

# COUNTRY BASELINE UNDER THE ILO DECLARATION ANNUAL REVIEW

New Zealand - 2022

## FREEDOM OF ASSOCIATION AND THE EFFECTIVE RECOGNITION OF THE RIGHT TO COLLECTIVE BARGAINING

### REPORTING

#### Fulfilment of Government's reporting obligations

87 Fulfilment of Government's reporting obligations

yes

#### Involvement of Employers' and Workers' organizations in the reporting process

91. When preparing its report, the Government consulted [10.1]

a) The most representative employers organizations, b) The most representative workers organizations

94. Please describe the consultation process(es). [10.2]

Social partners were forwarded a copy of the Government's report and invited to comment.

### OBSERVATIONS BY THE SOCIAL PARTNERS

#### Employers' organizations

95. Did employers organizations comment on the report? [11a]

Yes

#### Workers' organizations

96. Did workers organizations comment on the report? [11b]

No

# EFFORTS AND PROGRESS MADE IN REALIZING THE PRINCIPLE AND RIGHT

## Ratification

87-98 Ratification status

C 87 unratified; C 98 ratified

## Ratification intention

6. What are the prospects for ratification of Convention No. 87?

Likely

8. What, if any, are the impediments to the ratification of Convention No. 87?

Eventual ratification is more likely than unlikely given commitments contained in the recently settled (but not yet ratified) Free Trade Agreement between New Zealand and the European Union to work towards ratification of unratified Fundamental Conventions. This Agreement specifies that the parties "shall make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so." However, currently there are issues concerning the inconsistency between New Zealand's approach to lawful and protected strike action and that taken by Committee of Experts and Committee on Freedom of Association that, under the Convention, sympathy strikes and strikes on social and economic policy matters should be lawful and protected from penalty. These issues will need to be worked through and resolved. NZCTU Comment: No comment. BusinessNZ Comment: While New Zealand's employment relations legislation is concerned to promote the principles underlying Convention 87 and while BusinessNZ also supports those principles, this organisation cannot, as it has previously indicated, support the way in which the Convention is interpreted by the ILO's Freedom of Association Committee and the Committee of Experts. These committees have read into the Convention the right to strike not only for collective bargaining purposes - over which an employer can have some influence - but also on social and economic matters. Their authority to do so (given that the Convention makes no mention of any right to strike and the status of the committees themselves) is, at the very least, open to question in view of the conflict this interpretation creates between workers' rights and the public interest. Members of the public, who can do nothing to bring strike action to an end, should not suffer disadvantage through the actions of others with whose views they may entirely disagree. Government policies are best addressed via the ballot box. BusinessNZ has long believed that strike action should not be permissible over matters the affected employer can do nothing about. It therefore cannot support the ratification of Convention 87. But beyond the issue of whether or not to ratify Convention 87 is the more immediate issue of the government's decision to ignore its obligations under

	<p>Convention 98, a Convention which it has ratified. For many years ratification of Convention 98 was not possible as New Zealand's then national award system negated the right of unions and employers to engage in voluntary collective bargaining. More recently, the bargaining process has been more generally freed from state control and ratification has followed. Now, however, New Zealand is to return to a situation where whatever is negotiated between union and employer representatives will apply to all workers and employers although they have had no part in the bargaining process. This is very far from the voluntary bargaining situation Convention 98 envisages, representing a move back to a situation where demarcation disputes were rife and strike action (theoretically unlawful during the bargaining process) the consequence of the discontent engendered. It is regrettable that the government will not acknowledge its breach of a fundamental convention and its inability now to comply with the Convention's provisions. The fact that if no representative employer bargaining party can be found or is available, terms and conditions can be determined by the Employment Relations Authority – an institution with no experience of the bargaining process – serves only to emphasise the involuntariness of what is about to be introduced.</p>
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**Recognition of the principle and right (prospect(s), means of action, basic legal provisions)**

**Constitution**

<p>9. Have there been changes in law and practice in your country as regards freedom of association and the effective recognition of the right to collective bargaining?</p>	<p>Yes</p>
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**Policy-Legislation and/or Regulations**

<p>9. Have there been changes in law and practice in your country as regards freedom of association and the effective recognition of the right to collective bargaining?</p>	<p>Yes</p>
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	<p>Development of a Fair Pay Agreement (FPA) system (in progress) Please refer to New Zealand's 2021 report for the background to this initiative. A key aim of the FPA system is to promote collective bargaining, and to drive enduring, transformational change benefiting workers – particularly those in low-paid jobs, or in sectors where collective bargaining does not presently exist or, if it does, is not effective. FPAs will be agreed through a bargaining process between unions, employees and employer representatives and will then become legal requirements in that sector. This will provide an industry or occupation specific floor for terms and conditions of employment above which additional terms</p>
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and conditions may be agreed through individual or enterprise level bargaining. The Fair Pay Agreements Bill was introduced to Parliament on 29 March 2022, and is due for report back to Parliament from Select Committee by 5 October 2022, with enactment expected before the end of 2022. A key policy change to the proposed FPA system, since the Government's previous report, is a proposed backstop process, to cover situations where there is no bargaining party on one side of FPA bargaining and where the default bargaining party does not step in to fill the gap. This proposal was referred to the Parliamentary Select Committee on 5 April 2022 and included in the Select Committee's public consultation process for the Bill. Further information on the Bill, the backstop proposal and the Bill's progress through Parliament is available at: Fair Pay Agreements Bill 115-1 (2022), Government Bill 224 Powers of Authority under this Act – New Zealand Legislation

<https://www.legislation.govt.nz/bill/gov>

[ernment/2022/0115/latest/LMS656468.html](https://www.legislation.govt.nz/bill/government/2022/0115/latest/LMS656468.html) Parliamentary

paper: Proposed policy change to the Fair Pay Agreements

Bill <https://www.parliament.nz/resource/en-NZ>

[/PAP\\_121464/a141b142e6532b7aa40dedfb2c02](https://www.parliament.nz/resource/en-NZ/PAP_121464/a141b142e6532b7aa40dedfb2c024177e9292a47)

[4177e9292a47](https://www.parliament.nz/resource/en-NZ/PAP_121464/a141b142e6532b7aa40dedfb2c024177e9292a47) Fair Pay Agreements Bill - New Zealand

Parliament [https://www.parliament.nz/en/pb/bills-an-d-](https://www.parliament.nz/en/pb/bills-an-d-laws/bills-proposed-laws/document/BILL_121328/fair-pay-agreements-bill)

[laws/bills-proposed-laws/document/BILL\\_121328/fair-pay-](https://www.parliament.nz/en/pb/bills-an-d-laws/bills-proposed-laws/document/BILL_121328/fair-pay-agreements-bill)

[agreements-bill](https://www.parliament.nz/en/pb/bills-an-d-laws/bills-proposed-laws/document/BILL_121328/fair-pay-agreements-bill) Further information on the design of the FPA

system is available at: [https://www.mbie.govt.nz/business-](https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-t-legislation-reviews/fair-pay-agreements/)

[and-employment/employment-and-skills/employmen t-](https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-t-legislation-reviews/fair-pay-agreements/)

[legislation-reviews/fair-pay-agreement s/](https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-t-legislation-reviews/fair-pay-agreements/)

[https://www.mbie.govt.nz/dmsdocument/14297-fair-pay-](https://www.mbie.govt.nz/dmsdocument/14297-fair-pay-agreements-approval-to-draft-proactiverelase-pdf)

[agreements-approval-to-draft -proactiverelase-pdf](https://www.mbie.govt.nz/dmsdocument/14297-fair-pay-agreements-approval-to-draft-proactiverelase-pdf) NZCTU

Comment: No comment. BusinessNZ Comment: See response

above regarding the government's fair pay agreements

initiative. The Fair Pay Agreements Bill is imminently

expected to pass into law and will come into force in a

month's time. --- Screen Industry Workers' Bill The

Government has noted in previous reports the origins and

rationale for the formation of the Film Industry Working

Group, and the development of the Screen Industry Workers

Bill. Principally, the legislation gives screen workers the right

to collectively bargain, without changing their designation as

independent contractors. It will provide protections for

screen production workers, while also giving the industry

certainty and flexibility. The legislation: • provides clarity

about the employment status of people doing screen

production work, • introduces a duty of good faith and

mandatory terms for contracting relationships in the

industry, • allows collective bargaining at the occupation and

enterprise levels, and • allows access to employment

institutions to resolve disputes arising from contracting

relations or collective bargaining in the screen industry. The

Bill has passed through its Committee stages and into law. It

can be found at: <https://www.legislation.govt.nz/bill/gov>

[ernment/2020/0219/latest/LMS230343.html](https://www.legislation.govt.nz/bill/government/2020/0219/latest/LMS230343.html) NZCTU

Comment: No Comment. BusinessNZ Comment: This Act is

now in force and, it is understood, does little more than put

into legislative form the way in which the screen industry

currently operates.

Consultation on better protections for vulnerable contractors  
The Government wants to ensure that all workers in New Zealand – including contractors - have access to decent working conditions and fair remuneration. Feedback received from public consultation in 2020 made it clear that some workers who are engaged as contractors are vulnerable to poor outcomes because they lack both the protections offered to employees by law, and the power to negotiate a better deal (through, for instance, collective bargaining). A tripartite working group with Business New Zealand and the New Zealand Council of Trade Unions has drawn on this feedback to develop recommendations to the Government. The main theme of these recommendations is that the Government should work to improve the legal distinction between employees and independent contractors, so that fewer workers are misclassified as independent contractors. The Working Group’s main recommendations (subject to further policy and legal analysis) are to:

- Revise the legislative definition of “employee” to include a strong sense of contradistinction to someone genuinely in business on their own account.
- Construct more detailed, objective and prescriptive legislative requirements for worker classification.
- Prioritise further policy work and consultation to understand the impacts of possible changes and manage the risk of unintended consequences.
- Development of a comprehensive package of guidance and support services (consistent across all government channels) to support better classification practices by firms in the first instance, reducing reliance on the dispute resolution system.
- Allow judicial determinations on employment status to cover other workers performing similar work for the same hiring entity under similar contractual terms (even if only one worker seeks a judicial decision).
- Explore options for regulatory design that would allow regulators to intervene in cases of potential worker misclassification, without relying on an individual complainant wanting to pursue the matter.
- Align the definition of “employee” across employment and tax legislation.

Further information on these recommendations is provided in the Tripartite working group report [PDF, 440 KB]. <https://www.mbie.govt.nz/assets/tripartite-working-group-on-better-protections-for-contractors-december-2021.pdf> The Government is working through the detail of a policy proposal based on the Tripartite Working Group’s recommendations; this is expected to be published for public consultation in late 2022. NZCTU Comment: No Comment. BusinessNZ Comment: BusinessNZ does not condone attempts to circumvent employment relations protections but would point out that there are many individuals who prefer to be work on their own account. For those others who consider their employment relationship is that of employee/employer the means of establishing their true relationship already exist – as recent employment Court decisions have underlined (notably, its most recent decision relating to four Uber drivers.)

## Exercise of the principle and right

## At national level (enterprise, sector/ industry) and international level

### For Employers and Workers

#### 12.1. Please specify and indicate the involvement of social partners.

As noted in previous reporting, the social partners meet with Government on a regular basis to discuss topical matters of interest and are represented on a number of groups that have been convened to examine and provide recommendations on relevant policy issues. These have included Fair Pay Agreements, Better Protections for Contractors and The Screen Industry Workers Bill. In this latter case, the Bill reflects recommendations made by the Film Industry Working Group, of which social partners were members. Since the Film Industry Working Group made its recommendations to the Government, social partners have been included in designing the detail of the Bill. In 2021 the Government allocated NZ\$250,000 per annum for three years to be available to each of the social partners (the NZCTU and BusinessNZ), to support the Fair Pay Agreements system, and the Screen Industry Workers Bill if they wish. The funding is to be used to raise awareness (including upskilling), assist in coordinating bargaining representatives, and support bargaining parties. NZCTU Comment: No Comment. BusinessNZ Comment: BusinessNZ declined to accept the money offered by the government to adopt the role of default bargaining partner, enabling it, in the absence of any other appropriate employer bargaining partner, to act for employers designated by unions in fair pay agreement bargaining. However, it appears from the legislation itself, that BusinessNZ is still expected to carry out this role, defining the default bargaining party for the employer side as the 'most representative organisation of employers' (the NZCTU is the 'most representative organisation of unions'.)

### Information/ Data collection and dissemination

#### 12. If yes, please specify:

b) Information/data compilation,e) Other related activities

#### 12.e. Please specify other

Please refer to the responses provided above, regarding the ongoing work on Fair Pay Agreements and collective bargaining in the Screen Industry, which are intended to promote freedom of association and collective bargaining. NZCTU Comment: No Comment. BusinessNZ Comment: As previously noted, there has been no effort made to promote effective, voluntary collective bargaining, quite the reverse. Freedom of association, on the other hand, has long been recognised in New Zealand.

### Monitoring, enforcement and sanctions mechanisms

<p><b>9. Have there been changes in law and practice in your country as regards freedom of association and the effective recognition of the right to collective bargaining?</b></p>	<p>Yes</p>
	<p>Increased Funding for the Labour Inspectorate and Additional Functions to Support Fair Pay Agreements (FPAs) In Budget 2022 the Government allocated \$16.4 million over four years in increased funding to the Ministry of Business, Innovation and Employment and to the Employment Relations Authority to carry out three new functions: • Backstop determinations, where the Authority will fix FPA terms if there is no bargaining party on one side. • Coverage determinations, where the Labour Inspectorate will decide whether employees are covered by an FPA. • Enforcing regional variations, where the Labour Inspectorate will enforce any regional variations in FPA terms. An additional \$6 million in funding was also approved to support the development of two additional FPAs per year in addition to the four per annum funded in Budget 2021. This covers bargaining support, dispute resolution services, compliance and enforcement, vetting and verification, and research and business support to the Employment Relations Authority.</p>

## Involvement of the social partners

<p><b>12.1. Please specify and indicate the involvement of social partners.</b></p>	<p>As noted in previous reporting, the social partners meet with Government on a regular basis to discuss topical matters of interest and are represented on a number of groups that have been convened to examine and provide recommendations on relevant policy issues. These have included Fair Pay Agreements, Better Protections for Contractors and The Screen Industry Workers Bill. In this latter case, the Bill reflects recommendations made by the Film Industry Working Group, of which social partners were members. Since the Film Industry Working Group made its recommendations to the Government, social partners have been included in designing the detail of the Bill. In 2021 the Government allocated NZ\$250,000 per annum for three years to be available to each of the social partners (the NZCTU and BusinessNZ), to support the Fair Pay Agreements system, and the Screen Industry Workers Bill if they wish. The funding is to be used to raise awareness (including upskilling), assist in coordinating bargaining representatives, and support bargaining parties. NZCTU Comment: No Comment. BusinessNZ Comment: BusinessNZ declined to accept the money offered by the government to adopt the role of default bargaining partner, enabling it, in the absence of any other appropriate employer bargaining partner, to act for employers designated by unions in fair pay agreement bargaining. However, it appears from the legislation itself, that BusinessNZ is still expected to carry out this role, defining the default bargaining party for the employer side as the ‘most representative organisation of employers’ (the NZCTU is the ‘most representative organisation of unions’.)</p>
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## Promotional activities and special initiatives /Progress

<p><b>13. Have any initiatives resulted in successful examples or good practice in promoting freedom of association and the effective recognition of the right to collective bargaining?</b></p>	<p>Yes</p>
<p><b>13.1. Please Specify</b></p>	<p>Please refer to the responses provided above, regarding the amendments to the employment relations system and the ongoing work on FPAs and collective bargaining in the screen industry, which are intended to promote freedom of association and collective bargaining. Both the proposed Fair Pay Agreements system and the Screen Industry Workers Bill have arisen from a tripartite process. NZCTU Comment: No Comment. BusinessNZ Comment: It is BusinessNZ's view that, recent government initiatives have done more to undermine collective bargaining than to promote it.</p>
<p><b>18. Please provide URL(s) to any other information you may deem necessary.</b></p>	

## CHALLENGES IN REALIZING THE PRINCIPLE AND RIGHT

### According to the Government / social partners

	<p>New Zealand lacks sector-level coordination mechanisms in our employment regulation framework necessary to establish industry or sector-level minimum standards. The Government aims to redress this by introducing a Fair Pay Agreements system and a bespoke collective bargaining framework for workers in the screen industry (via the Screen Industry Workers' Bill). New Zealand's minimum employment code applies to all employees. Separate sectoral standards have no relevance in a small country such as New Zealand and will, apart from everything else, simply cause confusion. Occupations might have the same job title but, depending on the organisation concerned, have very different job content.</p>
	<p>As noted in previous baseline reports, the New Zealand Government considers that the current legislative framework enables the effective realisation of freedom of association and the collective bargaining of terms and conditions of employment where sought by the parties. All employees have the right to join a union and the right to collectively bargain through their union. The Employment Relations Act 2000 contains detailed provisions and mechanisms to promote a process of orderly collective bargaining that recognises the interests of employees and employers and is conducted in good faith. However, given that in practice: most bargaining is conducted individually between employer and employee; most employees are not union members; and most collective bargaining occurs at the level of the</p>



enterprise, unions may experience difficulties in recruiting and organising members across industries. The Government's work on Fair Pay Agreements and the Screen Industry Workers Bill is intended to enhance access to collective bargaining, including at industry or occupation-level. NZCTU Comment: No Comment. BusinessNZ Comment: The government's statement in the penultimate paragraph under this heading clearly indicates what the effect of introducing the fair pay agreements system will have, not only the removal of the freedom element from collective bargaining but in doing so, the right of true freedom of association. Employees will be affected whether they are union members or not. In BusinessNZ's view this is a retrograde step and one that should not be undertaken.