NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

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

to the

Transport and Industrial Relations Select Committee

on the

Employment Relations Amendment Bill

Part II- Technical analysis

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Wellington

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Part II

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APPENDIX: *CTU submission to the Transport and Industrial Relations Select Committee on the Employment Relations (Meal and Rest Breaks) Amendment Bill (2010)* 55

Note:

The CTU submission is in two parts. This part (Part II) contains detailed discussion of the most significant proposed changes and the CTU's recommendations in relation to these. This part (Part I) reviews the justification for the Bill's proposed changes along with an overview of their likely effects on collective bargaining, vulnerable workers, income inequality and adequacy and on the economy. This part (Part I) reviews the justification for the Bill's proposed changes along with an overview of their likely effects on collective bargaining, vulnerable workers, income inequality and adequacy and on the economy. my. .

Part II

2 Summary of recommendations

Recommendations: Duty of good faith where employment is at risk (cl 4)

The CTU recommends that cl 4 of the Bill[1] is not enacted. It will reduce workers' rights to natural justice. This is likely to lead directly to worse employer decisions and more personal grievances. It is contrary to the objects of the Act.

If the Government continues to pursue these amendments then we recommend the following to ameliorate the worst aspects of the current proposal:

- S 4(1B)(b) is amended to state "(b) that is evaluative material within the meaning set out in section 29(3) of the Privacy Act 1993" or that the Privacy Act definition is repeated. This would have the benefit of aligning the law closely with that under the Privacy Act;
- Proposed s 4(1B)(c) should be deleted. The right to know one's accuser is a fundamental natural justice right and should only be waived in exceptional circumstances.
- Given the requirement of information disclosure in existing s 4(1A)(c)(i) we think that the permissive 'may' is misleading in proposed s 4(1C)(b). We propose this section is amended to state that "an employer **must** provide access to information contained in the same document as the information described in new subsection (1B)."

Recommendation: Duty to conclude bargaining (cl 7 and 9)

Cls 7 and 9 of the Bill should not be enacted. The changes will encourage poor bargaining behaviour, discourage collective bargaining and do not conform to the Government's obligations to promote collective bargaining or the interests of working New Zealanders.

Recommendation: Requirement to continue bargaining (cl 8)

Cl 8 is premised on a misunderstanding of the law prior to 2004. The enactment of s 32(1)(ca) set out the existing duty of good faith at the time. Repeal of s 32(1)(ca) does not make sense and should not occur.

[1] All clause ('cl') references are to the relevant clauses in the Employment Relations Amendment Bill ('the Bill') as are references to 'proposed sections' (such as 'proposed 's 4(1C)(b). Otherwise all section ('s') references are to the current Employment Relations Act 2000 ('the Act') unless another piece of legislation is specifically referenced.

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Recommendations: Application to conclude bargaining (cl 12)

The CTU opposes changes to the bargaining framework that make it easier for parties to walk away from the negotiating table. Combined with the proposed weakening of the duty to settle collective agreements, allowing parties to apply for a declaration that bargaining is over will ultimately result in fewer collective agreements being concluded. Cl 12 should not be enacted.

While it will not fix fundamental problems with the proposal, if the Government proceeds with the introduction of this mechanism, the CTU recommends the following amendments:

- The 60 day period where neither party may reinitiate bargaining will create further delay and will be detrimental to workplace relations. It is contrary to ILO jurisprudence. Proposed s 50K(3)(b) should not be enacted.
- If the 60 day non-initiation period is enacted then workers must retain the right to take industrial action during this time and immediately after the second initiation of bargaining (rather than waiting 40 more days).
- A subsection should be added to state that the Authority shall not declare bargaining over if the applicant party has failed to comply with the duty of good faith in s 4 and s 32 of the Act and any applicable codes of good faith and the failure undermined the bargaining.
- Notwithstanding a declaration that bargaining has concluded, an expired collective agreement should remain in force unless replaced by a new collective agreement (with consequential amendment to s 53(3).
- The application to conclude should include requirements to deal with the Authority in good faith.

There is merit in the Government's earlier proposals to reduce the high thresholds for access to the Authority's facilitation function. These proposals should be revived.

Recommendation: Equalisation of timeframes for bargaining (cl 10)

The major effect of equalising timeframes for bargaining will be to create disorder and dispute at the initiation stage. Cl 10 should not be enacted.

Part II

Recommendation: Continuation of collective agreements in force (cl 13)

The CTU supports the continuation of collective agreements remaining in force regardless of whether a union or an employer initiates bargaining. The amendment is critical if equalisation of initiation timeframes occurs. Cl 13 should be enacted.

As noted under *application to conclude bargaining* above, if bargaining has been initiated by either party, the expired collective should continue in force unless replaced by a new collective agreement.

Recommendation: MECA opt out (cl 11)

The removal of the right to negotiate and exercise full bargaining rights in support of multi-employer bargaining is a breach of fundamental rights of freedom of association and collective bargaining. New Zealand has been reprimanded previously by the ILO for breaching workers' rights in this way. Cl 11 should not be enacted.

Recommendation: 30 day coverage for new workers (cls 14-19)

The removal of the 30 day rule is an attack on terms and conditions for new workers. Indirectly it is also an attack on the terms of existing collective agreements. Cls 14-19 should not be enacted.

Recommendation: Flexible working arrangements (cl 21)

We support the extension of flexible working arrangement requests to all workers. Other restrictions around eligibility to request should be lifted and timeframes for response should be tightened as proposed.

The fundamental problem with flexible work requests is they remain, in effect, a procedural right only. The grounds for rejecting a flexible work request should be tightened. This may be achieved by adding a reasonableness test for the employer's decision and allowing workers to challenge this decision. This could be done by:

- Amending s 69AAF(1)(b) to state that the employer may only refuse a request if the employer determines that "the request cannot **reasonably** be accommodated on one or more of the grounds specified in subsection (2); or";
- Amending ss 69AAI, 69AAJ and 69AAK to provide that a worker may challenge the reasonableness of their employer's refusal under s 69AAF(1); and
- Removing the $2,000 upper limit on the penalty that may be imposed on the employer for breach of s 69AAE or s 69AAF(1) in s 69AAJ(1).

Part II

Recommendation: SME exemption from Part 6A (cls 28-34, 36)

Exempting SMEs from Part 6A is a mistake. It will make the law more complex and tilt the market towards a race to bottom. It arbitrarily deprives some of the most vulnerable workers of protection. It did not form part of the recommendations from the reviews of Part 6A. The SME exemption should not be enacted.

If the Committee decides to proceed with the exemption then the associated persons test must be improved. Challenging an incorrect declaration relies too heavily on access to information that may be deliberately hidden and systems that may be gamed. It does not constitute real protection for workers.

The CTU recommends that consideration is given to the possibility of adopting the more expansive Income Tax Act 2007 definition of associated persons. This test is familiar to employers. If the full test is seen as onerous or otherwise unsuitable then two of the general tests in s YB2 of the Income Tax Act 2007 should be adopted:

YB 2 Two companies

Common voting interests

(1) Two companies are associated persons if a group of persons exists whose total voting interests in each company are 50% or more. …

Common control by other means

(3) Two companies are associated persons if a group of persons exists who control both companies by any other means.

It is unclear whether s 69OAA is intended to codify the parties and causes of action available in the instance of false warranty of exempt employer status. If it is, then much more work should be done in the design of that section.

Recommendation: Right to elect to transfer (cl 32)

The default window for workers to elect to transfer to a new employer is too short and does not allow adequate time to consider, seek advice or to correct individualised employee information. Either the current "reasonable opportunity to make an election" should be retained or a longer default timeframe such as 20 working days should be allowed.

The CTU supports requirements to provide affected workers with information about their right to transfer at an earlier point. We also support the stipulation that failure of the old employer to pass valid transfer information to the new employer does not affect the validity of the transfer.

Section 69G(2)(e) regarding the form in which the election is to be made is rendered redundant by s 69G(5) which permits an election to be made by post, fax or email. We recommend that it is replaced with:

(e) the employee's employers contact details for receipt of the election including post, fax and email addresses.

Section 69G(5) should include hand delivery of the election along with post, fax or email as valid delivery methods. It is illogical to exclude it.

We presume that an email sent by a worker or their agent validly electing to transfer would meet the requirements of the authenticated signature fiction. If not, the section should be amended to allow this.

Recommendations: Disclosure of individualised employee information (cls 38, 39 and 41)

The transfer of information relating to terms and conditions of employment, leave entitlements and tax matters from the old to the new employer is useful.

However, the transfer of disciplinary and grievance information is intensely problematic. This information is often inherently private and embarrassing.

The restriction on provision of confidential information, while necessary, will make the information unreliable in many instances. As the Privacy Commissioner points out, much of the information will be irrelevant to the worker's on-going employment. The timeframes for transfer do not allow workers a real opportunity to correct wrong or misleading information.

Disciplinary and grievance information should not be transferred.

If the Government is determined to proceed then we submit that only disciplinary and grievance matters clearly relevant to the worker's on-going employment with the new employer are to be transferred.

Before sending individualised employment information to the new employer, the old employer must provide the transferring worker with a genuine opportunity to review the information and correct it. We recommend that proposed s 69OEA(3) is amended to state:

(3) The employee's employer must provide the individualised employee information as soon as practicable allowing the employee a reasonable right to review and correct the individualised employee information.

A worker should be provided with a copy of the individualised employment information if they request it.

Recommendation: Ability to add employees to Schedule 1A (cl 63)

The CTU does not support the repeal of s 237A. The process has not been subject to significant problems or misuse and the responsiveness it provides is valuable compared to amendment by primary legislation.

Recommendation: Rest breaks and meal breaks (cls 43-46)

The changes to the meal break and rest break provisions cannot be justified. They solve a problem for which there is no real evidence by removing an important right from workers. These changes will have negative outcomes for health and safety and remove New Zealand from the international mainstream.

Cls 43-46 should not be enacted.

Recommendations: Notice requirement for strikes (cls 47-53)

The proposal that all strike action should be subject to notice requirements is an unjustified derogation from the right to strike guaranteed by New Zealand's ratification of ICESCR and fundamental rights of freedom of association. Clauses 47-53 should not be enacted.

Several of the proposed notice requirements are particularly illogical and onerous. They are unjustified barriers to the effective exercise of strike action:

- The requirement to notify the chief executive of MBIE of any strike serves no practical purpose and is unduly onerous.

- The notice requirement for strike action does not allow unions to specify a certain group of workers at a particular worksite other than by name. This is more restrictive than the equivalent provision in essential services.

Section 86 of the Act should be amended to provide a statutory codification of the *de minimis* rule along the lines of the United Kingdom Lawful Industrial Action (Minor Errors) Bill.

Recommendation: Penalties for breach of notice requirements in relation to passenger transport services (cl 54)

We support the amendment proposed by cl 54.

Recommendations: Withdrawal of notice of strike or lockout (cl 55)

We do not support the introduction of strict requirements for the withdrawal of strike or lockout action. The withdrawal of this action should be made as easy as possible. Cl 55 is unnecessary.

If the Government proceeds with these changes, as we have said in relation to cl 49 above we do not support written notice requirements for strikes outside of essential services, passenger transport and education. The reference to s 86A should be removed from proposed s 95AA.

The clause ought to contain an equivalent section to proposed s 86A(3) requiring that the notice be signed by a union official and may be given on behalf of all union members covered by the bargaining (or groups thereof). The former protects against fraudulent withdraw notices and the latter allows whole groups to withdraw early from strike action (rather than one worker at a time).

Recommendation: Pay deductions for partial strikes (cl 56)

Cl 56 should not be enacted. There is no evidence of a significant problem to be addressed and the solution will lead the parties into legal dispute. The proposal to deduct 10% of workers' pay will be in breach of ILO jurisprudence in many situations. It also constrains the options for workers in dispute and this is a deliberate attempt to undermine the bargaining strength of workers on wages and conditions.

Part II

Recommendations: Employment Relations Authority processes (cl 61)

We cautiously support the proposal that the Employment Relations Authority should render its final determinations within three months barring exceptional circumstances.

We do not support the proposals around Authority members giving indications of preliminary findings. This is a barrier to considered decision-making and may create stress, cost and procedural issues.

Part II

3 Duty of good faith where employment is at risk

3.1 Cl 4 replaces the current s 4(1B) which allows an employer to withhold access to confidential information where a worker's employment is at risk (required by s 4(1A)(c)) if there is a good reason to do so and s 4(1C) which non-exhaustively defines good reason as including statutory confidentiality, the privacy of natural persons and preventing the unreasonable prejudice of the employer's commercial position.

3.2 Proposed s 4(1B) and (1C) state:

> (1B) However, subsection (1A)(c) does not require an employer to provide access to confidential information—
>
> (a) that is about an identifiable individual other than the affected employee:
> (b) that is evaluative or opinion material compiled for the purpose of making a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more employees:
> (c) that is about the identity of the person who supplied the material described in paragraph (b):
> (d) that is subject to a statutory requirement to maintain confidentiality:
> (e) where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position).
>
> (1C) To avoid doubt,—
>
> (a) the requirements of subsection (1A)(c) do not affect an employer's obligations under—
> (i) the Official Information Act 1982:
> (ii) the Privacy Act 1993 (despite section 7(2) of that Act): [s 7(2) provides that the Privacy Act does not derogate from information requirements under other Acts]
> (b) an employer may provide access to information contained in the same document as the information described in subsection (1B) by providing access to—
> (i) that document, with any deletions or alterations that are necessary to avoid disclosing the information described in subsection (1B); or
> (ii) a summary of the contents of that document.

3.3 This is a significant diminution of workers' rights to information relevant to their on-going employment. As we note at [6.12] of part I of our submission, New Zealand has the lowest level of protection for workers in the OECD in relation to collective dismissals such as redundancies. Employers are given extremely wide latitude as to the justification for these dismissals and redundancy compensation is only payable where it is a contractual term. The only effective protection for workers is the requirement for employers to go through a real consultation process. These changes would undermine even this protection.

3.4 Particularly concerning is the breadth of proposed s (1B)(b) "evaluative or opinion material compiled for the purpose of making a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more employees."

3.5 Depending how the courts read "evaluative or opinion material" the scope of this exemption may be very wide. For example, this exemption could be read to capture an investigator's recommendations to a decision maker as to the appropriate way forward following a disciplinary investigation. Equally, a consultant's report in a redundancy situation may be withheld if it recommends a particular way forward.

3.6 The breadth of the term "evaluative or opinion material compiled for the purpose of making a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more employees" is also greater than the equivalent in the Privacy Act 1993. S 29(3) of the Privacy Act 1993 states:

> **Evaluative material** means evaluative or opinion material compiled solely—
> (a) for the purpose of determining the suitability, eligibility, or qualifications of the individual to whom the material relates—
> (i) for employment or for appointment to office; or
> (ii) for promotion in employment or office or for continuance in employment or office; or
> (iii) for removal from employment or office; or
> (iv) for the awarding of contracts, awards, scholarships, honours, or other benefits;

3.7 As the Bill's explanatory note states at 5 "[c]onflicting obligations about the disclosure of personal information under different Acts create uncertainty for employers."

3.8 We are concerned about the effect of the proposed scheme on natural justice in disciplinary investigations given the ability of the employer to deny the worker information about other named individuals[2] (and the names of those supplying evaluative or opinion material).[3] These exemptions could be used to undertake disciplinary investigations where workers have little or no power to challenge evidence put forward against them by their colleagues.

3.9 These exemptions do not fit with requirements of procedural fairness under the common law and s 103A of the Act. In particular s 103A(3)(b) and (c) provide a strong obligation to raise "the concerns that the employer had with the employee" and to give the employee "a reasonable opportunity to respond to the concerns."

3.10 In *Vice-Chancellor of Massey University v Wrigley*[4] the Employment Court carefully considered the purpose of s 4 in light of the objects of the Act:

> What is immediately apparent in s 3(a) is the strong and fundamental emphasis on good faith as the principal means of achieving successful employment relationships. This supports an interpretation of the specific obligations in s 4 which minimises the likelihood of employment

[2] Proposed s 4(1B)(a).
[3] Proposed s 4(1B)(c).
[4] [2011] NZEmpC 37 at [47]-[48].

> relationship problems developing. In general, that is more likely to be achieved by giving timely and ample access to relevant information. More informed employee involvement will promote better decision making by employers and greater understanding by employees of the decisions finally made. That will avoid or reduce the sense of grievance which may otherwise result and thereby reduce the incidence of personal grievances and other employment relationship problems.
>
> …Recognition of the inequality of power in employment relationships is also directly relevant. When a business is restructured, the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer's final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues. In this sense, knowledge is the key to giving employees some measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer.

3.11 The importance of confidentiality must be weighed against the right of workers to make their best possible answer to allegations against them or unfavourable proposals. Fundamentally, this is a question about the fairness of our employment law. As the Privy Council commented in the case of *Furnell v Whangarei High Schools Board*[5] "[n]atural justice is but fairness writ large and juridically, fair play in action."

3.12 On the specific issue of the right to know the case, Lord Denning stated in a famous Privy Council decision:[6]

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.

3.13 To obtain a fair outcome these competing interests must be balanced against each other. Does the good reason to maintain confidentiality outweigh the natural justice in receiving information relevant to the worker's continuation of employment? As the Employment Court commented in *Vice-Chancellor of Massey University v Wrigley:*[7]

> In any particular case, whether a sufficiently good reason exists will require consideration of the likely effects of giving access to the information and those of maintaining confidentiality. How serious those effects are likely to be and how likely they are to occur, will be important. Equally, the employer must consider means of reducing possible adverse effects and restrict access to information only to the extent necessary to reduce the adverse effects of sharing that information to a level which no longer constitutes a sufficiently good reason to maintain confidentiality of the remaining information.

3.14 The CTU submits that this balancing act remains appropriate. While the test does not provide a binary answer, it provides a fair and reasonable answer to a

[5] [1973] 2 NZLR 705 at 718.
[6] *Kanda v Government of Malaya* [1962] AC 322 (PC) at 337.
[7] [2011] NZEmpC 37 at [81].

question that cannot be black-or-white with the risk of substantial unfairness to one of the affected parties.

3.15 The proposed amendments will ultimately lead to more personal grievances as workers challenge what they perceive as unfair processes (and material that is not released earlier will almost certainly be discoverable). As the Employment Court suggests above, this is contrary to the objects of the Act to address the inherent inequality of employment relationships and to reduce the need for judicial intervention.

Recommendations: Duty of good faith where employment is at risk (cl 4)
The CTU recommends that cl 4 of the Bill is not enacted. It will reduce workers' rights to natural justice. This is likely to lead directly to worse employer decisions and more personal grievances. It is contrary to the objects of the Act.

If the Government continues to pursue these amendments then we recommend the following to ameliorate the worst aspects of the current proposal:

- S 4(1B)(b) is amended to state "(b) that is evaluative material within the meaning set out in section 29(3) of the Privacy Act 1993" or that the Privacy Act definition is repeated. This would have the benefit of aligning the law closely with that under the Privacy Act;
- Proposed s 4(1B)(c) be deleted. The right to know one's accuser is a fundamental natural justice right and should only be waived in exceptional circumstances.
- Given the requirement of information disclosure in existing s 4(1A)(c)(i) we think that the permissive 'may' is misleading in proposed s 4(1C)(b). We propose this section is amended to state that "an employer **must** provide access to information contained in the same document as the information described in new subsection (1B)."

4 Duty to conclude bargaining

4.1 Clause 7 repeals s 31(aa) which provides that one of the objects of Part 5 of the Act is that the duty of good faith requires parties to conclude a collective agreement unless there are genuine reasons based on reasonable grounds not to.

4.2 Clause 9 replaces the existing s 33 with:

33 Duty of good faith does not require collective agreement to be concluded

> The duty of good faith in section 4 does not require a union and an employer bargaining for a collective agreement—
>
> (a) to enter into a collective agreement; or
> (b) to agree on any matter for inclusion in a collective agreement.

4.3 Aside from a reversal of ss (a) and (b) this clause is identical to the original section that remained in force from 2 October 2000 to 30 November 2004. The requirement is removed that a collective agreement be concluded unless there is a genuine reason based on reasonable grounds not to. Also removed are the limitations on what constitutes a genuine reason to ensure that 'objection in principle to bargaining for or being bound by a collective agreement' or 'disagreement about the inclusion of a bargaining fee clause' are not included.

4.4 We note the Employment Court's decision in *New Zealand Public Service Association v Secretary for Justice*.[8] In that case, it was found that, despite a genuine belief by the employer that a stalemate had emerged on the issue of remuneration they could not unilaterally declare the bargaining at an end while "circuit-breaking" options remained to the parties (such as facilitation under sections 50A-50I of the Employment Relations Act 2000). Chief Judge Colgan noted at [24]:

> The legislative scheme for bargaining encourages its continuation, even in difficult circumstances, and emphasises that in all but exceptional circumstances, collective bargaining should result in the settlement of a collective agreement between the parties.

4.5 The termination of bargaining has potentially serious negative consequences for unions and their members engaged in bargaining. As Chief Judge Colgan noted in *New Zealand Public Service Association v Secretary for Justice*:[9]

> If, in law, the parties are no longer bargaining, the legality of any strike action must be in question. So too will the employment status of PSA members and, in particular, whether the terms and conditions of their employment are governed by an expired collective agreement that is nevertheless continuing in force statutorily or, alternatively, whether they are deemed to be on individual agreements based on the expired collective. If bargaining has ended, can the parties still have recourse to the statutory mechanisms for progressing stalled bargaining including mediation assistance, facilitation of the bargaining process by the Employment Relations Authority or, ultimately, the fixing of terms and conditions by the Authority?

4.6 The more stringent requirements of good faith during bargaining would also come to an end, potentially allowing restructuring or contracting out that compromises the position of the union or the members (such as the mass dismissal proposed in the

[8] [2010] NZEmpC 11.
[9] [2010] NZEmpC 11 at [2].

Ports of Auckland dispute and ruled as arguably undermining bargaining in *Maritime Union of New Zealand Inc v Ports of Auckland Ltd*[10]).

4.7 The Department of Labour identifies other risks with this proposal:[11]

> [T]his proposal encourages poor bargaining behaviour (such as surface bargaining) as was seen prior to the 2004 amendment to the Act, when one party has no intention of concluding an agreement and does no more than going through the motions to avoid a breach of good faith complaint. Parties may abandon attempts to reach an agreement, where it may have been possible to do so under the current framework.
>
> This change will have a signalling effect that employers can walk away easily… This may cause disputes around when bargaining has ended. This may cause deterioration of the employment relationship and see an increase in staff turnover, particularly where there is a strong union presence and commitment to collective bargaining. There is also a risk that fewer collective agreements will be concluded.

4.8 The signalling effects of this change are extremely problematic. We note the comments of Paul MacKay of Business New Zealand on the duty to conclude cited in a recent LLM Thesis:[12]

> Business New Zealand believes that, "In an ideal world, the employer organisations, ourselves included, would say that you should work in good faith towards an agreement, but if you can't, you can't." Business New Zealand stated that if an employer does not want to have a collective agreement, reasons for not having one can still be found without being in breach of this requirement to conclude a collective.
>
> "… [W]hy bother putting that there unless you are to go to the full Monty and say, if a union initiates bargaining and lays claims for one, you shall conclude a collective agreement based on your resolution of those claims. But as long as you provide a loophole, people will use the loophole."
>
> Business New Zealand takes the position that defining a philosophical objection as not being reasonable grounds to conclude a collective agreement will not prevent employers fundamentally opposed to unionisation from covering up their motive for withholding at the bargaining table from concluding.

4.9 As discussed in Part I of our submission, signalling to employers that collective bargaining is unimportant is contrary to our best interests as a country. Almost as important as the regulatory framework that the law imposes is the normative framework. Ellen Dannin rebuts the argument that minimum behavioural standards are unnecessary in legislation because good employers will naturally treat their workers well and bad employers will not be constrained by legal requirements:[13]

> These objections could be made about many laws. Most people will not murder, but some do despite the existence of murder laws. No one argues that this means murder laws serve no purpose. In the case of employment laws, experience teaches us that even laws that merely

[10] [2012] NZEmpC 54.
[11] 'Regulatory Impact Statement: Improving how collective bargaining operates' (26/4/2012) at [53]-[54].
[12] Polakoski, J. M. (2011) 'The Impacts of Good Faith on Collective Bargaining: A New Zealand Case Study' (LLM Thesis, Victoria University of Wellington) 138-139.
[13] Ellen Dannin, "Good Faith Bargaining, Direct Dealing and Information Requests: The U.S. Experience" (2001) 26(1) *NZJIR* 45, 52-53.

> reinforce what good employers do can play a useful role. All laws play a normative role, that is giving government sanction to the behaviour society supports and spelling out what behaviour it condemns. Employers who need guidance as to what standards should be applied can find it from such laws. In other words, a well-written law can help them become better employers.
>
> Second, bad employers can force good employers to lower their standards of conduct. If some employers operate at less expense by being bad, they pressure good employers to do the same. If there are no norms and no sanctions, the general standard of conduct may be ratcheted down. A well-written law can help good employers remain good employers and perhaps even become better employers.

4.10 The ILO has commented on the lack of promotion of collective bargaining under the Employment Contracts Act 1991. The ILO's Committee on Freedom of Association ('the CFA') investigated the Government's breaches of ILO fundamental conventions C87 Freedom of Association and the Right to Organise 1948 ('C87') and C98 on the Right to Organise and Collective Bargaining 1949 ('C98') through the enactment of the Employment Contracts Act 1991. In the CFA's report they noted:

> **255.** As regards employment contracts, the Committee finds it difficult to reconcile the equal status given in the Act to individual and collective contracts with the ILO principles on collective bargaining according to which the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations should be encouraged and promoted, with a view to the regulation of terms and conditions of employment by means of collective agreements. In effect, it seems that the Act allows collective bargaining by means of collective agreements, along with other alternatives, rather than promoting and encouraging it. The Committee, therefore, hereunder draws the attention of the Government to certain principles it has established in this respect.

4.11 While the Employment Relations Act 2000 has stated objects of promoting collective bargaining (s 3(a)(iii)) and observance of C87 and C98 (s 3(b)) it has failed in that respect. As Blumenfeld and Ryall point out:[14]

> …[T]he total coverage figure of 308,900 employees for the year to June 2012 reflects an increase in collective bargaining coverage of 3.5 percent in the past year. Nonetheless, this year's figure also represents a significant decline in collective bargaining coverage in the 11 years since enactment of the ERA. In the year prior to the ECA's enactment, there were approximately 720,000 workers in New Zealand whose minimum pay and conditions were determined by an award or a CEA. Most of the latter were derived through multi-employer or industry-wide collective bargaining…. By the end of the ECA era, just over 420,000 New Zealand workers were covered by a CEA, the vast majority negotiated at the workplace or enterprise level. Yet, after nearly a dozen years under legislation that purported to support collective bargaining, the number of employees cover by CEAs has fallen by over 25 percent [not taking into account workforce growth since 2000].

4.12 In sections 4 and 6 of Part I of submission, we outline reasons that promotion of collective bargaining is important to building a high wage, high skill economy. A general objection we have to this Bill is that it merely allows collective bargaining in a constrained way, and does not promote collective bargaining. Thus it reduces the already weak structure of the Act in relation to promotion of collective bargaining.

[14] Blumenfeld, S and Ryall, S 'Trends in Collective Bargaining: A review of the 2011/2012 year' in Blumenfeld, S., Ryall, S. and Kiely, P. (2012) *Employment Agreements: Bargaining Trends & Employment Law Update 2011/2012* Victoria University of Wellington Industrial Relations Centre, 119.

4.13 The ILO Committee on Freedom Association's jurisprudence regarding bargaining in good faith is also relevant:[15]

> **936.** Both employers and trade unions should bargain in good faith and make every effort to come to an agreement, and satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence. …
>
> **938.** While the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith making every effort to reach an agreement.

Recommendation: Duty to conclude bargaining (cl 7 and 9)

Cls 7 and 9 of the Bill should not be enacted. The changes will encourage poor bargaining behaviour, discourage collective bargaining and do not conform to the Government's obligations to promote collective bargaining or the interests of working New Zealanders.

5 Requirement to continue bargaining

5.1 Clause 8 repeals s 32(1)(ca) "even though the union and the employer have come to a standstill or reached deadlock about a matter, they must continue to bargain… about any other matters on which they have not reached agreement."

5.2 The intended significance of this amendment is not explored in any real sense in the available cabinet papers and regulatory impact statements. The first Cabinet Paper stated that "[t]he related provision that parties have to continue to bargain over issues which they have not reached agreement if they are at a standstill or deadlocked over issues will be amended in line with the change."[16] The explanatory note to the Bill similarly states "[t]he repeal of section 32(1)(ca) relates to the replacement of section 33."

5.3 While s 32(1)(ca) was enacted at the same time as section 33 in 2004, they are distinct (albeit they both have the effect of keeping parties at the negotiating table). As *Mazengarb's Employment Law* notes out at ERA32.9A:

> [S 32(1)(ca)] is designed to codify the case law outlined above [the unchanged parts of s 32], which requires that the parties should bargain over issues between them, rather than allowing specific matters (even coverage) to impede further bargaining (Cabinet Economic Development Committee, paper EDC (03) 45, 31 March 2003).

[15] *'Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO'* Fifth (revised) edition 2006.

[16] 'Employment Relations Amendment Bill 2012 paper one: collective bargaining and flexible working arrangements' 3 May 2012 at [12].

The provision reflects the approach earlier taken by the Employment Relations Authority in *NZ Amalgamated Engineering etc Union (Inc) v Independent Newspapers Ltd* (2001) 6 NZELC 96,360 (WA 51/01) where, amongst other things, some employer respondents had refused to bargain on other issues until resolution had been reached on impasse around the question whether the proposed collective agreement should be a multi-employer collective agreement. The Authority held that the refusal to deal with other proposals was a breach of good faith.

5.4 Since the Bill proposes to return materially to the bargaining situation under which *Independent Newspapers Ltd* was decided, that case seems likely to remain good law. Where a statutory provision was enacted to codify existing law, it is legally perverse to remove the provision without demonstrating clear legislative intent as to what the new legal position should be.

5.5 If it is intended that a party should be able to refuse to negotiate further unless a ‘deadlock’ issue is agreed to, then this conclusively undermines the bargaining process (particularly if a deadlock relates to opposition in principle to collective bargaining). As we note in section 7 of part I of our submission certain claims such as the length of the agreement and pay increases are almost never agreed until the end of the negotiation due to their significance. This would also be contrary to the ILO principles relating to good faith cited above at 4.13.

5.6 Further, the Government’s concern regarding cycles of fruitless bargaining is already answered by s 32(2): “Subsection (1)(b) does not require a union and an employer to continue to meet each other about proposals that have been considered and responded to.”

Recommendation: Requirement to continue bargaining (cl 8)

Cl 8 is premised on a misunderstanding of the law prior to 2004. The enactment of s 32(1)(ca) set out the existing duty of good faith at the time. Repeal of s 32(1)(ca) does not make sense and should not occur.

Part II

6 Applications to conclude bargaining

6.1 Clause 12 inserts a proposed s 50K as follows:

50K Authority may determine that bargaining has concluded

(1) A party to bargaining for a collective agreement may apply to the Authority for a determination as to whether bargaining has concluded.

(2) Where an application is made under subsection (1), the Authority must—

(a) consider whether the parties have attempted to resolve the difficulties in concluding a collective agreement by use of mediation and, if applicable, facilitation; and

(b) direct that mediation, further mediation, or facilitation (as the case may require) be used before the Authority investigates the matter, unless the Authority considers that the use of mediation, further mediation, or facilitation would be unlikely to result in the parties resolving those difficulties.

(3) If the Authority determines that bargaining has concluded,—

(a) the Authority may make a declaration to that effect; and

(b) none of the parties to that bargaining may initiate further bargaining earlier than 60 days after the date of the declaration without the agreement of the other party or parties concerned.

(4) If the Authority determines that bargaining has not concluded,—

(a) the Authority may make a recommendation as to the process that the parties should follow to resolve the difficulties; and

(b) none of the parties to that bargaining may make another application under subsection (1) in respect of that bargaining until the process recommended by the Authority has been followed.

(5) If the Authority determines that bargaining has not concluded, but does not make a recommendation under subsection (4)(a), none of the parties to that bargaining may make another application under subsection (1) in respect of that bargaining earlier than 60 days after the date of the determination without the agreement of the other party or parties concerned.

6.2 The proposed process is a clumsy hybrid of adjudication to determine whether bargaining has concluded and facilitation (minus important procedural safeguards as noted below). It creates clear perverse incentives and an application to have bargaining deemed concluded will move parties into legal dispute and away from actual bargaining. It should not be enacted.

6.3 If the Government disagrees then major changes are needed to make the section workable in practice (although they do not ameliorate our fundamental concern regarding the proposal).

6.4 There is a question as to whether the test in s 50K(2)(b) imports the usual test for reference to facilitation or is a new one. Current s 50C speaks of the Authority “accepting a reference for facilitation” and the grounds on which this may occur.

Whether this is different from the Authority's proposed power to "direct… facilitation (as the case may require)" is unclear.

6.5 Assuming that the existing grounds are necessary for the Authority to direct reference to facilitation, these are set out in s 50C:

50C Grounds on which Authority may accept reference

(1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:

(a) that—
(i) in the course of the bargaining, a party has failed to comply with the duty of good faith in section 4; and
(ii) the failure—
(A) was serious and sustained; and
(B) has undermined the bargaining:

(b) that—
(i) the bargaining has been unduly protracted; and
(ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement:

(c) that—
(i) in the course of the bargaining there has been 1 or more strikes or lockouts; and
(ii) the strikes or lockouts have been protracted or acrimonious:

(d) that—
(i) in the course of bargaining, a party has proposed a strike or lockout; and
(ii) the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

(2) For the purposes of subsection (1)(d)(ii), a strike or lockout is likely to affect the public interest substantially if—
(a) the strike or lockout is likely to endanger the life, safety, or health of persons; or
(b) the strike or lockout is likely to disrupt social, environmental, or economic interests and the effects of the disruption are likely to be widespread, long-term, or irreversible.

(3) The Authority must not accept a reference in relation to bargaining for which the Authority has already acted as a facilitator unless—
(a) circumstances relating to the bargaining have changed; or
(b) the bargaining since the previous facilitation has been protracted.

6.6 Where parties would prefer to enter into facilitation rather than have bargaining declared over, a clear incentive is created to embark upon a course of action that would meet one or more of the criteria under s 50C. This is a stark example of misaligned incentives and will become more prevalent with the threat of an application for a determination that bargaining has concluded hanging over negotiations.

6.7 These incentives are particularly misaligned in relation to breaches of good faith which may, on the one hand, justify referral or direction to facilitation, but on the other

make reaching substantive agreement more difficult. Davenport and Brown cite the Canadian Report of the Task Force on Labour Relations to this effect:[17]

> Collective bargaining works more effectively and yields more satisfying results when both sides to the negotiations act in good faith. This applies both to the negotiation of the agreement and to its administration. Where one party does not act in good faith the disease is usually contagious. A sign of bad faith by one side is likely to make the other suspicious, and to weaken the possibilities for meaningful accommodations both before and during the life of the collective agreement.

6.8 The negative flow-on effects to the employment relationship may be very serious. In order to stop parties from breaching good faith to their strategic advantage as a method of ending collective bargaining, we propose the introduction of a 'clean hands' provision. In deciding whether to declare bargaining over, the Authority should decide whether the applicant party has complied with the duty of good faith in sections 4 and 32 of the Act and any applicable codes of good faith. If they have not done so, and that failure has had the effect of undermining the bargaining then the Authority should decline to make a declaration that bargaining is over.

6.9 The first cabinet paper canvassed the value of reducing the threshold for facilitation by removing the requirements for bargaining to be unduly protracted[18] or for industrial action to be protracted or acrimonious[19] but Cabinet appears to have rejected this.[20] There is merit in this idea and it should be revived. Parties should be encouraged to work through their difficulties with expert assistance wherever this is possible.

6.10 Unlike facilitation (see s 50I) there is no clause requiring parties to deal with the Authority in good faith in relation to applications that bargaining has been concluded. This should be added in relation to the quasi-facilitative process of application to conclude bargaining.

6.11 No justification has been given for the sixty-day period where parties may not initiate bargaining without the other parties' consent following a successful application to have bargaining declared at an end other than to cynically term this a 'grace period' in the explanatory note. More accurately, it is a 'free hit' period where the greater obligations of good faith in collective bargaining come to an end along with any existing collective agreement. Since industrial action may only be taken while

[17] *Canadian Industrial Relations: The Report of the Taskforce on Labour Relations* (1968) at [554] cited in Davenport, G and Brown, J (2002) *Good Faith in Collective Bargaining:* Wellington LexisNexis Butterworths at 346.
[18] Under s 50C(1)(b).
[19] Under s 50C(1)(c).
[20] 'Employment Relations Amendment Bill 2012 paper one: collective bargaining and flexible working arrangements' 3 May 2012 at [12]. The changes have not been carried forward into the Bill as introduced

bargaining continues and forty days after the initiation of bargaining this is effectively a 100 day ban on industrial action in support of a collective agreement. This is a fundamental breach of the right to strike.

6.12 The employer may then look to contract out the work of union members or to offer them individual employment agreements that are incompatible with the previous or proposed collective agreement. This proposal is an extraordinarily cynical incitement to union-busting and dispute and runs utterly counter to the Government's obligations to promote collective bargaining and productive employment relationships.

6.13 It is also contrary to the right to strike guaranteed by Art 8 of ICESCR and strong ILO jurisprudence:[21]

> **937.** The principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided….
>
> **522**. The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.
>
> **523**. The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.

6.14 Proposed s 50K(3)(b) should not be enacted.

6.15 If the 60 day non-initiation period is enacted then workers must retain the right to take industrial action during this time and immediately after the second initiation of bargaining (rather than waiting 40 more days).

Recommendations: Application to conclude bargaining (cl 12)

The CTU opposes changes to the bargaining framework that make it easier for parties to walk away from the negotiating table. Combined with the proposed weakening of the duty to settle collective agreements, allowing parties to apply for a declaration that bargaining is over will ultimately result in fewer collective agreements being concluded. Cl 12 should not be enacted.

While it will not fix the fundamental problems with the proposal, if the Government proceeds with the introduction of this mechanism, the CTU recommends the following amendments:

[21] *'Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO'* Fifth (revised) edition 2006

- The 60 day period where neither party may reinitiate bargaining will create further delay and will be detrimental to workplace relations. It is contrary to ILO jurisprudence. Proposed s 50K(3)(b) should not be enacted.
- If the 60 day non-initiation period is enacted then workers must retain the right to take industrial action during this time and immediately after the second initiation of bargaining (rather than waiting 40 more days).
- A subsection should be added to state that the Authority shall not declare bargaining over if the applicant party has failed to comply with the duty of good faith in s 4 and s 32 of the Act and any applicable codes of good faith and the failure undermined the bargaining.
- Notwithstanding a declaration that bargaining has concluded, an expired collective agreement should remain in force unless replaced by a new collective agreement (with consequential amendment to s 53(3)).
- The application to conclude should include requirements to deal with the Authority in good faith.

There is merit in the Government's earlier proposals to reduce the high thresholds for access to the Authority's facilitation function. These proposals should be revived.

7 Equalisation of timeframes for initiation of bargaining

7.1 Clause 10 amends s 41 to equalise timeframes for initiation of bargaining between unions and employers to 60 days prior to initiation where one collective agreement is in force. Where more than one collective agreement binds unions and employers that propose to negotiate (i.e. where an attempt is made to consolidate bargaining) the proposed timeframe is the later of 120 days before the last collective agreement expires or 60 days before the first collective expires.

7.2 On a practical level the proposal is likely to lead to disorderly bargaining. The Department of Labour's Regulatory Impact Statement summarises the key issues with this proposal:[22]

> Having the timeframe the same may create gamesmanship around who initiates bargaining and cross-initiation may occur. Confusion about who the relevant parties to the bargaining are or legal disputes about who initiated first will create extra costs, will take the focus away from the bargaining, and may generally prolong the bargaining process.

[22] 'Regulatory impact statement: Improving how collective bargaining operates' (26 March 2012) at [72]. The State Services Commission raised this issue as a particular concern, noted at 20.

7.3 It is difficult to reconcile these potential effects with the objects of the Act to build productive employment relationships by promoting collective bargaining and reducing the need for judicial intervention.

7.4 The explanatory note to the Bill states that the Bill aims "to reduce ineffective bargaining."[23] We suggest that this change (and several others) will shift the focus from discussion of the real bargaining issues to disputes around process. This will mean less effective and orderly bargaining and more workplace disputes.

Recommendation: Equalisation of timeframes for bargaining (cl 10) The major effect of equalising timeframes for bargaining will be to create disorder and dispute at the initiation stage. Cl 10 should not be enacted.

8 Continuation of collective agreements in force

8.1 Cl 13 amends s 53 to provide that an existing collective agreement continues in force for a period not exceeding 12 months after its expiry if either a union or an employer initiates bargaining before it expires (currently this only occurs if a union initiates bargaining first).

8.2 The clause removes the existing difference between union and employer initiation of bargaining (if an employer initiates the collective agreement does not continue in force beyond its printed term).

8.3 The amendment is critical if the Committee agrees that timeframes for initiation of bargaining should be equalised. Otherwise, the issues of gamesmanship and legal dispute around initiation will be multiplied.

8.4 The CTU is extremely concerned that employer parties will seek to make applications that bargaining has concluded for tactical reasons to end the collective agreement's continuation in force or even if unsuccessful create delay that will bring the year's expiry closer. This is a perverse incentive for employers to avoid actual negotiation. We submit that the best way to remove this perverse incentive is to ensure that once bargaining has been initiated for a new collective agreement the previous collective should continue in force until replaced by a new collective agreement.

[23] Employment Relations Amendment Bill explanatory note, 2.

Recommendation: Continuation of collective agreements in force (cl 13)
The CTU supports the continuation of collective agreements remaining in force regardless of whether a union or an employer initiates bargaining. The amendment is critical if equalisation of initiation timeframes occurs. Cl 13 should be enacted.

Further, as noted under *application to conclude bargaining* above, if bargaining has been initiated by either party, the expired collective should continue in force unless replaced by a new collective agreement.

9 MECA opt out

9.1 Cl 11 adds proposed ss 44A-44C. The effect of these sections is to allow an employer who receives a notice initiating bargaining for a multi-employer collective agreement ('MECA') to opt out of the bargaining by writing to the other parties to the collective agreement within 10 days of receiving notice of initiation of bargaining. A valid opt out notice will bring bargaining to an end for that employer and the union(s) or employer may reinitiate bargaining.

9.2 As the Department of Labour identified in their initial regulatory impact statement this provision is clearly in breach of Conventions C87 and C98.[24] Allowing employers to opt out of MECA coverage denies workers the opportunity to bring bargaining leverage to bear on the question of employer coverage. The Committee on Freedom of Association ('the CFA') has stated clearly:[25]

> **539.** Provisions which prohibit strikes, if they are concerned with the issue of whether a collective employment contract will bind more than one employer are contrary to the principles of freedom of association on the right to strike; workers and their organisations should be able to call for industrial action in support of multi-employer contracts.
>
> **540.** Workers and their organisations should be able to call for industrial action (strikes) in support of multi-employer contracts (collective agreements).

9.3 The restriction on strike action in support of multi-employer bargaining was one of the grounds criticised by the Committee of Freedom of Association ('the CFA') in the

[24] 'Regulatory Impact Statement: Improving how collective bargaining operates' at [42] and [43]. New Zealand ratified C98 on 9 June 2003. C87 is not yet ratified.
[25] *'Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO'* Fifth (revised) edition 2006.

previous case brought by the New Zealand Council of Trade Unions ('the NZCTU') against the New Zealand Government. In Case 1698 the CFA commented:[26]

> **259**. As regards the prohibition of strikes or lockouts if they are "concerned with the issue of whether a collective employment contract will bind more than one employer"…. It was and remains true that such strikes are prohibited; it was and remains true that employees have the right to strike in support of the content of multi-employer contracts, once such a bargaining option has been chosen. Recalling that the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and that legislation should not constitute an obstacle to collective bargaining at the industry level (Digest, ibid., paras. 632-633) the Committee notes that section 63(e) of the Act is not neutral in that respect, since the impugned provision essentially removes the means of pressure that may be applied for the determination of that level. This does not imply that employers have to accept multi-employer bargaining but simply that the parties should be left free to decide for themselves on the means (including industrial action) to achieve particular bargaining objectives. The Committee therefore reiterates that workers and their organizations should be able to call for industrial action in support of multi-employer contracts.

9.4 It was only following the passage of the Employment Relations Act 2000 containing provisions allowing workers to take industrial action in support of multi-employer bargaining that the CTU withdrew our complaint.[27]

9.5 There has been a significant trend toward public sector bargaining consolidation in MECAs. Blumenfeld and Ryall report that 41% of workers covered by a collective agreement were covered by a MECA in 2012 (up from 22% from 2009). This trend is concentrated in the public sector with 65% of workers in the core public service covered by MECAs vs. 13% of collectivised private sector workers (down from 22% in 2008). Allowing employers to opt out would have significant consequences for this consolidation and create significant duplication of bargaining in the public sector.

9.6 Davenport and Brown usefully summarise some of the more subtle advantages of multi-employer bargaining:[28]

> [B]enefits of multi-party bargaining include decreasing the transaction costs involved in numerous individual bargaining processes, enabling parties to set and maintain industry standards and best practice, developing consistent career structures within industries, fostering industry stability, and taking a strategic approach to technological, economic and market changes….
>
> Multi-party bargaining can also foster industry training, a point noted by Dannin [in her paper "Cooperation, Conflict or Coercion: Using Empirical Evidence to Assess Labor-Management Cooperation (1998) 19 Mich J Int L 873, 92]:
>
> > "…Industry training can only effectively be done across employers, particularly in the lower-skilled, lower-paid industries. Under the award system virtually all negotiation was done on an industry basis, and training was just one more industry issue to be

[26] Case No 1698 (New Zealand) Report in which the committee requests to be kept informed of development - Report No 295, November 1994.
[27] Case No 1698 (New Zealand) Effect given to the recommendations of the committee and the Governing Body - Report No 324, March 2001.
[28] Davenport, G and Brown, J (2002) *Good Faith in Collective Bargaining:* Wellington LexisNexis Butterworths.

> taken up. Procedures are very different in a system based on enterprise. Workers who expect to be paid low wages cannot afford to pay for their own training and, indeed, may see no point in making an investment whose costs the workers are unlikely to recover in the short term either in increased wages or a better job.
>
> The individual employer which might wish to train its workers will refrain from doing so out of fear that its newly trained workers will be able to demand higher pay or credibly threaten to leave for higher pay. The employer which hires such a worker but does not pay for training will benefit and will be able to pay higher wages because it does not incur training costs. This provides a further disincentive to other employers in the industry to train.
>
> Thus, if each actor makes rational choices in a system without industry training, no one will train, and the industry as a whole will suffer."

9.7 As discussed in section 5 of part I of our submission, the cumulative effect of this Bill and earlier legislation (such as the Employment Relations (Film Production Work) Amendment Act 2010) is deeply concerning to the CTU. We believe that New Zealand is in significant breach of our international obligations and the direction of travel is enormously troubling.

Recommendation: MECA opt out (cl 11)

The removal of the right to negotiate and exercise full bargaining rights in support of multi-employer bargaining is a breach of fundamental rights of freedom of association and collective bargaining. New Zealand has been reprimanded previously by the ILO about breaching workers' rights in this way. Cl 11 should not be enacted.

10 Repeal of 30 day rule re terms and conditions of new workers

10.1 Cl 16 repeals s 63 providing that new workers will be employed on terms and conditions comprising those they would expect under the collective agreement if they were a union member and other terms and conditions not inconsistent with these. Cls 14, 15, 17-19 are consequential on the repeal of s 63.

10.2 We outline the very significant impact on workers and unions of the repeal of the 30 day rule in sections 8.2-8.7 of part I of our submission and refer the Committee to that section.

10.3 This repeal is a deliberate increase in the vulnerability of new workers, will undermine collective agreement terms and conditions, is specifically aimed to reduce wages for new workers, will promote terms that are inconsistent with the collective agreement, and will remove a valuable protection for new workers. It increases the ability of the employer to impose unilateral terms and conditions of employment.

Recommendation: 30 day coverage for new workers (cls 14-19)
The removal of the 30 day rule is an attack on terms and conditions for new workers. Indirectly it is also an attack on the terms of existing collective agreements. Cls 14-19 should not be enacted.

11 Flexible working arrangements

11.1 The proposed amendments make three changes to the flexible working regime:

- They remove the restriction on the ability to request flexible working arrangements to workers with caring responsibilities;[29]
- Limits on frequency (currently requests may not be made in the first 6 months of employment or within 12 months of the last request) are removed.[30] A worker may make a request at any time;
- The maximum time limit for an employer's response to a flexible working request has been cut from three months to one month.[31]

11.2 The proposed amendments follow the review of Part 6AA[32] which found (among other findings) that:

- The review process found no reported problems with Part 6AA, and employers had not experienced any significant costs associated with it.
- Part 6AA has not changed the widespread practice of employers and employees developing formal and informal flexible work arrangements that suit their particular needs beyond caring responsibilities.
- Awareness of Part 6AA has declined in New Zealand between 2008 and 2010.
- Almost all requests for flexible work arrangements took place without any recourse to Part 6AA, and likewise the majority of requests were accepted by employers without referring to the provisions of the Part.
- Flexible working arrangements are common in many workplaces throughout New Zealand, with 70 percent of employers reporting that some or all of their employees work flexibly. The remaining 30 percent of employers reported that they did not have any employees working flexibly.
- Uptake of flexible working arrangements is by both men and women, and a significant proportion of these employees have no caring responsibilities.

11.3 Given the broad grounds for refusal that remain under s 69AAF(2) flexible working requests remain essentially a procedural right rather than a substantive one. This may account for the small numbers of workers making formal Part 6AA requests.

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[29] Cl 20 replacing s 66AA(a), cl 21 replacing s 69AAB and cl 22 repealing s 69AAC(d).
[30] Cl 21 replacing s 69AAB, cl 23 repealing s 69AAD, cl 24 replacing s 69AAE and cl 25 replacing s 69AAF(1).
[31] Cl 20 amending s 66AA(b), cl 24 replacing s 69AAE and cl 26 amending s 69AAI(5).
[32] http://www.dol.govt.nz/er/bestpractice/worklife/flexiblework/part-6aa/ReportofreviewofPart6AAMay2011.pdf .

11.4 The right to flexible working arrangements should be made more substantive.

Recommendation: Flexible working arrangements (cl 21)

We support the extension of flexible working arrangement requests to all workers. Other restrictions around eligibility to request should be lifted and timeframes for response should be tightened as proposed.

The fundamental problem with flexible work requests is they remain, in effect, a procedural right only. The grounds for rejecting a flexible work request should be tightened. This may be achieved by adding a reasonableness test for the employer's decision and allowing workers to challenge this reasonableness. This could be done by:

- Amending s 69AAF(1)(b) to state that the employer may refuse a request only if the employer determines that "the request cannot **reasonably** be accommodated on one or more of the grounds specified in subsection (2);
- Amending ss 69AAI, 69AAJ and 69AAK to provide that a worker may challenge the reasonableness of their employer's refusal under s 69AAF(1); and
- Removing the $2,000 upper limit on the penalty that may be imposed on the employer for breach of s 69AAE or s 69AAF(1) in s 69AAJ(1).

12 SME exemption from Part 6A

12.1 Neither the initial review of Part 6A nor the subsequent cost-benefit analysis recommended that an exemption be made for incoming small-to-medium enterprises ('SMEs') employing less than 20 people.

12.2 In a May 2012 aide memoire[33] the Department of Labour discussed the value of the exemption for SMEs as follows:

> **Would it be possible to exempt small business from Part 6A of the Employment Relations Act 2000?**
>
> 6. The Department notes that Sapere considered this as a possible amendment to Part 6A of the Act in its CBA. However, Sapere commented that:
>
> *"from what we heard in the interviews and found with our subsequent analysis, it seems likely that restricting the special provisions to only large employers would be counter-productive and lead to even more perverse outcomes than the current arrangements. This is because it would result in transfer situations where one party had to be compliant and the other did not, leading in all likelihood to a breakdown in the exercising of the provisions at all."*

[33] Discussion on the Review of Part 6A of the Employment Relations Act 2000 (18 May 2012 12/02603).

> 7. The Department concurs with this analysis…. Applying Part 6A of the Act to all businesses would provide more scope for improvement. Applying Part 6A of the Act to all businesses would ensure that all contractors were competing on an equal footing during a tendering situation.

12.3 According to an MBIE Briefing to the Minister of Labour[34] this exemption was requested by the office of the former Minister of Labour. The September briefing notes that SMEs will have reduced compliance costs associated with Part 6A and may pass these reductions on to the contract principals. However, MBIE notes several serious impacts of the proposed exemption:

> **Reduced compliance costs for SMEs…**
>
> 6. With employee cost estimated to comprise 70-80 percent of the costs of contracts in the specified sectors, new SME employers would be able to provide lower-cost services to contract principals by not having to employ affected employees or employ them in their existing terms of employment.
>
> **Potential impacts on competition in the market**
>
> 7. With SMEs having an advantage over large employers in bidding for contracts that would be affected by Part 6A, large employers may look to set up smaller companies or engage SME-sized subcontractors for the purpose of taking advantage of the exemption. While there are some compliance costs associated with setting up a new registered company, some large employers may find it beneficial or profitable to engage in such behaviour.
>
> **Impacts on employees**
>
> 8. This proposal would reduce the number of employees protected by Subpart 1. It is difficult however, to estimate how many employees would lose this protection. If businesses adjust to take advantage of the exemption, the number of employees affected would increase further. Without continuity of employment protection, we expect there will be increased employee “churn” in the sector.

12.4 The briefing concludes that:

> This proposal will lead to uneven competition between SMEs and non-SMEs, and undesirable practices (such as undercutting contracts in the affected sectors) and inadvertently, provide incentives to engage in such practices.

12.5 The exemption for incoming SMEs is illogical. It is against officials’ advice and the views of many in the sector.

12.6 We agree with the Dominion Post editorial of 2 November 2012 suggesting that this change will lead to a massive increase in litigation. The editorial also notes:

> Ms Wilkinson has justified the exemption for small companies as a necessary protection for mum-and-dad-type operations, which might win tenders only to find they have to employ existing workers – an obvious concern if it were occurring regularly, but there is no evidence that is the case.
>
> On the other hand, the exemption will certainly create inequalities in a workforce that is already extremely vulnerable. It will mean workers in a company that loses a tender to a contractor with

[34] Part 6A: Exemption for Small to Medium Enterprises (21 September 2012 12/05192).

> 19 staff will have no right to keep their job, while those in a company that loses a tender to a contractor employing 21 people will. That is not fair, and cannot be justified.

12.7 As to the mechanics of the proposal itself, cl 30 inserts the key operational provision for being declared an 'exempt employer' from the usual requirements of Part 6A. In summary, on certain dates[35] an incoming employer may make a declaration in writing that they (along with their associated persons) employ less than 20 people and give this to every other employer of employees affected by the restructuring along with the contract principal.

12.8 The effect of a genuine declaration that an employer is an exempt employer is to exempt the employer from the obligation to allow workers to elect to transfer.[36]

12.9 Cl 29 inserts a definition of associated person into Part 6A's interpretation section (s 69B). The definition sets out five associated person tests:

- Employees of any **subsidiaries** (where the purportedly exempt employer controls the board composition, exercises more than half of the votes at company meetings, holds more than half of the issued shares or receives more than half of dividends) count towards the 19 employee limit.
- Employees of any **holding company** (that controls the purportedly exempt employer's board composition, exercises more than half of the votes at company meetings, holds more than half of the issued shares or receives more than half of dividends) count towards the 19 employee limit.
- Employees of subsidiaries of the same body corporate (**sister companies** of the purportedly exempt employer) will also count towards the 19 employees.
- Employees of companies that are **subcontractors** to the purportedly exempt employer and either before or on the date of restructuring are engaged to do the restructured work count towards the 19 employee limit.
- Employees of **franchisors** of the purportedly exempt employer count towards the 19 employee limit.

12.10 Some of these tests seem relatively easy to elude or obfuscate. For subsidiaries and holding companies the control of board composition, voting rights, issued shares and dividends may be gamed through use of silent shareholder arrangements.

[35] In a contracting in on the date that notice is given of termination of contract, in contracting out, subsequent contracting or sale of business both when a tender is submitted and when an agreement is reached.
[36] Cl 34 inserting new s 69I(1A).

12.11 Given the intensely technical nature of the associated persons test it is difficult to see how workers (particularly those working in the occupations listed in Schedule 1A) will be able to muster the research and information gathering capacity to review complex corporate and shareholding structures. For many workers, the associated persons test is likely to be a dead letter law from commencement.

12.12 The associated persons test applied for income tax purposes is far more carefully and strictly defined. The Income Tax Act 2007 contains detailed tests for defining associated persons that go much further than the proposed tests in the Employment Relations Act 2000. Given that these tests are widely understood, it may be valuable to consider importing all or part of the Income Tax Act 2007 definition of associated persons.

12.13 If the Committee consider that the full Income Tax Act 2007 definition is undesirable then two of the tests for associating companies should be imported:

YB 2 Two companies

Common voting interests

(1) Two companies are associated persons if a group of persons exists whose total voting interests in each company are 50% or more. …

Common control by other means

(3) Two companies are associated persons if a group of persons exists who control both companies by any other means.

12.14 Cl 36 inserts a new s 69OAA setting out the consequences for providing a false warranty. Workers may pursue personal grievances for false warranty but may not be reinstated.[37] The Authority may also impose a penalty for false warranty.

12.15 An employer to whom the false warranty was provided may commence proceedings for damages in a court of competent jurisdiction.[38] The general reference to 'damages' may suggest the possibility of actions in either tort (such as negligent misstatement) or contract (such as misrepresentation). If instead, the Government aims to create a separate cause of action for breach of warranty they are leaving a considerable amount of detail to be decided by the Courts (including the correct measure for calculation of damages).

12.16 It is unclear whether s 69OAA is intended to codify all of the parties (workers, employers to whom a false warranty was provided) that may seek remedies in case

[37] Proposed s 69OAA(2).
[38] Proposed s 69OAA(4).

of a false warranty. Contract principals who are not employers and unsuccessful tenderers for the business ought to have some remedy where they have been undercut by falsely exempt employers. Unions should also be able to take penalty cases.

Recommendation: SME exemption from Part 6A (cls 28-34, 36)

Exempting SMEs from Part 6A is a mistake. It will make the law more complex and tilt the market towards a race to bottom. It arbitrarily deprives some of the most vulnerable workers of protection. It did not form part of the recommendations from the reviews of Part 6A. The SME exemption should not be enacted.

If the Committee decides to proceed with the exemption then the associated persons test must be improved. Challenging an incorrect declaration relies too heavily on access to information that may be deliberately hidden and systems that may be gamed. It does not constitute real protection for workers.

The CTU recommends that consideration is given to the possibility of adopting the more expansive Income Tax Act 2007 definition of associated persons. This test is familiar to employers. If the full test is seen as onerous or otherwise unsuitable then two of the general tests in s YB2 of the Income Tax Act 2007 should be adopted:

YB 2 Two companies

Common voting interests

(1) Two companies are associated persons if a group of persons exists whose total voting interests in each company are 50% or more. …

Common control by other means

(3) Two companies are associated persons if a group of persons exists who control both companies by any other means.

It is unclear whether s 69OAA is intended to codify the parties and causes of action available in the instance of false warranty of exempt employer status. If it is, then much more work should be done in the design of that section.

Part II

13 Right to elect to transfer

13.1 Cl 32 replaces the existing s 69G with a significantly more restrictive one regarding the right of eligible workers to transfer to a new employer in relation to both timeframes and method of election.

Timeframes

13.2 The timeframe for provision of information has changed from "before a restructuring takes effect" to "as soon as practicable, but no later than the date on which a restructuring takes effect." This is an improvement on the current situation.

13.3 The proposed window for workers to decide to transfer has been limited to five working days after being provided with information about the transfer or such longer period as agreed by the outgoing and incoming employer rather than "a reasonable opportunity to exercise the right to make an election."[39]

13.4 The cabinet paper 'Proposals for amendments to the Employment Relations Act 2000' clearly sets out the problems with this proposal: [40]

> The timeframe for employees to elect to transfer is intended to provide greater certainty for all parties. However, five working days is a small window of time for employees to consider their options (which include bargaining with the current employer for an alternative arrangement). It may also be especially challenging if the employees are represented by one or more unions who may need to organise meetings of affected employees as part of the process. Section 18 of the Act provides for unions to represent their members' interests and it will be important to ensure requirements of Part 6A are not inconsistent with the practical requirements of Section 18 of the Act.

13.5 Additionally as discussed in part 16 below the default timeframe does not allow sufficient time to check the individualised employee transfer information for accuracy before it is sent on.

13.6 The current employer must send the election to the new employer as soon as possible but no later than five working days after receipt. Failure to do so does not invalidate the worker's election but as currently may render the employer liable to a penalty.[41]

[39] Proposed s 69G(1)(d)) replacing existing s 69G(1)(a).
[40] CBC(12)(79) 30 August 2012 at [49].
[41] Proposed s 69G(4), (5) and (8).

Method of election

13.7 The Employment Court has held that an employee's election may be "validly made by any means which effectively conveys the affected employee's choice to the incoming employer. It may be done orally or in writing, either by the employee personally or by someone acting on his or her behalf."[42] It is proposed that that the election must be in writing, signed by the employee and sent to the (pre-restructuring) employer.[43] This seems reasonable in the circumstances though we note that this may create an obstacle for workers with poor English literacy (compounded by the provision of information about the transfer in writing and the short timeframe for election).

13.8 The election must be treated as valid if sent by post, fax or email.[44] This overrules the employer's specification as to "the form in which the election is to be sent to the employee's employer (for example, by post, fax or email)."[45] Oddly, hand delivery of the notice does not count as a valid election method. There is no requirement on the employee's employer under s 69G(2) to specify their postal address, fax number or email address as part of the information to be provided.

Recommendations: right to elect to transfer (cl 32)

The default window for workers to elect to transfer to a new employer is too short and does not allow adequate time to consider, seek advice and (as discussed below) to correct individualised employee information. Either the current "reasonable opportunity to make an election" should be retained or a longer default timeframe such as 20 working days should be allowed.

The CTU supports requirements to provide affected employees with information about their right to transfer at an earlier point. We also support the stipulation that failure of the old employer to pass valid transfer information to the new employer does not affect the validity of the transfer.

Section 69G(2)(e) regarding the form in which the election is to be made is rendered redundant by s 69G(5) which permits an election to be made by post, fax or email. We recommend that it is replaced with:

(e) the employee's employers contact details for receipt of the election including post, fax and email addresses.

42 *Doran v Crest Commercial Cleaning Ltd* [2012] NZEmpC 97 at [52].
43 Proposed s 69G(2)(d) and 69G(5).
44 Proposed s 69G(5).
45 Proposed s 69G(2)(e).

Section 69G(5) should include hand delivery of the election along with post, fax or email as valid delivery methods. It is illogical to exclude it. We presume that an email sent by a worker or their agent validly electing to transfer would meet the requirements of the authenticated signature fiction.[46] If not, the section should be amended to allow this.

14 Disclosure of information relating to transferring workers

14.1 Cl 39 creates a new definition of "individualised employee information" that includes (*inter alia*) personnel records, information about disciplinary matters, information about personal grievances, terms and conditions of employment, wage and time records, holiday and leave records and tax information. It expressly excludes "any information about the employee that is subject to a statutory or contractual requirement to maintain confidentiality."

14.2 Cl 41 inserts a proposed section 69OEA governing when this individualised employee information must be transferred. If an employee elects to transfer under s 69I to a new employer then the individualised employee information must be provided by the previous employer to the new employer "as soon as practicable, but no later than the date on which the restructuring takes effect."[47]

14.3 Following transfer of the individualised employee information, the original employer is under a continuing duty if "there is a change in the matters or circumstances that the information relates to"[48] to immediately notify the new employer that the information is out of date and what the new information is.[49]

14.4 Information about disciplinary matters and personal grievances is often intensely personal and private. Being subject to disciplinary or grievance procedures is usually traumatic in and of itself. The surrounding information often involves embarrassing or humiliating information not only about the worker but also about their co-workers, clients, customers, and patients.

[46] See *Tait-Jameison v Cardrona Ski Resort Ltd* [2012] 1 NZLR 105 for a discussion of the three requirements of the authenticated signature fiction. In summary: 1. The document must have been prepared by the party or their authorised agent and have the parties name printed or written on it. 2. It must have been sent by the party or their agent to the other intended party. 3. It must be shown either from the form of the document or the surrounding circumstances that it was to constitute a complete and binding contract between the parties.
[47] Proposed s 69OE(3).
[48] Proposed s 69OE(4).
[49] Proposed s 69OE(5).

14.5 Collecting and sending this information is also extremely onerous for the previous employer. The proposed cure is far worse than the alleged problem it purports to fix.

14.6 Additionally, the proposed operation of these provisions is deeply flawed for three reasons. First, the definition of individualised employee information may lead in many cases to a strange and partial picture. The requirement to disclose disciplinary and personal grievance information but not confidential information would appear to require disclosure of, for example, a personal grievance letter but not confidential settlement discussions, documents or evidence prepared for mediation (s 148) or mediated settlements (s 149).

14.7 The Office of the Privacy Commissioner's comment in the Cabinet Paper 'Proposals for amendments to the Employment Relations Act 2000' is valid:[50]

> **Office of the Privacy Commissioner Comment**
>
> …We agree that information that is clearly relevant to the continuing employment relationship should be able to be transferred to the new employer under Part 6A of the Act. However, in many cases grievance information will not meet this test. It may relate to the previous employer's actions, or the actions of third parties, rather than saying anything about the employee's ability to do the job. We therefore recommend that the transferred information should be limited to disciplinary or grievance information that is clearly relevant to the continuing employment relationship.

14.8 Second, compounding this problem, workers are unlikely to have a genuine ability to access and correct their personal information prior to provision to the new employer because of the timeframe for election to transfer. According to proposed s 69G(1) the old employer must provide the employees "[a]s soon as practicable but no later than the date on which a restructuring takes effect" with various information including "(a) information about whether the employees have a right to make an election [to transfer]" and "(d) the date by which any right to make an election to transfer must be exercised [at least five days thereafter]."

14.9 Proposed s 69OEA(3) provides that "[t]he employee's employer must provide the individualised employee information as soon as practicable, but no later than the date on which the restructuring takes effect." These dates have the potential to clash (an employer cannot provide individualised employee information if they do not know whether the worker has elected to transfer and this may be after the date of the restructuring) and breaches of either are liable to a penalty in the Employment Relations Authority.[51]

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[50] CBC(12)(79) 30 August 2012 at [71].

[51] Proposed sections 69G(8) and 69OEA(6) respectively.

14.10 The right to correct incorrect personal information becomes nugatory when the timeframes for information access and correction under the Privacy Act 1993[52] are so much longer than the timeframes for transfer of individualised employee information. By the time the worker has the opportunity to object to incorrect information being transferred it will have long since been transferred in most circumstances. This is untenable.

14.11 Third, the obligation to correct individualised employee information that is rendered out of date by a change in circumstances only applies to events that occur after the handover of information.[53] There is no initial obligation on the old employer to ensure that the individualised information is, in fact, current at the time of transfer. As outlined above, they will be unable to check with the worker whether it is and in many circumstances will be prevented by confidentiality from providing an accurate picture.

14.12 It is also unclear whether the obligation of correction overrides statutory or contractual confidentiality obligations.

14.13 Taken together these issues create fundamental privacy and natural justice issues for a transferring worker in relation to their new employer. Disciplinary and personal grievance information should not be transferred or, at the minimum, the Privacy Commissioner's suggestion that only disciplinary or grievance information that is clearly and directly relevant to an employee's continuing employment should be transferred. Workers must always retain a right of correction before the information is transferred.

Recommendations: Disclosure of individualised employee information (cls 38, 39 and 41)

The transfer of information relating to terms and conditions of employment, leave entitlements and tax matters from the old to the new employer is useful.

However, the transfer of disciplinary and grievance information is intensely problematic. This information is often inherently private and embarrassing.

The restriction on provision of confidential information, while necessary, will make the information unreliable in many instances. As the Privacy Commissioner points out, much of the information will be irrelevant to the worker's on-going employment. The

[52] 20 working days for each under s 40 of the Privacy Act 1993.
[53] S 69OEA(4)(b).

timeframes for transfer do not allow workers a real opportunity to correct wrong or misleading information.

Disciplinary and grievance information should not be transferred.

If the Government is determined to proceed then we submit that only disciplinary and grievance matters clearly relevant to the worker's on-going employment with the new employer are to be transferred.

Before sending individualised employment information to the new employer, the old employer must provide the transferring worker with a genuine opportunity to review the information and correct it. We recommend that proposed s 69OEA(3) is amended to state:

(3) The employee's employer must provide the individualised employee information to the employee as soon as practicable allowing the employee a reasonable right to review and correct the individualised employee information.

A worker should be provided with a copy of the individualised employment information if they request it.

15 Ability to add workers to Schedule 1A

15.1 Cl 63 repeals s 237A. Doing so removes the ability to amend Schedule 1A (so-called 'vulnerable workers') by order in council.

15.2 The CTU does not support the repeal of s 237A as we do not believe that this allows adaptation for changing circumstances. The 2010 review of Part 6A notes the position of worker representatives (including the CTU) that the current provisions have been very sparingly used and have not created issues.

15.3 There are, however, categories of workers who may fall within the criteria set out in s 237A(4) but who are not currently covered by Part 6A. Categories of workers commonly mentioned include security guards and health care assistants. Changes to industry makeup may render other categories of worker vulnerable in the future. The current system provides a robust though responsive way to protect these workers.

Part II

> **Recommendation: Ability to add workers to Schedule 1A (cl 63)**
> The CTU does not support the repeal of s 237A. The process has not been subject to significant problems or misuse and the responsiveness it provides is valuable compared to amendment by primary legislation.

16 Rest and meal breaks

16.1 The CTU has previously submitted on the changes to rest and meal breaks when they were contained in the Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill 2009. Our previous submission on that Bill is in the appendix to this submission. These comments remain relevant since the Transport and Industrial Relations Select Committee's recommended changes (as captured in the Employment Relations Amendment Bill 2013) do not ameliorate our concerns in any substantive way.

16.2 As a concise and trenchant critique of the problems with these changes, John Hughes's conclusion to his article 'The Proposed Changes to Rest and Meal Breaks'[54] is impossible to improve upon:

> It is entirely predictable that relaxing requirements for rest breaks and meal breaks will have an adverse impact on the very groups whom the original Part 6D was designed to protect. These include vulnerable workers in sectors such as service and manufacturing and particularly the young. For these groups, a regime for rest and meal breaks resting on managerial prerogative often left inadequate entitlements from the point of view of health and safety and general work/life balance. In response to this argument, the then Minister maintained that the removal of existing minimum entitlements:
>
> > *... must be weighed against:*
> >
> > - *the advantages of increasing flexibility for employees not to take breaks on occasions they wish to work through and have an earlier finish time; and*
> > - *flexibility for employers to maintain, where necessary, continuity of production and services in circumstances where a complete break from work is not feasible.*
> >
> > *Where rest and meal breaks are provided under the relaxed provisions, they must still be reasonable and appropriate for the duration of the working period. Furthermore, a requirement on employers to provide needed rest during the working day is maintained through the requirements of the Health and Safety in Employment Act 1992, relating to the employer's duty of care in relation to fatigue, which continues to apply.*
>
> To which the response is threefold. First, the original Part 6D arguably provides the necessary mechanisms to negotiate around desired flexibilities whilst maintaining a default position as a safeguard for employees who are likely to lack the necessary power to protect a minimal level of entitlement. In over three years since the original Part 6D came into force, the current provisions have given rise to no direct issues in the Employment Relations Authority or the Employment Court, notwithstanding the ability of either party to refer difficulties to mediation

[54] [2013] ELB 9

> and thence to further dispute resolution. Arguably, then, there is no demonstrable need for legislation relaxing what is already a reasonably flexible regime.
>
> Second, and by extension, objective reasonableness is ultimately only determinable at the point of challenge. Requirements for "reasonable and appropriate" breaks provide little practical protection when the groups most likely to be adversely affected if those requirements are ignored are also the very groups least able to challenge such unlawful behaviour. To this extent the various enforcement mechanisms under the proposed Part 6D signify little by way of guarantee. Nor, on current practice, does the prospect of enhanced understanding through a proposed non-binding Code of Practice. Such a Code was also promised when the test for justification under s 103A was altered as from 1 April 2011. Over 18 months later, it has not eventuated. Indeed, the former Department of Labour proved to be under-resourced to develop and promulgate such codes in areas as vital as health and safety, and employers' awareness of existing developed codes also appears to be limited. All of this assumes, in any event, that monetary "compensation" for losing breaks is not already built into the wage structure under an offered individual employment agreement.
>
> Third, the Minister's reference to protection under the Health and Safety in Employment Act 1992 ("the Act") (from working conditions resulting in fatigue) is technically accurate but practically arid. The Independent Taskforce on Workplace Health and Safety has recently highlighted the vagaries around the concept of "fatigue" as a hazard under the Act, as well as the official reliance on voluntary compliance by most businesses in terms of duties under that Act, evidenced by the recorded "light presence" of health and safety inspectors. Yet, as the Independent Taskforce observed in this context, "[levels] of compliance are influenced by the likelihood that non-compliance will be detected and that penalties will apply". Whilst the obligations under the Act are contractually enforceable in principle, the Taskforce made the telling point that lack of job security reduces the willingness of workers even to raise health and safety concerns. In any event, the original Part 6D was intended to address issues beyond the extreme borders of hazards resulting from fatigue and to provide for the work/life balance arising from a genuine break from workforce tasks, providing the opportunity to rest, eat and drink, and attend to personal matters during a work period.
>
> Finally, although the proposed new regime for rest breaks and meal breaks is now to be incorporated into wider changes to the Employment Relations Act 2000, there is one unusual distinction between the two measures. Unlike the provisions triggering other proposed amendments to the Employment Relations Act 2000, the National Party voted in support of the original Part 6D when in opposition. That support, however, was marked by an openly expressed reluctance at the time. Given this background, and with little to suggest that the current law is problematic, it is tempting to see the developments following the air traffic controllers' dispute as one more illustration of the well worn political maxim "never waste a good crisis". Even, apparently, one that was speedily resolved within the parameters of the current law three years ago.

16.3 We agree fully with John Hughes' assessment and with that of the Labour and Green members of the Transport and Industrial Relations Select Committee when they said "we believe [the Bill] is unjustified, unfair and unworkable."[55]

16.4 Recent case law has clarified the operation of the current legislation in ways which render the proposed changes even less necessary:

- In *Broughton v Portage Licensing Trust*[56] a duty manager in sole charge for liquor-licensing purposes who left the premises during her break (in violation of the licensing rules) was summarily dismissed. The Employment Relations Authority held that her dismissal was justified in light of her obligations and at

[55] Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill as reported from the Transport and Industrial Relations Select Committee (91-2) at 3.
[56] [2012] NZERA Auckland 179.

[35] that it did not accept that "the obligation to allow a break extends to an obligation to permit an employee to leave the workplace in order to take the break."

- In *Greenslade v Jetstar Airways Ltd*[57] the Employment Relations Authority found that jet pilots (who are covered by compulsory civil aviation laws governing breaks) are not entitled to breaks in accordance with the Employment Relations Act 2000 given the alternative regime (current s 69ZH(2) takes precedence). This judgment seems materially applicable to other statutory regimes which govern breaks such as the Land Transport Act and associated rules.

Recommendation: Rest breaks and meal breaks (cls 43-46)
The changes to the meal break and rest break provisions cannot be justified. They solve a problem for which there is no real evidence by removing an important right from workers. These changes would have negative outcomes for health and safety and remove New Zealand from the international mainstream.

Cls 43-46 should not be enacted.

17 Notice requirement for strikes

17.1 Cl 49 inserts new notice requirements for strikes and lockouts (proposed sections 86A and 86B respectively) as follows: In summary, a union must give written notice of any strike (including a partial strike) to an employer and to the Chief Executive of the Department of Labour. This notice must specify the notice period given, the nature of the proposed strike, the location of the strike, the workers who will be party to the strike and the start and end dates of the strike. Coupled with the new secret ballot requirement and the ban on industrial action for 100 days after the Authority declares bargaining over these changes will impose significant restrictions on unions and workers who wish to take industrial action.

17.2 Imposing a formal notice requirement on all strike action means that it will all now be subject to the detailed jurisprudence surrounding notices given in essential services.

[57] [2012] NZERA Auckland 436.

In *Secretary for Justice v New Zealand Public Service Association Inc*[58] Cooke P said:

> While the Act recognises strike action as a legitimate industrial strategy, in effect it also recognises that in a free and democratic society the right to strike must be subject to reasonable limits prescribed by law. In essential services one of the limits is that relating to notice. It is in accordance with the spirit of the Act if it is interpreted to mean that the organisers of the strike must make their intentions clear. … The question is not one of the actual intention of each sender of a communication, but the objective one of what it would reasonably convey to the other party.

17.3 Failure to meet these strict requirements will render strikes unlawful. The consequences of unlawful strike action for unions and workers are extremely serious. As *Mazengarb's Employment Law* notes at ERA P8.36:

> A person who is affected by an unlawful strike now has several options:
> (a) They may bring an action for damages resulting from the strike; or
> (b) They may seek an injunction to prevent or stop the strike; or
> (c) They may seek a compliance order to prevent or stop the strike or seek a penalty under s 133.
>
> The first two remedies normally require the workers involved, or their union, to have committed one of the economic torts. The third is a statutory remedy. In addition, an employer may be able to dismiss the workers involved. The Act allows a penalty to be imposed for a breach of an employment agreement. The maximum amount is $5000 in the case of an individual or $10000 for a body corporate. Actions for damages are relatively rare, although the threat of such actions can be used with some effect against unions. The usual remedy is for an employer to seek either an interim injunction or a compliance order to prevent or halt an allegedly unlawful strike.

17.4 In addition, unlawfully striking workers are not protected by the restriction in s 97 around the replacement of labour during strikes. The employer may hire or contract other labour to replace them.

17.5 We are concerned that the requirements for strike action in non-essential services are unduly technical and the threat of injunction, ruinous actions for damages or penalty, and replacement or dismissal of striking workers will cast a long cold shadow over the unions' ability to take industrial action. Because of this, the unions' bargaining power will be substantially reduced.

17.6 Strict procedural requirements for notices of industrial action are more justifiable in relation to essential services where the public interest may be substantially harmed (through disruption of, for example, hospital services or the provision of electricity).

17.7 However, these requirements are much less defensible outside of the essential services context where they simply become grounds for seeking to end industrial

[58] [1990] 2 NZLR 36, (CA) (*Oughton's case*) at 41.

action by way of injunction relief or as grounds for damages. As the CFA has stated:[59]

> **547**. The conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations.

17.8 Restrictions on the right to strike are a breach of New Zealand's international obligations under the International Covenant on Economic, Social and Cultural Rights ('ICESCR') which holds (*inter alia*):

> **Article 8**
>
> 1. The States Parties to the present Covenant undertake to ensure: …
>
> > (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
> >
> > (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

17.9 Art 2(1) of ICESCR provides for the 'progressive realisation' of the rights recognised therein:

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

17.10 A key element of progressive realisation is the avoidance of retrogression where possible. As Joss Opie notes:[60]

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

17.11 In *Service and Food Workers Union Inc v OCS Ltd*[61] Judge Colgan (as he was then) stated:

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[59] *'Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO'* Fifth (revised) edition.

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

> I accept that Parliament has required certain minimum content of notices… in essential industries and services and that… strict compliance is expected with those statutory requirements of content and timeliness. But that said, the Court should take a pragmatic, rather than pedantic, approach to interpreting such notices and attempt to put itself in the shoes, not of a lawyer minutely scrutinising legal documents for error after the event, but rather, and to the extent possible, from the perspective of the parties to bargaining. Strike and lockout notices are powerful practical bargaining weapons in a battle where recipients of such notices have a strong incentive to have these events delayed or at least nullified by reliance on legal technicalities that may have little or nothing to do with the merits of the bargaining….

17.12 Though not phrased as such, this is an expression of the legal maxim *"de minimis non curiat lex"* (the law does not concern itself with trifles: commonly abbreviated to the *de minimis* rule). We are concerned that the proposed changes may directly undermine this.

17.13 A Member's Bill currently before the United Kingdom House of Commons[62] is the Lawful Industrial Action (Minor Errors) Bill. The effect of that Bill is (among other things) to ensure that minor failures in relation to ballots for and notices of industrial action will not render the industrial action unlawful if:[63]

> [T]he failure is, or the failures taken together are—
> (i) such that there has been substantial compliance with the provision or provisions in question, and
> (ii) on a scale which is unlikely to affect (in the case of a ballot) the result of the ballot or (in the case of a notice) a reasonable recipient's understanding of the effect of the notice,

17.14 These provisions represent a sensible proposal to ensure that employers cannot thwart the reasonable exercise of the right to strike through legal stratagems.

Recommendations: Notice requirement for strikes (cls 47-53)

The proposal that all strike action should be subject to notice requirements is an unjustified derogation from the right to strike guaranteed by New Zealand's ratification of ICESCR and fundamental rights of freedom of association. Clauses 47-53 should not be enacted.

Several of the proposed notice requirements are particularly illogical and onerous. They are unjustified barriers to the effective exercise of strike action:

- The requirement to notify the chief executive of MBIE of any strike serves no practical purpose and is unduly onerous.

[61] Employment Court, Wellington WC 20A/05, 8 September 2005, Judge Colgan at [18].
[62] Though stalled so that it is effectively unlikely to ever pass subsequent readings. See: http://www.tucg.org.uk/parliament/158-liame.
[63] Lawful Industrial Action (Minor Errors) Bill cl 1(3) retrieved from http://www.publications.parliament.uk/pa/cm201011/cmbills/004/2011004.pdf.

- The notice requirement for strike action does not allow unions to specify a certain group of workers at a particular worksite other than by name. This is more restrictive than the equivalent provision in essential services.

Section 86 of the Act should be amended to provide a statutory codification of the *de minimis* rule along the lines of the United Kingdom Lawful Industrial Action (Minor Errors) Bill.

18 Penalties for breach of notice requirements in relation to passenger transport services

18.1 S 95 of the current Act states:

95 Penalty for breach of section 93 or section 94

(1) A union that fails to comply with section 93 [procedure to provide public with notice before strike in certain passenger transport services] is liable to a penalty imposed by the court under this Act.

(2) An employer who fails to comply with section 93 or section 94 [procedure to provide public with notice before lockout in certain passenger transport services] is liable to a penalty imposed by the court under this Act.

(3) Except as provided in this section, a union or employer is under no liability (whether under this Act or the general law) for a failure to comply with section 93 or section 94.

18.2 Cl 54 would replace s 95 with:

95 Penalty for breach of section 93(4) or 94(4)

(1) An employer who fails to comply with section 93(4) or 94(4) 30 is liable to a penalty imposed by the court under this Act.

(2) Except as provided in this section, an employer is under no liability (whether under this Act or the general law) for a failure to comply with section 93(4) or 94(4) [an employer must take all practicable steps to notify affected members of the public as soon as possible after receiving notice of a strike or intending to lock out in passenger road or rail services].

18.3 The explanatory note states (at 19) that "[n]ew section 95 repeats the penalty that can currently be imposed if an employer fails to comply with section 93(4) or 94(4), but removes the penalty that can currently be imposed if a union or an employer (as the case may be) fails to comply with sections 93(1) or 94(1)."

18.4 S 93(1) and s 94(1) deal with the lawfulness of strikes and lock outs respectively. While there is no real discussion of the change in the supporting policy papers, it appears to remove a seeming anomaly in the current Act whereby an unlawful strike or lockout in some passenger transport services only creates liability for a penalty (rather than damages, etc.).

> **Recommendation: Penalties for breach of notice requirements in relation to passenger transport services (cl 54)**
> We support the amendment proposed by cl 54.

19 Withdrawal of notice of strike or lockout

19.1 Cl 55 adds a proposed s 95AA allowing workers to give notice of early withdrawal of a strike to their employer and the chief executive of MBIE and employers to do the same in relation to lockouts by way of a notice to the workers' union(s) and the chief executive of MBIE.

19.2 We do not support the introduction of strict requirements for the withdrawal of strike or lockout action. The withdrawal of this action should be as simple as possible. We therefore think that cl 55 is unnecessary and unhelpful.

19.3 As we note in part 17 above, written notice of strike action in every circumstance is an unjust limitation on the right to strike and we do not support the enactment of this section. If strike action outside of essential services, passenger transport and education does not require written notice then it would be anomalous for withdrawal notice to also be in writing. Therefore reference to s 86A should be removed from proposed s 95AA(a).

19.4 It is odd that no subsections equivalent to proposed s 86A(3) have been proposed:

> (3) The notice—
>
> (a) must be signed by a representative of the employee's union on the employee's behalf:
>
> (b) need not specify the names of the employees on whose behalf it is given if it is expressed to be given on behalf of all employees who—
>
> (i) are members of a union that is a party to the bargaining; and
> (ii) are covered by the bargaining.

19.5 These sections would be useful to prevent a union that wished to withdraw strike action early having, arguably, to write a separate notice for each worker and to safeguard against receiving fake notices of withdrawal.

Recommendations: Withdrawal of notice of strike or lockout (cl 55)

We do not support the introduction of strict requirements for the withdrawal of strike or lockout action. The withdrawal of this action should be made as easy as possible. We do not therefore think that cl 55 is necessary or useful.

If the Government proceeds with these changes as we have said in relation to cl 49 above we do not support written notice requirements for strikes outside of essential services, passenger transport and education. The reference to s 86A should be removed from proposed s 95AA.

Also the clause ought to contain an equivalent section to proposed s 86A(3) requiring that the notice be signed and can be given on behalf of all union members covered by the bargaining (or groups thereof). The former protects against fraudulent withdraw notices and the latter allows whole groups to withdraw early from strike action (rather than one worker at a time).

20 Pay deductions for partial strikes

20.1 Cl 56 adds a new scheme permitting employers to deduct a fixed or estimated amount from workers for taking part in partial strike action. We summarise the process below.

20.2 A partial strike does not include either a total withdrawal of labour or a refusal to work overtime or on-call work where a special payment would be received.[64] Additionally, the employer may not make specified pay deductions where the strike is lawfully on health and safety grounds or where the worker is a pieceworker and the partial strike results in a reduction of their output.[65]

20.3 Having received notice of partial strike action, if the employer wishes to make specified pay deductions then they must give notice to all workers they wish to deduct pay from before deducting the pay and in the same pay period as the first

[64] Proposed s 95A

[65] Proposed s 95B(2)

deduction.[66] The notice may also be given to all workers or to the union on their behalf.[67] The notice need not specify the amount of the deduction but must specify the duration of the deduction.[68]

20.4 Where a worker or group of workers believes that the specified pay deduction has been incorrectly made they may ask their union to request the information relied on to calculate the specified pay deduction. The union request must be in writing and as soon as reasonably practicable after the pay day on which the first deduction was made. The workers cannot request the information directly. When the employer receives the request they must reply in writing as soon as reasonably practicable. If the workers believe the calculation is incorrect they may challenge this though their union as an employment relationship problem.

20.5 It is likely that many of the disputed calculations will need to be formally adjudicated by the Employment Relations Authority. This will use up considerable time and resources for both unions and employers. As the Department of Labour note in their Regulatory Impact Statement: “Any dispute around the proportion or compliance with notification creates a secondary issue and takes the focus away from bargaining, potentially prolonging the bargaining process.” [69]

20.6 The disadvantages to workers proposing to undertake partial strike action are clear. Partial strike action is usually undertaken on a substitution basis (other work is undertaken instead of the normal work) and under the law change this work would effectively become unpaid. Because the notices of wage reduction need not specify the calculation made by the employer these are likely to intimidate workers. It is likely that these factors will push workers towards full withdrawal of labour and thereby escalate disputes.

20.7 Alternatively workers may abandon their strike action. This gives further bargaining strength to the employer with the likelihood of a worse outcome for workers in bargaining.

20.8 The proposed proportion of wages deducted is based on an unscientific estimate by the employer of “how much time an employee (or group of employees) usually

[66] Proposed s 95C(2)
[67] Proposed s 95C(3)
[68] Proposed s 95C(4)(d) and s 95C(2)(b).
[69] ‘Regulatory Impact Statement: Improving how collective bargaining operates’ at [59].

spends doing this type of work during a day."[70] Absent time-and-motion studies, an employer is unlikely to have a clear idea of how much time an worker spends on a given task in a day and their estimate may be wildly inappropriate (and sometimes punitive).

20.9 As an alternative to estimating the time taken, employers may also deduct a flat 10% of the workers' pay for partial strike action.[71] The CFA disapproves of this kind of deduction where it is disproportionate to the lost time:[72]

> **539.** In a case in which the deductions of pay were higher than the amount corresponding to the period of the strike, the Committee recalled that the imposition of sanctions for strike action was not conducive to harmonious labour relations.

20.10 Geoff Davenport's comments in relation to the 2010 changes regarding communication during bargaining are apposite to this proposed change (and to those around conclusion of bargaining):[73]

> The maxim "if it ain't broke, don't fix it" comes to mind. The introduction of legislation always carries with it the potential for uncertainty. Unwarranted change can be counterproductive and this reform is an example of that. The reality with litigation over collective bargaining communications is that by the time the litigation is finally resolved, the collective bargaining will most likely have been settled, and an agreement reached. It would, however, be a mistake to underestimate the damage that litigation of this kind can cause to the ongoing and long term employment relationship between the employer and the union. It can have long term consequences in terms of trust to the parties and their dealings on a day to day basis and in future collective bargaining. Legislative reform that is likely to result in increased litigation, and which will enhance confusion rather than provide clarity, is not, therefore in the interests of employers, unions or employees.

20.11 The proposal around partial strikes appears to be a solution in search of an issue. In 2012[74] (the latest data available) there were 10 work stoppages (6 complete strikes, 3 partial strikes and 1 lockout). This is the lowest number since the series began in 1985. By way of comparison there were 206 work stoppages in 1986.

[70] 'Employment Relations Amendment Bill 2012: Paper One- Collective Bargaining and Flexible Working Arrangements' at [31].
[71] Proposed s 95D(3).
[72] *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* Fifth (revised) ed, 2006.
[73] Geoff Davenport 'Communications during collective bargaining- Will the legislative reform clarify or confuse the 'conversation'? [2010] *ELB* 94
[74] Department of Labour 'Work Stoppages: 2012 calendar year'

Recommendation: Pay deductions for partial strikes (cl 56)
Cl 56 should not be enacted. There is no evidence of a significant problem to be addressed and the solution will lead the parties into legal dispute. The proposal to deduct 10% of workers' pay will be in breach of ILO jurisprudence in many situations.

21 Employment Relations Authority processes

21.1 Cl 61 speeds up the Employment Relations Authority ('the Authority') in making its determinations by adding the following proposed subsections to s 174:

> (1) At the conclusion of an investigation meeting, the Authority must—
>
> (a) give its determination on the matter orally; or
>
> (b) give an oral indication of its preliminary findings on the matter.
>
> (2) Where the Authority gives its determination orally, the Authority must record that determination in writing no later than 3 months after the date of the investigation meeting.
>
> (3) Where the Authority gives an oral indication of its preliminary findings,—
>
> (a) the indication may be expressed as being subject to any further evidence or information from the parties or from any other person; and
>
> (b) the Authority must record its final determination in writing no later than the later of the following dates:
>
> (i) the day that is 3 months after the date on which the investigation meeting concluded; and
>
> (ii) the day that is 3 months after the date on which the Authority received the last evidence and information from the parties.
>
> (4) However, the Authority may record a determination later than the dates described in subsection (2) or (3)(b) if the Chief of the Authority decides exceptional circumstances exist.

21.2 Acknowledging that the Authority has been tardy over the last 18 months, this provision appears to shift the blame onto the Authority members for a situation that is not of their making. According to a May 2012 Memorandum from the Chief of the Employment Relations Authority regarding delays in commencing investigations:[75]

> [Delay in commencing investigations] has resulted largely from change to the membership of the Authority and the adjustment to caseloads that must occur when serving members are finishing their term of appointment and, usually at about the same time, new members are beginning theirs….
>
> In mid-2010 the Authority had 17 members (all full time), many of whom had served on the Authority since its inception in 2000. Changes to membership in the two years since have led to a reduction to 15 members, five of whom were new and have been appointed in the last two

[75] Available here: http://my.lawsociety.org.nz/branches/waikato-bay-of-plenty/news/memorandum-from-chief-of-employment-relations-authority-re-delays-in-commencing-investigations

> years. Those five appointments followed either resignation or the expiry of the term of appointment of seven other members. The number of members has risen to 17 again, only very recently, following further appointments in April of two new members, although they have not yet commenced their term but will in June….
>
> The Authority's capability has lately been affected by this situation and parties have experienced delays as a result. They are likely to continue over the next few months if there is further change to the membership of the Authority.

21.3 On behalf of our members, the union movement is acutely aware of the problems caused by delays in rendering determinations. In several cases these delays have contributed greatly to all parties' stress. Justice delayed is justice denied. However, we think much of this delay can be attributed to the decision to substantially change the membership of the Authority.

21.4 We note Susan Robson's comments in relation to these changes:[76]

> Nothing much will change, however. Just as the power of recommendation (inserted into the Act in 2011) sought to formalise what effective members had been doing informally from the outset, only to suffer the torpedo of an Employment Court decision that transformed a practice designed to save costs into the opposite, so this will fail to achieve the policy goal set for it. This has been the fate of a number of policy initiatives designed to mitigate the effects of formalism on process in the employment jurisdiction. The failure of the Mediation Service to admit to decision-making powers in s 150, and the Court to accept it no longer has powers of review over the Authority, are but two examples.
>
> It also remains unclear whether lengthy waits for determinations are a feature of the Authority as it operates currently. A quick calculation of the times between investigation and determination of proceedings reported on the Government website reveals that of the 22 substantive determinations (that followed investigation meetings) issued between 26 April and 8 May 2013, three took longer than 90 days, seven took 60–90 days, five took 30–60 days and seven took less than 30 days.
>
> Given the requirement to either deliver determinations orally or indicate preliminary findings Authority members are likely to opt for the latter, as the result of the incentives to do so in the provisions of s 174(3). This will have the effect of increasing the number and range of submissions that will seek to tweak or change the indication. There will follow the inevitable challenges to determinations that fail to replicate what was said (or what the challenger believes they heard). They will be taken up by the Court with alacrity. Multi-page decisions will issue. They will contain the detail of every last submission and they will take months, if not years, to appear. And employer associations will continue to complain about how time consuming and expensive dispute resolution in the employment jurisdiction is.

21.5 We have seen the submission of Chief Judge Colgan on behalf of the Employment Court in relation to cls 60 and 61. We concur with his Honour's lucid analysis of the problems of rendering oral determinations in relation to safety, complexity of cases, determinations on the papers and timeframes for appeal.[77]

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[76] In her article 'The more things change, the more they stay the same: the proposed amendments to s 174 Employment Relations Act' [2013] *ELB* 60

[77] Submission of the Employment Court of New Zealand on the Employment Relations Amendment Bill 2013- Bill #105-1 28 June 2013 (Chief Judge Colgan)

Recommendations: Employment Relations Authority processes (cl 61)

We support the proposal that the Employment Relations Authority should render its final determinations within three months barring exceptional circumstances.

We do not support the proposals around Authority members giving indications of preliminary findings. This is a barrier to considered decision-making and may create stress, cost and procedural issues.

Part II

APPENDIX: *Submission of the New Zealand Council of Trade Unions- Te Kauae Kaimahi to the Transport and Industrial Relations Select Committee on the Employment Relations (Meal and Rest Breaks) Amendment Bill.*

11 June 2010

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Part II

1. Introduction

1.1. The New Zealand Council of Trade Unions – Te Kauae Kaimahi (CTU) is the internationally recognised trade union body in New Zealand. The CTU represents 39 affiliated trade unions with a membership of over 350,000 workers.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Runanga o Nga Kaimahi Māori o Aotearoa (Te Runanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. The CTU strongly supported the re-establishment of rest and meal breaks in law in 2008 to ensure that all workers were assured of rest and meal breaks. We are very disturbed that the Government wants to relax rest and meal breaks provisions for workers. We do not believe that there is any justification for a legislative change.

1.4. This submission contests the justification for flexibility around rest and meal breaks and the risks that it would bring, identifies why and for whom prescribed rest and meal breaks are important, looks at provisions in other countries and explores some of the issues that have arisen in New Zealand since rest breaks and meal breaks legislation was introduced in 2008.

2. Summary

2.1. Rest and meal breaks are needed to ensure and protect health and safety and ensure well-being. Workers are entitled to some certainty about rest breaks and meal breaks. Many workers rely solely on statutory minimum entitlements for these employment rights. Rights in employment law are necessary for awareness and enforceability purposes.

2.2. The thrust in this Bill for flexibility on the grounds that rest breaks and meal breaks create burdens and impose administrative costs is, in effect, saying that the needs of business and the needs for continuity of service are more important than the health and safety needs of workers. The role of government is not to make compliance cheaper. Government's role is to maintain and enforce standards.

2.3. Compensatory measures, in the form of time off at the end of a shift, cannot substitute for a meal break or for rest periods. We have particular concerns about

putting a price on rest breaks and meal breaks if that is what is meant by compensatory measures.

2.4. The proposal in the Bill for rest breaks and meal breaks to be taken at a time agreed between the employee and employer completely fails to recognise the inherent inequality in the employment relationship.

2.5. There have only been isolated problems with the meal breaks legislation since its enactment in 2009. The problems that have occurred have been either been settled, or were entirely capable of finding an acceptable solution under the current law.

3. Rest and meal breaks are necessary for health and safety

3.1. Access to regular rest and meal breaks is a basic requirement of health, safety and well-being at work.

3.2. Minimum standards establishing rest and meal breaks are necessary to protect and ensure workers' health and safety and wellbeing. Hours of work and the way the hours of work are organised can significantly affect quality of work and quality of life in general. The risk of accidents is higher when the hours of work are long, irregular and at an inconvenient time.

3.3. In certain industries workers are exposed to greater health and safety risks. Workers who work long hours, who work shift work and who work at night have higher exposure to health and safety risks.

3.4. Rest breaks are also recognised as having a role in ensuing worker productivity. Research undertaken in a car plant in Swansea over a three year period found that the risk of accidents during the last half-hour of a two hour period of work, was double that for the first half-hour.[i] On this basis the ILO concluded that increasing the frequency of rest breaks of workers who operate machinery could substantially reduce industrial accidents and that frequent work breaks (e.g. ten minutes every hour) can improve work performance[ii].

3.5. With an increase of workers undertaking more than 40 hours work a week, and many of these now in unpaid time, there is even more need to ensure in employment law certainty and legal recognition of rest and meal breaks and monitoring of these health, safety and wellbeing needs.

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4. Rest and meal breaks are necessary for reasons of fairness

4.1. It is equally necessary that workers have some certainty about rest and meal break periods and that those requirements are explicit in minimum employment legislation so that all parties are aware of entitlements and there is clarity for enforcement purposes.

4.2. Despite not having rest and meal breaks in the minimum employment legislation, rest and meal break provision have been maintained for many workers particularly in unionised workplaces with established collective agreements.

4.3. However one of the primary effects of the Employment Contracts Act was a significant reduction in collective bargaining and union membership. And while the Employment Relations Act sought to extensively promote collective bargaining it has only stemmed the decline.

4.4. As a result, significantly more workers rely on statutory minimum entitlements for their employment rights and, over time, established custom and practice regarding rest and meal breaks has declined.

5. Rest and meal breaks are necessary to protect vulnerable workers

5.1. While many workers – particularly in unionised workplaces – may have established rest and meal breaks, those most affected by the absence of these provisions are those who are most vulnerable in the labour market: young workers, inexperienced workers, migrant workers, those in precarious work and low-income workers.

5.2. It is the experience of unions that young people are the most vulnerable to exploitation in respect of not getting rest and meal breaks. Young people do not have employment experience or knowledge about employment rights. It is imperative to include rest and meal break provisions as a mandatory right to ensure they transfer into all employment agreements.

5.3. There are also a number of sectors of economy where rest and meal breaks are at best ad hoc. Workers in the restaurant, hotel, retail and food industry sectors routinely miss out on breaks because of staffing and workload pressures.

5.4. Clause 3 of the Employment Relations Act states, among other things, that the objective of the Act is, “to build productive employment relationships … by

acknowledging and addressing the inherent inequality of power in employment relationships".

5.5. The Service and Food Workers Union (SFWU) report that the largest number of queries to their call centre is from workers asking about meal break entitlements especially in small workplaces that are not covered by collective agreements.

6. The real meaning of flexibility

6.1. The General Policy Statement in this Bill states, "relaxing legislative provisions on rest and meal breaks… will move the focus from prescription to flexibility". Such a statement incorrectly frames the debate about rest breaks as one about burdensome regulation hindering some inherently desirable natural dynamic. Such framing is entirely false.

6.2. The prescription in question is not rules for the sake of rules – it is asserting a fundamental minimum standard for decent work in relation to rest and meal breaks. A departure from so-called "prescription" is a departure from fundamental standards. Equally "flexibility" is simply giving permission to flaunt fundamental standards. There is no problem in the current law with rest and meal breaks that exceed the existing law. There is only a problem with breaks that do not meet the standard – this Bill seeks the "flexibility" to undermine basic minima.

6.3. There are numerous examples both now and in the past of employers failing to provide rest and meal breaks or seeking to reduce them in pursuit of gains in profits at the expense of intensification of work. This is a short-sighted, mean-spirited and unsustainable approach to improving workers' productivity exhibiting antiquated management principles compared to improving technology and encouraging worker participation in productivity improvement.

6.4. The Regulatory Impact Statement for this Bill states the current provisions, "appear to be over prescriptive in practice in relation to what constitutes a genuine break and the extent of flexibility about when rest and meal breaks may be taken".

6.5. However, there is no evidence given to support this highly contentions claim.

6.6. The Regulatory Impact Statement also states that this proposed change, "maintains a clear signal that employees should be able to have rest breaks and meal breaks, but does not do so in a way that imposes compliance cost on business or an administrative cost on government". This Orwellian language tries to mask a direct

attack on workers' rights. Breaks must impose some cost on employers, but it is a cost we accept because we all agree that rest breaks at work are a fair and decent thing to have. Equally, policing minimum standards will impose administrative costs on government – suggesting otherwise is only acknowledging there is no intent to police the rules.

6.7. In this context "flexibility" has no positive connotations. It simply seeks to assist employers to take away a fundament right of workers.

7. The danger of allowing employers to impose breaks

7.1. The amendments proposed in this Bill are contrary to the principle of good faith in employment relations and indifferent to the unequal power dynamic in the employment relationship.

7.2. Clause 3 of the Employment Relations Act states, among other things, that the objective of the Act is, "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment… by acknowledging and addressing the inherent inequality of power in employment relationships".

7.3. This Bill proposes that, in principle, rest and meal breaks will be taken at times agreed between employee and employer. But Clause 5 of this Bill proposes to amend Clause 69ZE of the existing Act to state, "An employee must take his or her rest breaks and meals at the times and for the duration agreed between the employee and his or her employer; but in the absence of such agreement, at the reasonable times and for the reasonable duration specified by the employer".

7.4. It cannot be a good faith relationship where one party (in this case the employer) gets to impose their will simply by concluding they don't agree with the other party. But this is exactly what this Bill proposes.

7.5. Such a contradictory position is even more concerning in the context of the inherent inequality of power in employment relationships. One of the fundamental truths that becomes apparent to unions when working in un-unionised environments is that unequal bargaining power ensures so-called "agreement" is rarely free and genuine.

7.6. Employers can use their relative power to push employees to agree to a timing and duration of breaks that is both inequitable and contrary to an employee's interests.

7.7. The removal of a statutory minimum for rest and meal breaks in the Act removes any standard below which these agreements cannot fall – anything is possible as long as it is "agreed".

7.8. In the absence of agreement the employee's only protection is that the imposition by an employer should be "reasonable". Given the stated intent of the Bill to "move the focus from prescription to flexibility", the protection it offers is very limited.

7.9. But that limited protection is further undermined by the next proposed subsection, 69ZE (2), which states, "For the purposes of subsection (1)(b) an employer may specify *reasonable* [emphasis added] times and durations that, having regard to the employer's operational environment or resources and the employee's interests, enable the employer to maintain continuity of service or production."

7.10. In essence this means that, in order to be reasonable and without any floor as to how short or irregular they could be, the primary criteria for an imposed set of rest and meal breaks are the way the employer wants to organise its workforce ("operational environment or resources") and ensuring "continuity of service or production".

7.11. If enacted, this Bill will result in the steady erosion of rest and meal breaks across the workforce in the name of employers' "operational environment" or "service continuity" – either through imposition of reduced conditions by employers or inequitable agreements reached by employer's exercising their relative power. With no obvious limit to the extent employers can drive down these conditions in pursuit of their goals, not only will workers be harmed but the very intent of the Employment Relations Act will be undermined.

8. The real meaning of compensatory measures

8.1. The General Policy Statement of this Bill states that it "provides flexibility for employers and employees to agree that, instead of a break, there will be compensatory measures". Putting to one side the fundamental problems with the terms "flexibility" and "agree" already discussed, the sentence contains a third fallacy that compensatory measures can be substituted for breaks.

8.2. As obvious as it seems, the tenor of this Bill requires the meaning of breaks to be spelt out. Breaks are necessary to break up extended periods of work. They are necessary to ensure the mental and physical health of the human beings doing the

work and, as a result, help ensure the quality of work being done by human beings doesn't deteriorate and end up harming the mental and physical health of others.

8.3. In this context, a break is not a break if is tacked on the start or the finish of the working day. Equally it is not a break if it is some extra dollars and cents in an employee's bank account at the end of the week.

8.4. Having established an employer is not required to provide rest and meal breaks, the Bill states (cl.5, new subsection 69ZEA (2)), "To the extent that the employer is not required to provide rest breaks and meal breaks … the employer must provide the employee with compensatory measures." Having established you cannot truly compensate for a loss of break with anything other than another break, a significant question remains about what exactly a compensatory measure is.

8.5. As it stands the Bill doesn't even limit compensation to time off. It does entitle the employee to time off equivalent to the loss of break but that is only, "*if* [emphasis added] an employer provides an employee with compensatory measures that involve time off work".

8.6. In the context of the proposed buy-back of the fourth week of annual leave, unions are entirely opposed to the idea of putting a price on holidays. That principle equally applies to putting a price on breaks.

9. The importance of the 2008 amendment

9.1. The CTU strongly supported the re-establishment of rest and meal breaks in law in 2008.

9.2. The absence of mandated rest and meal breaks in legislation was, particularly from the beginning of the 1990s, a significant problem.

9.3. The absence of legislated rest breaks and meal breaks came about as a result of cumulative changes in employment law. The Factories and Commercial Premises Act introduced in 1981 dropped all references to rest and meal breaks. However, at that time, workers were covered by industry awards so its impact was not significant.

9.4. But in 1991 the Employment Contracts Act dismantled the award system that provided basic industry standards including meal and rest break provisions.

9.5. Re-establishing rest and meal breaks in minimum employment law was part of rebuilding decent and basic employment rights legislation which was radically and deliberately destroyed by the Employment Contracts Act (ECA) 1991.

9.6. This Bill represents an overreaction to the complaints of a very few employers and to issues that were resolvable. It has been developed in haste and without adequate consultation. We note that the Regulatory Impact Statement for the Bill states, "Officials have advised they have concerns about developing the proposed amendments to the rest breaks and meal breaks provisions of the principle Act at speed and without adequate consultation".

10. Legislating for the non-existent exception

10.1. When the Minister first announced her intent to introduce this Bill, she pointed to a dispute between air traffic controllers and the Airways Corporation about the implementation of rest and meal breaks in control towers as the justification.

10.2. Subsequently when the Bill was introduced, the Minister had abandoned the air traffic controllers argument and moved on to cite, "numerous complaints from workers including teachers, supermarket night-fill staff and healthcare professionals".[iii]

10.3. Such shifting arguments underline a number of flaws in the Minister's argument.

10.4. First, the Minister appears to want to legislate only for the exception. The 99 per cent of employers who have not had cause for "numerous complaints" suggests any problem may be more specific to the employer rather than any broader need to, as stated by the Minister, "restore some common sense to the law."

10.5. But even then, the exceptions seem perfectly capable of reaching an acceptable solution *under the current law*. Despite some histrionics about regional airports having to close (and ignoring the fact that single-controller towers in Australia and UK stop operating to allow breaks) the parties negotiated an acceptable agreement before this Bill had its first reading in the House.

10.6. After discussions with affiliated unions representing teachers, retail workers and health professionals, it is entirely unclear which education, supermarket or health workers have a problem with a minimum right to rest and meal breaks. Even then there is every chance any complaints are a result of employer belligerence and/or failure to adapt wider work practices to accommodate statutory rest breaks.

Part II

11. ILO Conventions

11.1. The organisation of working time has been an important issue for the International Labour Organisation since its inception. The significance of provisions relating to hours of work can be shown by the fact that the very first ILO Convention in 1919 was The Hours of Work (Industry) Convention. Currently there are 25 ILO conventions and 14 recommendations in the area of working time, including hours of work, night work, paid leave, part time work and workers with family responsibilities.

11.2. The need to limit excessive hours of work and provide for adequate recuperation including weekly rest and paid annual leave to ensure workers' health and safety are enshrined in these international labour standards.

12. New Zealand will be leaving the international mainstream

12.1. If New Zealand removes statutory minimum provisions for rest and meal breaks it will leave the international mainstream and become part of a minority of countries, particularly in the context of developed countries.

12.2. Rest and meal breaks to be taken during the working day are mandated by legislation in just over two thirds of the 150 countries listed in a 2005 ILO report which examined work and employment bases[iv]. The most widespread approach is a rest break of at least 30 minutes although a substantial number of countries require a break of 45 minutes or more.

12.3. Among industrialised countries, all European countries entitle their workers to a break during the working day. Most countries require a break of at least 15 - to 30 minutes in length although both Finland and Portugal specify a one hour break.

12.4. Many jurisdictions also specify a minimum shift length for entitlement to rest breaks – usually of 4-6 hours – and a number of countries mandate a longer break when daily hours are extended. In Finland those working for more than ten hours in a day are entitled to a 30 minute break after eight hours of work in addition to the universally available 30 minute break. Additional breaks are also required for work beyond eight hours in Japan.

12.5. Longer breaks are mandated in some countries and for some sectors. In the United Kingdom the legislation states than when the work patterns put health and safety at

risk, particularly when the work pattern is monotonous or its rate is predetermined, the employer is required to ensure adequate rest breaks.

12.6. The table below lists the minimum duration of rest periods and the numbers of hours of work after which a break must be taken for selected countries.[v]

Country	Rest break duration	Daily working time threshold
Brazil	1-2 hours	6 hours
Japan	45 minutes	6 hours
Nigeria	60 minutes	6 hours
Estonia	30-60 minutes	4 hours
United Kingdom	20 minutes	6 hours
Republic of Korea *	30 minutes	4 hours

* 60 minutes rest is required if work exceeds eight hours

12.7. Another requirement regarding daily hours has emerged with the European Union's (EU) level instrument – the Directive on the Organisation of Working Time with its main provisions to limit maximum hours of working, establish minimum entitlements to rest periods and paid annual leave for most workers in the EU.

13. Conclusion

13.1. This Bill proposing to amend the rest breaks and meal break provisions in the Employment Relations Act is retrograde and unjustified. Legislated rest breaks and meal breaks provide minimum standards, fulfil basic health and safety needs for workers and are especially important for vulnerable workers who may not have the protection of collective employment agreements. The moves in this Bill to relax rest break and meal break provisions and introduce flexibility into the timing of rest breaks and meal breaks to suit service or production continuity strip away fundamental employment rights of workers.

[i] P Tucker, S Folkard and I Macdonald, "More frequent rest breaks could reduce industrial accidents", Lancet, Vol 361, Issue 9358, 2003, p680
[ii] Working Time and Health: Fact Sheet, International Labour Office, Geneva, 2004.
[iii] Press Release, Kate Wilkinson, "Rest and Meal Breaks Bill passes first reading", 29 April 2010
[iv] McCann, D. (2005) Working Time Laws: A Global Perspective, International Labour Office.
[v] Rest Period: Fact Sheet, International Labour office Geneva, 2004.