Te Kauae Kaimahi

Submission to EDUCATION AND WORKFORCE SELECT COMMITTEE on the:

Employment Relations (Restraint of Trade) Amendment Bill

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi

18 September 2023

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This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 340,000 union members, the CTU is one of the largest democratic organisations in New Zealand.

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.

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1. Executive summary

1.1. This submission is made on behalf of the unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 300,000 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. The CTU welcomes the opportunity to submit before the Select Committee on the **Employment Relations (Restraint of Trade) Amendment Bill** (the Bill). This proposed legislation represents an encouraging step towards addressing an area of industrial relations that is not often focused and where vulnerable workers are disproportionately impacted.

2. Introduction

2.1. The CTU strongly endorses the underlying principle of Employment Relations (Restraint of Trade) Amendment Bill.

2.2. Unions most frequently encounter 'restraint of trade' clauses in the employment agreements of low-income earning and un-unionised workers. They are a hallmark of a worker's lack of bargaining power.

2.3. Restraint of trade clauses are by nature intrusive. Even after an employment relationship has dissolved, these clauses can stop workers from freely seeking new employment.

2.4. In practical terms, a restraint of trade clause presents a serious restriction on a worker's freedom of mobility within the labour market. Not only do they stop workers from seeking employment in areas where they have skills and expertise, they also bind workers to geographic and time restraints.

2.5. In most cases dealt with by unions, the restrictions placed on workers by these clauses are unjustifiably intrusive, overly expansive, and unnecessary. The restrictions in these

clauses are arbitrary and not connected to any discernibly justifiable interest on the part of the employer.

2.6. Courts have long recognised the problematic nature of restraint of trade clauses and have 'jealously guarded'[1] the rights of working people to freely seek employment.

2.7. For this reason, in common law, a restraint of trade clause is presumed to be 'void'[2] unless employer who seeks to rely on it can show a lawful and justifiable reason for the clause to be upheld.

2.8. However, despite a judicial approach aimed at protecting the rights of workers, unjustifiable restraints of trade often remain unchallenged as many workers do not have the resources to bring challenges before the court or the Employment Relations Authority.

2.9. The CTU recognises the need for clear legal framework for dealing with restraint of trade clauses in employment agreements.

2.10. The Bill that is currently before the Select Committee has many well thought out features that are strongly endorsed by the CTU in principle.

2.11. The introduction of a statutory time limit on restraint of trade clauses in employment agreements has several advantages.

2.12. A statutory time limit will protect workers from excessively long and burdensome restrictions. It will also provide all parties to employment agreements with 'certainty' as to the maximum length of time a restraint of trade may apply.

2.13. This certainty will reduce the need for litigation as the question of whether a restraint of trade has a 'reasonable duration' is often a dominant theme of judicial discussion.

2.14. A timeframe defining the maximum limit that a restraint of trade may lawfully apply will set clear legal parameters within this question can be considered and will discourage the setting of contractual timeframes that may be considered unreasonable.

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[1] *Asiaciti Trust New Zealand Ltd v Harris* [2013] NZEmpC 178
[2] Ibid:

*'The general principle and starting point is that restraints of trade are contrary to public policy and are **void** and unenforceable. There are strong policy reasons for that principle to apply as a worker's right to work and to a means of earning a living are jealously guarded in employment law [33]'.*

2.15. The Bill strikes a thoughtful balance between the interests of workers and employers in situations where a restraint of trade may apply.

2.16. Requiring employers to have a clearly defined 'proprietary interest' and for that interest to be demonstrably protected by a restraint of trade clause provides solid recognition to the legitimate interests that some businesses may have for having such clauses in certain employment agreements.[3] At the same time, this requirement affirms the need for such restraints to be balanced against the rights of workers to freely move within the labour market. [4]

2.17. Restricting the application of restraint of trade clauses to employees who earn *above* a statutory threshold is a salutary aspect of this Bill that protects low and middle-income earning workers from being disproportionately impacted by restraints of trade.

2.18. Workers in a low, or middle-income categories face the harshest consequences of restraint of trade clauses.

2.19. When seeking any form of employment, such workers only have their skills and expertise as 'tradable' commodities in the job market. These skills are typically obtained through the worker's own investment in training, education, and personal development.

2.20. For such workers, a restraint of trade clause would seriously impact the ability of a vast majority of workers to establish a viable new means of livelihood as although these workers are not independently wealthy, they certainly are specialised in their skills, and the nature of work that will be made available to them.

2.21. This hardship faced by workers is wholly disproportionate to any legitimate benefit that an employer may claim from a restraint of trade.

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[3] *Air New Zealand v Kerr* [2013] NZEmpC 153 (EC)

[4] The ability for workers to freely move between employers has long been recognised in common law as what distinguishes modern employees from feudal serfs - *Gibbs v Crest Commercial Cleaning Ltd* BC200570621:

"That was put more pithily in the language of the era by Lord Atkin as long ago as in Nokes v Doncaster Amalgamated Collieries Ltd (1940) AC 1014, 1026, thus:

'... I confess it appears to be astonishing that apart from overriding questions of public welfare, power should be given to a court or anyone else to transfer a man without his knowledge and possibly against his will from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf [107].'

2.22. Similarly, the requirement for an employer who relies on a justifiable restraint of trade to pay the affected worker some form of statutorily defined compensation is also a positive feature of this Bill.

2.23. This requirement recognises that even where a restraint of trade may be reasonable, lawful, and justifiable in the circumstances, the restriction touches on a very fundamental freedom that all workers have.

2.24. Any restriction on such a freedom should not be one-sided, and ought to be compensated for.

3. Fidelity

3.1. The **'General policy statement'** explains that the Bill 'is not intended to limit or affect the common law duties of confidentiality and *fidelity*.'[5]

3.2. **Clause 67K (2)** goes on to state that nothing in the substantive sections of the Bill '...limits or affects the common law duties of confidentiality and *fidelity*.'[6]

3.3. However, the common law duty of *fidelity* (along with the duty to act in *good faith*) does not survive the employment relationship.[7]

3.4. In common law, employers have no basis for asserting that former employees may owe them an ongoing duty of fidelity, and restraint of trade clauses have never derived legitimacy from this duty.

3.5. The current Bill incorrectly draws a connection between statutory content that relates to restraints of trade (that only apply after an employment relationship has ended), and a common law duty that only applies (to employees) during the life of an employment relationship.

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[5] Employment Relations (Restraint of Trade) Amendment Bill (172-1) (explanatory note) (pg. 1)
[6] Employment Relations (Restraint of Trade) Amendment Bill, cl 67K-

Effect on law of restraint of trade, confidentiality, and fidelity

Nothing in **sections 67I or 67J** limits or affects any rule of law relating to restraint of trade, except to the extent that the rule is inconsistent with those sections.
Nothing in **sections 67I or 67J** limits or affects the common law duties of confidentiality and fidelity.

[7] *Marsden Providors* (1988) Ltd v Cotterill (1989) 2 NZELC 97,094 (HC)- Highlights separation between a duty of fidelity (that ends upon dissolution of employment) and, the operation of lawful restraint of trade provisions.

3.6. **The CTU recommends that any mention of the duty of fidelity be removed from the proposed legislation.**

3.7. Mentioning the unrelated duty of fidelity in this amendment Bill runs a risk that the nature of the duty of fidelity will be wrongly interpreted and may lead some to hold the view that there is a possibility that ongoing fidelity binds former employees to their former employers.

4. Statutory definition of 'restraint of trade provision'.

4.1. **Clause 67I (1)(b)** at paragraphs **(i)(ii)** & **(iii)**[8] provides the statutory definition of a 'restraint of trade provision'.

4.2. The preciseness and accuracy of this definition is vitally important. To be effective, the statutory definition of a restraint of trade in employment must capture all the types of restrictions that such clauses place on former employees.

4.3. Currently, the definition describes clauses that prohibit the *'offering of employment to employees of their former employer's business'.* However, this definition does not cover situations where a former employee 'causes' offers of employment without making the offer personally.

4.4. For example, restrictions on the ability of a former employee to recommend that a business offers employment to their former employer's current employees does not fall within the proposed statutory definition of a restraint of trade.

4.5. The absence of coverage for such situations presents a statutory loophole that allows for certain versions of restraint of trade provisions to exist that are not subject to statutory regulation.

[8] Employment Relations (Restraint of Trade) Amendment Bill, cl 67I Interpretation –

restraint of trade provision means a provision in an employee's employment agreement that—
operates after the employment ends; and
prohibits or restricts the former employee from 1 or more of the following:
performing work in a similar field to their former employer's business:
(ii)contacting or dealing with employees or clients of their former employer's business:
offering employment to employees of their former employer's business

4.6. **The CTU recommends that the definition of restraint of trade contained in cl 67I (1)(b) be expanded slightly to cover situations where a former employee 'causes' fresh offers of employment to be made to a former employer's employees.**

5. Proprietary interest

5.1. **Clause 67J** provides that no restraint of trade provision may have effect unless, it protects a proprietary interest, is described in the employment agreement, and imposes restrictions that *are 'no greater than necessary having regard to the [protected] interest.*[9]

5.2. However, no definition of proprietary interest is contained in the Bill.

5.3. **The CTU recommends that a definition of proprietary interest should be included in this Bill and should make explicitly clear that 'proprietary interest' does not encompass an interest in restricting employment offers being made to existing staff.**

5.4. This is because a worker and their right to choose where they sell labour to cannot be described as an employer's property.

6. Threshold test to apply to secondary employment

6.1. The CTU supports the submission made by E tū Union that:

> *"...the threshold weekly rate be introduced to cover those already in employment to ensure that they are not limited in their ability to undertake other employment or set up a business in the same industry whilst still employed."*[10]

6.2. Secondary employment is of particular significance to low-income earning workers. Currently, there is no restriction on the ability of employers to preventing low-income earning employees from obtaining secondary employment by inserting prohibitive clauses in employment agreements.

[9] Employment Relations (Restraint of Trade) Amendment Bill, cl 67J (1)(b)(iii)
[10] Submission by E tū to Education and Workforce Committee [September 2023] on the 'Employment Relations (Restraint of Trade) Amendment Bill- **Recommendation 1**, pages 2 & 3

6.3. In essence, there is no restriction on the ability of an employer to restrict a current employee's ability to seek secondary employment. Given the impact that such restrictions can have on the livelihood of lower income workers, the **CTU strongly endorses E tū Union's recommendation that the income threshold applied in the Bill to protect former employees of an employer be extended to protect current employees as well**.

7. Time limit to be reduced to 3 months

7.1. The CTU supports the submission made by E tū Union that:

> *'...the restraint of trade provision should cease on the day that is three months after the date on which the employment ends (or on any earlier date agreed by the parties).'*[11]

7.2. Currently, the Bill provides a time limit of 6 months for any restraint of trade provision. However, the CTU agrees with E tū union that a shorter time limit of 3 months provides employers with sufficient time to take any reasonable steps to protect their proprietary interests.[12]

7.3. The interest of an employer in having a timeframe for addressing and mitigating any risks associated with the activities of their former employees, where justifiable, must be weighed against cost to those employees in not being able to re-establish their livelihood for a significant period.

7.4. For workers, the economic, social, and psychological costs of not being able to freely seek employment are much higher than those faced by employers. While employers may face a degree of *risk* from the activities of former employees, restrictions on the ability to workers expose many workers to real hardship.[13]

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[11] Submission by E tū to Education and Workforce Committee [September 2023] on the 'Employment Relations (Restraint of Trade) Amendment Bill- **Recommendation 2**, pages 2 & 3

[12] Ibid, discussion on page 3 gives an example of how a 3 month timeframe will give employers enough time to meet with their clients and ensure that they remain with the business, thus highlighting the idea that the timeframe should give employers sufficient time to take any reasonable steps to mitigate risk to proprietary interest.

[13] Parkhill, '*Should restraints of trade be limited to senior staff?*'Dentons Kensington Swan, Auckland, pages 521-523- discusses the prevalence of restraint of trade provisions among lower income earning workers:

'...we can see from the table attached to this paper that the Authority and the courts usually decline to uphold non-compete restraints that seek to bind low income and junior workers. That said, what the table also clearly demonstrates is that the clauses have been in the employment agreements of many junior workers who have had to come before the courts or Authority as respondents to litigation brought by their former employers'. [page 521]

7.5. **Accordingly, the CTU strongly endorses E tū Union's recommendation that the timeframe for the existence of restraint of trade provisions be shortened from 6 months to 3 months, to give employers a reasonable opportunity to mitigate risk, and to quickly as possible, restore the natural right of former employees to freely seek a new means of livelihood.**

8. Updating collective agreements

8.1. The CTU supports the submission made by E tū Union that:

> *'...the wording be changed so that it would be 6 months from the commencement date of the proposed Bill or when an agreement is replaced, whichever is the earlier.'*[14]

8.2. Currently, the Bill provides that it's amendments will come into effect for previously established individual employment agreements, 6 months after the commencement of the Bill. For collective agreements however, the amendments will come into effect 'on the commencement of a replacement agreement'.

8.3. Collective agreements may last for up to 3 years before being replaced. This means that workers who are covered by collective terms and conditions may have to wait a considerably longer time to receive the same protections as workers who are covered by individual agreements.

8.4. The CTU agrees with the representation of E tū Union, that this disparity between the treatment of collective agreements and individual employment agreements cannot have been the intention of the proposed legislation.

8.5. **Accordingly**, **the CTU strongly endorses E tū Union's recommendation that collective agreements by updated within the same timeframe as individual employment agreements**.

[14] Submission by E tū to Education and Workforce Committee [September 2023] on the 'Employment Relations (Restraint of Trade) Amendment Bill- **Recommendation 3**, pages 2 & 3

9. Summary of submission

9.1. That all references to the 'duty of fidelity' be removed from the Bill and any accompanying statement of parliamentary intent.

9.2. That the definition of restraint of trade contained in cl 67I (1)(b) be expanded slightly to cover situations where a former employee 'causes' fresh offers of employment to be made to a former employer's employees.

9.3. That a definition of proprietary interest should be included in this Bill and should make explicitly clear that 'proprietary interest' does not encompass an interest in restricting employment offers being made to existing staff.

9.4. That the income threshold applied in the Bill to protect former employees of an employer be extended to protect current employees as well.

9.5. That the timeframe for the existence of restraint of trade provisions be shortened from 6 months to 3 months.

9.6. That collective agreements by updated within the same timeframe as individual employment agreements (6 months after the commencement date of the Bill).

10. Conclusion

10.1. Restraint of trade provisions in employment agreements are in real need of clear and effective statutory regulation.

10.2. Currently, working people (particularly low and middle-income earners) are frequently and unfairly disadvantaged by such provisions.

10.3. Most workers lack the resources and time to challenge unjustifiable restraints of trade, but still suffer from the curtailment of their fundamental rights and freedoms.

10.4. The CTU views this Bill as an extremely positive step towards addressing what is a widespread problem faced by many working people.

10.5. The implementation of the recommendations made in this submission will strengthen the policy intention that underlies the Bill. It will close loopholes and ensure that these

amendments provide a clear and serviceable codification of the law in relation to restraint of trade provisions.

10.6. We look forward to this Bill being enacted, along with our recommendations.

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