent individuals and members collectively is broad in the Swedish context. Most of these rights are exercised by unions and their officer holders rather than individual members. For instance the right to strike is not an individual right, but is exercised by individuals through the constitutional right of unions to engage in collective action. However, these rights are not unfettered. The right to strike, for example, is generally limited to bargaining periods in which new agreements are negotiated. There is, consequently, a legal requirement to submit such disputes to compulsory mediation if negotiations fail, although it is always possible to 'opt out' of this arrangement. The industrial sector, for instance, has opted out of it by setting out a detailed conflict resolution process in the Industry Agreement.

The Constitution, the *Co-determination* and *Trade Union Representatives Acts* and other legislation provide unions with the following rights:

- the right to strike;
- the right to negotiate with an employer on any matter relating to the employment of any union member;
- the right to be consulted about changes in the workplace;
- the right to be consulted about redundancies;
- the right to veto the use of contract workers;
- the protection of representatives' activities related to union business or the employment of a member; and
- the right to representation on the Board of Directors (*Board Representation (Private Sector Employees) Act*).

Collective bargaining arrangements.

Collective bargaining in Sweden has traditionally been centralised along sectoral lines, taking place within the boundaries established by the various national collective agreements/social pacts. However, it is increasingly common to have complementary wage agreements at the company level. In 2005, the National Mediation Institute (NMI) registered around 80 nationwide collective agreements, with most of them having a duration of two years. Most collective agreements contain procedures regarding their renewal. Ideally, bargaining for a new agreement should take place before the expiry of the old agreement, so that there is limited scope for industrial action.

The impact of the European Work Council directive has been minimal in Sweden. Swedish unions have been reluctant to use Work Councils for European wide bargaining as they tend to prefer their own approach to collective bargaining.

Enforcement and remedies

There is no overriding duty to bargain in good faith in Sweden. However, as noted above, the range of rights provided to unions typically come with corresponding obligations. It was also noted that the right to strike was limited, and strikes during the life of an agreement are illegal. Disputes which arise in relation to the interpretation of an agreement are dealt with by Labour Courts.

There has been a growing concern over employer commitment to enforce collective bargaining. In 2005, a special Commission investigated whether there was any need for additional government regulation dealing with the observance of collective agreements. It was recommended that the current system of self regulation by the parties is adequate.

Effectiveness

Unions have traditionally enjoyed a privileged position in the Swedish labour market, owing largely to Sweden's unique, self regulatory, approach to industrial relations. Union membership and collective bargaining coverage in Sweden has consequently remained high.

Like most industrialised economies, however, the 1990s was associated with growing pressure from employers to decentralise the locus of bargaining. This push has been largely resisted by the union movement, although concessions have been made in relation to local wage agreements. This is reflected in the registration of some sectoral agreements with the NMI that either have no wage clause or only contain wage setting principles.

There is also some evidence of a growing trend for employers to opt out of sectoral arrangements and a growing incidence of employers breaching collective agreement obligations. In contrast to many other countries, it has been the declining membership and authority of employer associations that has threatened the effectiveness of the Swedish model of collective bargaining, rather than a decline in union membership.

Nonetheless, the Swedish model remains highly effective in protecting union rights of recognition and collective bargaining.

E. Italy

The industrial relations system

Italy has a single labour law jurisdiction at the national level. However, since the 1980s there has been a program of devolution of political authority to regional government. In contrast to Sweden and Germany, Italy does not have a tradition of social democratic government. Although it has a history of frequent changes of government (on average, every 2 years), Italian politics has been dominated by the Christian Democrats, who have usually ruled in coalition with minor parties. There have been some periods of centre-left government, but these have tended to be short-lived.

While the national government retains power to legislate on employment issues, it has not done so in any great way, apart from a few statutes that include the *Statute of the Workers Rights 1970*, the recently enacted law 30/2003, and other smaller legislative initiatives (such as the Act 223/1991, which governs collective dismissals). Collective bargaining, sometimes with subsequent legislative ratification, has provided the most influential regulatory instrument.

This arrangement is supported by Constitutional provisions that grant important rights to both trade unions and individuals. Two examples illustrate this point. First, the Constitution grants protection directly to trade unions (section 39 paragraph 1) and to the right to strike (section 40); while employers' right to lockout is outlawed. Second, the Constitution grants specific collective and individual entitlements that extend trade union recognition rights. The individual rights are: the right to a sufficient wage and to weekly time off, the right to paid annual leave (section 36 paragraphs 1 and 3), equal pay for men and women (section 37 paragraph 1), minimum age of employment (section 37 paragraph 2), equal pay for young employees (section 37 paragraph 3), while the collective rights concern: freedom of association (section 39 paragraph 1), the possibility for trade unions to conclude collective agreements that apply *erga omnes* (section 39 paragraph 3) and the right to strike (section 40).

Section 36 is particularly relevant to extend both collective bargaining coverage and union recognition in that in paragraph 1 the Constitution proclaims that "Workers shall be entitled to a remuneration commensurate with the quantity and quality of their work, and in any case sufficient to ensure to them and their families a free and honourable existence [Article 2099 Civil Code]". This section represents the cornerstone of wage protection in Italy and has been used to establish a far-reaching system of wage maintenance since the end of the Second World War. Section 36 is implemented using collective agreements via article 2099 of the Civil Code. Consequently, wage clauses in collective agreements, which normally apply only to the members of the signatory associations, are extended to all workers. This mechanism is based on the conditions laid down in collective agreements that are used as benchmarks to establish the level of the sufficient wage. This mechanism that extends the coverage of collective agreements also applies to other standards such as annual, long service and sick leave.

The post-WW2 Italian labour movement emerged as highly politicised and centralised under the *Confederazione Generale Italiana del Lavoro* (CGIL). In parallel with government in the immediate post-War period, the CGIL consisted of a coalition of Communist, Socialists, Republican and Catholic factions. With the advent of the cold war, not surprisingly, these elements broke away to form separate federations. Thus traditionally there have been three main union federations: the CGIL, the *Confederazione dei Sindacati Lavoratori* (CISL – the Catholics), and the *Unione Italiana dei Lavoratori* (UIL – the social democrats). Following a number of developments during the 1970s, new unions

emerged and, by the 1990s, represented significant proportion of unionised workers in public sector and service sector industries.

In the aftermath of WW2, the dominant Christian Democrats did not legislate to give effect to a number of important reforms stipulated in the Constitution, including explicit rights relating to unions, strikes and collective bargaining. As a consequence, for the period to 1970, Italian labour law was governed by the fascist statutes, which were authoritarian and anti-union. This provided employers with the ability to limit the influence of unions in wage setting and suppress union activism at the workplace. Employers, through the peak employer group *Confindustria*, also used national wage agreements to regulate wage outcomes.

This situation changed after the “hot Autumn” of 1968, which involved an increase in strike action, which did not subside until the completion of industry agreements in 1970. This period of strikes lead directly to the *Statuto dei Diritti dei Lavoratori* (the *Statute of the Workers Rights*), passed in 1970. This law combined elements of American and French labour law. Passed at the height of the US system of collective bargaining under the Wagner Act, the Workers’ Statute consisted of a series of articles guaranteeing rights of workers as citizens: freedom of thought and expression, right to job security, and limits on the capacity of employers to undertake surveillance of employees and union activists. The Act also included a range of union guarantees to protect unions, including bans on the use of black lists of union workers, the right to organise, and the right of unions to create workplace level organisation as they saw fit.

A number of “social pacts” have also proved important since the early 1970s: the *Scala Mobile*, introduced in 1975 and attempts at ‘social concertation’ in 1976, 1983 and 1993, 1996 and 1998. As it was the case in Australia these Accord-like agreements between peak union confederations, employer associations, and governments, were concluded to tackle periods of poor economic performance or to join the European Union.

The *Scala Mobile* was introduced in 1975 to curb inflation. It provided for wage indexation and a guaranteed wage for workers laid off, set at 80 percent of their current wage. In return unions gave undertakings to refrain from industrial action and further wage claims.

The “social pacts” of 1976 and 1983 also represented an attempt to readdress sluggish economic growth, and persistently high rates of unemployment and inflation. In essence unions were committed to restrain wage claims in return of increases in the ‘social wage’ (welfare , taxation, active labour market policy and industry reform). However between 1985 and 1992, the force of the 1983 social pact on wage bargaining broke down, only for a new social pact to be re-negotiated in 1993. Other pacts followed in 1996 (the Pact for Work), 1998 (the Christmas Pact) and 2002 (the Pact for Italy). However, the continuing relevance of social pacts is being questioned in Italy; with the CGIL refusing to sign the 2002 ‘Pact for Italy’. This in part reflected attempts by the newly elected Berlusconi government to introduce greater labour market flexibility by means of law 30/2003 that was enacted in 2003. Union attempts to restrict these types of developments have also been limited by European Union requirements to introduce a range of labour reforms to meet various Directives.

Procedure for union recognition

The role played by unions in collective bargaining and industrial relations is recognised and protected by a mix of regulatory sources that include the Constitution, the Statute of the Workers' Rights and other provisions.

The existence of unions is constitutionally guaranteed through article 39 of the Constitution. However, the necessary legal mechanisms for registration were never implemented in the post War period. This was the consequence of a number of events. First, unions have generally opposed any attempt to legally register them. Section 39 (paragraphs 1 and 2) of the constitution established rules for the registration of trade unions. In order to be registered "the statutes of the trade unions must be democratic", while only registered unions are allowed to conclude collective agreements that apply to all workers. During the 1950s, a debate took place in Italy on whether or not trade unions should be registered. Trade unions strenuously opposed the enforcement of mandatory registration as they feared the implementation of these constitutional provisions would enable governments to exercise statutory control over their activity and internal affairs. This was perceived as dangerous at a time when trade unions were still recovering from the repressive fascist experience. Second, the registration process also aimed to regulate the right to strike granted by section 40 of the Constitution. Once again, trade unions opposed any attempt to limit the right to strike and rejected the implementation of section 39. As a result, unions became "unrecognised" associations and consequently their internal structure is only regulated by the Civil Code (articles 36 to 42; "unrecognised" organisations). Article 36 paragraph 1 of the Civil Code states "the internal statutes and administration of the "unrecognised" associations are regulated by the agreements between the members". An important consequence of this provision is that ballots are not necessary to constitute a union. By contrast, employers can refuse to bargain with unions and recognise them.

The legal void generated by the failure to implement section 39 was partially filled in different stages. First, the Judiciary implemented section 36 of the Constitution (see above). Second, the Judiciary sanctioned the principle that collective agreements can be derogated by individual contracts of employment only if the latter grant better conditions of employment (Civil Code art. 2113). In addition, the Judiciary extended the ambit of application of collective agreements. It was held that, under specific circumstances, the working conditions laid down in collective agreements must be applied to the individual contract of employment irrespective of the party affiliation. For example, collective agreements should be applied whenever the parties explicitly or implicitly endorse them. The first case occurs when the conditions contained in the individual contracts of employment closely resemble clauses laid down in relevant collective agreement while in the second case the employer, who applies numerous and significant clauses of a collective agreement, is compelled to apply the whole agreement. The *Corte di Cassazione* (the highest court in Italy) also sanctioned the principle that employers who are affiliated with an employers' association that signed a collective agreement must apply the agreement to all workers who ask for it.

As it was mentioned earlier, the Statute of the Workers' rights was the first major legislative initiative in the post war period dealing with unions and collective bargaining. Although it did provide a number of general rights to protect unions, it did not include provisions to provide union recognition to bargain on behalf of a "bargaining unit". This was principally because all three major confederations organised workers in (most) large workplaces, thus exclusivity of recognition was not possible. Instead, the

Workers' Statute embraces the French solution of automatic recognition of union organisations on the basis of being 'the most representative'. That is, where a union has members in a workplace, and has concluded a national or provincial agreement, then recognition is automatic. Like Sweden, these provisions do not require Italian unions to be registered before they can advocate on behalf of individual members.

Recognition at the workplace level, like Italian industrial relations more generally, is also complex. It will be re-called that the *Statute of the Workers Rights* guarantees unions the right to organise at the workplace. It also ensures that unions have a range of rights which allow them to conduct their industrial activities, such as the right to convene mass meetings and conduct secret ballots among employees, and the right to paid or unpaid time off for carrying out trade union duties.

The *Statute of the Workers Rights* also allows unions to organise their system of workplace representation in whatever way unions deem to be appropriate. Following these developments, the three main confederations agreed in 1972 to the creation of a unified workplace structure centred on *Rappresentanza Sindicale Aziendale* (factory councils). These were subsequently replaced by the *Rappresentanza Sindicale Unitare* (works committees or councils, or literally, united union delegates). These operate quite differently from works councils in Germany; and are perhaps more like workplace union committees that existed in Sweden. Italian works councils are elected at each workplace through a process agreed between union confederations and the employer federation. These workplace committees engage in both workplace level collective bargaining (usually over issues delegated by industry level negotiations), and are the primary institution for unions to represent workers in consultations with employers.

The nature of union recognition

Like Germany and many other European countries, the right of unions to exist, organise, and represent their members derives from Constitutional provisions.

Provisions in the Workers' Statute, as well as other pieces of legislation, such as *Act 223/1991* regulating collective dismissals (which provides unions with the right to be informed when a collective dismissal is to occur), along with private agreements with employer groups, and the social pacts, in the end, approximate a fairly typical system of union recognition for European countries. Unions continue to be recognised at the workplace, for the purposes of collective bargaining, and enjoy ongoing political recognition. It should also be noted that union recognition rights were further extended in the early 1980s-1990s. In particular, legislation that promoted wage and numerical flexibility and decentralised the bargaining locus, has been counterbalanced by a strengthening of labour's legal capacity to negotiate the terms and conditions of such provisions. Important clauses that incorporate this aspect include: article 47 of Law 428/1990 which makes it compulsory for an employer to notify trade unions of the intention to sell a firm (or part of it) and to negotiate the matter should trade unions request it. Failure to comply with this prescription is regarded as an anti-union offence and elicits heavy sanctions (Law 428/1990 art. 47, paragraphs 1 and 2). Also article 1 paragraph 2(a) of Law 196/1997 and article 23 of Law 56/1987 directly involve trade unions in this process. These articles hold that fixed-term contracts can only be used in the ways prescribed by collective agreements. Finally, law 196/1997 provides for the compulsory involvement of unions in determining the extent to which employers are allowed to use

outworkers, also protecting Labour's market power by prohibiting the use of outsourced workers to replace employees involved in industrial action (Law 196/1997 art. 1 paragraph 4(b)). The compulsory reference to collective agreements embedded in many laws enacted in the past two decades protected/strengthened labour's institutional capacity to bargain. Under this regime, trade unions were granted enhanced control over management decisions while at the same time the employer's freedom to utilise the workforce was strengthened.

Collective bargaining arrangements

Collective bargaining in Italy has oscillated between national industry-level agreements (1940s-1960s, 1975-1984, 1993-present) and more decentralised arrangements (1968-1975, 1985-1992). The use of more centralised bargaining has tended to be associated with periods of economic crisis. Centralised bargaining has been complemented by tripartite/bipartite self regulation through corporatist type social pacts.

These social pacts act as framework agreements which define the parameters of collective bargaining in Italy at industry, regional and workplace levels. Thus workplace and regional collective agreements, which typically run for four year periods, cannot deal with issues that have been addressed in national agreements or by law.

In practice there is great variation in union presence, collective bargaining and the enforcement of legislation between regions, particularly between the industrialised north and the south. This problem was addressed in 1996 through an initiative to introduce "Territorial Bargaining" as part of the Employment Pact. This pact tried to increase collective bargaining in the South by mandating bargaining on a regional level to take into account the various economic discrepancies between regions in Italy. There have been mixed results from this new level of bargaining which has steadily increased in use.

Employers in Italy, as elsewhere in Europe, have been pushing for more decentralised bargaining. They do, however, acknowledge the inherent value in their current multi level bargaining structure.

Confindustria, the main employer association, has called for, among other things, a system of arbitration to enforce collective agreements, and a revision of the work councils system.

Enforcement and remedies

There is no general prohibition on unfair labour practices. However, section 28 of the Workers' Statute establishes the illegality of behaviour designed to hinder or limit the exercise of freedom of association and trade union activities, or the right to strike. From this starting point, case law has developed a reasonably wide interpretation of the concept of 'anti union behaviour' which is prohibited – it has included such things as dismissal of striking workers, hiring replacement workers (also dealt with by Workers' Statute), retaliatory behaviour against striking workers and failure to inform the unions on issues regulated by collective agreements, direct bargaining with the workers and infringement of union rights fixed by law, such as not reserving a room for union meetings inside the factory and not allowing the union to have a board to post union information. If an employer is found to have breached these provisions, the union can be granted an injunction stopping the conduct and/or obtain orders for compensation.

Effectiveness

Since WW2, the Italian system of industrial relations has proved the most 'dynamic' and least stable of any of the national systems reviewed for this project. It is a case of paradoxes. Despite the oscillation between centralised and decentralised bargaining, and attempts through social pacts to reform the dynamics of industrial relations, Italy has somehow managed to approximate a system of union recognition and collective bargaining similar to that found in other European countries. Yet much of this has not involved extensive regulation of these processes as in many other European countries. Rather these processes have been institutionalised by the parties themselves through social pacts.

Italian unions, although constrained in their actions by the limits imposed by the social pacts, remain reasonably strong. For example, union density has declined, but certainly not as rapidly as in Germany or Anglo-American countries. The relative strength of Italian unions can in part be attributed to their ongoing involvement in areas outside traditional industrial relations. For instance, unions have been actively involved in pension reform and in attempts to draft policies to help the development of the south.

F. The United Kingdom

The industrial relations system

Industrial relations in Britain has historically been characterised by a high degree of voluntarism. It was not until the 1970s that the state took a more proactive role in managing industrial relations through the establishment of a legal framework to govern collective bargaining. This involved the introduction of two statutory procedures for the formal recognition of trade unions for purposes of collective bargaining, first in 1971 and then in 1975. The provisions for statutory union recognition were repealed by the Conservative government of Margaret Thatcher in 1980, and ideological as well as legal state support for collective bargaining remained low until the end of conservative rule in 1997.

Government policy towards collective bargaining became more favourable with the election of the Labour Party to power in 1997. This shift is reflected in the passing of the *Employment Relations Act 1999* (ERA), which, by inserting Schedule 1 A into the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA), re-introduced a statutory procedure for union recognition. The TULRCA is the main piece of legislation governing collective bargaining in the UK; its procedure for statutory union recognition became effective in June 2000 (below we discuss its operational requirements in more detail).

Although collective agreements are a major source of employees' workplace rights in the UK, they operate on a stronger floor of basic statutory rights than in Canada or the US. Employers in the UK have a legal duty to consult employees, irrespective of whether they are represented by a recognized union or not, over matters such as collective redundancies, business transfers, and health and safety matters.

Employers with at least 1000 employees in European Union (EU) member states and at least 150 employees in two or more EU member states are also obligated to institute European Works Councils (EWCs) if requested to do so by their employees. EWCs are a source of information and consultation at the European level. Moreover, since April 2005 employees in organisations with more than 150 employees have a right to be informed and consulted by their employer about important workplace issues (e.g. substantial changes in work organisation or contractual relations) under legislation that implemented the European Union Directive on informing and consulting employees; this right is dormant and needs to be "activated", either through the initiative of the employer or by a written request from 10 percent of the workforce. Workers also have a statutory right, albeit narrowly circumscribed, to be accompanied by a co-worker or union official to certain grievance hearings.

Procedures for union recognition

Like their union counterparts in the US and Canada, British unions can achieve recognition via a voluntary or a statutory mechanism. Yet while voluntary recognition is rare in the two North American countries, it is the prevalent form of recognition in the UK. This divergence to some extent reflects the philosophical underpinnings of the statutory recognition provisions in the UK. While the British union recognition procedure adopts elements and language associated with the North American model, it is also based on the European notion of "social partnership" and consensus. Thus, while the formal recognition procedure follows a procedure analogous to North Americas' for the purposes of collective bargaining, as we have indicated, the law also provides some forms of automatic recognition involving individual and collective matters at the work. In line with the European notions of social partnership, the

statutory procedure seeks to provide a “last resort” where employers and unions fail to reach voluntary agreements. Consistent with the intention that it should be last resort option, the statutory procedure is a burdensome, technical and multi-stage process. It has been suggested that it is designed to reduce its attractiveness to the bargaining parties; it thus implicitly reinforces the political preference for voluntarism. Indeed, even once invoked, the procedure is designed to encourage employers and unions to reach voluntary agreements before it runs its entire course.

A union invokes the statutory procedure by filing an application with the Central Arbitration Committee (CAC), an independent statutory body. The application will be valid if the CAC is satisfied that the union has at least 10 percent membership in the bargaining unit, and that the majority of workers in the bargaining unit would favour recognition (known as the “majority likely” test). The two pieces of evidence the CAC typically uses to determine whether the majority of workers are likely to favour recognition are: (i) the level of union membership in the bargaining unit and (ii) a petition in support of recognition signed by members of the bargaining unit, but not in the union. Whether or not a union’s application satisfies the “majority likely” is at the discretion of the CAC; the thresholds for acceptance may vary from case to case.

If the CAC accepts a union application, there are two possible mechanisms by which the question of recognition can be determined; which of the two the CAC uses depends on the level of union membership in the relevant bargaining unit. If less than 50 percent of the workers in the bargaining unit are members of the union, the CAC will hold a secret ballot on recognition. The union gains recognition if the majority of those voting and at least 40 percent of workers in the bargaining unit vote in favour in the ballot. Alternatively, if the CAC is satisfied that a majority of workers in the bargaining unit are members of the union, it must issue a declaration of recognition without holding a ballot. However, if one of three exceptions applies,⁹³ the process reverts back to the balloting procedure described above even if the majority of workers in the bargaining unit are members of the union.

The nature of union recognition

As the preceding discussion indicates, the statutory recognition procedure for the purposes of collective bargaining is first of all underpinned by legal requirements to consult with individual employees and unions over workplace matters. Unlike the US system, this does not involve unions having exclusive representation rights for all purposes. Thus, while a union might have formal recognition as a bargaining agent, an individual may elect to be represented in say a disciplinary matter by a union of their choice.

In the UK, the representation rights that a union gains from recognition are less exclusive than in Canada and the US. A British employer who has recognized a union is not prohibited from negotiating individually with workers in the bargaining unit represented by that union. The employer has this right even after she has concluded a collective agreement with the relevant union. On the other hand, statutory recognition does limit the scope for union competition in bargaining; recognition is granted to a union for a period of three years, effectively “quarantining” the represented bargaining unit from “take-overs” by other unions. Moreover, the statutory recognition procedure seeks to eliminate recognition disputes early on in the process, since the CAC can accept only one application relating to a particular bargaining unit.

Regardless of how recognition is achieved, an employer has a duty to disclose to a recognised union any information that is relevant to collective bargaining. Further, if the CAC imposes a bargaining procedure on the parties under the statutory procedure, the employer has a duty to consult and inform the union on a six-monthly basis about policies and plans for, and provision of, training to the workers comprising the relevant bargaining unit.

A great deal has been made in Britain about workplace partnership, the UK version of the European notion of social partnership. This concept has allowed British industrial relations to engage with European notions of social corporatism in which unions are recognised at a political level, but to retain to an extent the tradition of voluntarism. This mix finds its way into requirements for the introduction of European Works Councils in British firms operating in the European Union under the EU Social Charter. European Works Councils provide a further avenue for *employee* consultation over workplace matters, but do not mandate union involvement.

Collective Bargaining Arrangements

Similar to Canada and the US, collective bargaining in the UK is predominantly confined to the level of the workplace or enterprise. Specifically, under the statutory procedure there is no scope for multi-employer agreements.

Formal recognition requires the parties to agree on a **method** of collective bargaining, but *not* necessarily reach a collective agreement. Where the parties fail to agree to a method of collective bargaining, the CAC must specify such method. Where the parties fail to reach agreement there are mediation services available to assist the parties.

Unless otherwise agreed by the parties, the scope of negotiations is confined to pay, hours, and holidays under the statutory procedure. By contrast, the scope of a voluntarily concluded agreement may be either broader or narrower, as long as it contains at least one of the matters identified in s.178 of the TULRCA.

A number of criteria must be satisfied for strikes to be “protected”. Aside from procedural requirements, such as the mandatory holding of a secret ballot, strikes may only be called in the context of a “trade dispute”. In essence, a dispute between workers and their own employer over employment related matters constitutes a trade dispute. However, there is no outright prohibition of industrial action during the life of a collective agreement. Secondary action and political strikes are unlawful.

Enforcement and remedies

Generally, the UK statutory recognition regime lacks strong sanctions for failure to comply with its requirements. Instead, sanctions are primarily remedial. As noted above, statutory recognition requires employer and union to agree to a method of bargaining, and where no agreement is reached the legislation provides for specification of such bargaining method by the CAC. The remedy for failure to comply with the required method of bargaining – whether agreed by the parties or specified by the CAC – is an order or of specific performance. This remedy stands in contrast with Canadian provisions for first

contract arbitration, which provide a much stronger incentive for an employer to bargain with a view to actually concluding a collective agreement.

More recently, the *Employment Relations Act 2004* introduced provisions concerning unfair practices during balloting periods for recognition and de-recognition. Unfair practices are behaviours designed to influence the result of a ballot, such as bribes, coercion, intimidation, dismissal, or disciplinary action. Where the CAC decided that unfair practices were used it may issue a remedial order to the offending party and / or order a new ballot. Failure to comply with such a remedial order, further unfair practices, or unfair practices specifically involving the use of violence or the dismissal of a union official, may result in a declaration of recognition / non – recognition by the CAC. By contrast, the majority of Canadian jurisdictions provide for the declaration of recognition as a remedy against employer attempts to unfairly influence the outcome of a ballot.

Effectiveness

The direct impact of the statutory procedure on union recognition has been extremely limited. In the period between its introduction in June 2000 and April 2005, the CAC received 444 applications for recognition, with 116 of these resulting in statutory recognition. However, the statutory procedure seems to have had an indirect impact on labour relations, with evidence pointing to a rise in the number of *voluntarily* concluded agreements since it came into force; between June 2000 and June 2005, just under 1800 new recognition deals were signed in the voluntary arena. By comparison, it is estimated that only 758 voluntary agreements were concluded between 1995 and 1999. This outcome is hardly surprising given the intention of the procedure to promote voluntary recognition.

Overall, collective bargaining coverage has declined slightly in recent years, with the proportion of employees whose pay and conditions was affected by collective agreements down from 36.2 percent to 35 percent between 1999 and 2004.

The statutory recognition regime suffers from several significant shortcomings, including

- ii) the procedure can not be applied to employers with less than 21 employees, thus excluding workers in small business from obtaining union representation,
- iii) weak sanctions, especially the lack of recourse to arbitration, provide little incentive for employers to engage in meaningful bargaining
- iv) in the case of an unsuccessful application, a union is prohibited from reapplying to represent the same bargaining unit for a period of 3 years,
- v) an employer can voluntarily recognize a compliant union that has only minimal support amongst the workers, thus curtailing their right of workers to be represented by the union of their choosing.

G. New Zealand

The industrial relations system

New Zealand comes from a similar industrial background as Australia, in the sense that it had an arbitration based system until its gradual abolition over the course of the 1970s. Its system has fluctuated during the period from 1894 from a system of registration to one in which the legal personality of unions was recognised only through standard incorporation procedures under the *Employment Contracts Act 1991* (ECA). In this way, unions were relegated to mere spectators with the only recognised personalities in industrial relations being the employer and the employee.

In 2000, New Zealand took steps to realign itself with a registration based system, while not reverting entirely to its former arbitral system. The *Employment Relations Act 2000* (ERA) is the primary piece of legislation which regulates unions and their activities in New Zealand. It established unions as the only body competent to collectively bargain with employers and introduced the notion of good faith dealings to New Zealand industrial relations. However, it retained the obligation on unions to be registered as a company.

Procedures for union recognition

Unions must satisfy five key elements before they can be registered as an employees 'organisation. These elements are that the Union must:

1. have as its aim the protection of members collective interests;
2. be independent from the employer/s;
3. be incorporated under the Incorporated Societies Act;
4. have at least 15 members; and
5. have rules which contain, among other things, the object of promoting the collective interests of members, must establish the union as a democratic organisation which acts reasonably, and must set out procedures for changes to the rules.

In the 1970s, New Zealand attempted to reduce the number of unions in existence by increasing the minimum number of members required for registration. This led to many mergers of unions. However, since that time, the minimum membership has been set at 15, which has made it easier for workplace based unions to become registered.

The requirement of independence has been narrowly defined by New Zealand courts to include situations where an employer paid the establishment costs of the union, finding that even though the establishment costs were paid for, at some later point, the union became a distinct entity, with no formal ties to the employer. Accordingly, this requirement has become almost meaningless as it allows employers to establish unions that are more sympathetic to their organisational aims, in circumstances where such a union would be in competition with a more established national union. This is important in the context of New Zealand, where, during the period of the ECA, employer sponsored associations of employees were a common occurrence. Given the interpretation of the independence requirement by the Courts, this situation is likely to continue.

If a Union is able to satisfy those various requirements, then it becomes registered by the Registrar of Unions. Registration can be contested or queried if, at some point, the requirements under the ERA are no longer met. However, as long as a union continues to fulfil those requirements, it will remain registered.

In practice, this system of registration allows for more than one union to exist at any given workplace. The small minimum membership requirement, together with the absence of having to establish a mandate of representation from the majority of employees at a workplace mean that in the face of a larger, more established union, a small, bargaining focussed union can form and become registered. This again reflects in large part the system which existed during the ECA, as many of the employee associations which existed on a workplace basis have become registered as unions. This is reflected in the findings of the Industrial Relations Centre at Victoria University that the majority of new union registered under the ERA in its first three years of operation were workplace based⁹⁴.

The nature of union recognition

The main consequence of registration under the ERA is that a union becomes a recognised party to the general employment relationship. Accordingly, it becomes bound by the general good faith obligation which requires parties to an employment relationship to deal with each other in good faith – which conversely means the union must also be treated in good faith. This obligation applies to all aspects of the union/employer relationship including requests for and provision of information and consultation in redundancy situations and has been found to prevent such things as providing deceptive or misleading information. This supplements the statutory procedures for provision of information set out in the ERA in respect of collective bargaining.

Unions are allowed to enter a workplace for purposes related to union business – such as recruitment or dissemination of information – or related to the employment of a member – such as collective bargaining or health and safety. Access must be for a reasonable amount of time and at a reasonable time for the workplace. Access cannot be unreasonably declined to a union representative.

In addition, unions are able to hold union meetings, for which 14 days' notice must be given. Members must be allowed to attend two union meetings per year.

Strikes are regulated by Part 8 of the ERA and are limited to collective bargaining and health and safety issues – this part mandates that employees individually may participate in strike action. It specifically states that a strike or a lock out is not a breach of the obligation of good faith.

Collective Bargaining Arrangements

Approximately 75% of new unions registered in the period from 2000-03 were workplace based. Given the increase in workplace based unions, collective bargaining in New Zealand has become increasingly decentralised⁹⁵.

Once a union is registered it is able to bargain collectively on behalf of its members. The Union and the employer, will be bound by the additional good faith obligation which attaches specifically to collective bargaining under the ERA.

In this respect, the ERA allows the Minister of Labour to issue of a Code of Good Faith (Code) which provides guidance to the parties to collective bargaining as to how the good faith obligation should be implemented. In addition, the courts and the Employment Relations Authority may have regard to it in the course of proceedings before them relating to an alleged breach of the good faith obligation. They are not, however, bound to apply or follow a Code.

The ERA sets out the procedure for the preparation and issue of such Codes which involves consultation with a committee comprising at least equal numbers of employer and union representatives. Even if the Committee prepares and approves a Code, the Minister retains the power to decline to issue the Code and, in deciding whether to approve a Code, may consult any person they see fit. Since 2000, three Codes have been issued by the Minister of Labour, of which one is specific to the health industry.

While there is no duty imposed on the employer to commence bargaining with a given union, once bargaining has been initiated, the parties are obliged to reach an agreement unless there is a good reason not to. The parties are able to bargain about a wide range of issues with the only stipulations being that the resulting agreement must contain the following clauses:

1. a coverage clause;
2. a plain English explanation of dispute/grievance resolution;
3. an employee protections clause (dealing with negotiations with a prospective purchaser in a sale of business);
4. a clause setting out the mechanisms for variation; and
5. an expiry date.

Unions have often used the employee protections clause to guarantee a role for themselves in negotiations for the sale of a business, which would not otherwise exist.

While there is no compulsory conciliation or arbitration, one or both of the parties can have a difficult negotiation referred to the Employment Relations Authority, which can set part of the collective agreement.

Finally, it has recently been made a specific breach of good faith to offer in an individual contract of employment the same terms and conditions of employment as a collective agreement, if the purpose of doing so is to undermine the collective agreement. Similarly, the terms and conditions of one collective agreement cannot be offered in another collective agreement if the purpose is to undermine the original collective agreement. This latter provision is arguably important to the larger, more established unions who have had to compete against new workplace based unions who may have been established by the employer. As this development is new, it has not been tested in the Labour Court.

Enforcement and remedies

The overriding obligation of good faith can be used by unions to protect a variety of other rights which are explicitly granted to unions in different jurisdictions such as consultation.

The existence of a Code of Good Faith, prepared in consultation with unions and employers, informs collective bargaining in New Zealand, while not being legally enforceable.

If the Labour Court finds that the parties did not bargain with each other in good faith, sections of the resulting agreement can be changed or the whole agreement can be struck down.

Effectiveness

Unions in New Zealand have endured a tumultuous decade and a half during which a serious attempt was made to curtail their influence in industrial relations by refusing to acknowledge their existence.

Accordingly, New Zealand is still trying to rebuild a system in which unions have a legitimate and recognised role to play in industrial relations as advocates for their members' interests. It remains to be seen whether the proliferation of small workplace based unions, some of which were established by employers as employer friendly employee associations under the ECA, is positively contributing to this process. Commentators have noted that some of these workplace based unions do not identify themselves as truly a union, becoming registered only to have access to the collective bargaining process set out by the ERA. This could serve to undermine unions which genuinely seek to protect their members' interests beyond collective bargaining.

Appendix 2:

The Trade Union Representatives (Status at the Workplace) Act 1974 (Sweden)

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- ¹ B Creighton W Ford and R Mitchell (1993) *Labour Law*. Text and Materials, , 2nd edition Law Book Company Sydney at 923.
- ² Creighton Ford and Mitchell (1993) at 997.
- ³ See e.g. A Frazer (1995) 'Trade Unions under Compulsory Arbitration and Enterprise Bargaining', in P. Ronfeldt and R. McCallum (eds), *Enterprise Bargaining, Trade Unions and the Law*, The Federation Press, Sydney, at 52.
- ⁴ B Creighton and A Stewart (2005) *Labour Law*, 4th edition, Federation Press, Sydney, at 397, 525-527.
- ⁵ Creighton and Stewart (2005) at 496-497.
- ⁶ See further Creighton and Stewart (2005) at 483-485.
- ⁷ See J E Isaac (1994) 'Australia' in Anne Trebilcock (ed), *Towards Social Dialogue: Tripartite Cooperation in National Economic and Social Policy-Making* at 67.
- ⁸ See Creighton and Stewart (2005) at 486-487.
- ⁹ See further P Gahan (2000) 'Dead Letters? An Examination of Union Registrations Under Colonial Trade Union Acts, 1876-1900,' *Australian Journal of Labour Law*, 13(1): 50-83. The retention under some State industrial laws of registration provisions for State-based unions has, over many years, raised important questions such as the extent to which registration under one or other of the State systems provided unions with legal personality, the nature of incorporation under federal industrial law, and the relationship between the two forms of incorporation – however, consideration of these questions is beyond the scope of this Report. For present purposes, the central point to note is that the use of registration to provide unions with legal personality was (and remains) a significant element of union recognition in Australia.
- ¹⁰ See further M Rimmer, 'Unions and Arbitration', in J. Isaac and S. Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, 2004, p 275. The height of union density was in fact 1963, when it reached 63 percent.
- ¹¹ Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, Australia*. Canberra, 6310.0, 2005.
- ¹² For detailed accounts, see e.g. D Peetz, *Unions in a Contrary World: The Future of the Australian Trade Union Movement*, Cambridge University Press, Cambridge; 1998; M Crosby, *Power at Work: Rebuilding the Australian Union Movement*, The Federation Press, Sydney, 2005.
- ¹³ The *Work Choices Act* amended and re-numbered the Workplace Relations Act, with effect from 27 March 2006.
- ¹⁴ J E Stackpool (1989) 'Industrial Relations Legislation in 1988,' *Journal of Industrial Relations*, 31(1) at 95.
- ¹⁵ Unless 'special circumstances' justified registration: *IR Act 1988*, s 189(1)(c). At the time, around 25 percent of all federally registered unions fell below the 1000 member threshold (see the data in Creighton, Ford and Mitchell (1993) at 1103). It should also be noted that the original proposal contained in the IR Bill was for a minimum membership number of 3000. See K Spooner (1989) 'Australian Trade Unionism in 1988,' *Journal of Industrial Relations*, 31(1) at 122.
- ¹⁶ J Catanzariti and F Youl (1991) 'Industrial Relations Legislation in 1990,' *Journal of Industrial Relations*, 33(1) at 80.
- ¹⁷ Creighton and Stewart (2005) at 496.
- ¹⁸ Creighton and Stewart (2005) at 506-507.
- ¹⁹ Catanzariti and F Youl (1991)
- ²⁰ Catanzariti and F Youl (1991)
- ²¹ Creighton and Stewart (2005) at 506-507.
- ²² Commencing with provisions of the *IR Act 1988*, followed by the *Industrial Relations Legislation Amendment Act 1992*. see Creighton and Stewart (2005) at 195.
- ²³ *IR Reform Act 1993*, Part VIB, Divisions 2 and 3: Reitano (1993) at 67; Creighton and Stewart 4th edition (2005) at 195-196; for further detail, see R Naughton, 'The New Bargaining Regime under the Industrial Relations Reform Act' (1994) 7 *Australian Journal of Labour Law* 198.
- ²⁴ Creighton and Stewart 4th edition (2005) at 196.
- ²⁵ Creighton and Stewart 4th edition (2005) at 195, 221; see further Naughton (1994).
- ²⁶ Naughton (1994).

- ²⁷ R Naughton, *The Obligation to Bargain in Good Faith: Inspired Innovation or Legislative Folly?*, (Working Paper No. 6, Centre for Employment and Labour Relations Law, University of Melbourne); Creighton and Stewart 4th edition (2005) at 220-221.
- ²⁸ *Appeal by CPSU* (AIRC Full Bench, L4605, 31 August 1994).
- ²⁹ (1995) 59 IR 385.
- ³⁰ M Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62.
- ³¹ R McCallum, 'Australian Workplace Agreements – An Analysis' (1997) 10 *Australian Journal of Labour Law* 50.
- ³² Pittard (1997).
- ³³ G McCarr, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 133.
- ³⁴ R Naughton, 'Sailing into Uncharted Seas: The Role of Unions Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 112; A Coulthard, 'The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion under the Workplace Relations Act 1996 (Cth)' in S Deery and R Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion – An International Study*, (The Federation Press, Sydney 1999), p 48.
- ³⁵ See for example C Briggs, R Cooper and B Ellem, 'What About Collective Bargaining? In *The State of Industrial Relations: The State of the States 2005*, Evatt Foundation, 2005, p 66.
- ³⁶ *Boeing Australia Limited v AWU*, AIRC Full Bench Decision, 23 February 2006, PR968945, para 47.
- ³⁷ *Sensis Pty Ltd v Members of the Full Bench of the Industrial Relations Commission* [2005] FCAFC 74 (12 May 2005).
- ³⁸ See *Community and Public Sector Union v Sensis Pty Ltd*, AIRC, Smith C, PR927827, 17 February 2003, (2003) 53 AILR 100-005; and PR930269, 10 April 2003, (2003) 53 AILR 100-026(58); overturned by the AIRC Full Bench in *Sensis Ltd v CPSU* (2003) 128 IR 92; see also *Jet Care Pty Ltd v ALAEA*, AIRC, 15 July 2003, PR934761; *Minister for Health v ANF*, AIRC, McCarthy DP, 8 December 2004, PR945670.
- ³⁹ Creighton and Stewart (2005) at 504-505, 509-510.
- ⁴⁰ For example, *Patrick Stevedores Operations No. 2 Ltd v MUA* (1998) 195 CLR 1; *AWU v BHP Iron Ore Pty Ltd* (2000) 96 IR 422; *Greater Dandenong City Council v ASU* (2001) 184 ALR 641; *FSU v Commonwealth Bank of Australia* (2000) 106 IR 139; *FSU v Commonwealth Bank of Australia* [2005] FCA 796 (9 September 2005), and [2005] FCA 1847 (16 December 2005); compare however *BHP Iron Ore Pty Ltd v AWU* (2000) 97 IR 266; *AWU v BHP Iron Ore Pty Ltd* (2001) IR 410.
- ⁴¹ Creighton and Stewart (2005) at 527-529.
- ⁴² That is, does registration under federal law now involve too high a price for unions, and entail too few benefits? This issue is explored further in paras 2.34-2.38 below.
- ⁴³ A Forsyth, 'Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission' (2006) 32 *Australian Bulletin of Labour* (forthcoming).
- ⁴⁴ A Forsyth and C Sutherland 'Collective Labour Relations Under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* (forthcoming).
- ⁴⁵ A Forsyth and C Sutherland, 'From 'Uncharted Seas' to 'Stormy Waters': How Will Trade Unions Fare under the Work Choices Legislation?' (2006) *Economic and Labour Relations Review* (forthcoming).
- ⁴⁶ Forsyth and Sutherland (2006) *Economic and Labour Relations Review* (forthcoming).
- ⁴⁷ C White, 'Inside the Tent: The Right to Strike in Australia', (Evatt Foundation, 2005).
- ⁴⁸ See for example R Adams 'The North American model of employee representational participation: "A Hollow Mockery"' (1993-4) 15 *Comparative Labor Law Journal* 4, J Godard (2003) 'Labour Unions, Workplace Rights and Canadian Public Policy,' *Canadian Public Policy*, 29(4) 449-467; S Wood and J Godard (1999) 'The Statutory Recognition Procedure in the Employee Relations Bill: A Comparative Perspective,' *British Journal of Industrial Relations*, 37(2): 203-45.
- ⁴⁹ B Townley (1987) 'Union Recognition: A Comparative Analysis of the Pros and Cons of a Legal Procedure,' *British Journal of Industrial Relations*, 25(2): 177-200; and M Hart (1978) 'Union recognition in America- the Legislative Snare', *Industrial Law Journal* 7: 201215.
- ⁵⁰ For background, see K. Ewing (1990) 'Trade Union Recognition – A Framework for Discussion,' *Industrial Law Journal*, 19: 209-227; and (1999) 'Freedom of Association and the Employment Relations Act 1999,' *Industrial Law Journal*, 28(4): 283-298.
- ⁵¹ See e.g. R Townshend-Smith, 'Trade Union Recognition Legislation – Britain and America Compared' (1981) 1 *Legal Studies* 190.

- ⁵² See B Simpson, 'Trade Union Recognition and the Law, A New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 20 *Industrial Law Journal* 193.
- ⁵³ See e.g. M Terry, 'Partnership and the Future of Trade Unions in the UK' (2003) 24 *Economic and Industrial Democracy* 485.
- ⁵⁴ See G Gall, 'The First Five Years of Britain's Third Statutory Union Recognition Procedure' (2005) 34 *Industrial Law Journal* 345.
- ⁵⁵ A Bogg, 'Employment Relations Act 2004: Another False Dawn for Collectivism?' (2005) 34 *Industrial Law Journal* 72 at 75-82.
- ⁵⁶ The two systems have common antecedents; see contributions in S Macintyre and R Mitchell (1989) *Foundations of Arbitration*, Oxford University Press, Melbourne.
- ⁵⁷ E Dannin (1997) *Working Free: The Origins and Impact of New Zealand's Employment Contracts Act*. Auckland, Auckland University Press.
- ⁵⁸ See e.g. G Anderson, 'Transplanting and Growing Good Faith in New Zealand Labour Law (2006) 19 *Australian Journal of Labour Law* 1-29.
- ⁵⁹ Ewing (1990).
- ⁶⁰ Lord Wedderburn of Charlton 'The New Structure of Labour Law in Britain,' (1978) 13 *Israel Law review* 435 at 436.
- ⁶¹ This discussion extends the framework of forms of recognition developed by Ewing (1990), which derives from Anglo-American debates. His framework is extended to accommodate the traditional Australian forms of union recognition, and the European models of recognition.
- ⁶² The first three of these elements can be seen as approximating the concept of union recognition for *industrial* purposes under the traditional Australian system, identified in section 1 above; the fourth element clearly equates to the Australian notion of recognition for *social, economic and political* purposes, as does the fifth to *legal* recognition as identified in section 1.
- ⁶³ Based on the rights founded in the ILO *Freedom of Association and Protection of the Right to Organise Convention* 1948 (No 87).
- ⁶⁴ *WR Act 1996* (as amended by the *Work Choices Act 2005*), Part 16.
- ⁶⁵ E.g. *WR Act 1996* (as amended by the *Work Choices Act 2005*), section 515(1)(a) (relating to awards).
- ⁶⁶ Ewing (1990).
- ⁶⁷ *Termination, Change and Redundancy Case* (1984) 8 IR 34; 9 IR 115.
- ⁶⁸ E.g. *Employment Protection Act 1982* (NSW).
- ⁶⁹ Creighton and Stewart (2005) at 432.
- ⁷⁰ See e.g. A Forsyth, 'Giving Employees a Voice over Business Restructuring: A Role for Works Councils in Australia', in P Gollan and G Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy, Labor Essays 2003* (Pluto Press, Sydney, 2003) 140.
- ⁷¹ The right to collectively bargain has been viewed by the courts as a natural extension of the right to organise, and therefore implicitly a right which derives from the constitutional guarantee to organise.
- ⁷² See e.g. B Bercusson, 'The European Social Model Comes to Britain' (2002) 31 *Industrial Law Journal* 209; M Biagi, 'The Role of Social Partners in Europe: From Dialogue to Partnership' (1999) 20 *Comparative Labor Law and Policy Journal* 485.
- ⁷³ That is, following the German model: see D Miller, 'Social Partnership and the Determinants of Workplace Independence in West Germany' (1982) 20 *British Journal of Industrial Relations* 44.
- ⁷⁴ See e.g. Bercusson (2002); Terry (2003); W Brown, 'Putting Partnership into Practice in Britain' (2000) 38 *British Journal of Industrial Relations* 299.
- ⁷⁵ Forsyth and Sutherland (2006) *Economic and Labour Relations Review* (forthcoming).
- ⁷⁶ The determination of conclusions on these issues is beyond the scope of this Report.
- ⁷⁷ Wedderburn 'The New Structure of Labour Law in Britain,' *Israel Law Review*
- ⁷⁸ Townley (1987).
- ⁷⁹ Townley (1987) at 193.
- ⁸⁰ C R Fine (2002) 'Union Salting: Reactions and Rulings since *Town and Country*,' *Journal of Labor research*, 23(3): 475-485; and JM Capron (2005) 'A Saline Solution to the Salting problem,' *Employee Relations Law Journal*, 30(4): 3-26.
- ⁸¹ A Stokes, R L Murphy, P E Wagner and D S Sherwyn, 'How Unions Organize New Hotels Without an Employee Ballot,' *Cornell Hotel and Restaurant Quarterly*, October-November, 2001, 86-96 at 96.

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- ⁸² There are three exceptions to this rule. A ballot will be held if the CAC believes (i) it is in the interest of good industrial relations to hold a ballot, (ii) a significant number of the union members in the bargain unit inform the CAC that they do not want the union (or unions) to conduct collective bargaining on their behalf (iii) membership evidence is produced which leads the CAC to conclude that there are doubts whether a significant number of the union members within the bargaining unit want the union (or unions) to conduct collective bargaining on their behalf [ERA 1999 - paragraph 22 (3)(4)]
- ⁸³ Central Arbitration Committee. (2005) Annual Report 2004-2005.
- ⁸⁴ For detail of the prohibitions on unfair practices in relation to recognition ballots see paragraph 27A of the *ERA 1999* (Schedule 1 A TULCRA 1992) as inserted by the section 10 of the *Employment Relations Act 2004*.
- ⁸⁵ Simpson (2000)
- ⁸⁶ This right is contained in section 10 of the *ERA 1999*. Smith and Morton (2001) have argued that a right to be accompanied does not equal a right to be represented. In addition, they have pointed out that the scope of the provision is narrow, for it concerns disputes of right rather than disputes of interest. Similarly, Miller (2000) has drawn attention to the narrowness of this right. Our concern here is that the grievance provision offers a role for unions that is not dependent on formal recognition by the employer, albeit only if the union is the preferred "companion" of the affected worker. We have therefore liberally categorised the grievance provision as an employee representation right.
- ⁸⁷ "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests".
- ⁸⁸ "The State Parties to the present covenant undertake to ensure ... the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests."
- ⁸⁹ Williams for instance notes that while Australia is distinctive in not constitutionally guaranteeing certain rights of association, under the external affairs power, legislation could expressly ensure such rights exist. See Williams (1998) *Labour Law and the Constitution*, Federation Press, Sydney, Chapter 3.
- ⁹⁰ Currently found at section 133 of the Registration and Accountability of Organisations Schedule to the Workplace Relations Act 1996 (Cth).
- ⁹¹ The independence of the NLRB has been questioned by many unions and commentators, principally around the question of senior appointments to the Board and a perceived policy of neglect of collective bargaining. In 1994, the Clinton appointed Commission on the Future of Work-Management Relations recommended significant changes to the collective bargaining system, but these were ignored by Congress.
- ⁹² Charges of unfair labour practices are filed with the NLRB. Initially, unfair labour practices complaints are investigated by the NLRB, followed by an attempt to resolve the complaint by the relevant regional NLRB director. About 85 percent of complaints are resolved by the director. If unsuccessful, a decision is made as to whether the complaint should proceed to a formal hearing before an administrative law judge. Any decision is implemented by an agent of the NLRB. The parties can appeal the decision, in which case appointed board members decide upon the complaint. Once again, this decision may appeal to the courts; it will not be implemented until ruled on by the courts, which may take up to three years.
- ⁹³ These exceptions are (i) if it is deemed to be in the interest of good industrial relations, (ii) if there is some reason to believe union membership is not bona fide; and (iii) if there is reason to believe some union members do not favour recognition.
- ⁹⁴ R May, P Walsh and C Otto, 'Unions and Union membership in New Zealand: Annual Review for 2003' (February 2004) Victoria University Industrial Relations Centre, Auckland, New Zealand.
- ⁹⁵ *Ibid.*

Trade Union Representatives (Status at the Workplace) Act

(SFS 1974:358)

Including amendments up to and including SFS 1990:1039

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SECTION 1 This Act applies to any person who has been appointed as a trade union representative, by an employees' organisation, to represent the employees at a particular place of work with respect to matters concerning the relationship to the employer or with respect to other issues relating to union activities.

Employees' organisation, for the purpose of this Act, means an organisation which is, or usually is, bound by a collective bargaining agreement relating to those employees, which are affected by the activities of the representative.

The Act shall apply to a trade union representative when the employees' organisation has notified the employer of the trade union representative appointment. The employees' organisation shall determine when the Act shall apply in relation to the representative. (SFS 1990:1039)

SECTION 2 If any Act contains a provision that differs from this Act, that provision shall apply. Provisions in other enactments than an act shall apply if they relate to an issue concerning a right of priority to continued employment or the planning of time off for a trade union representative whose pay benefits are determined in conjunction with the Government or a public authority appointed by the Government, or a trade union representative of the Riksdag or its departments.

Any part of an agreement whereby a trade union representative's rights pursuant to this Act are restricted is invalid. Deviations may, however, be made from Sections 1, 5-7, Section 8, first paragraph, and Section 9a, first and second paragraphs, on the basis of a collective bargaining agreement that has been concluded or approved on behalf of the employees by an organization that is deemed to be a central employees' organization under the Employment (Co-Determination in the Workplace) Act (1976:580). (SFS 1990:1039)

SECTION 3 An employer may not prevent a trade union representative from performing his duties.

If the appointment relates to a place of work other than the representative's own place of work, the employer is obliged to allow the representative to perform his duties and to be active to the extent necessary to fulfil his duties. The activities may not, however, result in any significant impediment to the proper performance of work. The representative shall be provided with the use of premises or other space at his own place of work as necessary for the performan-

ce of the trade union activity carried out there. (SFS 1990:1039)

SECTION 4 A trade union representative shall not be subjected to worse conditions of work or terms of employment as a result of his appointment. Following the completion of the appointment, the employee shall be ensured the same or an equivalent position, with respect to working conditions and terms of employment, as if he had not received any trade union appointment.

SECTION 5 In the event that an issue arises concerning the alteration of a trade union representative's conditions of work or terms of employment, the employer shall inform the representative and give at least two weeks advance notice to the local employees' organisation. If this is not possible, the representative shall be informed and notice shall be given as soon as possible. The obligation to inform the trade union representative and notify the union shall not arise if the alteration takes place in the normal course of the trade union representative's work and does not detract from his opportunity to perform his trade union duties.

The local employees' organisation and the representative shall be entitled to deliberations with the employer concerning measures referred to in the first paragraph. Such deliberations shall be convened not later than one week after the representative has been informed and the union notified. Once the deliberations have been convened, the employer shall not be entitled to implement the anticipated measure until the opportunity for deliberations has been afforded.

SECTION 6 A trade union representative is entitled to time off, as required, for performance of the trade union duties.

The time off may not, however, exceed what is reasonable taking account of circumstances prevailing at the place of work. The time off may not be scheduled in such a manner as to cause any significant impediment to the proper performance of work.

The amount of time off and the time at which it is to be taken shall be determined following deliberations between the employer and the local employees' organisation.

SECTION 7 The representative shall be entitled to retain his employment benefits in the event that time off is taken for the performance of trade union activities at his own place of work.

If trade union activities at his own place of work take place at times outside the representative's normal working hours and this results from a decision taken by the employer, the representative shall be paid compensation as though the work had been performed on behalf of the employer.

Additional costs incurred shall also be reimbursed, if they are attributable to the employer.

Where, according to law, employment benefits are paid on the basis of the amount of time worked, the time referred to in the first and second paragraphs shall be regarded as equivalent to time worked. (SFS 1990:1039)

SECTION 8 In the event of giving of notice of termination as a consequence of a shortage of work and in connection with redundancies, trade union representatives shall, notwithstanding Section 22 of the Employment Protection Act (1982:80), be given priority to continued employment, if it is of special importance for the trade union activity at the place of work. If the representative can only be afforded an opportunity to continue his work after a transfer, his right of priority to continued employment shall be contingent upon his having sufficient qualifications for that employment.

Any dismissal which takes place contrary to the first paragraph shall, upon the application of the representative, be declared invalid. The provisions of Section 34, second and third paragraphs, Sections 37, 39, 40 and 42 and Section 43, second paragraph, of the Employment Protection Act (1982:80), shall apply in this connection. (SFS 1982:87)

SECTION 9 If a dispute relating to a trade union representative arises concerning the application of Section 1, 3, 4, 6 or 7 or Section 8, first paragraph, or the provisions of a collective bargaining agreement which, on the basis of Section 2, second paragraph, applies instead of Section 1, 6, 7 or Section 8, first paragraph, the opinion of the local employees' organisation on the correct interpretation of the Act or collective bargaining agreement shall apply pending the final determination of the dispute. A collective bargaining agreement which applies instead of this Act may provide that the right of determination of the party for the employees shall instead accrue to the central employees' organisation.

The employer may, notwithstanding the provisions of the first paragraph, refuse any time off which would jeopardise safety at the place

of work, important public functions or interests equivalent thereto.

SECTION 9A An employer who, pursuant to Section 3, second paragraph, is obliged to afford a trade union representative access to a place of work and permit the representative to be active there, is entitled to negotiate with the relevant employees' organisation with respect to an obligation of confidentiality concerning the information which is to be given to the representative.

In such circumstances, Section 21, second and third paragraphs, of the Employment (Co-Determination in the Workplace) Act (1976:580), shall apply. Information which a trade union representative has acquired subject to an obligation of confidentiality according to the first paragraph, may be disclosed by the representative, notwithstanding the obligation of confidentiality, to a member of the board of directors of the employees' organisation. In such circumstances the obligation of confidentiality shall also apply to the member of the board of directors.

The provisions of Chapter 14, Sections 7, 9 and 10 of the Secrecy Act (1980:100), shall apply, instead of the provisions of the first and second paragraphs of this Section, with respect to issues concerning the performance of appointments pursuant to Section 3, second paragraph at a place of work in the public service. (SFS 1990:1039)

SECTION 10 An employer who fails to comply with his obligations pursuant to this Act or the provisions of a collective bargaining agreement which apply instead of this Act, shall, in addition to pay and other employment benefits to which a union representative is entitled, pay compensation for any damage incurred. In assessing whether, and to what extent, damage has been incurred, account shall also be taken of the interests of the employees' organisation in compliance with the provisions of this Act in relation to the union's representatives, and also other circumstances which are not purely of a financial significance.

An employees' organisation may be ordered to pay damages if it has caused the erroneous application of this Act or a collective bargaining agreement which applies instead of the Act and where such organisation was aware, or clearly should have been aware, of the error. This also applies if the organisation fails to take reasonable measures to stop a trade union representative from similar conduct or if the union fails to endeavour to prevent damage arising as a consequence of an incor-

rect procedure. A union representative cannot be ordered to pay damages or to repay pay which he has received for union activities which he has conducted with the approval of the organisation.

Damages may be adjusted if, taking account of the extent of damage or other circumstances, it is reasonable to do so.

SECTION 10A If a union representative or a member of the board of directors of an employees' organisation breaches the obligation of confidentiality as referred to in Section 9a, first and second paragraphs, or makes unauthorised use of knowledge which the union representative or member of the board of directors has acquired subject to such an obligation of confidentiality, the employees' organisation shall be liable for any damage caused thereby. In such circumstances liability shall not be imposed pursuant to Chapter 20, Section 3 of the Penal Code.

Where reasonable, damages may be reduced, in part or in whole. (SFS 1990:1039)

SECTION 11 Any person wishing to claim damages pursuant to this Act shall notify the other party of his claim within four months from the time at which the damage arose. If negotiations have been convened during that time pursuant to the Employment (Co-Determination in the Workplace) Act (1976:580), or on the basis of a collective bargaining agreement, the action shall be commenced within four months from the conclusion of negotiations. In other circumstances, the action shall be commenced within eight months from when the damage arose.

The first paragraph applies, *mutatis mutandis*, with respect to claims concerning pay and other employment benefits pursuant to this Act or collective bargaining agreements which apply instead of this Act.

If the provisions of the first and second paragraphs are not observed, the right of action will lapse. (SFS 1976:594)

SECTION 12 Proceedings concerning the application of this Act shall be processed in accordance with the Labour Disputes (Judicial Procedure) Act (1974:371). Such proceedings shall be conducted expeditiously. The same applies with respect to proceedings concerning collective bargaining agreements which apply instead of this Act. Notwithstanding Section 9, the Labour Court may make orders in the disputed issue pending the final determination of the dispute. Applications for such orders may not be granted until the other party has been afforded an opportunity to express his views.