NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

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

to the

Ministry of Business, Innovation & Employment

on

Employment Relations Amendment Bill Implementation

P O Box 6645

Wellington

November 2014

1. Introduction

1.1. This submission is made on behalf of the 36 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 325,000 members, the CTU is one of the largest democratic organisations in New Zealand.

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

1.3. We comment briefly on proposed amendment one and three below. The majority of our comments focus on amendment two. We would like to meet and discuss these issues.

2. Proposal one: Amend relevant forms in the Employment Relations Authority Regulations 2000

2.1. We do not think much turns on the sections used in an application to conclude collective bargaining. Much more significant is the information set out in the statement of problem and reply. This information is not easily reducible to boxes on a form but includes:

- An account of the negotiation process including meeting dates, description of the outstanding issues between the parties, evidence of communications, bargaining progress and consideration of outstanding issues along with evidence of efforts of the parties to resolve issues and deadlock;
- The parties' view as to whether grounds for referral to facilitation exist and supporting evidence including an account of industrial action taken in support of the bargaining (previous, ongoing and proposed), effects of the industrial action, alleged breaches of good faith and effects of that breach.

3. Proposal two: Amend the Employment Court Regulations 2000

3.1. The authors of *Mazengarb's Employment Law* comment at [2342] that "[t]he EC Regulations (reg 37-52) provide a comprehensive regime for discovery with significant differences in process from the rules concerning discovery in the ordinary Courts."

3.2. This means that comments of the Higher Courts and principles derived from the Evidence Act 2006 will largely be of persuasive value except where they concern the operation of the Employment Court Regulations directly.

3.3. Reg 44(3) sets out only three grounds for objection to disclosure on the basis of legal professional privilege, self-incrimination and the public interest. *Mazengarb's Employment Law* notes at [3244] that:

> Since the three grounds specified in reg 44(3) are the only bases of objection, privilege on the grounds of public interest has been extended to areas otherwise thought to form their own category of privilege. For example, it has been invoked in relation to communications with medical practitioners privileged under s 32 of the Evidence Amendment Act (No 2) 1980…. The privilege has also been held to apply to documents relating to a party's negotiating strategy….

3.4. The issue with the proposal to include confidentiality as a ground in reg 44(3) is that doing so elevates it to the level of a privilege. In the ordinary Courts it has never been treated as such. In *Chatton Properties Ltd v Marshall* [2012] NZHC 1042, Osborne AsJ noted at [18]-[20]:

> [18] … It is trite that confidentiality of itself does not give rise to privilege. The objection being taken in this case is confidentiality pure and simple.
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> [19] Lord Wilberforce said in *Science Research Council v Nasse*:
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> > *There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in the exercise of its discretion to order discovery, the [court] should not have regard to the fact that the documents are confidential, and that to order disclosure would involve a breach of confidence.*
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> [20] The same general principle was developed in New Zealand law. Numerous are the cases in which this Court, prior to the implementation of the Evidence Act 2006, dealt with orders of discovery and disclosure so as to protect genuine commercial sensitivity. Often that has included agreements and orders whereby disclosure is made but limited to counsel, so that counsel is not handicapped by non-disclosure.

3.5. The Evidence Act 2006 treats confidential information differently from privileged information. Section 69 sets out a mechanism for the consideration of confidential information by the Courts:

69 Overriding discretion as to confidential information

(1) A **direction under this section** is a direction that any 1 or more of the following not be disclosed in a proceeding:
(a) a confidential communication:
(b) any confidential information:
(c) any information that would or might reveal a confidential source of information.

(2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
(a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
(b) preventing harm to—
(i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
(ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
(c) maintaining activities that contribute to or rely on the free flow of information.

(3) When considering whether to give a direction under this section, the Judge must have regard to—
(a) the likely extent of harm that may result from the disclosure of the communication or information; and
(b) the nature of the communication or information and its likely importance in the proceeding; and
(c) the nature of the proceeding; and
(d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
(e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
(f) the sensitivity of the evidence, having regard to—
(i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
(ii) the extent to which the information has already been disclosed to other persons; and
(g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.

(5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

3.6. The leading case regarding s 69 is *R v X* [2010] 2 NZLR 181 (CA). In that judgment the majority of the Court (Hammond and Fogarty JJ) commented on the development and application of s 69 at [67]-[70]:

[67] The commentary on s 69 in Mathieson (gen ed), Cross on Evidence (looseleaf) suggests that (at [EVA69.2]):

> *The Law Commission intended to create a broad judicial discretion to cover the previously statutory based discretion and the common law. The general intention of provisions like this had been to extend a qualified protection to the wide range of relationships where (like other statutory privileges) the confidentiality attending the communication may on the facts of each case be deserving of protection.*

> [68] In its report Evidence Code and Commentary (NZLC R55(2), 1999), the Law Commission said: “Judges have always exercised the right to exclude evidence on the basis that it would be a breach of confidence to give that evidence” (at [C273]). But the Law Commission considered that “a judge may direct non-disclosure if the normal public interest in putting all relevant facts before a fact-finder is outweighed by the public interest in preserving the confidence, measured in terms of the harm brought about by disclosing the confidences” (at [C274]).

> [69] Section 69(2) is constructed on the footing that all relevant information is disclosable in litigation (even if confidential), but it may be prevented from disclosure by the court, on the terms set out in s 69 itself. We should perhaps add that the disclosure is limited to “a proceeding”, and we think that must be subject to the usual ability of a court to determine what, if any, further publication should be permitted beyond the proceeding.

> [70] If the foregoing is correct, the prevention of disclosure of confidential information is restricted to the categories in s 69(2). To put this another way, confidential information may be disclosed in court unless the judge gives a direction under s 69(2) having regard to the factors in s 69(3).

3.7. A recent case provides a helpful example of the application of s 69 to discovery in a job application context. In *Waters v Alpine Energy Ltd* (Discovery) [2014] NZHRRT 8, the Human Rights Review Tribunal considered a claim of discrimination in relation to application for employment.

3.8. The Tribunal operates under yet another statutory regime but follows the Evidence Act 2006 in relation to these matters. In *Waters*, the Court found that the curriculums vitae of successful candidates should be disclosed to an unsuccessful candidate for the purposes of testing a claim of discrimination (but no other purposes). The Tribunal summarised their decision-making process at [38]-[39]:

> [38]… [T]he public interest in the full and rigorous investigation of alleged unlawful discrimination must be given significant weight in the weighing or proportionality assessment mandated by s 69(2) of the Evidence Act. In addition, proper recognition must be given to the principle that all relevant information is disclosable and a claim to confidentiality should not be lightly upheld.

> [39] We have also taken into particular account the following additional factors:

> [39.1] The other interests to be weighed or assessed must be “public” interests. Private interests are excluded from the assessment exercise under s 69(2) of the Evidence Act except to the extent that those private interests can be elevated into a public interest, possibly via s 69(3).

> [39.2] There was no evidence by Alpine Energy that a confidentiality direction under s 69 was necessary to prevent harm to a person or to a particular relationship, or relationships of similar kind, or to maintain activities that rely on the free flow of information. The evidence given by Mr Small and by Mr McNabb came nowhere near to establishing that those submitting applications for employment or those providing references will be inhibited in any material way by knowing that the information provided will be admissible in proceedings before the Tribunal under the HR Act. To the contrary, they may be assumed to believe that if, during the recruiting and interview process, there is discrimination on one or more of the prohibited grounds of discrimination, it would be both desirable and necessary that such discrimination be exposed.
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> [39.3] At common law a party to proceedings who gains access to documents through the discovery process gives an implied undertaking to use those documents only for the purpose of those proceedings. This principle is now incorporated into the discovery process mandated by Part 8 of the High Court Rules. See particularly r 8.30(4):
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>> (4) A party who obtains a document by way of inspection or who makes a copy of a document under this rule—
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>>> (a) may use that document or copy only for the purposes of the proceeding; and
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>>> (b) except for the purposes of the proceeding, must not make it available to any other person (unless it has been read out in open court).

3.9. A proposal to add confidentiality to the grounds on which a party may object to information disclosure would be unwise and run counter to the treatment of confidential information both at common law and by the ordinary Courts under the Evidence Act 2006. It is a threat to the right of litigants to justice and a fair trial.

3.10. There may be a case for bringing the Employment Court’s practice into greater alignment with the ordinary Courts through a system based on or analogous to the consideration of privileged and confidential information under the Evidence Act 2006.

3.11. Doing so however, adds complexity to the current system which may make it harder for non-legally qualified advocates to effectively represent their clients and members.

4. Proposal three: Remove certain forms from regulations

4.1. No reasons have been given for the proposal to revoke or amend Form 3 (record of strike or lockout) or Form 4 (demand notice) other than that it

"would be useful if this form was able to be easily amended to respond to market trends or changing regulatory environment."

4.2. We do not understand what "responding to market trends" means in the context of either industrial action or demand notices.

4.3. We agree with the criteria for revoking or removing forms from regulations (that the forms are minor and technical, have little impact on the rights of individuals and do not raise significant policy issues). We are not convinced that either of these forms meet these criteria particularly where no good reason for their revocation has been articulated.