NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

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

to the

Education and Workforce Committee

on the

Employment Relations Amendment Bill

Part I

P O Box 6645
Wellington

30 March 2018

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Note:

The CTU submission is in two parts. 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. Part II contains detailed discussion of the significant changes and the CTU's recommendations. See Part II for further details including a summary of our recommendations on each of the significant changes.

1. Introduction and outline of submission

1.1. This submission is made on behalf of the 30 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 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 advocates for all New Zealand workers to receive fair treatment and recognition of their rights and voice at work. Workers are entitled to decent, secure work that is healthy and safe and provides adequate remuneration to allow workers to live in dignity.

1.4. The CTU strongly supports this Bill. It reverses changes made by the previous Government which in our submissions at the time and from subsequent experience were a backwards leap in employment relationships towards the failed paradigm of the 1990s. Many were undertaken against the advice of officials, were contrary to New Zealand's international commitments, and in the face of evidence and common sense. It is right that they should be reversed.

1.5. There is good reason to believe that those changes contributed to the poor wage growth New Zealand working people have seen, the falling share they are receiving of New Zealand's income, and the failure of real wages to keep up with labour productivity growth, resulting in high levels of financial stress, particularly in the face of increasingly unaffordable housing costs.

1.6. But this is only the first step in restoring justice, respect and decent working conditions to New Zealand's two million wage and salary earners. We look forward to further changes which will make a significant difference to working people in New Zealand. Kiwis have a right to expect that hundreds of thousands of them and their children should no longer have to live in poverty despite working full time, that they have the job security they need to live a decent life, buy a house and raise a family if that is what they want to do, that their right to choose representation by unions in their jobs is respected, that their right to negotiate for better working conditions

through their unions is respected, that they have safe workplaces including proper rest breaks, and that they are treated fairly and without discrimination at work.

Structure of our submission

1.7. New Zealand has become an increasing unequal society with a host of negative social and health consequences. Our submission reviews the negative effects of inequality in section 2 of this part and details how this Bill can begin to stabilise or reverse this problem.

1.8. Collective bargaining is one of the most important means for fair income distribution. The dismantling of the award system in 1991 and the inadequacy of primarily enterprise-based bargaining since 1991 has led to sharp increases in inequality. We discuss evidence of the importance of collective bargaining in section 3 of this part.

1.9. The changes were contrary to International Labour Organisation ('ILO') rules and international treaties that New Zealand has committed to observe. We discuss New Zealand's international obligations in section 4 of this part and steps needed to bring New Zealand into compliance with them.

1.10. In section 6 of this part we provide an overview of the improvements that these changes will make to help vulnerable workers: better protection for the pay and conditions of new employees, restoring protection of workers when contractors change in Part 6A of the Act, removing the threat of 90 day trials for at least some workers (but it should be removed for all), and restoring rights to rest and meal breaks.

1.11. Section 7 of this part describes the importance of specifying pay rates as precisely as possible in employment agreements, as key terms of employment that must be negotiated.

1.12. Section 8 of this part sets out the positive impact on health and safety of the changes in the bill and why this is necessary to support present efforts to raise New Zealand's health and safety standards to world class.

1.13. In Section 9 we rebut the standard criticisms of progressive changes such as those in this bill. The previous Government justified their changes as adding flexibility, creating jobs, making work more productive and rebalancing the employment law framework towards employers. We review each of these claims and conclude they are unsupported by evidence.

1.14. Section 10 concludes Part I and leads into the detailed analysis of Part II of our submission.

1.15. Part II of our submission analyses and makes recommendations on the Bill clause by clause.

2. The problem of inequality

2.1. In this section, the submission looks at the impact of inequality and the contribution of poor wage setting systems to inequality.

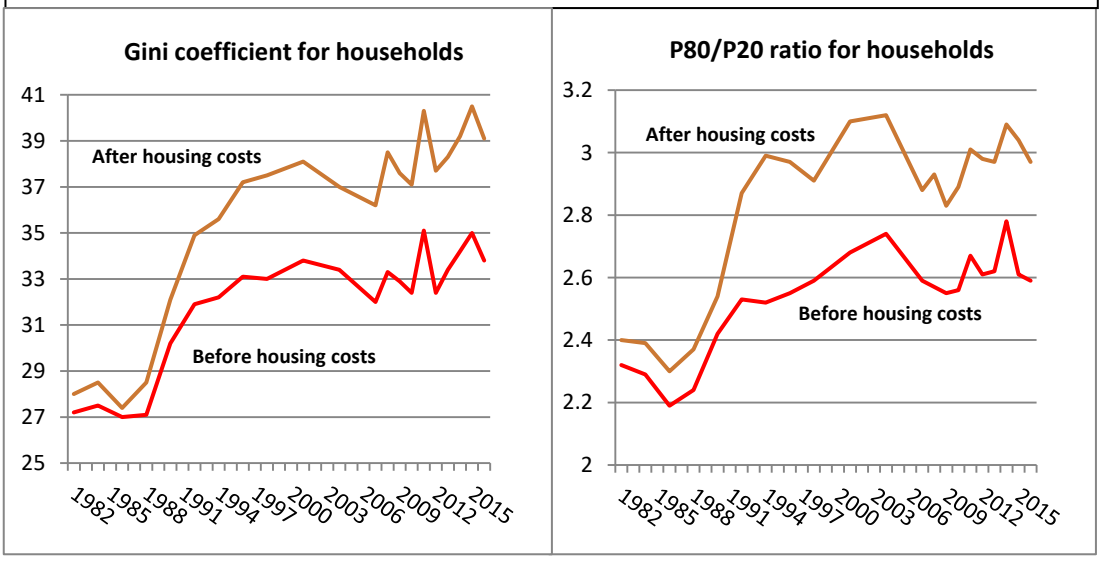
2.2. High levels of inequality are now recognised as a curse on society for a variety of reasons. There is a strong and demonstrable relationship between low wages, the removal of adequate structural support for collective bargaining and widening inequality. Weak wage and salary growth for people on low and middle incomes and growing inequality in gross 'market' incomes requires additional support through the tax and transfer (benefits and income support) system to prevent the growth of high levels of inequality. The weaker the wage setting system, the more work the tax and transfer system must do. Yet as will be seen the tax and transfer system has been weakened and is one of the weakest in the OECD.

The state of inequality in New Zealand

2.3. Since deregulation began apace in the 1980s, New Zealand has become a starkly more unequal society.

Inequality in New Zealand, 1982-2016

Source: Household Incomes Report 2017, MSD, Tables D.9 and D.8 respectively

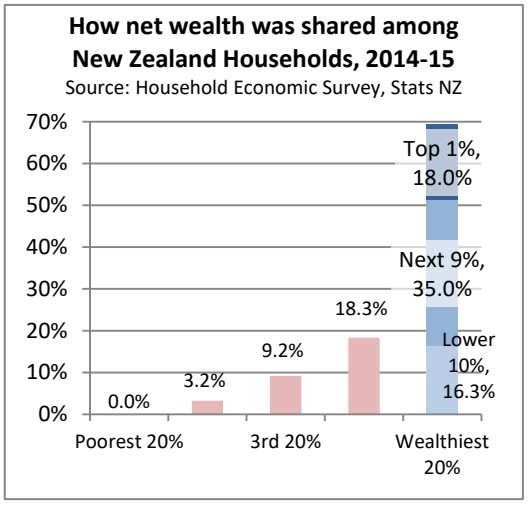


- From the mid-1980s to the mid-1990s, income inequality grew faster in New Zealand than in any other developed country.

- We are now in the most unequal half of the OECD. We would be even worse in relative terms if inequality in the rest of the OECD had not also risen rapidly since the 1990s.

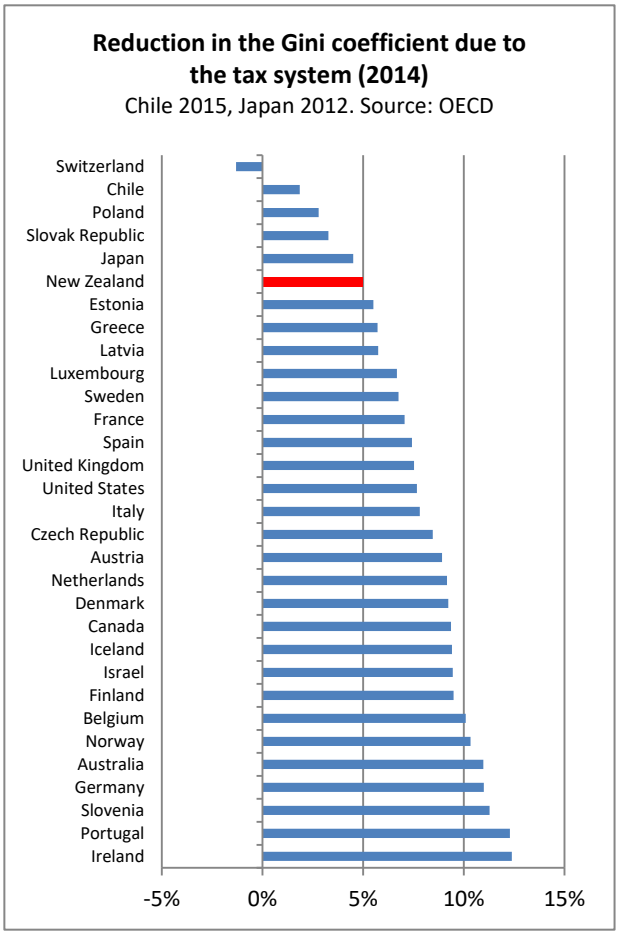
- On a number of measures published by the Ministry of Social Development, Household income inequality has risen again since about 2007, and particularly (but not only) after housing costs are taken into account. Two examples are given above.

- In the year to June 2015, the wealthiest 1 per cent of households owned 18 per cent of the country's total wealth while the 60 percent with least net wealth had just 12 percent.



2.4. Our tax system, and our tax-and-transfer system (after taxes, benefits and support like Working for Families) are among the weakest in the OECD in reducing income inequality.

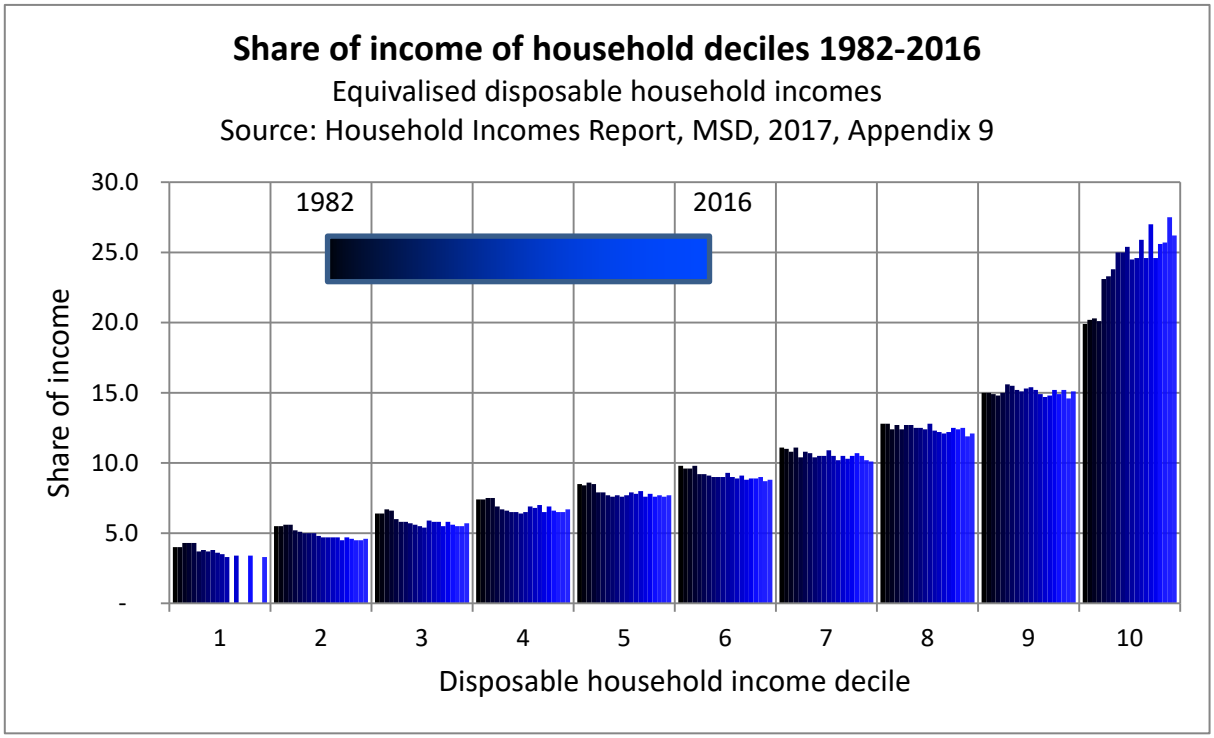
2.5. Comparative statistics from the OECD, show New Zealand's tax system reducing income inequality measured by the Gini coefficient by just 5 percent, the sixth weakest in the OECD, compared to a median of 8 percent and the most effective (Ireland) reducing the Gini coefficient by 12 percent (see accompanying graph).



2.6. The weakened power of the whole tax-and-transfer system is summed up as follows by in MSD's 2017 Household Incomes Report (Perry, 2017, p. 197):

- The inequality-reducing power of the tax and transfer system on market income inequality has steadily declined for New Zealand from 27% to 17% over the last three decades, 1985 to 2015 (using the Gini).
- The size of the impact reflects not only the original level of household market income inequality but also changes in policy settings and in the number in receipt of a main working-age benefit (the latter has declined since the mid-1990s except for a brief rise post GFC).
- The inequality-reducing power of the New Zealand's tax-benefit system is currently relatively low compared with that for other OECD countries, including those who (like NZ) have lower unemployment rates (eg Germany, Norway, the UK and Australia). It is below the OECD average.

2.7. In terms of household shares of income, after adjusting for household size and after tax and transfers, all the increase in income in the economy going to households over either the full period 1982-2016, or the period of the last Government 2007-2016 (2008 is not available), has gone to the highest income 10 percent of households. This is without accounting for capital gains which will also tend to have gone disproportionately to the highest income households.



2.8. Both tax and transfer systems were weakened by the previous Government. For example, Working for Families reduced in real value by $700 million between 2010 and 2017. In the 2010 Budget National stopped adjustment of the income thresholds at which abatement of tax credits begins, so increasing proportions of families experienced the higher abatement rates as their nominal wages rose. Abatement rates were increased in the 2011 Budget and the threshold reduced. While Labour has announced a substantial increase in Working for Families payment rates, abatement rates remain high. As a result, middle income families have effective marginal tax rates much higher than households with the highest incomes. In addition, accommodation supplements were not adjusted to match rapidly rising housing costs, and will be increased for the first time in a decade from July this year. The income tax system was flattened in 2010, reducing its progressivity. At the same time (and not taken into account in the above OECD statistics), in 2010 GST was raised 20 percent from 12.5 percent to 15 percent, adding further costs disproportionately to lower income households (Tax Working Group, 2009).

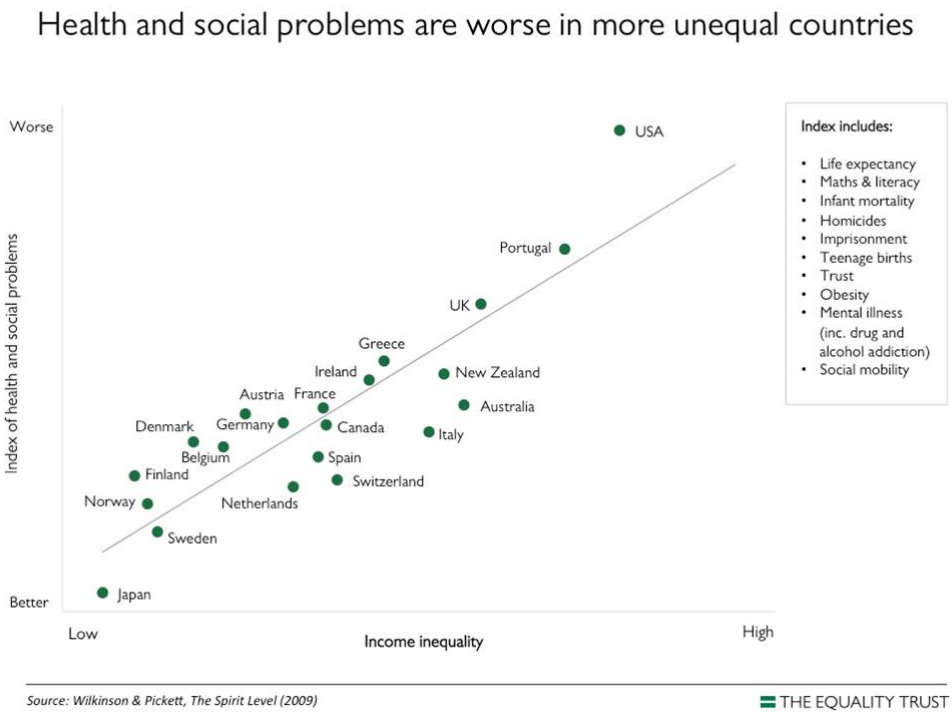
2.9. This occurred at a time when the bargaining power of employees was also being weakened by the measures this bill reverses and the continuing effects of globalisation such as offshoring and competition from imports, exacerbated by an excessively high exchange rate and increased trading over the internet. Rather than the tax and transfer system doing more to compensate for these pressures, it was weakened.

High inequality is bad for society

2.10. High levels of income inequality are bad for society, including poor economic growth, physical and mental health, social cohesion, trust, serious crime levels and social mobility.

2.11. It can lead to social breakdown. There is evidence from both common experience and carefully designed experiments that people dislike unfair shares. With high inequality, people feel they are being treated unfairly, social tensions rise, and cohesion as a society breaks down. We can see that happening in the US, one of the most unequal high income countries, right now. Those tensions can create the forces needed for positive change and progress, but they can also lead to intolerance, racism and authoritarianism – the breakdown of democratic values.

2.12. Inequality is highly correlated with, and contributes to many other social, mental and physical ills. As Wilkinson and Pickett (2010) demonstrated in their book *The Spirit Level: Why More Equal Societies Almost Always Do Better*, "almost all problems which are more common at the bottom of the social ladder are more common in more unequal societies". They included lowered life expectancy, poorer mathematical achievement and literacy, worse infant mortality, more homicides, high imprisonment rates, more births to teenage mothers, lowered trust, more obesity, poorer mental health, drug and alcohol addiction, and decreased social mobility. The following graph summarises their findings[1].



2.13. High inequality can increase financial instability and crises. For example IMF researchers Michael Kumhof and Romain Rancière (2010a, 2010b, 2011) find evidence of increasing instability as inequality grows. They suggest that as income inequalities have increased, low and middle income earners have increasingly borrowed in order to make ends meet, raising their indebtedness. Those with the highest incomes (the "1%") put their increasing wealth in financial rather than productive investment, inflating asset prices. The financial sector grows, acting as cheerleader and intermediary in these increasingly risky investments. Eventually some event triggers a financial crisis. Kumhof and Rancière's solutions are either

[1] Graph retrieved from http://www.equalitytrust.org.uk/research/why-more-equality

orderly debt reduction – which they find is difficult to do short of a major crisis – or restoring workers earnings through strengthening collective bargaining. Other evidence shows reverse causality too: that beyond a certain level, more finance (and more international financial openness) creates greater inequality and poorer economic growth (e.g. Arcand, Berkes, & Panizza, 2012; Cecchetti & Kharroubi, 2012, 2015, Furceri & Loungani, 2013, 2015; International Labour Office, 2013; Jaumotte, Lall, & Papageorgiou, 2013; Stockhammer, 2009). We could have a vicious downward spiral of inequality creating debt, creating greater inequality, poor economic growth and instability.

2.14. Inequality can worsen economic growth. As inequality rises, there is evidence for both more intermittent growth (e.g. A. G. Berg & Ostry, 2011, 2011; A. Berg, Ostry, & Zettelmeyer, 2008) and for slower growth (e.g. Cingano, 2014; Ostry, Berg, & Charalambos G., 2014; Wade, 2013). International Monetary Fund (IMF) Deputy Director of Research Jonathan Ostry spoke about these issues at a Government Economics Network conference in Wellington in December last year. The IMF also finds that redistribution of income is rarely harmful to growth. Financial crises are of course devastating for growth too.

2.15. Robert Wade dismantles the argument that an unequal winner-takes-all society generates economic efficiency and innovation. He notes, for example, that: [2]

> Inequality above a certain level is macro-economically inefficient, in that it raises the probability of financial crisis and economic slump. It does so through at least four mechanisms.
>
> First, above a certain level of inequality, economies tend to become 'debt-intensive.' The other side of income concentration as the top is stagnant or falling incomes lower down. One result is insufficient aggregate demand to utilise productive capacity, including the employment of the labour force. So a 'common interest' develops among firms, households, politicians and financial regulators to allow an explosion in private debt to fill the gap between (a) the demand supported by incomes, (b) the demand generated by aspirations to participate in the boom and (c) the demand needed to utilise productive capacity.
>
> Second, above a certain level of inequality, developed economies tend to enter bubble dynamics. After the early 1990s the surge in income concentration unleashed a flood of global capital as those at the top hunted for ways to store and multiply their

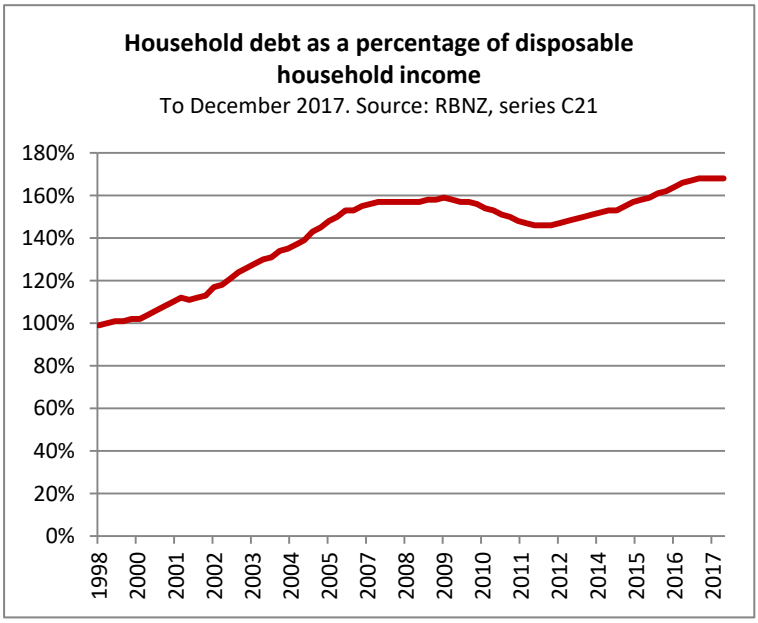
[2] Wade, R (2013) 'Inequality and the West' in Rashbrooke, M (ed) *Inequality: a New Zealand crisis,* 50

wealth. Bank assets (loans) soared, and bubbles erupted in housing, property, business and art; with a repeat after the early 2000s. The bursting of the house price bubble in the US, the UK, New Zealand, Iceland and many other western economies helped to turn an ordinary business cycle downturn around 2007 into the larger financial crash and ensuing slump.

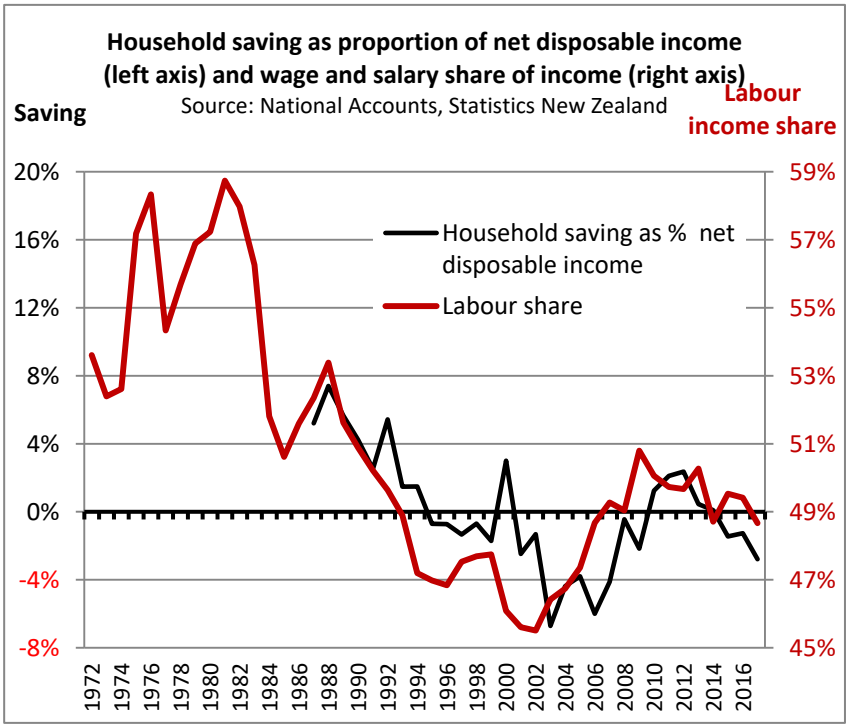
Third, the huge returns to financial operations distort business incentives, channelling investment away from productive uses into redistributive uses like mergers and acquisitions, private equity funds, property and financial engineering….

Fourth, and most fundamental, high concentrations of income and wealth propel 'state capture,' such that finance comes increasingly to dominate the state apparatus and the democratic process more generally. In the post-war decades, before the surge in income concentration, 'establishment' elites recognised that their prosperity and privileges depended on the prosperity and social peace of the society at large: accordingly, they designed tax systems to meet widely accepted criteria of equity, and devoted a large part of public spending to public goods rather than redistributive goods (to themselves). Since the 1980s the dominant elites in many capitalist countries see less of a mutual interest in the well-being of their society, and use the levers of state power to sluice resources upwards.

2.16. New Zealand has a very high rate of household indebtedness. According to the Reserve Bank of New Zealand's latest figures (December 2017), household debt amounts to 168 percent of annual household disposal income, up from 146 percent in 2013 when National made many of its amendments to the Employment Relations Act 2000 (the ER Act). After being stable for at least a decade up to 1988 at around 47 percent of household disposable income, debt rose almost without pause until peaking at 153 percent in 2008 at the time of the global financial crisis. It fell temporarily and rose again.



2.17. Compounding this is New Zealand's major housing affordability problem. Home ownership is increasingly unaffordable nationally and in Auckland among the least affordable in the world, private rental housing is poor quality, frequently dangerous to its residents' health, and rents are rising much faster than incomes. Housing Corporation housing has been run down and sold off, and income-related rents made more and more difficult to qualify for. The result has been loss of housing security with multiple health, education and social effects.



2.18. The problem is also reflected in low saving rates. The national accounts show household saving falling over the period from the late 1980s until the mid 2000s (which as will be seen below coincided with increasing wages and salaries). It rose until 2011 and then began to fall again.

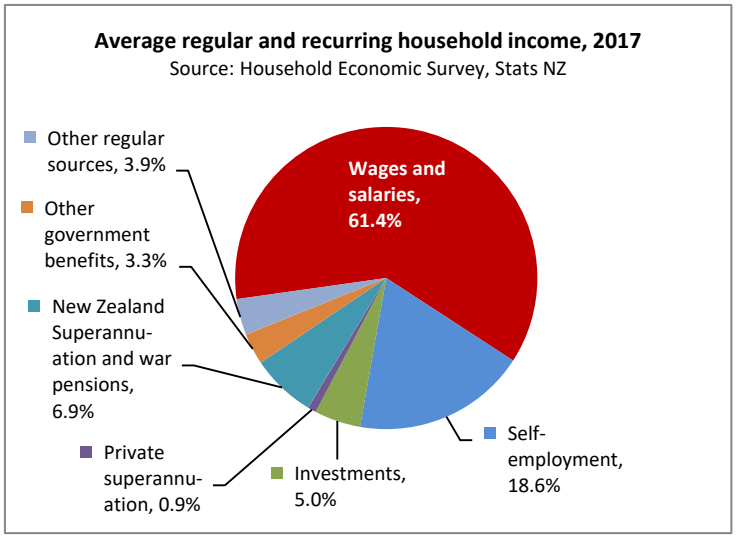
2.19. A common defence of a high level of inequality is that it encourages saving because high income households have a higher propensity to save. While saving is concentrated among high incomes, New Zealand's high levels of inequality have not had that effect in aggregate. Instead, household saving fell during the 1990s and early 2000s as inequality rapidly increased and wages and salaries stagnated in real terms.

2.20. The trend did not reverse until incomes began rising consistently again in real terms in the mid-2000s. In 2004 there were significant changes to the ER Act, many of which National reversed. It was followed by a strong push by unions for wage increases including the '5% in 05' campaign and substantial pay equity rises to nurses and primary and early childhood teachers. These were accompanied by strong rises in the minimum wage. The results showed in the wages and salaries

share of national income beginning to rise after falling almost every year since 1988. The inability of the great majority of households to save has outweighed the saving by the highest income households.

Wages are a large part of income

2.21. Since wages and salaries are by far the largest part of household incomes, the inadequate rises particularly in low incomes must be seen as a significant contributor to household income inequality. Among all households, Statistics New Zealand's Household Economic Survey showed that 61% of regular and recurring income came from wages and salaries in the year to June 2017. For households with prime working age members (aged 18-64) that will be even higher, given that 8 percent of average household income came from superannuation and pensions. A further 3 percent came from other government benefits.



2.22. According to Perry (2017, p. 49), "The two factors that impact the most on the incomes of two-parent-with-dependent-children households are average wage rates and the total hours worked by the two parents." He also finds that four out of ten children in poverty are in households where at least one adult was in full-time paid employment or was self-employed (p.142).

2.23. Easton (2013, p. 23) reports that "The majority of the poor are couples with jobs, with some – but not a lot of – children living in their own home albeit with a mortgage". He includes as a factor in the steep rise in inequality 1985-1993: "union power to maintain and increase real wages was weakened".

2.24. As Wade, Kumhof and Rancière (among others) observe, the levels of inequality reached in New Zealand are a recipe for social and economic instability and failure.

2.25. Good and rising wages bring multiple benefits to families and society. They are necessary to ensure that parents have enough resources to raise their families

within a healthy and supportive physical and emotional environment, including good housing. This provides a strong basis for children to benefit from the education that the State offers to them. Adequate wages allow parents more time to spend with their children, to provide stability in the home and the support that is essential for the children to succeed in their education. These are consistently identified as the most important factors in educational success.

2.26. Rising incomes allow families to save to buy a home, to provide for retirement, and to be in a sufficiently secure position financially to ride out difficult times.

2.27. Along with direct benefits, these buffers reduce the costs to the State of families who are unable to cope without assistance, of health problems caused by poverty, excessive stress and poor housing, and of educational failure brought about by inadequate support for children in the home due to circumstances beyond their parents' or caregivers' control. Transfers such as Working for Families, welfare benefits and many of the costs of ill-health have risen as a result of the failure of the wages system to provide adequately for the needs of the majority of New Zealand's households.

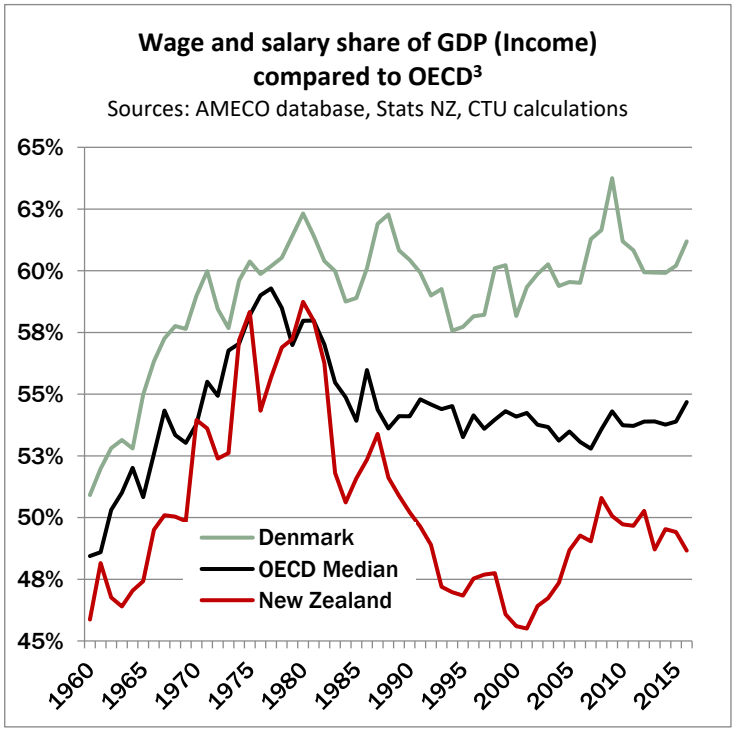
2.28. Finally, and equally importantly, good incomes that provide families with a fair share of the production of the nation's economy give them dignity and the confidence that they have a part to play in our society. They encourage participation in our political and social institutions, ranging from sports clubs to political parties and government. They are the basis of a healthy society.

2.29. As we will show in more detail below, collective bargaining and union activity are important means to greater income equality. When National brought in its employment law changes which this Bill is reversing, we argued that wages would be lower as a result. Weak wage in New Zealand growth well after the end of the recession is evidence that we were correct.

2.30. Indeed, wage and salary earners have been losing their share of New Zealand's total income since 2009. Since the early 1980s, their share of income has been low compared to the rest of the OECD, and their share is again declining after regaining partially during the 2000s.[3]

[3] Note that (1) the accompanying graph shows years ended March as the previous year for compatibility with the AMECO database, so the year to March 2017 is shown as 2016; (2) Labour income share of GDP is calculated

2.31. Each percentage point decline in the labour income share was worth on average $1,160 per year in lost income to each wage and salary earner in the year to March 2017. Between March 2009 and March 2017 the labour income share declined from 50.8 percent of GDP to 48.7 percent – a 2.1 percentage point decline worth $2,470 on average per wage and salary earner in the March 2017 year.



2.32. Real wages have fallen behind labour productivity growth in the market ('measured') sector of the economy since the early 1990s and particularly so since 2009 as the following graphs show. They show how real wages would have risen if they had risen at the same rate as labour productivity growth as measured by Statistics New Zealand and compare that to how they actually rose. The wage measure used is compensation of employees per hour, which includes not only wages and salaries but other employer costs of labour such as superannuation contributions and ACC levies. Two forms of real wage are shown: one adjusted for living costs (using the CPI), and the adjusted for employer revenue (using the GDP Deflator). Both show the same trend. Real hourly wages would have been 8 to 10 percent higher in March 2017 had they followed productivity growth between 2009 and 2017, and 20 to 23 percent higher had they followed productivity growth between 1989 and 2017.

2.33. It is unlikely that increased capital intensity is a significant contributor to loss in wage and salary income share since 2009: Statistics New Zealand's most recent productivity statistics show the capital/labour ratio virtually static between 2010 and 2017. They also show real unit labour costs (the real labour cost per unit of

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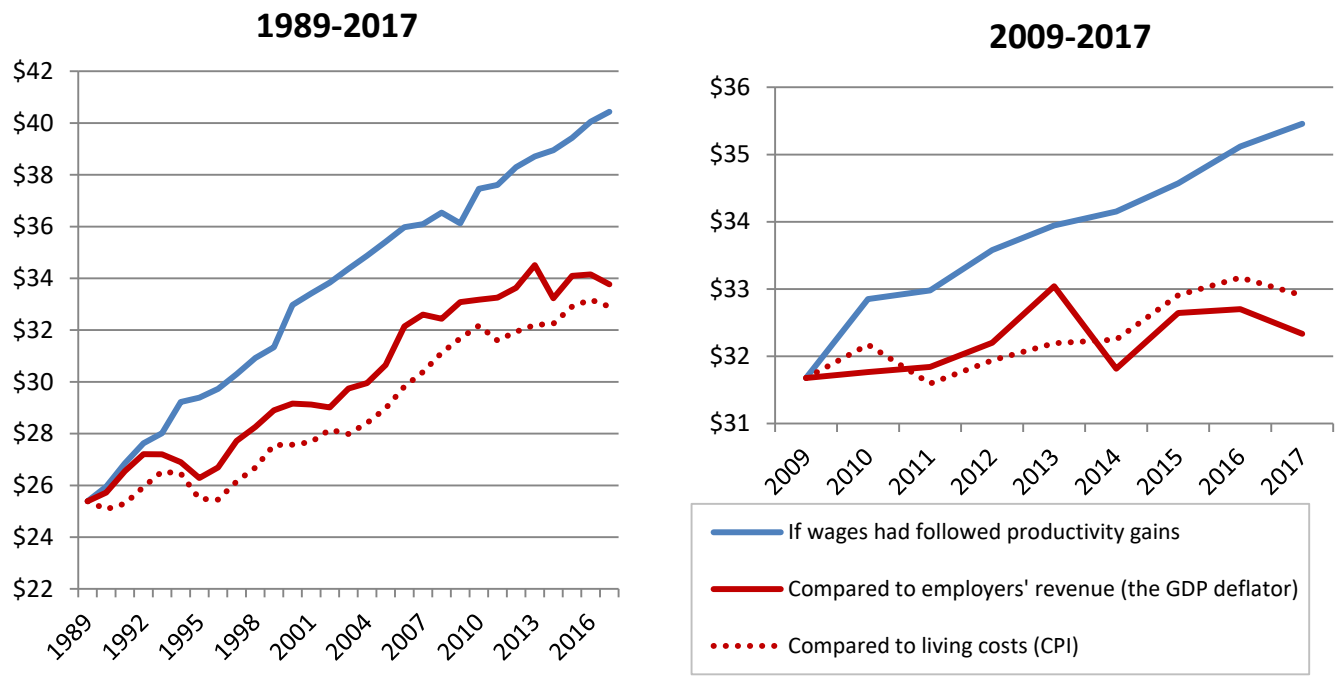
as factor income, equal to Compensation of Employees/(Compensation of Employees+Gross Operating Surplus).

production) falling sharply, like labour's share of domestic income, to which they are closely related.

Real Compensation of Employees per hour compared to labour productivity gains

March 2017 dollars, market sector[4]



2.34. It is more likely that the falling share of income and poor real wage increases going to wage and salary earners is primarily a result of weakened bargaining power in the face of employment legislation being skewed towards employers' interests, high unemployment for much of the period (and still too high even now), the use of immigration to avoid the need to raise wages or train local workers, and the continued threat of offshoring (such as happened recently at Cadbury's factory in Dunedin despite its profitability).

[4] Productivity is measured by Statistics New Zealand over the 'measured' sector which is essentially the market sector of the economy. Between 1989 and 1996 it is estimated by productivity growth in the somewhat smaller 'former measured sector'. Compensation of Employees per hour is the Compensation of Employees aggregate for the measured sector from the National Accounts, divided by employee hours paid for the sector (supplied by Statistics NZ). The 2017 value is estimated by the increase in the total hourly wage. The GDP Deflator for the measured sector is calculated from nominal GDP Income and real GDP(P), and for 2017 estimated by the GDP(E) deflator. The wage measures are calculated from a common dollar base for ease of comparison.

3. The importance of unions and collective bargaining

3.1. In 2015, International Monetary Fund researchers, Florence Jaumotte and Carolina Osorio Buitron, published a study, “Inequality and Labor Market Institutions” (Jaumotte & Buitron, 2015). It found that deunionisation

> is associated with the rise of income inequality in our sample of advanced economies [20 including New Zealand], notably at the top of the income distribution. Our key findings are that the decline in unionization is related to the rise of top income shares and less redistribution, while the erosion of minimum wages is correlated with considerable increases in overall inequality.

In addition they found that (unsurprisingly) lower top tax rates are related to higher inequality, and (in common with several other recent studies) that financial deregulation is also associated with rising inequality while technology plays a relatively modest role.

3.2. Jaumotte and Buitron found that not only do unions reduce *gross* income inequality – that is before taxes and transfers – mainly among low and middle income earners, as would be expected, but they also made some less expected findings.

3.3. Firstly, deunionisation increases the share of income that the highest incomes receive. The rise in the income share of top incomes, most clearly documented by French economist Thomas Piketty (such as in his book “Capital in the twenty-first century”) and colleagues, is a critical feature of the growing imbalance in income, hence wealth, and associated with that, political power. The reason for this effect is likely to be

> the positive effect of weaker unions on the share of capital income – which tends to be more concentrated than labor income – and the fact that lower union density may reduce workers’ influence on corporate decisions, including those related to top executive compensation.

3.4. Or put the other way round, unions rebalance not only bargaining power but also the distribution of incomes from the very top incomes to the rest of the population. They increase the share of income going to wage and salary earners (the labour share of income).

3.5. Secondly the researchers find that as well as reducing gross income inequality unions also reduce *net* income inequality – that is after taxes and transfers. Indeed,

on average they estimate that about half of the increase of net income inequality in the countries that they analyse was due to deunionisation. Unions don't directly affect tax rates and the strength of social security so how does this come about? The authors conclude that it is likely to be because unions influence policies that bring about redistribution of income through mechanisms such as these. In other words unions are a powerful force for social progress. Weakening unions leads to weaker social protections and increasingly unfair distribution of the income generated by the economy.

3.6. They find that New Zealand is at an extreme in the effect of deunionisation on increasing inequality – but also near the opposite extreme in the positive effect of the minimum wage in reducing inequality.

3.7. Collective bargaining has important functions beyond contributing to fair incomes. Academic Jelle Visser, who has written authoritatively on collective bargaining for the European Commission and elsewhere, outlines the functions of collective bargaining, in a review of collective bargaining following the GFC (Visser, 2016, pp. 2–3):

> For workers, collective bargaining has a *protective* function - ensuring adequate pay, establishing limits on daily and weekly working time, and regulating other working conditions for those with weak individual negotiating power; a voice or *participation* function - the collective expression of grievances and participation in the success of the enterprise; and a *distributive* function - securing a fair share of the benefits of training, technology and productivity growth. For employers, collective bargaining has a key *conflict management* function - it provides a process for resolving disputes of interest. Managerial control tends to be more acceptable and effective when legitimised through joint rules (Flanders 1968).
>
> Collective agreements and wage regulations like a mandatory minimum wage put a floor in the labour market and thus limit cutthroat competition. This is the aspect defended by Keynes in the quotation above[5]. Stabilizing wages reduces uncertainty about future costs and prices and can thus contribute to raising business and human capital investment decisions, which depend strongly on expectations. Collective bargaining, when sufficiently inclusive and coordinated, offers a mechanism for responsible wage setting, with outcomes that are compatible with price stability and low unemployment (Aidt and Tzannatos 2008; Flanagan 1999; OECD 2006; Traxler

[5] "I regard the growth of wage bargaining as essential. I approve minimum wage and hours regulation." (John Maynard Keynes, 1-2-1938, letter on recovery policies from the Great Depression to President Roosevelt.)

and Brandl 2012). Moreover, collective bargaining relieves the state from the complex task of setting standards and solving coordination problems in an area marred with conflicts and risks of non-compliance. It provides the possibility to tailor regulations to the circumstances in an enterprise or industry. In many countries and in EU law it is, moreover, possible to derogate by collective agreement from legal minimum standards on for instance working hours, employment contracting and employee information and consultation in the enterprise.

Compared to individual bargaining or unilateral pay determination, collective bargaining is associated with higher earnings, more security for employees and more earnings equality. In the literature a gap between union and non-union wages, or more properly specified between workers covered and not covered by collective agreements, of 4 (Norway) to 20 percent (Canada) has been reported (Hartog et al. 2002). A study based on ISSP survey data for 1995–99 covering 17 countries found a union or collective bargaining 'mark up' varying from less than 1 percent, negative or insignificant in Sweden, Italy or the Netherlands, 4 percent in Germany, 7 percent in Norway and Spain, rising to more than 20 percent in Japan (Blanchflower and Bryson 2003). A recent study of German wage data found that the gap between the average wages of covered and uncovered workers had risen from 8 to 19 percent between 1999 and 2010, or from 1 to 10 percent if controlled for firm size. The authors concluded that the decline of collective bargaining in Germany in the past two decades - with the coverage rate decreasing from over 80 to under 60 percent - has contributed more to rising wage in- equality than international trade (Felbermayr et al. 2014). Addison et al. (2014), using a different methodology and controlling for employee heterogeneity, report a smaller 'wage gap' in Germany of 3–4 percent during the first half of the 2000s. Their analysis shows that in a period of general standstill in wages, workers whose firms abandoned the sectoral agreement experienced a wage loss, albeit decreasing over time, whereas workers whose firms joined the sectoral agreement enjoyed a slightly increasing wage gain.

3.8. Recently, the OECD in its 2017 Employment Outlook acknowledged the important role of collective bargaining (OECD, 2017b, p. 129):

> Collective bargaining and, more generally workers' voice (the collective expressions of workers' interests with no proper bargaining prerogatives), aim at ensuring adequate conditions of employment (*protective function*), a fair share of the benefits of training, technology and productive growth (*inclusive function*) and social peace (*conflict management function*). Collective bargaining is also a key tool of market control, i.e. reining wage competition between companies or, on the opposite, limiting the so-called "monopsony power" of firms which in some cases may profit from a lack of bargaining power of workers. While often considered mainly as a wage setting

> institution, collective bargaining also plays an important role for setting other conditions of employment such as job security, working-time regulation, quality of the working environment, provision and access to training, etc.
>
> Collective bargaining entails both benefits and costs for employers, workers, and society as a whole. Collective bargaining and workers' voice can make labour markets function more efficiently by correcting market failures (asymmetry of information and bargaining power between workers and employers, possibly reflecting monopsony and other labour market frictions) and reducing transactions costs involved in individual bargaining. For instance, it can ensure that workers' requests for pay to increase with productivity are heard, prevent excessive turnover of staff, and limit the extent of costly procedures in case of grievances and complaints. Collective bargaining can also improve the quality of the employment relationship between workers and firms, leading to more efficient allocation of resources, greater motivation and ultimately productivity. Finally, unions and employer organisations can also provide important services to their members.

3.9. The OECD acknowledges that poorly designed regimes can lead to some problems, such as failing to cover less-skilled, temporary or young workers or young/small firms. There are some opportunities: "worker voice may help reduce turnover costs" but also risks such as "workers could extract excessive rents from their employers by threatening to leave after an irreversible investment has been made (for instance after a substantial training)". This of course can happen without unions. Not mentioned is the opposite risk: that the position of workers with specialised skills or few job choices because of their skills or location can be exploited by their employers.

3.10. Importantly, the OECD does acknowledge that "companies may have fewer incentives to invest in innovation when unions are weak as they can increase profits by simply reducing wages." It continues:

> Collective bargaining can have an impact on wage dispersion and income inequalities more in general (e.g. by affecting employment but also through its influence on management pay at firm level and the tax and benefit system at country level), unemployment levels and competitiveness as well as the way labour market responds to unexpected shocks. It can thus affect labour market performance along all the dimensions of the OECD Jobs Strategy (see Chapter 1) – in terms of both quantity and quality of outcomes, but also in terms of resilience, adaptability and inclusiveness of labour markets. Moreover, it can represent a useful tool for self-regulation between workers and employers and bring more stable labour relations

> and industrial peace. Finally, collective bargaining, and more in general social dialogue, systems can constitute an efficient tool to promote effective consultation and implementation of structural reforms. When collective bargaining is well organised and representative, it can help manage and reduce the extent of any trade-offs between different policy objectives. The overall effect of collective bargaining on overall economic performance largely depends on the specific features of the system of each country, how they interact with other key parameters of labour market institutions, such as employment protection or minimum wage legislation, but also on prevailing macroeconomic and labour market conditions and policies.

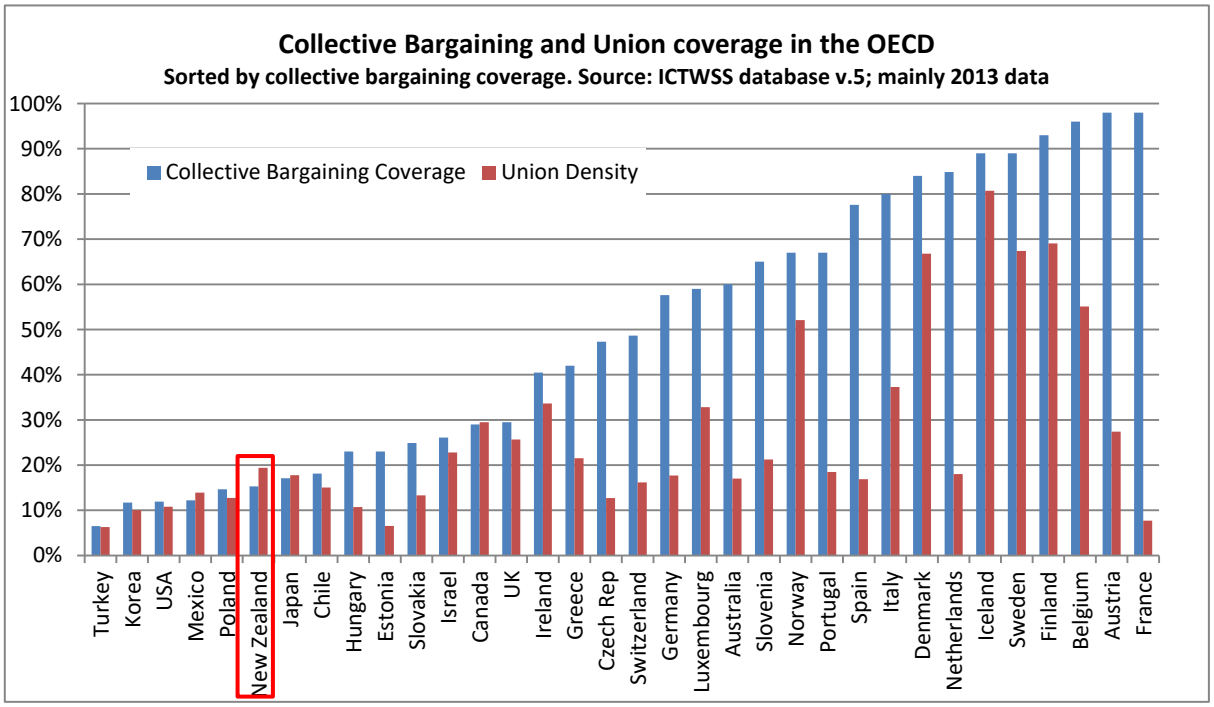
3.11. On this assessment, New Zealand's collective bargaining system is weak and far from optimising the advantages that it can bring.

3.12. Co-ordination of bargaining is increasingly seen as a key feature of a well performing system. The above OECD report states (p.152-3):

> Co-ordination is the other key pillar of collective bargaining systems. Co-ordination refers to the "degree to which minor players deliberately follow what major players decide" (Kenworthy, 2001 and Visser, 2016a). Co-ordination can happen between bargaining units at different levels (for instance when sector- or firm-level agreements follow the guidelines fixed by peak-level organisations or by a social pact) or between units at the same level (for instance when some sectors or companies follow the standards set in another sector/ company).
>
> Many studies have found in different co-ordination practices a main factor behind wage developments and macro flexibility, namely the ability of the economy to adjust to macroeconomic shocks (Soskice, 1990; Nickell, 1997; OECD 1997, 2004 and 2012; Blanchard and Wolfers, 2000; Traxler and Brandl, 2012). While conceptually different, co-ordination and centralisation can be thought of as two different ways to reach the same objective, and strong co-ordination has been found to be a functional equivalent of centralisation in some cases (Soskice, 1990; Traxler, 1995; Teulings and Hartog, 1998). However co-ordination can also ensure that either organised, but also disorganised decentralisation does not result in totally independent and atomised negotiations and allow for a certain degree of synchronisation of different bargaining units when setting their strategy and targets. Co-ordination can play a particularly important role at the macroeconomic level as a critical tool to strengthen the resilience of labour markets by increasing the responsiveness of real wages to changes in macroeconomic conditions (OECD, 2012; IMF 2016). But co-ordination can be a key instrument in pushing up wages when needed. Co-ordination is also important to ensure that the competitiveness of the export sector in a country is not

endangered by what is negotiated in the non-tradable sector which does not suffer from international competition but is often a critical input for the tradable sector.

3.13. New Zealand has one of the lowest collective bargaining coverages in the OECD as the accompanying graphic shows. Our ratio to union coverage is particularly low –



one of only four countries where collective bargaining coverage is lower than union coverage. There is little multi-employer or national collective bargaining, so coordination, where some of the greatest gains can be obtained from collective bargaining for both workers and the economy, is near impossible. Instead wages are simply pushed down – leading to periodic skill shortage crises – and companies have little pressure to innovate or raise productivity: as the OECD stated above: "companies may have fewer incentives to invest in innovation when unions are weak as they can increase profits by simply reducing wages."

3.14. Collective bargaining has been severely weakened in New Zealand by a weak employment law regime, which was further weakened by the previous Government. The present bill will at least restore the previous position but there are still many weaknesses.

3.15. Regarding inequality, Visser states:

> Across countries, there is a strong negative association between bargaining coverage and wage inequality measured by the P1/P10 earnings ratio. Coverage accounts for 50 percent of the variance in wage inequality across the 32 OECD member states

> (Visser et al. 2015). If rising inequality has a negative impact on growth (IMF 2014; OECD 2014), then international and national policy makers should think twice before weakening the institutions that underpin inclusive and coordinated collective bargaining. Of these institutions, multi-employer bargaining above the level of single firms is the most important.

3.16. OECD researchers Koske, Fournier and Wanner (2012) also find that in general, higher union density, particularly if it is concentrated among lower and middle income earners, and stronger employment protection legislation for temporary and low paid workers, particularly alongside minimum wages, reduce income inequality. Stronger, effective active labour market policies reduce unemployment and thus labour income inequality.

3.17. In particular they find that the strong tendency of trade to increase inequality is reduced by a sufficiently strong union presence and strict employment protection. Given the desire of most political parties to intensify New Zealand's trade, this is an important consideration. A combination of strong unions, good employment protection, especially for low income and temporary workers, and well-designed intensive active labour market policies may allow countries to reap benefits from increased trade without the employment dislocation and greater inequality that is frequently the case.

3.18. Similar findings on the effect of unions have been made by other researchers. For example, Alan B. Krueger, a former Chairman of the US President Obama's Council of Economic Advisers and a prominent researcher in labour economics, said in a speech on "The Rise and Consequences of Inequality in the United States" (Krueger, 2012): "David Card [a leading labour economist and researcher] and others have shown that unions affect the wage structure primarily by raising the wages of lower middle class workers so they can make it to the middle class".

3.19. Western and Rosenfeld find that "Accounting for unions' effect on union and non-union wages suggests that the decline of organized labor explains a fifth to a third of the growth in inequality [in the US between 1973 and 2007] – an effect comparable to the growing stratification of wages by education." (Western & Rosenfeld, 2011).

3.20. Senior researchers at the International Monetary Fund have highlighted the role of income equality and household debt as a root cause of both the Great Depression of 1929 and the current 'Great Recession.' Michael Kumhof and Roman Rancière (2010b) propose that a key mechanism to avert future crises could be:

> [A] restoration of workers' earnings - for example, by strengthening collective bargaining rights- which allows them to work their way out of debt over time. This is assumed to head off a crisis event. In this case, debt-to-income ratios drop immediately because of higher incomes rather than less debt. More importantly, the risk of leverage and ensuing crisis immediately starts to decrease.
>
> Any success in reducing income inequality could therefore be very useful in reducing the likelihood of future crises. But prospective policies to achieve this are fraught with difficulties. For example, downward pressure on wages is driven by powerful international forces such as competition from China, and a switch from labor to capital income taxes might drive investment to other jurisdictions. But a switch from labour income taxes to taxes on economic rents. Including on land, natural resources, and financial sector rents, is not subject to the same problem. As for strengthening the bargaining power of workers, the difficulties of doing so must be weighed against the potentially disastrous consequences of further deep financial and real crises if current trends continue.
>
> Restoring equality by redistributing income from the rich to the poor would not only please the Robin Hoods of the world, but could also help save the global economy from another major crisis.

3.21. What additional evidence is there that unionisation and collective bargaining lifts wages? The evidence for a union wage premium is consistent though as may be expected given the marked different industrial relations systems and histories the effect varies considerably between countries and industries.

3.22. English academics Blanchflower and Bryson (2004) reviewed the union wage differential in the United States in 2004. They found that while the union wage premium varied considerably between workers and industries it was substantial by international standards. Branchflower and Bryson calculated the 2002 union wage premium at 16.5 percent (slightly down from the historical average of 17.1% between 1973 and 2001).

3.23. Fournier and Koske (2012) of the OECD find in an analysis for six countries for which data on union membership is available (Australia, Canada, Japan, Korea, Switzerland, and the US) that (p.88)

> the earnings of union members are higher and less dispersed than those of other workers, even if one controls for the influence of other factors such as age, education and gender. These findings are in line with earlier evidence (e.g. Gosling and Machin(1995); Machin (1997)). The lower dispersion of earnings among union

members may reflect that unions push for greater wage equality among their members or that individuals with higher earnings potential have lower incentives to join a union.

3.24. Robust New Zealand research on the union wage premium is scarce but what data there is supports a union wage premium. The CTU's Bill Rosenberg (2017) has compared annual data on wage increases compiled by the Victoria University Centre for Labour, Employment and Work ('CLEW') with the annual Labour Cost Index ('LCI'):

> For the year to June 2017 CLEW finds that, on average, wages in collectives rose by 1.9 percent, slightly higher than the 1.8 percent last year (which CLEW has revised to take account of additional information since last year). Over the same period, the LCI rose less: by 1.7 percent. Private sector collective pay rates rose 1.9 percent, which is the lowest increase since 2000 and significantly less than last year (2.2 percent) which was the lowest since 2001. However the private sector LCI rose only 1.6 percent, the same as last year, and also the lowest since 2000. Central government CEA rates rose 1.8 percent (up from 1.6 percent in 2016) while the central government LCI rose 1.9. Both are now rising at similar rates to the private sector after being well behind since 2012 (2011 in the case of the LCI). Finally, local government CEA pay rates rose 2.5 percent (the same as 2016), much more than the local government LCI which rose 1.8 percent.
>
> In each case in 2017 there was a clear union premium with the exception of central government, and that is probably more a measurement issue than a significant difference given the relatively high level of CEA coverage in central government. See the graphs on the next page (Figure 1). Despite the barriers the outgoing Government put in the way of negotiating CEAs, a premium remains. As will be seen [in what followed], the same was true in the great majority of industries we can compare. The year confirms the longer term picture: that there is a worthwhile premium for being on a CEA, particularly in the private sector.
>
> These figures understate the CEA premium because the LCI includes people on a CEA as well as those on individual agreements: if they could be separated out, the gap between CEAs and individual agreements would be even bigger.
>
> A job on a wage of $15.00 in June 1993 (around the average hourly wage) would be paying $27.06 in June 2017 if it had risen at the rate of increase in CEAs, but only $24.47 if it had risen at the rate of the LCI, a 10.6 percent CEA premium. For the private sector, the premium is 17.1 percent: $28.39 for CEAs compared to only $24.25 for the LCI. For Central Government (which includes both core public service

> and the wider state sector such as health and education), the premium is quite small at 3.2 percent, which would be expected as the result of much higher rates of unionisation and collective agreement membership in that sector. In Local Government, the premium is 14.2 percent…
>
> Information from the Labour Cost Index survey enables us to estimate how frequently jobs covered by collectives get pay rises compared to other jobs. CLEW shows that virtually all jobs on CEAs get a pay rise (only 1 percent didn't in 2017) but for jobs not on a CEA, only 48 percent got a rise. In general those on CEAs are more likely to get a rise of any given size though since 2013 those on a CEA have been less likely to get an increase of greater than 5 percent, but even that gap is very small. In all, jobs on CEAs are 2.1 times more likely to get a pay rise than those that are not.

3.25. Collective bargaining has importance to wage setting that considerably exceeds the union members directly covered by collective agreements. Researchers Blumenfeld and Ryall at CLEW (Blumenfeld, Ryall, & Kiely, 2012, p. 118) note that, while the proportion of workers covered by collective agreements is low, the precedent-setting value of collective agreement negotiations is much higher:

> [T]he prevalence of general terms and conditions which closely mirror settlements reached with trade unions suggests the true reach of collective bargaining extends well beyond union membership roles. Nevertheless, only one-in-five wage and salary workers are directly represented in collective bargaining; most others are non-union workers employed under IEAs. Most often, those agreements will simply reflect those terms and conditions determined through collective bargaining involving unions and employers in the industry.

3.26. The International Trade Union Confederation ('ITUC') undertook a detailed review of available evidence regarding the impact of collective bargaining in April 2013 (International Trade Union Confederation, 2013, p. 47). The ITUC concluded that:

> The facts are clear.
>
> There is absolutely no evidence that countries with highly decentralised collective bargaining systems and weak trade unions gain any economic advantage.
>
> Countries with strong unions, high collective bargaining coverage and synchronised collective bargaining systems have some distinct advantages.
>
> In particular these countries have consistently performed better in terms of unemployment, and they produce a wage distribution that is more compatible with social cohesion, political stability and stable economic growth.

> The economic advantages that accrue to countries with highly centralised and coordinated bargaining and high levels of union authority and concentration do not result from excessive wage restraint. Rather they appear to stem from taking labour out of competition. This encourages constructive competition in terms of product innovation, advanced technology, human capital development and better work practices.

4. Collective bargaining and New Zealand's international commitments

4.1. New Zealand has signed and ratified all of the major international conventions and covenants which uphold workers' rights to employment rights, freedom of association and trade union rights.

4.2. As a member of the International Labour Organisation (ILO) we are signatories to its founding document - the Declaration of Philadelphia, signed in 1944, (International Labour Organisation, 1944) which states that:

> (a) labour is not a commodity;
>
> (b) Freedom of expression and of association are essential to sustained progress;
>
> (c) Poverty anywhere constitutes a danger to prosperity everywhere;
>
> (d) The war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

4.3. In 1948 the Universal Declaration of Human Rights (UDHR), which sets out fundamental human rights to be universally protected, was adopted by the General Assembly of the United Nations. New Zealand, led by the then Prime Minister Peter Fraser, played a key role in the drafting of this Declaration.

4.4. Many Conventions adopted by the United Nations, from the UDHR, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) to the recent Convention on the Rights of Persons with Disabilities (2006) contain provisions on fundamental principles and rights at work.

4.5. The UDHR contains numbers reference to the world of work including freedom from slavery, child labour and discrimination at work. Art 22 (3) provides that “everybody has the right to form and join trade unions for the protection of their interests”. Although collective bargaining is not itself concluded in the UDHR, it is widely accepted that collective bargaining is a prime aspect of freedom of association.

4.6. To give effect to the UDHR, in 1966 the international human rights legal regime (the human rights corpus) developed two legal documents – the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant on Economic, Cultural and Social Rights (ICESCR). New Zealand ratified both ICCPR and the ICESCR on 28 December 1978. Art 22 of the ICCPR substantially restates the protections in the UDHR and recognises the primacy of ILO Convention C87 concerning Freedom of Association and the Right to Organize.

4.7. While no specific mention is made of collective bargaining in the ICCPR, the IECSCR is expansive on work rights with arts 6,7 and 8 providing core work rights including the right to work, the right of everyone to the opportunity to gain a living by work freely chosen and that the State will take appropriate steps to safeguards this right.

4.8. The New Zealand government has a reservation on art 22 of the ICCPR and art 8 of ICESCR in relation to trade unions rights but this reservation is not an opt out of trade union rights within the ICESR and ICCPR, only a restriction to ensure effective trade union representation, and to encourage orderly industrial relations.

4.9. The ILO brings together governments, employers and workers to set labour standards and develop policies for decent work for all working people. Through its tripartite processes the ILO develops and promulgates recommendations, non-binding guidelines and conventions.

4.10. There are eight fundamental ILO conventions - usually considered in interrelated pairs:

- C87 Freedom of Association and Protection of the Right to Organise and C98 Right to Organise and Collective Bargaining;
- C29 Forced Labour and C105 Abolition of Forced Labour;
- C138 Minimum Age; and C182 Worst Forms of Child Labour; and

- C100 Equal Remuneration and C111 Discrimination (Employment and Occupation).

4.11. New Zealand has ratified six of the eight fundamental conventions above - abstaining from C87 and C138. C87 provides the right for workers and employers to establish, join and operate organisations of their choosing (including federations of such organisations) without government interference so long as they follow the law of the land.

4.12. C98 regulates interaction between workers, employers and their organisations. Art 1 protects workers against acts of anti-union discrimination (including as a reason for hiring or dismissal). Art 2 protects workers' and employers' organisations from acts of interference. A particular prohibition is placed on employers setting up or otherwise attempting to gain control of workers' organisations. Art 3 requires countries to establish measures allowing the right to organise. In relation to collective bargaining, art 4 of C98 states (International Labour Organisation, 1948) that:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

4.13. New Zealand ratified C98 on 9 June 2003 following the passage of the ER Act that provides recognition of the right to organise and collectively bargain with its objectives of promoting good faith, collective bargaining, and the effective resolution of workplace problems.

4.14. While New Zealand has not ratified C87, the rights of freedom of association and collective bargaining are recognised by the ILO as sufficiently fundamental that membership of the ILO creates obligations to observe and promote these rights.

4.15. In June 1998, the ILO Declaration on Fundamental Principles and Rights at Work stated that "all Members, even if they have not ratified the [fundamental] Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights" (International Labour Organisation, 1998). These principles include freedom of association and the effective recognition of the right to collective bargaining.

4.16. As an example, in 1993 the CTU lodged a complaint with the CFA regarding the New Zealand Government's derogation of rights of freedom of association and collective bargaining by the passage of the Employment Contracts Act 1991. Although New Zealand had not then ratified C87 and C98, the CFA investigated the matter and found (among other things) that the Act was incompatible with ILO conventions because it did not "promote and encourage" collective bargaining (International Labour Organisation, 1994). They said that to achieve this:

> (1) The collective bargaining mechanisms must be clear and easy to operate so that they do not restrict the right of representative unions to bargain.
>
> (2) The provisions on the relationship between collective and individual employment contracts must reflect the overall principle that collective bargaining should be promoted.
>
> (3) The provisions on good faith must reflect the overall principle that collective bargaining should be promoted.

4.17. Alongside the fundamental conventions, New Zealand has ratified another 45 currently in-force conventions including minimum wage fixing, labour inspection, unemployment provision, migration, occupational safety and health, labour statistics (Department of Labour, 2008).

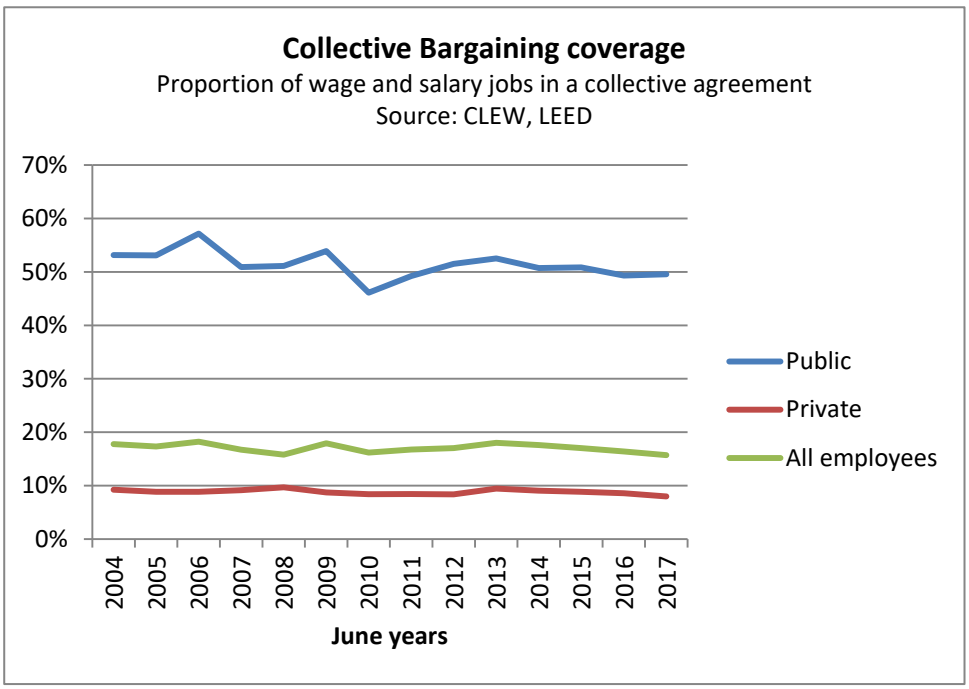
4.18. There can therefore be no doubt that New Zealand has a binding legal obligation to promote and strengthen collective bargaining mechanisms.

5. Impact of the changes to collective bargaining and industrial action

5.1. We analyse the detailed effect of the current law and the need for change in Part II of our submission. This section considers the cumulative effects of the changes in employment law in relation to collective bargaining since 2009, reinforcing the need for the changes in the present Bill and for further work to be done to repair and improve the employment relations system.

5.2. As already described, collective bargaining is a critical mechanism to protect and raise the wages and conditions of workers. The existing framework in 2008 was already relatively weak. Changes since then weakened it further. One symptom has been weak wage growth, with real wages falling well behind labour productivity growth (see paragraphs 2.29 to 2.34).

5.3. We have, as we feared, seen continuing falls in coverage and availability of unions and collective agreements. As the following graph shows, collective bargaining

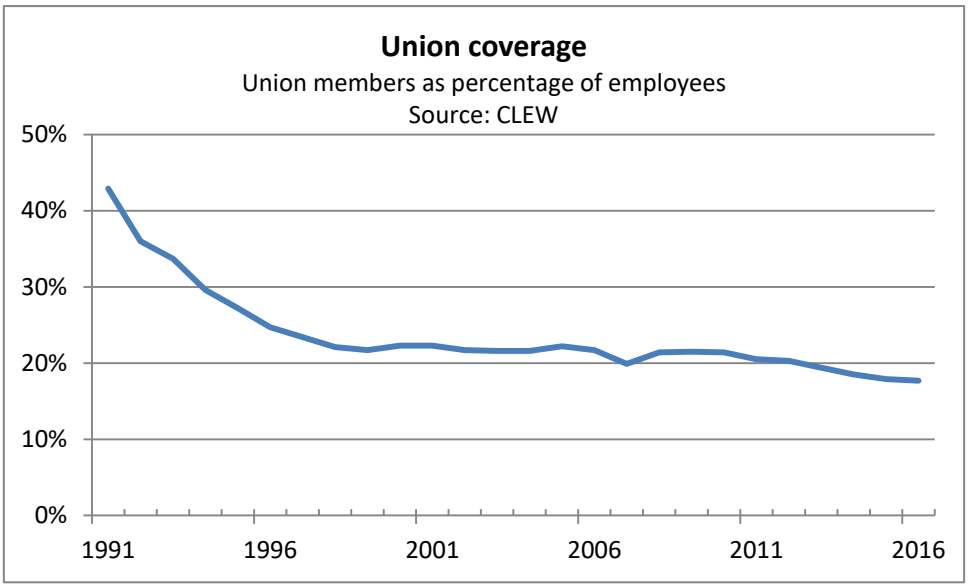


coverage, expressed as a percentage of wage and salary jobs, has been falling since 2004 when amendments to the ER Act 2000 were made to strengthen collective bargaining. It fell steeply between 2009 and 2010, recovered some ground between 2010 and 2013, but has been falling since then in both the public and private sectors.[6] Multi-employer collective agreements (MECAs) are largely confined to the public sector, showing the difficulties the ER Act presents to forming them, made even more difficult by the amendments under the previous Government.

5.4. Similarly union membership has continued to fall as a proportion of employees (see graph on next page).

5.5. The changes which the present Bill reverses, deliberately aimed to weaken the bargaining strength of collectivised workers in the sure knowledge that it would result in lower wages and conditions, and this is what has occurred.

[6] Collective bargaining numbers are as provided by CLEW, and wage and salary jobs come from Statistics New Zealand's Linked Employer-Employee Data (LEED) series. The 2017 value is provisional: CLEW data will be updated later this year, and jobs are estimated using the increase in the Household Labour Force Survey (HLFS) increase in wage and salary employment. Since June 2016, the HLFS has been asking employees about their type of employment agreement. This shows a higher collective agreement coverage (20.6 percent in June 2016 and 18.2 percent in June 2017) but a similar falling trend.



5.6. This impacts not only unionised workers but all workers because they benefit from positive spill-over effects from union-negotiated wage increases and wage trends which set standards for many other jobs.

5.7. The ER Act 2000 specifically recognises in its objects the value of collective bargaining and need to promote it. Before the amendments under the previous Government, the parties were strongly encouraged to work through their differences and a collective agreement resulted from bargaining unless there was a genuine reason (based on reasonable grounds) not to agree. Philosophical disagreement with collective bargaining was not treated as a genuine reason.

5.8. The following scenarios show how difficult it is to negotiate a collective agreement under the current law.

5.9. A union negotiating team meets with an employer to negotiate a replacement collective agreement on behalf of the workers on site. After agreeing the bargaining process, the negotiations proper commence. After hearing the workers' claims, the employer may say "I'm sorry; I simply do not want to have a collective agreement on site anymore."

5.10. An employer may effectively opt out of the collective bargaining process. They are required to go through some of the motions of negotiation but their philosophical position can win out in the end.

5.11. Where parties disagree on an issue in collective bargaining, the law previously required them to keep discussing other issues rather than letting the point of

disagreement end or stall the bargaining completely. Under the current law, that requirement has been removed. The reality of bargaining is that certain elements of the settlement (wage increases and the term of the agreement) will almost always be the last thing agreed since they are directly linked with the overall quantum of the settlement. Allowing employers to treat failure to agree on these issues as deadlock allows them to fatally undermine the negotiating process.

5.12. Altering the bargaining process in favour of employers pushes workers to use their most significant source of leverage in collective bargaining: strike action. Forty days from the commencement of negotiations both workers and employers may issue notice of strike or lockout. Here too, the legislation is tilted in favour of employers. It requires all strike action to be notified to the employer (and the Chief Executive of MBIE) in writing setting out a detailed and technical set of information. If the strike notice is incorrect in any way this may allow the employer to treat the strike as illegal.

5.13. The consequences of an illegal strike are grave for the union and workers. The employer may seek an injunction to stop the strike or seek substantial damages from the union for the effects. Striking workers may be replaced for the duration of the strike or even dismissed for participation. The harshness of these consequences substantially constrain the effective right to strike.

5.14. Employers are able to issue workers who partially withdraw their labour (such as by refusing to answer the phones) with a letter saying that their pay will be docked but not specifying how much money will be taken. These letters can be intimidating documents and they will tend to push workers towards full strikes. It is worth remembering that according to the latest figures (which MBIE stopped recording in 2014), all forms of industrial action are at their lowest level since the Second World War or earlier.

5.15. The law creates a mechanism for either party (but in practice the employer) to apply to the Employment Relations Authority for a declaration that bargaining has ended. The Authority looks at whether mediation or other methods may break the impasse and can recommend these.

5.16. A useful dispute resolution mechanism is facilitation (where an Authority Member hears each side and makes non-binding recommendations as to the best way forward). However, facilitation is only available where bargaining has gone on for a

long time, has been conducted in breach of the Act, that a strike or lockout would be against the public interest or that there have been “protracted or acrimonious strikes or lockouts.” Ironically, this last ground acts as an incentive for workers to escalate the dispute as soon as possible and get it into facilitation before the employer succeeds in having bargaining declared over. Both scenarios damage relationships in the workplace and lead to court processes (contrary to the objects of the ER Act 2000).

5.17. If bargaining is declared over, several bad things happen from the workers’ perspective. The workers’ existing collective agreement (which normally continues in force for a year while a replacement is negotiated) immediately comes to an end and members go onto individual employment agreements. The workers cannot take industrial action. In some circumstances, workers are protected from their employer contracting out their work during bargaining but this protection comes to an end when the bargaining does.

5.18. There is also a period of 60 days where bargaining cannot be initiated without agreement follow a declaration that bargaining has concluded. The employer may negotiate with individual union members and induce them to accept terms rejected by the union in collective bargaining or incompatible with the expired or proposed collective agreement.

5.19. All of these changes tilt the balance of power in negotiations toward the employer. The result of this has been lower collective agreement coverage and poor wage and salary growth.

6. Impact of the changes on vulnerable workers

6.1. This section provides an overview of the impacts of the 30 day rule for new workers, the Part 6A protections for ‘vulnerable’ workers, the changes to 90-day trials, and changes to meal break provisions. There is further detail on these matters in Part II of this submission.

New workers

6.2. Amendments to the ERA introduced in 2013 removed the right of new workers to be covered by the terms and conditions of an existing collective agreement for their first 30 days of employment regardless of their union membership status.

6.3. Cabinet knew that this was likely to lower wages and conditions. As the first cabinet paper on these changes noted in 2012 (K. Wilkinson, 2012, p. 15):

> Repealing the 30-day rule will provide employers with more flexibility on what they are able to offer to new employees as their starting terms and conditions of employment. It will enable employers to offer individual terms and conditions that are less than those in the collective agreement.

6.4. For many workers (particularly in a tight labour market) there is a significant imbalance of bargaining power in favour of the employer at the point of accepting a new job. As the Ministry of Social Development noted in 2013: “repealing the 30 day rule will disadvantage young people, those exiting benefits for employment and other vulnerable workers.” (Department of Labour, 2012b, p. 19)

6.5. Previously, the terms of an existing collective agreement formed a baseline entitlement that could not be negotiated below, though employers may agree enhanced terms. The law changes allowed prospective workers to agree to worse terms and conditions than existing workers. This is particularly likely where new workers feel they have little choice of employment, do not seek advice on their offer of employment (most will not), where the terms of the collective agreement are difficult to understand or where they are not provided with a copy of the applicable collective agreement (this last is noted as a risk in the Regulatory Impact Statement (paragraph 36)).

6.6. New workers, particularly those on 90-day trial periods where they may be fired for no reason or any reason, may be hesitant to join the union and thereby the collective agreement if they fear disfavour or reprisals from the employer (proving discrimination under s 104 or duress under s 110 of the Employment Relations Act 2000 is difficult).

6.7. The primary issue for unions organising in the workplace is the undermining of terms and conditions for union members through the introduction of workers on alternative terms and conditions. This may undercut the terms of the collective agreement (for example, by subverting seniority rules by offering additional shifts to non-union workers) and weaken the bargaining position of the union in subsequent negotiations. The 30-day period to be reinstated by the Bill offers a significant protection for new workers while they get information and experience in the workplace.

Part 6A: Restoring Vulnerable Worker Protections

6.8. The CTU welcomes the removal of the exemption for Small to Medium Sized (SME) employers in this Bill. Consideration should be given to extending these protections for vulnerable workers to all workers irrespective of the size of the workforce or business.

6.9. While Part 6A is valuable, it requires amendment to be effective. We support removal of the exemption of businesses that (together with associated companies) employ fewer than 20 workers should be removed, the truncated and artificially limited opportunity for workers in vulnerable industries to elect to transfer to a new employer, and the requirements to transfer certain personal information when a worker transfers. There should be a reinstatement of the ability to add new categories of vulnerable workers by Order in Council processes.

6.10. The Part 6A right of transfer protections should be extended to other problematic industries including security, care workers, bus drivers, pizza deliverers, waste and recycling workers and workers in other council controlled services. A review, potentially an Inquiry, will be required to establish to determine the extension to a greater range of industries.

6.11. The purpose of Part 6A in the ER Act, when it was introduced in 2004, was to provide protection for workers who had little bargaining power, who were employed in sectors in which restructuring of an employer's business occurs frequently and whose terms and conditions of employment tended to be thereby undermined. Legislative changes since 2008 have undermined those protections specifically and most damagingly by exemption processes for an employer with fewer than 20 employees.

6.12. The impacts and distressing disadvantages that workers and their families experience as a result of business transfers and closures include inferior terms of employment, wage losses, redundancy, deterioration in quality of service and work standards, long periods of stress and uncertainty and concerns about continual re-letting of contracts undermining job security.

6.13. This was recognised in 2001 in the work of The Ministerial Advisory Group on Contracting Out and the Sale of Transfer of Businesses (Department of Labour, 2001). At the time of this work, the then Department of Labour considered a range of options relating to additional protections for vulnerable employees in contracting out,

sale or transfer situations. They included considering whether there should be a statutorily prescribed minimum amount of redundancy compensation payable to vulnerable employees.

6.14. The absence of any statutory right to redundancy compensation, nor any common law rights in New Zealand law to redundancy unless employers and employees or their union have agreed to one in the applicable employment agreement, makes vulnerable worker protections in employment law essential.

6.15. This was recently recognised by the OECD in a 2017 report stating that New Zealand's systems for assisting displaced workers are among the weakest in the OECD (OECD, 2017a). The OECD report observed that "The legal protection against dismissal provided by the labour and case law in New Zealand is more flexible than in any other OECD country" and that "The downside of flexible labour market regulations is that the costs of economic restructuring largely fall onto individual workers.

6.16. The original aim of the transfer of undertaking protections in Part 6A of the ER Act was to provide some protection for these workers who are almost always denied any redundancy compensation. The objective was to prevent competitive tendering processes from undermining the terms and conditions of employees who were subject to frequent restructuring and unable to negotiate favourable outcomes each time businesses changed hands.

6.17. Part 6A provided protections for a list of vulnerable workers (defined in Schedule 1 of the Act) and included the right of these workers to transfer to the new employer on existing terms and conditions. The list of employees covered included workers providing cleaning, food catering, caretaking, orderly, and laundry services.

6.18. These are all workers susceptible to having their terms and conditions of employment undermined at a time of restructuring. They may have employment agreements terminate at the end of each contract for service with no new agreements confirmed.

6.19. The workers who are most vulnerable in transfer of undertaking situations are low-paid workers with women and non-European workers being disproportionately represented. The 2012 Ministry of Business, Innovation and Employment (MBIE) Review found that amongst specific occupational classes such as cleaners and laundry employees, and food preparation assistants, women were the majority of

employees (68 percent and 64 percent respectively). In respect of ethnicity 62 percent were New Zealand European, 18 percent Māori, 9 percent Pacific, 9 percent Asian, and 10 percent other categories (Middle Eastern/Latin American/African, and other ethnicity) (Department of Labour, 2012c).

6.20. The unravelling of Part 6A commenced in 2008 with the incoming National Government arguing that the provisions were costly, complex and prevented business flexibility. A campaign was initiated, led by the cleaning company CrestClean, who had previously lost a challenge to Part 6A in the Employment Court (Doran v Crest Commercial Cleaning Ltd 2012). Changes to the Act were made following the passing of the 2013 Employment Relations Amendment Bill and the Part 6A provisions were changed to apply only to employers with 20 or more employees.

6.21. The changes were illogical and made neither economic or employment sense. The 2012 MBIE Review had found that Part 6A was achieving an appropriate balance between ensuring continuity of employment protection for the defined set of employees and business performance and productivity in the affected sectors, that despite the concern of some employers, the relevant industries had remained highly competitive (Department of Labour, 2012c). While there were significant operational issues impacting on the affected businesses, the review concluded that overall the legislative provisions in Part 6A contributed to positive social and economic outcomes in New Zealand.

6.22. The exemption of incoming SMEs from the obligations in Part 6A were neither well founded nor were they supported by the then Department of Labour (later to become MBIE). The Department of Labour (Department of Labour, 2012) discussed the value of the exemption for SMEs asking the question: Would it be possible to exempt small business from Part 6A of the ER Act? Sapere, the consultancy firm contracted for advice 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.

6.23. The Department of Labour concurred with the 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.

6.24. Part 6A was further complicated in 2015 with a complex set of warrant processes that enables small employers to apply for an exemption.

90-day trials

6.25. The 90-day trial clause of the Employment Relations Act grants literally unjustifiable powers to employers.

6.26. The effect of 90-day trial clauses under s67A is specifically to allow employers to fire workers without a justifiable cause. This is because a s67A clause removes an employee's right to take a personal grievance claim for unjustifiable dismissal.

6.27. The test of justifiability is given in s103A. At its heart is s103A(2): "The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred."

6.28. Removing the test of justifiability from an employer's decision to terminate the employment of a worker during a 90-day trial therefore has the specific effect of allowing the employer to act unjustifiably, defined as unfairly and unreasonably in the circumstances.

6.29. Parliament has been asked on three occasions to grant this power to employers to act unjustifiably by introducing 90-day trial clauses. On each occasion they have had the opportunity, the three parties of the present government (Labour, NZ First, and Green) have voted against introducing or extending 90-day trials.

6.30. All three parties voted to reject the Employment Relations (Probationary Employment) Amendment Bill 2006 at its second reading.[7] Introduced as a member's bill by opposition National MP Wayne Mapp, the bill would have allowed 90-day trials for businesses with fewer than 20 employees.

[7] NZ First had supported the bill to select committee at its first reading but, following deliberations in committee, voted against the bill at its second reading.

6.31. 90-day trial periods were introduced by the National Government in December 2008 in the Employment Relations Amendment Act 2008 for businesses with fewer than 20 employees and extended to all businesses in November 2010. Labour and the Greens in opposition voted against both measures.

6.32. In speeches opposing the 2008 Bill, Trevor Mallard labelled it the 'Employment Relations Destruction Act', while Michael Cullen argued: 'This bill will create uncertainty; it will create further costs for employers. It will not create new employment.'

6.33. The present bill proposes to return to this scenario, in force from December 2008 to November 2010, allowing 90-day trials for businesses with fewer than 20 employees.

6.34. It could be argued that this time around the bill represents progress for workers' rights, since it returns the law to one stage further down a scale of legalised unjustifiable action by employers. But that begs the question, if this stage was wrong on the way up, is it not still wrong on the way down?

6.35. In introducing the Employment Relations Amendment Bill 2008 that allowed for 90-day trial periods in businesses employing fewer than 20 staff, Minister for Labour Kate Wilkinson stated:

> The Bill will give businesses the confidence to take on new staff, and it will give new employees the opportunities to get on the employment ladder. It will provide opportunities for those who might suffer disadvantage in the labour market—for example, employees who are new to the workforce or returning to the workforce after some time away, or specific groups at risk of negative employment outcomes.[8]

6.36. This claim has not been borne out by the evidence. In research for the NZ Treasury, Chappell and Sin compared employment outcomes for small enterprises (15-20 employees) and medium enterprises (20-24 employees) during the staged introduction of trial periods from 2009 and found no evidence for a change in average hiring decisions (Chappell & Sin, 2016, p. 2):

> We find no evidence that access to trial periods causes firms on average to change the number of people they hire, nor to be more likely to hire those struggling in the

[8]Parliamentary Debates (HANSARD) Volume 651: 8 December to 16 December 2008. https://drive.google.com/file/d/0B1Iwfzv-Mt3CSEIzZk8wakZrV3c/view, p318.

labour market, such as recent beneficiaries, recent migrants, or young Māori and Pasifika people.

6.37. The fact is that 90 day trial periods have no positive impacts on employment outcomes or benefits for workers. The only effect is to shift cost and risk from employers onto a group of vulnerable workers.

6.38. Worse than that, for the workers sacked under these 'trials', the experience is often a traumatic one. They may have no idea of the reason for being sacked; they may have been sacked in an arbitrary or callous way (one victim recounts that "We were in the middle of a ceremony to scatter my late grandmother's ashes when I received a phone call from the manager of the café"(Sissons & Rosenberg, 2014, p. 20)); they may fear that the sacking will make it more difficult for them to find another job. We will bring other evidence of such cases.

6.39. Such sackings occur well over 10,000 times a year, so are not rare occurrences. MBIE carries out an annual survey of employers which until the 2014/15 year included a question on the use of 90-day trials (Ministry of Business, Innovation and Employment, 2016, p. 13). In that year, two-thirds of employers (66 percent) had used them, and a quarter of those employers (24 percent) had dismissed an employee during or at the end of the 90-day period. From the published data, if each employer who had dismissed someone had dismissed just one person, 13,500 employees had been sacked out of the (at minimum) 57,500 employees put on a 90-day trial during that year. It is more likely that some, especially larger, employers had dismissed more than one person on a 90 day trial, which would push that total higher.

6.40. Of the 13,500, 10,600 were dismissed by employers with fewer than 20 employees – those whom this bill proposes will remain under threat of 90 day trials.

6.41. As an early survey commissioned by MBIE (Johri & Fawthorpe, 2010) – which overwhelmingly surveyed employers and only 13 workers – found, workers were very negative about the trial periods. They felt vulnerable while on the trial periods and many said they would agree to one in future. In reality they are unlikely to have that choice: Johri and Fawthorpe found that in practice the offer of employment was conditional on trial periods with no real opportunity to negotiate. In addition, "[e]mployees interviewed generally thought that it was standard to start on a trial period, and did not know that legally they did not have to accept it."

6.42. Workers who had been dismissed recounted their dismay (p.25):

> Employees who felt they would not have been dismissed were it not for the trial period were annoyed by the dismissal. They felt they had been disadvantaged by being on the trial period and treated unfairly by the employer, either because they had not been given a reason or explanation for the dismissal, or because they had been dismissed even though, in their opinion, they were performing better than other employees who were not on a trial period and thus could not be dismissed so easily
>
> . *… the fact that they did get rid of me just like that did make me really bitter*. Employee

6.43. While probationary periods with proper provision of induction, training and monitoring, and giving the employee adequate opportunities and information to improve performance if the employer considers it is inadequate, do have their place, trials with no requirements for fairness and justification do not. They encourage poor quality management of people and employment relationships. They can be a disastrous introduction to the work force for a young person. They are the antithesis of good faith and good practice.

6.44. 90-day trials cause just as much harm to workers in small businesses, with no evidence of any benefits to individual workers or overall employment outcomes. This is as true for workers in small businesses as in any other.

6.45. The bill should be amended to remove 90-day trials altogether.

Rest and Meal breaks

6.46. The reinstatement of prescribed rest breaks and meal breaks in the ER Act restores basic employment rights and protections. Ensuring that working people have guaranteed access to rest and meal breaks in employment law is protecting a fundamental employment and human right and ensuring a basic standard of decent work. There should be very limited circumstances where there is an exemption to this right.

6.47. Restoring the legal requirements of rest and meal breaks is also consistent with the objects of the ER Act. In particular it recognises the inherent inequality of power in employment relationship.

6.48. Rest and meal breaks are very important in international labour law. 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.

6.49. The removal of a right to rest and meal breaks in law was one of the most controversial of the amendments made to the ER Act by the National Government during its term of office. The changes were strongly opposed by the CTU, by unions and working people. Working people in workplaces up and down the country were in disbelief that such a basic right would be removed.

6.50. There was no basis to justify this legislative change. The problem, which the then Minister of Workplace Relations, Hon Kate Wilkinson, identified as the reason to change the law (New Zealand Parliament, 2010) – a dispute in the aviation industry with meal and rest breaks for air traffic controllers – was settled before the enactment of the amended Act. But solutions to that situation and other similar situations were found within the then legislative framework. Though the Minister said there were issues in other sectors no evidence of this was substantiated.

6.51. As Employment law expert, John Hughes wrote at the time,

> In over three years since the original Part 6D [the previous legislation] 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 and thence to further dispute resolution. Arguably, then, there is no demonstrable need for legislation relaxing what is already a reasonably flexible regime.

6.52. The argument was politically driven. The reason advanced, while the law was being debated, was that rest and meal breaks were prescriptive and there needed to be more flexibility. That same argument may be raised again. It must be unpacked and rejected.

6.53. Arguing that there needs to be flexibility around rest and meal breaks is saying that people's needs for rest, nutrition and psychosocial needs override business and service continuity needs. Wherever possible, business continuity and service needs should be arranged around the need for working people to have their basic personal, health and safety needs met. Not the other way around. The needs of business and continuity of service are not and should not be important than the physical, psychological and health and safety needs of workers.

6.54. 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 (Tucker, Folkard, & Macdonald, 2003). 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 can improve work performance.

6.55. The current law has compensatory mechanisms for where breaks cannot be taken – a monetary value, or an earlier finish time or time off in lieu. Compensatory measures undermine the whole purpose of rest and meal breaks: they are necessary for well-being, health, safety and certainty that those needs are met.

6.56. 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 a worker's bank account at the end of the week.

6.57. In many instances, employers will say that rest and meal breaks are not able to be taken because there are insufficient staff to cover. Sometimes the problem is inadequate staffing. This can in itself be a health and safety issue. Compensatory measures should not be used as a means to avoid dealing with short staffing.

6.58. That rest and meal breaks impose a cost on employers must be accepted because providing rest and meal breaks at work is the fair, safe and decent thing to do.

6.59. There will of course be situations where certain industries and sectors require provisions for dealing with emergencies and unexpected situations which may impinge on rest and meal breaks. But collective agreements are the suitable place to agree such arrangements, and many have developed their own practices and provisions on how working hours are arranged and organised. These will include meeting the needs of the workers but also recognising the nature of the industry. This is good practice as the arrangements are agreed between representatives of the workers and the employer.

6.60. This law restores a minimum floor protection. This is especially critical for sectors where there are risks of abuse and exploitation, where work is short term, precarious, or poorly paid. In sectors where there is migrant labour, in the hospitality industry and in some parts of the agriculture sector, workers are commonly not in a position to argue for their rights.

6.61. Young people in particular are disadvantaged by their inexperience in the workplace. In addition, they in general have a poor understanding of their employment rights (Gasson, N R, Linsell, C, Gasson, J, & Munder-McPherson, S, 2003) . In a survey of 11-15 year olds in work, only 15 percent were aware of any employment rights at all while 40 percent did not know and a third avoided the question. A further 8 percent confused rights with role responsibilities.

6.62. The wording in the current Act and the interpretation of it leaves employees open to abuse, with employers having the final say on any disagreements. The Act currently says that the employer and employee have to agree. However, when there is no agreement, the employer decides. This fails to recognise the inherent inequality in the employment relationship. It is another example of indifference to the unequal power dynamic in the employment relationship.

6.63. Having certainly about rest and meal breaks is the only form of protection and assurance that many workers have. With the increase in precarious employment there is an essential need to ensure certainty in employment law. Access to regular rest and meal breaks is a basic requirement of health, safety and well-being at work.

6.64. The CTU strongly supports the re-establishment of rest and meal breaks in law in 2018.

6.65. An historical background to the legislation, including further details of our concerns, are contained in the Appendix to Part II of the submission.

7. The importance of explicit pay rates

7.1. Clause 16 of the Bill seeks to amend s 54(3) of the ER Act to require wage rates to be included in collective agreements. In the proposal, pay rates may include pay ranges or methods of calculation.

7.2. The ability for workers to collectively bargain rates of pay with their employers is fundamental to the purpose of unions and collective bargaining arrangements.

7.3. Pay is a key term of employment and the ability to exclude pay from collective bargaining significantly undermines the ability of collective bargaining to address the inherent power imbalances in the employment relationship. The fundamental right to have pay included in collective agreements has been caught up in litigation in New Zealand. The Employment Court has confirmed (In *First Union Inc v Jacks Hardware and Timber Limited*) that the employer's choice to refuse to bargain

matters of pay and insistence that all remuneration should be set unilaterally with individual employees and not collectively, amounted to an opposition in principle to bargain wages and it was not a genuine reason to not conclude the collective agreement. However, in the recent case of *New Zealand Public Service Association Te Pukenga Here Tikanga Mahi v Lieutenant General Tim Keeling – Chief of New Zealand Defence Force* the Employment Authority also confirmed that unions are entitled to have a discussion about how wages are to be agreed, but noted that this did not mean that a scale will ultimately be included in a resulting collective employment agreement.

7.4. We therefore strongly support the requirement to include pay rates in collective agreements and for such rates to be agreed in writing during collective bargaining, but we do not consider the proposed provisions have struck the right balance to rectify the policy and legal problems.

7.5. This is likely to have a particular impact in the state sector, where wages are frequently determined by mechanisms which lie outside of collective agreements.

7.6. The CTU has long held concerns regarding public sector enterprise agreements not providing transparent pay rates. The amendments as they currently exist will allow continuing uncertainty around wage rates not being included in collective agreements.

7.7. The purported need for wage ranges in collective agreements is most frequently claimed by employers in the public service. However, as can be seen from the case law it is also an issue in the private sector. The Centre for Labour, Employment and Work ('CLEW') at Victoria University (Ryall & Blumenfeld, 2018, p. 2) reports that

> … whereas only 6 percent of collective agreements in private sector organisations do not include pay rates, 11 percent of private sector collective agreements include only the minimum rate paid rather than stipulating pay rates or specifying wage ranges for different occupations or across groups of employees…. It is, nonetheless, becoming more common for wages to be specified as a range of rates (currently 39 percent of private sector employees) and this is the most common way that wages are specified in public sector collective agreements.

7.8. However, the proposed amendments will authorise and formalise this process for the private sector.

7.9. If the provision proceeds as it is, it will gravely weaken collective bargaining especially in the private sector as the institution of collective bargaining turns on the capacity to negotiate wage rates. Wage rates are the mechanism to ensure employees receive a fair reward for their efforts and their needs. This is important both for the wellbeing of New Zealand's two million employees and their dependents, and economically in distributing the income generated, creating demand for the goods and services the employees' work produces.

7.10. For collective agreements to be effective in providing clarity and transparency to workers, the agreement needs to specify the rates of pay for each job, together with criteria for deciding when workers will move between different rates of pay in the specified scale.

7.11. A pay scale in a collective agreement should contain as many steps as necessary to allow for appropriate flexibility and advancement, as long as the criteria for advancement between steps are specified.

7.12. Clarity and transparency of pay rates and criteria for advancement are especially important for avoiding discrimination and for achieving gender pay equity.

7.13. For these reasons, the CTU proposes amendments to the bill to require pay rates, rather than ranges, to be required in collective agreements (see Part II of this submission).

8. Impact on health and safety

8.1. Improvement in New Zealand's appalling state of workplace health and safety is compromised in a number of ways by the current ER Act. As already noted, regular work breaks are an important for the health of workers but are compromised by the current legislation. Insecure and low wage workers, whose position has been made even more insecure by the loss of the protection for new workers, the weakening of Part 6A and the existence of 90-day trials, are also especially at risk of injury and occupational disease. Unions play a valuable role in securing and improving workplace health and safety, but their role has been weakened. This section reviews some of the evidence on these latter two aspects.

8.2. The Independent Taskforce on Workplace Health and Safety (2013) reported that "self-employed workers are more likely to be injured at work than employees", which has consequences for contracting out of work that could be done in-house, and

"employees new to positions or engaged in temporary, casual or seasonal work may be particularly at risk" (p.13). It also reported from submissions (p.35):

> *Workers working long hours.* Long hours contribute to fatigue and distraction issues. Fair and decent pay rates (removing the need to work double shifts, etc.) and placing limits on the number of hours that workers can work in a given period were recommended.
>
> *Workers in insecure employment relationships.* Casual workers, those on 90-day trials, short-term contractors and seasonal workers were all identified as less likely to report injuries or voice concerns for fear of not being reemployed in the future.

8.3. The Taskforce also noted that "workers in short-term or contract work relying on English as a second language are at greater risk than recent migrants in permanent employment."

8.4. Canadian research shows that workers new to their job are at much higher risk of injury: "workers on the job for less than a month had four times as many claims as those who held their current job for more than a year." Although this ratio has declined more recently it remained above three. This has significant implications for casual, temporary and other short term workers including contractors (Institute for Work & Health, 2009).

8.5. Similarly a European Parliament study found that (Belin et al., 2011, p. 92):

> Temporary workers on average face more difficult working conditions (e.g. shift work and hazardous tasks) than permanent workers. They are also affected by poorer ergonomic conditions than permanent workers and are at higher risk of developing MSDs [Musculoskeletal Disorders]. Some national and regional studies have found that temporary workers face higher levels of occupational injuries.
>
> These workers have less access to training and are less likely to be unionized; this can lead to a lower level of social and OSH protection than permanent workers receive.
>
> Temporary workers can experience high level of stress and frustration, which can negatively affect their lifestyle.

8.6. Elsa Underhill of Deakin University who has conducted research into temporary agency workers, notes (Underhill, 2007, p. 11) that:

> International and Australian research agrees that temporary agency workers have a higher incidence of workplace injury, and those injuries are more severe" and finds for such workers in Victoria, Australia that labour hire workers were more likely to be injured early in their placement than direct employees, despite similar qualifications.

8.7. A major review of research in 2001 by Michael Quinlan and colleagues (Quinlan, Mayhew, & Bohle, 2001) found that:

> Of the 93 published journal articles and monographs/book chapters reviewed, 76 studies found precarious employment was associated with a deterioration in occupational health and safety (OHS) in terms of injury rates, disease risk, hazard exposures, or worker (and manager) knowledge of OHS and regulatory responsibilities. Of the more than 25 studies each on outsourcing and organizational restructuring/downsizing, well over 90 percent find a negative association with OHS. The evidence is fairly persuasive for temporary workers, with 14 of 24 studies finding a negative association with OHS. The evidence is less strong for small business, and a handful of studies on part-time workers found no clear association with negative OHS outcomes (in some cases the reverse).

8.8. An analysis of the association between job insecurity and health carried out by European researchers from five European countries (László et al., 2010) found that "Persons with insecure jobs were at an increased risk of poor health in most of the countries included in the analysis. Given these results and trends towards increasing frequency of insecure jobs, attention needs to be paid to the public health consequences of job insecurity."

8.9. The importance of unions in strengthening workplace health and safety has been recognised by both the Pike River Royal Commission and the Independent Taskforce on Workplace Health and Safety. The former recognised the importance of the union role in a number of ways including its recommendation to reinstitute union-appointed check inspectors and its support for tripartite governance of the new workplace health and safety agency.

8.10. The Taskforce (p.21) noted that one of the factors in New Zealand's weak health and safety system was "Liberalisation of the labour market and the weakening of union representation". It recognised that lack of collaboration with unions (as well as businesses) was one of the failings of the regulator, and that falling union density was an important factor in poor worker participation in workplace health and safety (p. 24). It observed:

> 111. Leadership has also been hampered by the regulator's failure to engage with unions. While unions today are limited in their coverage, with the right support from the regulator and employers they can play a very positive role. This role includes: driving up health and safety standards; supporting worker participation; providing a safer channel for workers to report risks and incidents; contributing expertise; and building support for better health and safety practices. Unions' positive role was recognised in a recent government report (Labour and Immigration Research Centre, Department of Labour, 2012), which recommended "greater collaboration with unions on health and safety, who are seen as having a positive impact on health and safety practice", by the Royal Commission, and in international research. Unions' positive role is also recognised in international conventions ratified by New Zealand, and is seen as an important factor in more successful health and safety systems in other countries. (p.26)

8.11. It also recognised the fundamental importance of tripartism which it described as follows (p.40), and recommended should be fundamental to the structure of the new health and safety system, from representation on the board of the new agency, to the form of advisory groups to the agency, to relationships with health and safety inspectors, to arrangements between employers and workers in the workplace.

> Tripartism throughout the system
>
> 178. Our vision is that tripartism is inculcated throughout the workplace health and safety system. Tripartism involves the government regulator, employers and unions working together to improve workplace health and safety outcomes. The UK has shown respect for tripartism for 40 years. Tripartism is also the dominant model in Australia. The Royal Commission found that a key reason for DoL being an ineffective regulatory body was that it had "no shared responsibility at governance level, including the absence of an active tripartite body" [p.296]. Tripartism needs to be reflected in engagements between the Government and peak representatives of employers and workers, and in the governance of the regulators. Similarly, the implementation of the Robens model needs to be done on a tripartite basis, with representatives of employers and workers actively engaged in the development of regulations, ACoPs [Approved Codes of Practice] and guidance material.

8.12. Among other recommendations were, as part of a recommendation for stronger worker participation requirements, the right of workers to participate in their workplace health and safety through representation systems mechanisms of their own choosing including unions (p.60); to provide increased support for unions'

existing rights of entry to the workplace to carry out their health and safety role (p.62); and in leadership (p.77).

8.13. The Department of Labour report on the health and safety of Pacific workers in Manukau manufacturing firms cited by the Independent Taskforce (Labour and Immigration Research Centre, Department of Labour, 2012) remarked on the positive role recognised for the unions:

> The practices of firms appeared to be influenced by union presence in the workplace. Participants felt that unions had a two-fold positive influence on health and safety: through being a vehicle of information dissemination and through pushing for stronger practices from employers.

8.14. Accordingly it recommended (p.vi):

> [G]reater collaboration with unions on health and safety, who are seen as having a positive impact on health and safety practice.

8.15. These directions should not be a surprise. International authority on workplace health and safety, David Walters, who has specifically researched its success factors, summarised the state of knowledge in a paper for the Pike River Royal Commission (Walters, 2011, p. 3) as follows:

> When taken together, the overwhelming majority of studies that have considered the evidence of the effectiveness of employee consultation and representation on health and safety are positive about its benefits. Studies using objective indicators are inconsistent concerning their conclusions about the exact factors that promote and sustain such benefits but are broadly in agreement that positive outcomes are associated with joint arrangements for health and safety and that outcomes are better under such arrangements than when employers attempt to manage health and safety without the consultation and representation of their employees in these processes. Studies of the proxy indicators of effectiveness consistently find them improved under arrangements to manage health and safety that include measures to represent employees and consult with them. A variety of other studies suggest that the institutions of employee representation — trade unions — play a considerable role in promoting and sustaining health and safety improvement, through supporting representation of employee interests at workplace, sectoral, national and international levels.

8.16. The current Act weakens the freedom of workers to join unions, strengthening the hand of employers who wish to exclude unions from the workplace by damaging

unions' unique and fundamental role in collective bargaining, and hence further undermines the ability of unions to carry out their function in workplace health and safety. It gives encouragement to anti-union employers, harming health and safety along with many other aspects of workplace relationships. It repeated the mistakes of the 1990s which in hindsight have now been seen as (unfortunately literally) fatal.

8.17. The proposed changes will therefore be a positive step forward for the health and safety of New Zealand working people.

9. Rebutting the criticisms of this legislation

9.1. The previous Government's primary rationales for the changes to the ER Act appeared to be that

(a) The law needed more flexibility;

(b) They will create jobs;

(c) It needs to be "rebalanced" towards employers; and

(d) It will lead to greater productivity.

9.2. Doubtless, there will be accusations that the progressive changes proposed in the present Bill endanger those aims.

9.3. In this section we address each of these issues then consider the economic effect of legislation that provides insufficient protection to workers and provides incentives for a low-wage, low-productivity economy.

Flexibility[9]

9.4. Evidence that previous employment law lacked flexibility was noticeably lacking. We analyse elsewhere the specific aspects of the legislation which are said to indicate "inflexibility", and strongly disagree that an appropriate balance has been found.

9.5. In any area of conflicting interest such as employment law and employment agreements, both sides can claim they have insufficient "flexibility" or conversely insufficient "certainty" or "security" in any arrangement reached. Every such

[9] We are referring here not to the extension of (voluntary) flexible working arrangements to all workers, but to the additional flexibility given to employers in the types, conditions, and nature of employment relationships available to them.

arrangement is a compromise. Flexibility cannot stand alone as an unqualified benefit. For the state to change the balance there ought to be a public purpose and benefit that rises above simply giving a particular party an advantage. There is no evidence there is such a public purpose. The evidence is to the contrary.

9.6. The CTU does not oppose flexibility per se. We recognise that circumstances change and workplaces need a degree of flexibility to adapt and to meet new challenges. However, flexibility that impacts on employment conditions and job security should be by mutual agreement. It should recognise the needs and wishes of workers, and the role of their union should also be recognised.

9.7. A number of different kinds of 'flexibility' can be distinguished. For example Peter Auer, Chief of the Employment Analysis and Research Unit in the ILO, breaks it down into external flexibility, internal flexibility and wage flexibility (Auer, 2007). In each instance, the key issues are who benefits from the flexibility and what control workers have over the changing arrangements.

9.8. External flexibility can take the form of hiring, firing, temporary jobs, and outsourcing. All of these have major implications for job security, pay rates and working conditions and have been the subject of major industrial disputes.

9.9. Internal flexibility includes changes in hours worked hours, changes in work organisation (restructuring), multi-skilling, and work time arrangements such as shift work. Changes in hours worked can include reduction or increase in overtime, or through mechanisms like the four-day week which was used in some firms in New Zealand with government support during the worst of the recent recession. Some forms of internal flexibility can be mutually beneficial, such as the ability for an employee, at his or her choice, to vary by agreement hours worked on a short or medium term basis to accommodate changes in family responsibilities. However this is not typical of "flexibility" as most forms are initiated by the employer for the benefit of the firm. Employees may or may not benefit.

9.10. Wage flexibility implies rapidly changing wage rates and hence incomes in response to changes in production arrangements and markets. This reduces the advantages to an employee of the employment relationship with a significant increase in income insecurity, and at worst implies sharing losses and not profits: experiencing the risks of a business without the benefits of ownership.

9.11. Each of these cases can clearly be a win-lose rather than win-win situation. Where change is justifiable and necessary, any accommodation must be by negotiation supported by a high degree of trust between parties. Fair negotiation requires sound bargaining and representational arrangements. Trust is essential because it is often the case that it is difficult to know whether changes in production arrangements and markets are permanent or temporary, real or game-playing; and there must be trust regarding returning to previous arrangements if disadvantageous changes are temporary. The alternative is that changes to working conditions are imposed, in which case the term “flexibility” is simply a misleading euphemism. In the absence of sound bargaining and representational arrangements, all forms of “flexibility” will be imposed and can be used to repress wages, working conditions and job security.

9.12. New Zealand’s employment legislation is already among the most flexible in the OECD. For example, an International Monetary Fund (IMF) assessment of the responses of six OECD countries (Germany, Korea, Mexico, New Zealand, Spain, and Sweden) to the Global Financial Crisis, New Zealand was described as having “the least regulated labour market.” (Darius et al., 2010)

9.13. The OECD also rates New Zealand’s labour market as one of the most deregulated in the developed world. New Zealand ranked fourth in the OECD’s 2008 employment flexibility rankings (OECD, 2008), prior to the 2009 and 2010 changes to the ER Act which further undermined worker job security through, for example, introduction of 90 day “dismissal at will” periods and relaxation of the dismissal justification test.

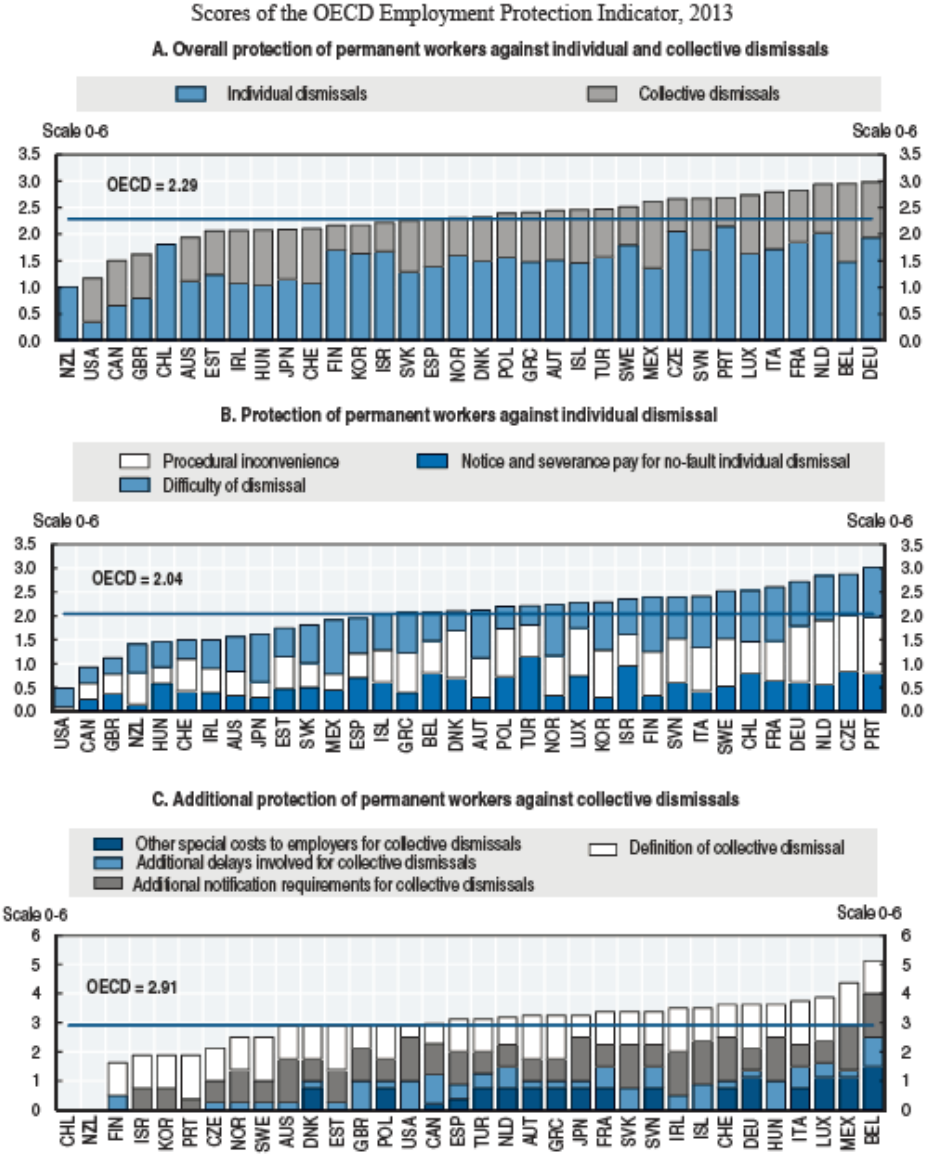
9.14. In its recent report on New Zealand’s notably poor support for displaced workers (OECD, 2017a), the OECD published the data in their Figure 2.1 reproduced below, which it has headed “Employment protection in New Zealand is more lenient than in any other OECD country”. This data is for 2013, before further changes were made to the ER Act. These are clearly examples where working people lose from supposed “flexibility” through reductions in job and employment security and lack of support though change.

9.15. International agencies including the OECD and IMF are rethinking many of their views on such matters in the light of growing concern about inequality and insecurity. For example on the issue of job protection OECD researchers (Causa, Hermansen, & Ruiz, 2016, p. 22) report findings that:

Reducing job protection for regular contracts is found to depress household incomes in the lower-middle class and among the poor... Associated reforms are thus found to increase inequality. This reflects disequalising micro-level effects through reform-driven household income declines in the bottom of the distribution; while macro-level estimates fail to identify any robust effect from job protection on either labour utilisation or labour productivity. The finding that reducing job protection delivers relatively pronounced disequalising effects on household incomes could reflect rising wage dispersion. Earlier studies have shown that job protection legislation tends to protect wages of low skilled workers with little bargaining power to a larger extent than those of high skilled workers and that, as a result, reducing job protection tends to widen wage inequality.

Figure 2.1. **Employment protection in New Zealand is more flexible than in any other OECD country**

Scores of the OECD Employment Protection Indicator, 2013



Source: OECD Employment Protection Database, 2013 update, http://dx.doi.org/10.1787/lfs-epl-data-en.

StatLink http://dx.doi.org/10.1787/888933436982

9.16. Both the negative impacts in raising inequality and reducing the wages of low income workers, and the lack of impact on labour productivity or employment should be noted.

9.17. Similarly, the World Bank's "Doing Business" Report for 2013 lists New Zealand as having no limits (and so complete flexibility) in almost all the 21 areas it regards as pro-business, covering difficulty of hiring (such as a minimum wage and restrictions on use of fixed term contracts), rigidity of hours (such as allowing a 50-hour week and allowing a 7-day week), difficulty of redundancy (such as permitting redundancies without consultation) and redundancy cost. The only exceptions were the existence of a minimum wage, paid annual leave and retraining or reassignment in case of redundancy. This makes very clear the "win-lose" aspects of "flexibility". The labour conditions criterion for its annual ranking of countries is highly contested, was not ranked in 2013 because of the Bank's belated recognition of the extreme, one-sided nature of its evaluation, taking no account of the interests of workers, health and safety or effects on productivity and wellbeing.

9.18. "Flexibility" in the changes made by the previous Government to the ER Act clearly gives workers less protection when taking on a new job; less bargaining power when negotiating for new employment conditions and wages; less certainty over rest breaks, and so on. The flexibility embedded n the ER Act by the previous Government is therefore not a 'win-win' for all participants in the workplace. It is a loss for workers. The only possible legitimate rationale – other than the unbalanced one of giving employers greater advantage – is perhaps that it could encourage employers to provide more jobs. The OECD report denies this. We address it further below.

9.19. The amendments promoted further lowering of wages (as was acknowledged in the relevant Cabinet papers) and encouraged employers to undermine secure employment with various forms of contracting out, casual, temporary and short term positions, labour hire and in general what is internationally known as precarious working conditions.

Source: (OECD, 2017a)

9.20. Low paid, insecure work has many negative consequences for workers affected.

9.21. Such forms of work also make on-the-job training less attractive to employers. If the workers are employees, high staff turnover means returns to the investment in training become too risky. If the workers are contractors, or employees of

contractors, or labour hire firms, no employer has the incentive and certainty to train employees for what may be limited periods of employment in one position.

9.22. Flexibility must therefore be carefully balanced by substantial employment and social protections, such as a strong social welfare system and active labour market policies. These too have been weakened rather than strengthened, as the already cited OECD report, “Back to Work: New Zealand” found (OECD, 2017a). It observed that

> The downside of flexible labour market regulations is that the costs of economic restructuring largely fall onto individual workers. Indeed, income and especially wage effects upon displacement can be considerable, even for those who successfully return to work, and seem to be more pronounced in New Zealand than in most other OECD countries…
>
> While many displaced workers in New Zealand find a new job quickly, they tend to suffer from a considerable drop in wages, working hours and job quality… wage losses for re-employed displaced workers reach 12% in the first year after displacement, compared with negligible wage effects in Germany and the United Kingdom and a loss of 6% in the United States and Portugal…
>
> Current public policies are focussed on helping people who are far away from the labour market or have been unemployed for a long time while displaced workers are, to a large extent, left by their own to find a new job….
>
> In addition, resources committed to active employment programmes are low and have been falling over time. With 0.33% of GDP spent on active labour market programmes in 2014, New Zealand ranks among the bottom third of OECD countries. A range of welfare reforms in 2011 extended work obligations to a larger set of welfare beneficiaries, including especially lone parents and jobseekers with health problems. Yet, despite a significant increase in the number of participants in active labour market programmes, total public expenditure on such programmes further declined.

9.23. The following IMF description concluding its analysis of New Zealand and five other countries’ response to the global financial crisis, appears to fit New Zealand (Darius et al., 2010, p. 21):

> Before the crisis, some economies encouraged temporary employment contracts that were not subject to the strict protection that applied to regular contracts. Although this led to fast employment growth, temporary contracts became the weak link of labor

markets during the recent crisis, leading to large overall employment losses and reducing the role of other shock absorbing mechanisms.

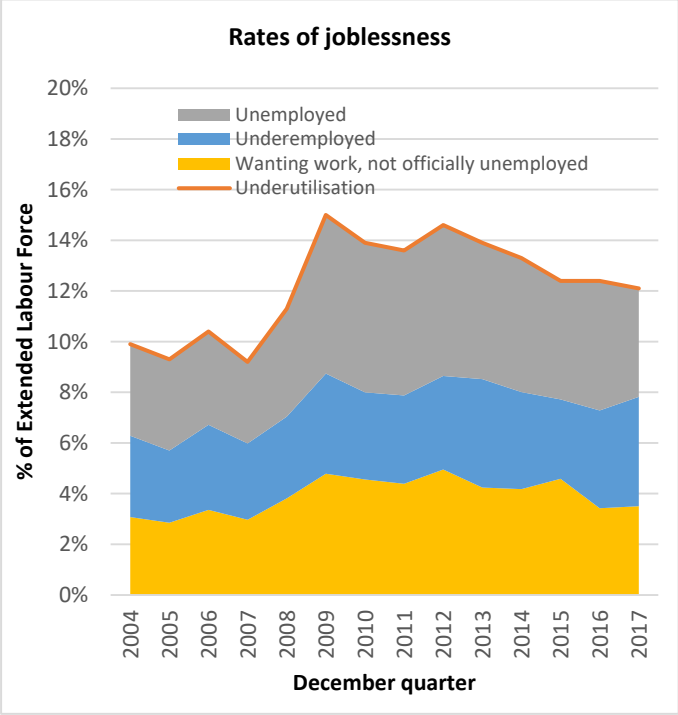
9.24. This indicates a key weakness of the ER Act in exactly the opposite direction to the previous Government: greater protection should be given to workers in insecure work rather than encouraging employers to make work more insecure.

Creating jobs

9.25. New Zealand's unemployment was lower, at 3.3 percent, in 2007 (under a ER Act almost identical to what is proposed in the present Bill) than it is now at 4.5 percent under the amended ER Act.

9.26. New Zealand had one of the largest increases in unemployment rate in the world between 2007 and 2010, according to the IMF (International Monetary Fund & International Labour Organization, 2010, p. 17). The OECD (2017a, p. 11) has similar concerns:

> While the job displacement risk in New Zealand used to be amongst the lowest in the OECD in the mid-2000s, the impact of the economic downturn was stronger than in any other country, lifting New Zealand to the middle of the OECD ranking in 2009. Seven years later, the stock of displaced workers has not yet returned to its pre-crisis levels.



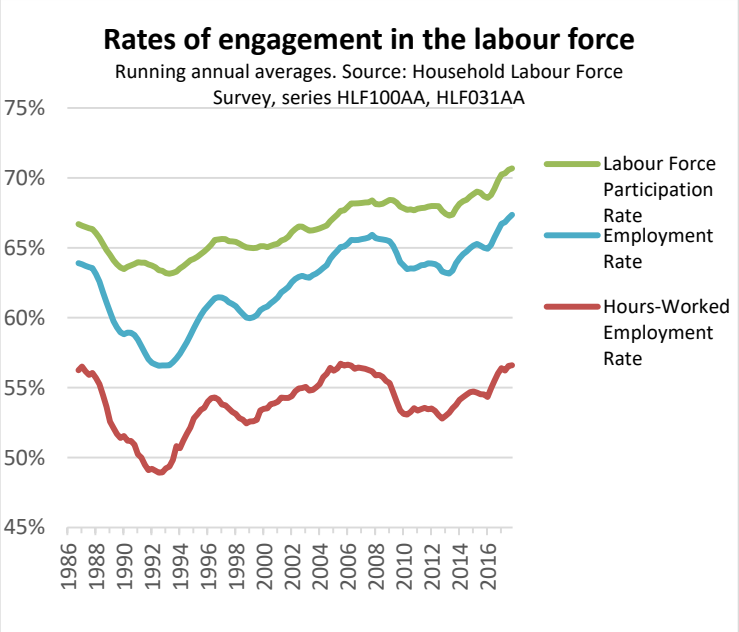
9.27. Contrary to expectations that more flexible employment regimes would lead to more rapid rises in unemployment, followed by rapid falls, and despite the global financial crisis not hitting New Zealand's economy nearly as hard as many others, New

Zealand's unemployment has not fallen as rapidly as other countries, worsening from 4th lowest in 2004-07 to 13th lowest now.[10] This was in the face of increased "flexibility" introduced in various amendments to the ER Act over this period.

9.28. Other forms of joblessness remain high and are falling even more slowly – there were 343,000 people looking for work or more hours of work in the December 2017 quarter.

9.29. There has indeed been substantial job creation, but that is much more clearly attributable to the needs of the earthquake rebuilds, an overheated housing market, record tourism numbers and record prices for commodity exports than changes in employment law.

9.30. While labour force participation rates are at a record high, the quality of the growth in jobs is poor. Labour's falling share of domestic income, weak real wage growth, persistently low growth in GDP per capita and in labour productivity all point to low quality job growth. It has been accompanied by increased signs of exploitative work practices as exposed by Labour Inspectors and unions.



9.31. Much of the employment growth can be attributed to more people in work, on average working fewer hours (such as in part time work), rather than more work being available. An employment rate based on hours worked instead of people in work[11] shows a lower rate of employment than at peaks in 2005 and 1986 as the accompanying graph shows.

9.32. It is also important to ask: is a higher employment rate always better? If it reflects genuine choice, it may be good; if reflects hard-pressed parents getting as much

[10] Harmonised unemployment rates from OECD and Statistics New Zealand.
[11] The numerator is total hours worked per week; the denominator used is 40 times the working age population.

paid work as possible because of low pay, it may be a sign of stress which is taking them away from quality time with their children and communities. In December 2017, 71.7 percent of couples with dependent children (and no others in the household) were working, the highest it has been since recording began in 1999, and 9 percentage points higher than during the 2000s when it averaged 62.5 percent.

9.33. No-one can now claim that the 90-day trial law led to increased employment. There is no evidence for it. The research quoted above (Chappell & Sin, 2016) makes such claims evidentially false.

The law needed to be "rebalanced" towards employers

9.34. We do not believe this requires serious consideration. We have described the poorly balanced, negative effects of the current legislation on working people throughout this submission. Any improvement in the economy cannot be ascribed to the changes in the ER Act, and indeed the economy has become more deeply embedded in a low-value, low income track. The only remaining justification for "rebalancing" is a class one: of favouring employers and increasing their profitability. The fall in the domestic income share going to wage and salary earners, and the failure of employers to ensure real wages kept up with labour productivity growth, both documented above, show that the changes certainly succeeded in doing that.

Productivity

9.35. No evidence has been provided that productivity has risen as a result of the previous Government's changes to the ER Act.

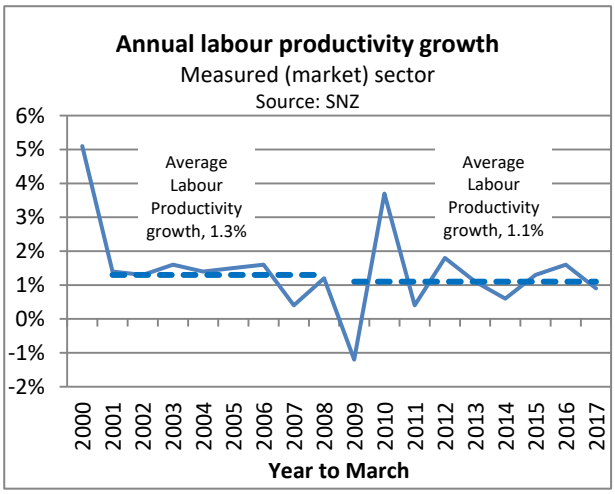
9.36. New Zealand is well known to have a chronically poor productivity performance relative to the rest of the OECD. Growth in productivity – labour productivity measures what is produced in an hour worked – is a basis of future potential incomes. If it is shared with workers, the increased income can mean higher wages. Collective bargaining plays an important role in that.

9.37. But productivity performance worsened under the changes to the ER Act under the previous Government. Admittedly there was an unexplained productivity slowdown in many high income countries, but the same didn't necessarily have to happen in New Zealand. Statistics New Zealand's official measure of labour productivity in the market sector of the economy fell from a mediocre average annual increase of 1.3 percent during the 2000s to 1.1 percent under the National Government (2008-2017). It grew just 0.7 percent in the year to March 2017. GDP per hour grew only 0.2 percent in the year to December 2017. Multifactor productivity continued its dismal performance, averaging a 0.6 percent annual increase compared to 0.5 percent during the 2000s.

9.38. New Zealand's low productivity growth compared to other countries has been described by the Productivity Commission and the OECD as 'New Zealand's Productivity Paradox' "given New Zealand's generally good regulatory and institutional settings"[12]. The OECD has repeatedly puzzled over why what it describes as "best practice" policies since the late 1980s, including in employment legislation, have not led to the outcomes it insists should have resulted. For example in its June 2013 Economic Survey of New Zealand the OECD stated (p.32):

> Far-reaching structural reform programmes in the late-1980s and early-1990s put New Zealand among the forefront of policy regimes, positioning the country well to reverse the long-term decline in per capita incomes relative to the OECD average. Despite these reforms, income and productivity gaps have shown no signs of narrowing.

9.39. It is well past time this evaluation of the policies of the late 1980s and early 1990s was reconsidered given its failure. This is not the place to go into that in detail. But an important part of those reforms was one of the most extreme deregulated employment regimes in the world (Blumenfeld et al., 2012, p. 17) under the



[12] See for example http://www.productivity.govt.nz/event/unpicking-new-zealand%E2%80%99s-productivity-paradox-symposium; and OECD Economic Survey of New Zealand, June 2013, p.59.

Employment Contracts Act 1991. We have documented above how even under the ER Act until 2008, collective bargaining has not thrived and employment protections are still among the weakest (and *the* weakest in some important instances) in the OECD.

9.40. Clearly weak job protection and poor support for effective wage setting through collective bargaining have not raised productivity levels. We showed above that OECD researchers found that weak job protection did not boost productivity.

9.41. Weak wage and job protection pressures have provided a number of incentives to employers, including reducing pressure to invest in training workers and to invest in raising capital intensity and hence productivity.

9.42. The OECD research on job protection quoted above corroborates this (Causa et al., 2016, p. 23):

> The absence of a robust macro impact on productivity from reducing job protection could reflect the interplay of opposite mechanisms offsetting each other at the aggregate level (Egert, 2016). On the one hand, associated reforms have been found in earlier studies based on disaggregated data to boost multifactor productivity by enhancing workers' reallocation across firms and industries. On the other hand, associated reforms may also reduce incentives to invest in training by firms and workers, and this negative effect on labour productivity may counteract the positive effect through improved labour reallocation. Indeed, some studies based on aggregate data have reported negative labour productivity effects from reductions in job protection.

9.43. In a 2003 Treasury paper, Hall and Scobie found that from being equivalent with Australia in the 1980s, the relative cost of labour to capital in New Zealand had fallen by 60 per cent[13] and observe that, "with labour relatively cheaper in relation to capital than in Australia, it appears that New Zealand firms have opted for a lower level of capital intensity."

[13]Hall, J and Scobie, G (June 2005) 'Capital Shallowness: A Problem for New Zealand?' NZ Treasury Working Paper 05/05

9.44. Other research has shown the same outcome: that the low wage structure led to reliance by business on low wages rather than increases in productivity through investment. For example, Deardorff and Lattimore[14] found in 1999 that:

> By 1986, the importable sector supported by trade barriers, was both more capital intensive than the exportable sector and more intensive in all categories of higher labour skills than exportables... This group had nearly halved by 1996 as the tradeable sector shed labour during the early phases of the economic reforms. ... The traded goods sector is not intensive in the use of employees, of either sex, with degrees or advanced tertiary training.

9.45. London-based consulting research economist and labour productivity expert Geoff Mason has found an increasing gap between the capital intensity per hour worked in Australia and New Zealand with New Zealand 13 percent behind Australia in 1997 and 38 percent behind in 2009. Less than 40 percent of the difference was due to industrial structure. Only three out of 26 industrial sectors had increased their capital intensity relative to Australia. He notes that "relatively low labour costs in New Zealand compared to the cost of capital" was one of the explanations (Mason, 2013, pp. 34–35).

9.46. Alain de Serres, Head of the Structural Surveillance Division of the Economics Department at the OECD, speaking at a Productivity Commission symposium in Wellington in June 2013, also highlighted New Zealand's "fixed effects" – its remoteness and distance – in accounting for the productivity gap. His group's analysis was that New Zealand's most fruitful policy options lay with more government and business research and development, better market access to markets in our region, and raising our internationally mediocre management quality, which fails most notably on people management. He noted that "poorly managed firms survive better in New Zealand than in the US market", perhaps as a result of little competitive pressures. He also found that New Zealand's high employment of low skilled workers contributed to the productivity gap (de Serres, 2013).

9.47. None of the speakers at the symposium considered that any lack of "flexibility" in New Zealand's labour market regulation was a significant barrier to raising New Zealand's productivity. On the contrary, in that the "flexibility" of existing law since

[14]Deardorff, A and Lattimore. R (June 1999) 'Trade and Factor-Market Effects of New Zealand's Reforms', New Zealand Economic Papers, June 1999 v33 i1 p71.

1990 has encouraged intensive employment of low skilled workers, it has itself been a barrier. Research for the IMF by De Michelis, Estevão and Wilson found “robust cross-country evidence of a strong negative correlation between growth in TFP [Total Factor Productivity] and labour inputs over the medium to long run”, or in other words, high employment levels lead to reduced productivity performance (De Michelis, Estevão, & Wilson, 2013, p. 31). This finding can be seen as similar to those we quote below regarding the pressure that higher wages exert on firms to raise productivity.

9.48. We are of course not asserting that a high employment level is a bad thing. We want to see employment at the highest practicable level possible. But when this is achieved by forcing people into too often unsatisfactory, poorly paid and insecure work because of chronically low household incomes and punitive conditions attached to welfare benefits, we should not pretend that all work is beneficial for people. Neither is it necessarily good for the economy. We now have the ‘working poor’. The objective should be to get all those seeking work into decent jobs at fair wages and levels of security or flexibility that are genuinely negotiated between workers and employers. The basis for this must be collective bargaining. It must be accompanied by both institutional and work-based education and training to raise skill levels and flexibility to adapt to new needs and technology.

9.49. The poor quality of New Zealand management has frequently been measured and commented on (e.g. Procter, 2011, p. 71). Weakening labour laws and thereby requirements for good management practices is exactly the wrong way to respond to this. The Government should be addressing the problem directly.

9.50. This is evidence that New Zealand’s productivity problem is not a lack of labour market flexibility or that wages are too high. The problem is that wages are far too low and that firms are investing in more low-skilled workers and engaging in poor workplace practices rather than more capital-intensive use of labour.

Are low wages the *cause* of low productivity as well as the result?

9.51. What if low wages are the cause and not just the result of poor productivity? Could raising wages trigger a rise in productivity, which in turn (given better collective bargaining systems) could fund further wage rises, with a virtuous upwards spiral, lifting us out of the low wage rut? This is commonly discussed in the U.K. and Europe.

9.52. Rising real wages can raise productivity at three levels.

Motivating workers

9.53. First, it works at the level of individual workers. Higher wages and fair treatment lead to better motivated workers who put more effort and thought into their work, raising productivity and efficiency. There is a long and well established body of research on the "Efficiency Wage" that explains why employers may set wages higher than would be predicted in a pure competitive market model.

9.54. There are four main ways the Efficiency Wage research has identified, though not all are necessarily present in any one case. It can attract a larger pool of applicants to positions, allowing the employer to choose more able employees (e.g. Weiss, 1980). It may reduce turnover by reducing the attractiveness of jobs in other firms, reducing costs including recruitment and training (e.g. Salop, 1979; Stiglitz, 1974). It will tend to encourage effort and workers will tend to avoid behaviour that threatens dismissal (e.g. Shapiro & Stiglitz, 1984). It will improve morale and this in turn encourages better quality work (e.g. Akerlof, 1982).

9.55. These rather material views miss the additional important point of the value of workers' knowledge, expressed this way by Dutch academics Storm and Naastepad (2011, p. 206):

> Productivity improvements in general depend crucially on the cooperation of workers and upon their tacit knowledge, ideas and suggestions, which will be withheld if workers feel their jobs are at risk as a consequence. This is an important paradox: the more "rigid" (using the conventional label) is the industrial relations system, the more flexible and open to technological progress is the social organization of production. This means that the more cooperative are the social relations of production, the more strongly workers will reciprocate firms by providing higher productivity – and the higher will be the rate of productivity growth.

9.56. Examples that have been studied include the famous case of Henry Ford doubling his workers' wages to $5 a day in 1914 (Raff & Summers, 1987), reduced turnover and quit rates in 5,000 firms in 11 US states (Campbell, 1993), the effects of a minimum wage rise (Georgiadis, 2013; Zelenska, 2011 and many others), reducing supervision requirements for non-unionised staff (Walsh, 2012) and a metastudy (study of studies) (Krassoi Peach & Stanley, 2009).

9.57. Behavioural economics which uses laboratory and field experiments to test the effect of perceived unfairness on people's behaviour (Fehr, Goette, & Zehnder, 2008 review evidence from a large number of these studies). Among their findings is that in the short run, a sizeable pay increase can motivate more effort. However this is short-lived. "Pay for performance" regimes have limited application – to the firm's senior management and a relatively few employees – because finding effective incentives is problematic, particularly with complex, multi-dimensional responsibilities, and there is justified employee distrust that effort will lead to ever-increasing performance requirements ("the ratchet effect"). Instead, fixed hourly wages and regular salaries are much more common.

9.58. Fairness of treatment is much more important. Fairness is highly valued by most people, and they are willing to make personal sacrifices (forgo a payment that they consider unfair for example) in the interests of fairness. Fairness includes, for employees, making a fair effort, but that requires reciprocation of fairness by employers. The negative response to unfairness is much greater than the positive response to fairness: for example a nominal pay cut is seen as much more unfair than a similar sized pay rise is seen as fair. Trust in both directions is also an important part of the relationship. These findings confirm the importance of fair treatment to the motivation of employees. Fair pay is part of that, and while higher pay acts as a motivator, it should not be seen as sufficient in an ongoing employment relationship: that requires ongoing fair treatment. On the other hand, pay which is seen as being so low as to be unfair is a greater demotivator.

Motivating employers

9.59. Second, higher wages can encourage productivity increases at the firm level. Higher wages encourage employers to invest more in productivity-raising production processes including equipment and technology, and for investment to move to higher productivity firms. Storm and Naastepad (2011, p. 208) list 17 studies, 15 of which show increases in productivity as a result of either increases in the real wage or improved worker rights.

9.60. This is the basis of the "Rehn-Meidner" or "Swedish model" which Sweden followed from the 1950s and was subsequently adopted in various forms by other Scandinavian countries. It has created a high wage, high productivity economy and one of the best countries in the world to live in. Gösta Rehn and Rudolf Meidner were two economists at the research department of the Swedish Trade Union

Confederation (LO, the counterpart of the NZCTU). It has led to the high value, high wage economies they now have. The model encouraged “solidaristic” labour policies which encouraged wage rises in concert with those in the higher productivity areas of the economy, reducing inequality. This requires tripartism and a strong role for unions to negotiate collectively. It is accompanied by appropriate fiscal policies and effective social policies to support people through change: income support at a level that ensures workers do not bear the cost of industry change (typically 80 to 90 percent of their former wages), assistance with career planning and retraining, relocation subsidies, job centres to help displaced workers find jobs that match their skills, and job subsidies to create jobs if necessary. It needs industry policies to encourage investment to move into productive industries. These policies are required in any case if we are to cope positively with changes that are occurring in industries and in the nature of work due to technology, globalisation, climate change, the aging population and other major transformations.

Creating an economy that encourages investment

9.61. Third, higher wages can encourage productivity increases at the economy-wide level. This has been known for many decades. If wage rises are widespread, particularly among lower paid workers who are more likely to spend their income, the increased spending creates greater demand for goods and services, encouraging employers to invest in their firms, install new technology and raise productivity and employment. Storm and Naastepad list 10 studies plus a review of 80 more that “find a causal link from demand growth to productivity growth”.

9.62. How can this virtuous spiral of increasing wages raising productivity and thus funding more wage rises be started? Individual employment agreements cannot do it: each individual employee’s bargaining power is too weak and in any case coordination of rises is needed for the effects at the firm and economy level. The government could mandate rises: the minimum wage rises are helpful in doing that, but have limited reach. To have widespread, coordinated increases we need widespread collective bargaining.

9.63. We are not suggesting that by themselves, ambitious wage rises are the silver bullet to high productivity growth: a number of policies need to be aligned. But shying away from higher wages, regarding them solely as a cost to employers, is short term, short sighted and poor policy. Higher wages are an ingredient which produces great social and economic benefits.

9.64. Instead, the evidence points to low wages having a negative impact on productivity. Low pay discourages investment in capital and skills, and locks many New Zealand firms into low targets for efficiency and harms economic transformation.

9.65. It is very significant that a 2013 International Monetary Fund (IMF) paper by its then chief economist Olivier Blanchard and others(Blanchard, Jaumotte, & Loungani, 2013, p. 30) recommended the "Nordic model – based on a medium to high degree of employment protection, on generous but conditional unemployment insurance, and on strong, active labor market policies – which allows for reallocation while maintaining low unemployment." While noting that detail is very important, it recommends on efficiency grounds a combination of national centralised bargaining and firm-level bargaining: "Firm-level agreements can adjust wages to the specific conditions faced by firms. National agreements can set floors and, when needed, help the adjustment of wages and prices in response to major macroeconomic shocks." There is much we would contest in the paper, and the recommendations are in stark contrast to labour market policy conditions in practice placed by the IMF on countries in difficulty in the EU (and in many other cases), but that such an institution is recognising the economic efficiency and welfare benefits of a much stronger collective bargaining structure than New Zealand has had for the last 20 years signifies a profound philosophical sea change that cannot be ignored.

9.66. Other aspects of New Zealand's deregulated regime act against productivity development. Workers are discouraged from raising their skill levels, and particularly industry-related skills because of uncertainty about job security and lack of recognition in their wages. Employers are reluctant to spend time and money on training for fear of their workers leaving once they have acquired new skills, a problem that has not been resolved by current industry training structures.

9.67. Excessively flexible labour laws can act against knowledge acquisition, creation and innovation. Workers are unable to gain or see little point in gaining sufficient firm-specific knowledge to develop and improve processes if they have poor job security. An example was provided by researchers Acharya, Baghai, and Subramanian who found that "Stringent labour laws can provide firms a commitment device to not punish short-run failures and thereby spur their employees to pursue value-enhancing innovative activities." Using patents and citations as an indicator of innovation, they analysed the effect of country-level changes in dismissal laws. "We find that within a country, innovation and economic growth are fostered by stringent laws governing dismissal of employees, especially in the more innovation-intensive

sectors. Firm-level tests within the United States that exploit a discontinuity generated by the passage of the federal Worker Adjustment and Retraining Notification Act confirm the cross-country evidence."(Acharya, Baghai, & Subramanian, 2010)

9.68. New Zealand employers also frequently do not recognise industry training qualifications and subsequent experience on the job sufficiently in better wages. For example a 2009 study of the earnings effect of workplace-based industry training by Statistics New Zealand and the then Department of Labour showed that 15–19 year old males experienced an annualised increase in average monthly earnings of just 11.3 percent as a result of undertaking and obtaining a Level 4 qualification, 3.6 percent for a Level 3 qualification, and no increase for lower levels. Even worse, 15–19 year old females benefited by just 6.8 percent from a Level 4 qualification, 9.7 percent for a Level 3 qualification, and no increase for lower levels. The increases were even less for older participants (for example 5.4 percent for male 20-24 year olds, 1.1 percent for female 20-24 year olds, and negative for 25-29 year old females completing a Level 4 qualification), and the study warned that the results for 15-19 year olds were overestimated. The position is even worse for further education by existing workers making the effort to increase their skills. For some, their pay actually falls after attaining a qualification, and most see at best small increases in their pay (Crichton, 2009; Crichton & Dixon, 2011).

9.69. In addition, the growing pressure for increased temporary migration into New Zealand creates disincentives for training and downward pressure on wages.

9.70. It is of course possible for firms to use low wages as a business model. Professor Morris Altman (Professor of Economics at Victoria University of Wellington) showed that two business models can exist side by side – one based on low wages and low productivity, the other on high wages and higher productivity. He gives the example of retail chains Walmart (low wage) and Costco (higher wage) in the US (Altman, 2012). Citing a 2007 article he says that "Costco pays employers much higher wages and greater benefits that does Wal-Mart. For example, on average, Costco, the fourth-largest U.S. retailer, paid fulltime employees an average hourly wage of $17, whereas Wal-Mart, the world's largest retailer, paid $9.68, in the recent past. But in Costco labour turnover was 50 percent lower than in Wal-Mart and productivity was higher. However, Costco shareholders have not lost out from the better treatment of its employees as Costco's returns have been better than that of Standard and Poor's 500 average returns and better than Wal-Mart's."

9.71. The advantage of a high wage/high productivity model should be obvious: among others, it addresses social issues such as New Zealand's high income inequality, it increases domestic demand, and it encourages people to stay in New Zealand. In addition high productivity allows firms to compete internationally, helping to address New Zealand's high international indebtedness.

9.72. McLaughlin (McLaughlin, 2009) compares Denmark to New Zealand and argues that raising the minimum wage will "shock" firms into raising productivity if there are strong incentives and pressures for them to do so. Based on the Danish experience, he suggests a coordinated approach incorporating employers, government supported institutions including funding for training, and an active union movement with legislatively supported industry bargaining mechanisms. These should work together to support investment in skills and training which are an essential contributor to enhancing productivity. "The coordination mechanisms between employers and unions at various levels of the economy play a pivotal role in ensuring that the funding is used effectively through an on-going process of developing, implementing and reviewing training programmes", he writes.

9.73. Rasmussen and Foster consider the evidence regarding the rise in individualism in New Zealand employment relations and the link with productivity (Rasmussen & Foster, 2011, p. 70):

> "[The] suggestion that legislative support of more individualism may encourage greater competitive flexibility and innovation which would then drive higher productivity appears to have little empirical basis. For example, the productivity experience of the 1990s where employers had a remarkable free hand in terms of establishing their preferred working arrangements… does not provide a convincing scenario.
>
> Generally, it is unclear how employer preferences for workplace and individualised employment relations can be part of a successful attempt to build a sustainable route to a high-wage, high-skill economy in New Zealand. As discussed below, there seems to be at least three types of issues associated with this approach.
>
> 1. There are few major New Zealand owned firms (except Fonterra) and industries which have shown substantial growth recently, and arguably too few industry-level collaborative solutions exist which can establish a sustainable economic growth path.

2. The lack of major collaborative solutions is particularly noticeable in the training and skills area because the key actors appear to have some overlapping interests. Recently, management capabilities have been raised as a crucial training and skills issue.

3. There is a distinct lack of a broadly-based 'plan' of how to inform and persuade employers to adopt more productive employment relations approaches.

4. Employer aversion to mandatory minima and/or collectively agreed minima facilitates a low cost, low skill 'equilibrium' where mainstream employers have to compete with employers who have rock-bottom employment conditions and invest little in their staff.

9.74. We do not pretend there are easy solutions here, but the existing path of a low wage economy has not produced economic, commercial or social success for New Zealand. Economies such as those of the Nordic countries have been successful based on a quite different model including high union density, widespread collective bargaining and high wages. The attractions of this alternative path are overwhelming. The previous Government's amendments to the ER Act took us in entirely the wrong direction, repeating the failures of the past.

10. Conclusion

10.1. We have set out a case as to why improved collective bargaining, pay and conditions are good not only for working people who, with their families, constitute the great majority of New Zealanders, but good for a cohesive society and a productive economy. It is particularly important to ensure vulnerable workers are able to establish decent working conditions, are treated with dignity and are protected from unwanted insecurity.

10.2. This Bill makes a useful start towards these objectives by reversing the backward steps taken by the previous Government. Overall, we therefore support this Bill. However we have some suggestions for improving it which we detail in Part II.

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Part II

PART II of CTU Submission on the Employment Relations Amendment Bill 2018

Part II

Part II

A. Introduction to Part II

1. Employment relationships in New Zealand are regulated primarily through the Employment Relations Act 2000 (the ER Act). The Act provides a framework for employers and employees to build productive employment relationships in good faith in all aspects of the employment environment and relationship.

2. The ER Act acknowledges there is an inherent imbalance of power between employers and employees, and seeks to address this through promoting effective enforcement of minimum standards and the promotion of collective bargaining. It sets out the parameters for collective bargaining between trade unions and employers, individual employment agreements and the enforcement of employment standards and protections for both unionised and non-unionised employees. The Act promotes mediation as the primary form of dispute resolution, and sets out the enforcement powers of Labour Inspectors, the Employment Relations Authority and Employment Court to uphold employment standards.

3. Under the previous government, key protections for employees were diminished by removing the right to prescribed rest and meal breaks, removing protections for certain vulnerable workers and removing reinstatement as the primary remedy. Employees' bargaining position was also weakened by undermining support for collective bargaining. This was inconsistent with New Zealand's commitments to promote collective bargaining by ratifying International Labour Organisation Convention 98 on the Right to Organise and Collective Bargaining.

4. As we describe in detail in Part I of this submission, for too many New Zealanders, the current employment relations system is failing to deliver on essential outcomes of fair wages for workers and adequate terms and conditions of employment. While the past few years have seen economic growth, the proportion of these gains being shared by workers is falling.

5. As the nature of work changes, workers need to be confident in the security of their work and their ability to make an income. This is particularly relevant for vulnerable workers in low-paid positions, who may not have access to effective collective bargaining. Vulnerable groups such as Māori, Pasifika and young people are more likely to be in these types of employment relationships.

6. New Zealand must have a highly skilled and innovative economy that provides well-paid, full-time jobs, and delivers on economic growth and productivity. To achieve these outcomes, working people need to have a voice in their workplace through effective collective bargaining and trade unions, and vulnerable workers need to be protected through core minimum standards.

7. The aim of the proposals in the Employment Relations Amendment Bill 2018 are twofold: to restore rights lost through the former National Government's amendments to the ER Act, and introduce new proposals to strengthen protections for workers and address the power imbalances between employers and employees.

8. The CTU is conscious of the need for these changes to strengthen employment relationships and contribute to workplace productivity and as such submits that the changes will not have a negative impact on employment, as most of the changes are

reverting the law to a pre-2014 position. There is no evidence that the changes that were made at that time yielded any ongoing employment or other benefits.

9. This part of the CTU's submission comprises the following sections: rights for employees, collective bargaining and union rights, and, new proposals.

10. Those sections are further particularised, and the CTU will address each clause respectively, in the following order:

Rights for employees:

a. Clause 35 - 37: Restoring of statutory rest and meal breaks.
b. Clause 29: Restriction of 90 day trial periods to SME employers (less than 20 employees).
c. Clause 38 & 39: Reinstatement restored as the primary remedy to unfair dismissal and the test of justification in s103A.
d. Clauses 30 - 34: Restoring protection and providing further protections for employees in the "vulnerable industries" (Part 6A).

Collective bargaining and union rights:

a. Clauses 9 & 11: Restoration of the duty to conclude bargaining and cls 14 & 15: repeal of determination that bargaining concluded.
b. Clause 10: Restoration of the duty to continue bargaining.
c. Clause 12: Restoration of the earlier initiation timeframes for unions in collective bargaining.
d. Clause 13: Removal of the MECA opt out.
e. Clause 18: Restoration of the 30 day rule where for the first 30 days new employees must be employed under terms consistent with the collective agreement.
f. Clauses 21 – 23: Repeal of partial strike pay deductions and notice requirements for strikes (s86A).
g. Clauses 5 – 8: Restoration of union access without prior employer consent.

New proposals:

a. Clause 16: A requirement to include pay rates in collective agreements.
b. Clause 4: A requirement for employers to provide reasonable paid time for union delegates to represent other workers.
c. Clause 18: A requirement for employers to pass on information about unions in the workplace to prospective employees along with a form for the employee to indicate whether they want to be a member.
d. Clause 17: Union may provide employer with information about role and functions of union to pass on to new employees.
e. Clauses 24 – 27: Greater protections against discrimination for union members including an extension of the 12 month threshold to 18 months relating to discrimination based on union activities and new protections against discrimination on the basis of being a union member.

Other:

a. Schedule: Transitional, savings, and related provisions.

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B. Summary of Recommendations

Recommendations:

i. Rights for employees

a) Clauses 35 - 37: Restoring of statutory rest and meal breaks.

Cls. 35 - 37 should be enacted subject to sub (2) of s69ZH being removed or amended according to the proposal of the CTU.

Breastfeeding breaks should be paid as working time.

b) Clause 29: Restriction of 90 day trial periods to SME employers (less than 20 employees).

Cl. 29 should not be enacted. Sections 67A and 67B of the ER Act should be repealed.

c) Clauses 38 & 39: Reinstatement will be restored as the primary remedy to unfair dismissal.

Cls 38 – 39 be enacted with deletion of the word 'reasonable'.

Section 103A(2) be changed from "could" to "would".

d) Clauses 30 - 34: Restoring protection and providing further protections for employees in the "vulnerable industries" (Part 6A).

Cls. 30 - 34 should be enacted with amendments. The repealed s 237A should be restored, allowing the Minister to add to the list of industries to which Part 6A applies.

ii. Collective bargaining and union rights

a) Clauses 9 & 11: Restoration of the duty to conclude bargaining and cls 14 & 15: repeal of determination that bargaining concluded.

Cls. 9 & 11 should be enacted, with amendments to express that the obligation to conclude relates back to the type of bargaining contemplated under the s 42 initiation notice.

Cl. 14 & 15 to be enacted.

b) Clause 10: Restoration of the duty to continue bargaining.

Cl.10 should be enacted.

c) Clause 12: Restoration of the earlier initiation timeframes for unions in collective bargaining.

Cl. 12 should be enacted.

d) Clause 13: Removal of the MECA opt-out.

Cl. 13 should be enacted.

e) Clause 18: Restoration of the 30 day rule where for the first 30 days new employees must be employed under terms consistent with the collective agreement.

Cl. 18 should be enacted, subject to it being made clear that s 62(4) only applies to the first 30 days of employment.

f) Clauses 21 - 23: Repeal of partial strike pay deductions and notice requirements for strikes (s86A).

Cls. 21 - 23 should be enacted.

Notice requirement for strikes (s 86A): Section 86A of ER Act should be repealed.

g) Clauses 5 – 8: Restoration of union access without prior employer consent.

Cls. 5-8 should be enacted.

iii. New proposals

a) Clause 16: A requirement to include pay rates in collective agreements (Cl 16).

The new sections should be enacted with the CTU's proposed amendments.

Section (3)(a)(ii)

(3)(a)(ii): *the rates of wages or salary payable to employees for each category of work.*

Section 54(4)

s54(4): *For the purpose of sub-section 3(a)(ii), a collective agreement does not contain the rates of wages or salary payable to employees for each category of work unless the collective agreement contains:*

(a) a description of the work to which the relevant rate of wages or salary applies; and,

(b) the specific criteria for identifying what rate of wages or salary is to be paid for the work; and,

(c) the specific criteria required to be met by an employee for any increase in wages or salary payable during the term of the collective agreement.

b) Clause 4: A requirement for employers to provide reasonable paid time for union delegates to represent other workers.

The new section18A should be enacted consistent with CTU's proposed amendments as follows:

18A Union delegates entitled to reasonable paid time to represent employees

(1) An employee is entitled to spend reasonable paid time undertaking union activities during the employee's normal hours of work if—

(a) the employee has been appointed as a union delegate to represent other employees of the employee's employer who are members of the union on matters relating to their employment; and

(b) the activities relate to representation of employees of the employer or other union business; and

(c) the activities would not unreasonably disrupt the employer's business or the union delegate's performance of employment duties.

(2) Before undertaking activities under subsection (1), an employee must—

(a) agree with the employer that the employee may undertake activities under this section from time to time without notice; or

(b) notify the employer—

(i) when the employee intends to undertake the activities; and

(ii) how long the employee intends to spend undertaking the activities.

(3) The employer may refuse to allow an employee to undertake the activities only if the employer is satisfied, on reasonable grounds, that the activities would unreasonably disrupt the employer's business or the union delegate's performance of employment duties.

(4) Any employer who seeks to refuse pursuant to sub-section (3) must inform the union in writing of its reasons and attempt to resolve the matter in mediation before limiting or abridging the entitlements set out in sub-section (1).

(5) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

c) Clause 18: A requirement for employers to pass on information about unions in the workplace to prospective employees along with a form for the employee to indicate whether they want to be a member.

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Cl 18 should be enacted consistent with the CTU's proposed amendments as follows:

s63 (3):

(3) They must also
(a) provide to the employee a copy of the collective agreement; and
(b) provide to the employee any information about the role and functions of the union that the employer is required to provide to new employees under section 59AA.
(c) if the employee agrees, inform the union as soon as practicable that the employee has entered into the individual agreement with the employer.

Section 63AA Employee choice form:

(1)This section applies to an employer who enters into an individual employment agreement with a new employee under section 62.

(2)The employer must, on the nearest working day to the 30th day after the employee commences employment with the employer, provide the employee with a form approved by the chief executive under s 237AA that the employee must complete and return for the purposes of –

a.Notifying the employer whether the employee elects to join a union (or a particular union)
b.Applying to join a union (or a particular union) if the employee has elected to join a union.

(3)The employer must as soon as practicable provide the form to each union that is a party to a collective agreement that covers the work to be done by the employee.

(4)The requirement in subsection (2), for the employee to complete and return the form may be waived by agreement between the employer and the unions that are party to a collective agreement that covers work to be done by the employee.

(5)Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

d) Clause 17: Union may provide employer with information about role and functions of union to pass on to new employee.

Cl 17 should be enacted with amendments to extend the provision to additionally cover circumstances where bargaining has been initiated where no existing collective agreement covers the proposed employees.

e) Clauses 24 – 27: Greater protections against discrimination for union members including an extension of the 12 month threshold to 18 months relating to discrimination based on union activities and new protections against discrimination on the basis of being a union member.

Cls. 24 – 27 to be enacted. Consideration given to amending the Human Rights Act 1993 to include union membership/activities as a protected ground.

Schedule: Transitional, savings and related provisions to be enacted.

Schedule: Transitional, savings and related provisions should be enacted.

C. Rights for employees

i. Clauses 35 – 37: Restoration of statutory rest and meal breaks.

Introduction

11. Clauses 35 to 37 of the Employment Relations Amendment Bill 2018 re-introduce prescription around rest and meal breaks, to what existed in law prior to the National Government's amendments in 2014.

12. Rest and meal breaks are vital to the health and safety of workers and important to ensure that employees have enough time to rest, eat and refresh before returning to work.

13. The previous government moved from a system of prescribed rest breaks to one where the duration and number of breaks is to be agreed between parties. In situations where agreement cannot be reached the employer can decide what rest and meal breaks should apply. In some instances employers may not grant breaks for operational reasons, instead employees are given compensatory measures. These compensatory measures are not prescribed – they may be time-in-lieu, monetary compensation or another arrangement.

14. The CTU was very disturbed that the Government relaxed rest and meal breaks provisions for workers. We did not believe that there was any justification for a legislative change.

15. The reinstatement of prescribed rest and meal breaks entitles employees to receive at least a minimum number and duration of breaks based on the hours they have worked.

16. 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 and the Employment Relations Amendment Act 2014. These comments remain relevant and are renewed in section 6 of Part I of this submission, and further detailed in the Appendix to this Part of the submission.

17. The CTU now strongly supports the re-establishment of rest and meal breaks in law in 2018.

18. 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.

19. The CTU strongly supported the re-establishment of rest and meal breaks in law when it occurred in 2008 under a Labour Government by the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008.

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20. In 2009, the National Government sought to dismantle, once again, regulation regarding rest and meal breaks by the Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill 2009, which was discharged on 26 February 2013.

21. There had only been isolated problems with the meal breaks legislation since its enactment in 2009. The problems that had occurred had been either been settled, or were entirely capable of finding an acceptable solution under the 2008 law.

22. The National Government's reforms in the Employment Relations Amendment Act 2014, represented an overreaction to the complaints of a very few employers and to issues that were resolvable. It was developed in haste and without adequate consultation. We note that the Regulatory Impact Statement for the 2014 Bill stated, "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".

23. The thrust in the 2015 amendments forcing the dismantlement of rest and meal breaks was flexibility and that rest breaks and meal breaks create burdens and impose administrative costs. This was, 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: that is secondary to the primary role of government, namely to maintain and enforce standards.

24. The law as it stands presently purports to provide compensatory measures, in the form of time off at the end of a shift, and this cannot substitute for a meal break or for rest periods. The CTU maintains particular concerns about putting a price on rest breaks and meal breaks.

25. The proposition that rest breaks and meal breaks are to be taken at a time agreed between the employee and employer completely fails to recognise the inherent inequality in the employment relationship.

<u>The exemption at proposed s 69ZEA</u>

26. The CTU has provided substantial contextual information in Part I regarding the enactment of the exemption at s69ZEA as it was in 2015. Whilst maintaining those concerns, the CTU acknowledges the currently proposed exemption at replacement s 69ZEA recognises that in some very limited circumstances, prescribed breaks may be difficult to provide.

27. The exemption is from providing prescribed breaks for certain businesses where the following three conditions are met:

    a) That due to the nature of work, the cost of substituting an equally skilled employee to cover the break is unreasonably high; and

    b) the continuity of the business is critical to either public safety or the provision of an essential public service; and

    c) the employer and employee have agreed in the relevant employment agreement to take breaks in a different manner than prescribed or have agreed to compensatory measures for those breaks.

28. The CTU accepts that given the combination of these three conditions, the exception is likely to be met in only a very small number of circumstances. Therefore, allowing

this exception will not undermine the intention that all workers should have a right to a minimum number and duration of breaks based on the hours worked by the employee.

29. However, we recommend that the provision be amended to state "without compromising health and safety of affected employees."

30. Further research needs to be undertaken to identify workers who are unable to take breaks for legitimate reasons, in order to ensure sufficient mechanisms are in place to provide payment.

CTU's concerns with the provisions:

31. As will be apparent from this submission, the CTU supports the principal of restoration of statutory rest and meal breaks, and the majority of the proposal contained in the Bill, however, the CTU raises three issues with the proposal as follows:

    1. The operation of s69ZEB;
    2. The drafting of s69ZH; and
    3. Breaks under sections 69X – 69ZB

The operation of s69ZEB

32. The CTU considers that s69ZEB could be made more clear in terms of expanding the understanding of what 'unable to reach agreement" means. For instance, does 'unable to reach agreement' in this clause mean unable to reach agreement overall or on any specific occasion where a replacement break can not be taken.

The drafting of s69ZH

33. The CTU understands the intended purpose of proposed s69ZH is to ensure more beneficial breaks under another enactment will prevail over the rest and meal breaks set out in Part 6.

34. Under the proposed s 69ZH, which repeats the original drafting, if an employee is entitled to enhanced or additional other legislative or regulatory meal breaks, when compared with those in Part 6D (subs (1)), the rest breaks and meal breaks provided under Part 6D do not apply.

35. However, where a person is "required" to take a "rest break" by, or under, another enactment, that requirement applies in place of those provided for "rest breaks or meal breaks" under Part 6D (subs (2)).

36. This was the subject of litigation in *Greenslade v Jetstar Airways Ltd* [1], where the Full Court observed that what is now the proposed s 69ZH(2) "has the effect of negating not only a Part 6D rest break, but also a Part 6D meal break if there is any rest break requirement under another enactment, even if that rest break requirement is only minimal and manifestly inferior to the entitlements to rest breaks and meal breaks under Part 6D" (at [75]).

37. The CTU acknowledges s69ZH as proposed in the Bill is a direct importation of s69ZH as it was enacted in 2009 as follows:

[1] [2014] NZEmpC 23.

69ZH Relationship between this Part and other enactments

(1) If an employee is provided with, or entitled to, rest breaks or meal breaks under an enactment other than this Part,—

(a) this Part prevails if the breaks provided under this Part are additional or enhanced breaks:

(b) the other enactment prevails if the breaks provided under the other enactment are additional or enhanced breaks.

(2) If an employee is required to take a rest break by, or under, an enactment other than this Part, the requirement for a rest break defined by, or under, the other enactment applies instead of the provisions or entitlements for rest breaks or meal breaks provided under this Part.

38. However it should be noted that subsection (2) was not in the original bill enacting the section and seems to have been accepted by the House during the 2008 debate on the original Bill, and without discussion, as the result of a New Zealand First initiative by Peter Brown (then deputy leader of New Zealand First).

39. Subsequent to the 2009 enactment, sub-section (2) was amended to take into account the case law developments.

40. The amendment to s69ZH in 2014 made the section read as follows:

69ZH Relationship between Part and other enactments

Where an employee is a person who is required to take rest breaks or meal breaks by, or under, an enactment other than this Part, the requirement for rest breaks or meal breaks defined by, or under, the other enactment applies instead of this Part.

41. The dispute in *Jetstar* arose before the 2014 amendment took effect. On appeal in *Jetstar Airways Ltd v Greenslade*[2], after the 2014 amendment, the Court of Appeal observed that "[on] one view, the fact that s 69ZH now refers to both rest and meal breaks tends to support the conclusion that the present version of this section is consistent with Parliament's original intention" (at [40]).

42. If the sub (2) as proposed remains this would arguably remain susceptible to the reasoning of the Employment Court in Jetstar, although the result seems almost certainly based on an uncorrected drafting error.

43. As a result, the CTU considers that sub (2) should not be enacted; or, in the alternative, if it is enacted, it should be drafted to allow the employee to choose the more favourable of the provisions in the Part and the other enactment (including time and payment).

Breaks under sections 69X – 69ZB

[2] [2015] NZCA 432.

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44. The CTU acknowledges there is specific statutory provision for breastfeeding breaks in the Act in Part 6, Breastfeeding facilities and breaks. The breaks are unpaid unless payment is agreed between the employer and employee.

45. The CTU takes this opportunity to recommend that breastfeeding breaks become paid breaks.

46. The current provisions in the ER Act are that payment for breastfeeding (infant–feeding) breaks at work is a matter of negotiation between the employee and employer. Section 69Y of the ER Act states that "breaks are paid only if the employee and employer agree that they are paid".

47. This provision does not meet the standard of the ILO Maternity Protection Convention, 2000 (No. 183) stipulating the right to one or more daily breaks or a reduction in working time for the purpose of breastfeeding. Convention No. 183, Article 10 states[3]:

> ***(1)*** *A woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child.*
>
> ***(2)*** *The period during which nursing breaks or the reduction of daily hours of work are allowed, their number, the duration of nursing breaks and the procedures for the reduction of daily hours of work shall be determined by national law and practice. These breaks or the reduction of daily hours of work shall be counted as working time and remunerated accordingly.*

48. Provision is made in at least 121 countries for breaks or a reduction in daily working hours for nursing mothers. When provided, nursing breaks are largely paid (114 countries).[4]

49. Given the importance of improving child health outcomes and the commitment to increasing breast feeding levels, the ER Act should be changed to state infant-feeding breaks should be considered as working time and not be a matter of negotiation as currently stands. This is good for mother and child, for businesses in respect of retaining employees, and beneficial for society as a whole for health and wellbeing reasons. Ensuring that breast feeding breaks are paid contributes to making workplaces friendly for returning to work mothers and improves child and maternal health.

Recommendation: Rest breaks and meal breaks (cls 35-37).

Cls 35 - 37 should be enacted subject to sub (2) s69ZH being removed or amended according to the proposal of the CTU.

Breastfeeding breaks should be paid as working time.

ii. Clause 29: Restriction of 90 day trial periods to SME employers (less than 20 employees).

50. Section 6 of Part I of the CTU's submission outlines the CTU's opposition to the use of 90 day trial periods. The CTU refers the Committee to that section.

[3] International Labour Organisation. (2000). "C183 - Maternity Protection Convention, 2000 (No. 183)".

[4] International Labour Organisation. (2014). "Maternity and paternity at work: Law and practice across the world". Geneva.

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51. We therefore oppose clause 29 and call for sections 67A and 67B of the ER Act 2000 to be repealed.

Recommendation: Restriction of 90 day trial periods to SME employers (less than 20 employees) (Cl 29).
Cl 29 should not be enacted. Sections 67A and 67B of the ER Act 2000 should be repealed.

iii. Clause 38 & 39: Reinstatement will be restored as the primary remedy to unfair dismissal.

52. Clause 38 – 39 of the Bill restores reinstatement as a primary remedy.

53. The CTU supports the proposal to restore reinstatement as the primary remedy in cases where a worker has been unjustifiably dismissed and is seeking reinstatement as a remedy. The CTU views reinstatement as the primary remedy as a fundamental employment right. Workers often face catastrophic economic and personal consequences from the loss of their employment. To have this occur unjustifiably merely amplifies the catastrophe. Work is central to people's social and economic relationships. Workers derive significant dignity and respect from meaningful engagement in a workplace community. Workers found to be unjustifiably dismissed should have a clear and unequivocal right to return to that workplace if they so choose. The dismissal of a worker should not be reduced to a mere compliance cost for an employer found to have behaved in an unjustified manner.

54. Indeed, a similar observation to the last point above was made by a former Chief Judge of the Employment Court in *Ashton v Shoreline Hotel*: "[u]nless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licencing unjustifiable dismissal".[5]

55. The remedy of reinstatement has been a feature of the New Zealand's industrial relations system since the concept of a "personal grievance" was first introduced by the Industrial Relations Act 1973. Reinstatement was made the primary remedy for unjustifiable dismissal under the Labour Relations Act 1987 (LR Act). While available as a remedy under the Employment Contracts Act 1991, it was not the primary remedy. Reinstatement was restored as the primary remedy upon enactment of the ER Act on 1 October 2000.

56. As enacted, s 125 of the ER Act required that where sought as a remedy the Authority must provide for reinstatement wherever practicable. This wording was, in effect, the same as that contained in the LR Act. In 2010, s 125 was repealed and replaced by the National Coalition Government. The primacy of reinstatement was replaced by discretion and a new "practicable and reasonable" test was introduced.

57. The CTU believes the retention of the word "reasonable" in the clause may undermine the primary nature of the remedy. While consideration of the practicality of

[5] [1994] 1 ERNZ 421 at 436.

reinstatement may have previously included a contextual examination of its "reasonableness", it is not entirely clear from the case law what the enactment of the separate requirement for reinstatement to also be "reasonable" means in practice.[6] The Employment Court appears to have settled on an uneasy formulation that the additional requirement to consider the reasonableness of reinstatement "invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned".[7] Given the "equities" of the employer's case would have been fundamental undermined by the finding of an unjustified dismissal, it is difficult to understand how such an inquiry is undertaken other than artificially. There is also a possibility that a requirement to separately consider whether reinstatement is reasonable could, and probably currently does, conflate the concerns of the employer about the undesirability of reinstatement, however formulated (including alleged post-employment conduct[8]), to the level of, or approaching, equilibrium, with the desire and willingness of the worker to be reinstated. This, in our submission, would not be giving primacy to the remedy of reinstatement. Finally in this respect, it would be entirely inconsistent with the primacy of reinstatement as a remedy if separate consideration of the reasonableness of reinstatement allowed for the development of an erroneous approach that it was only available where the dismissal was found to be substantively unjustified. In other words, the remedy would invariably not be ordered where a worker was found to have been procedurally unjustified dismissed alone.

58. The CTU fully supports the re-introduction of reinstatement as the primary remedy for unjustified dismissal. However, for the reasons stated at above, we recommend the word "reasonable" be deleted from the clause. Further we submit the deletion of the word "reasonable" from the clause is in keeping with earlier legislative provisions, in spirit and in drafting, governing reinstatement as the primary remedy contained in the ER Act, as enacted, and the LR Act.

Section 103A

59. In addition we submit that a further change is required to s103A. In 2014, the test for justification of dismissal or other action in s103A was changed from what a fair and reasonable employer "would" have done, to what a fair and reasonable employer "could" have done.

60. In 2011, the test for justification of dismissal or other disadvantageous action in s 103A was changed from what a fair and reasonable employer "would" have done, to what a fair and reasonable employer "could" have done.

61. This reinstated a test introduced under the Employment Contracts Act 1991, which had markedly restricted the Employment Court's ability to reach its own conclusions on justification. For example, and remarkably, in introducing the test of what a fair and reasonable employer "could" have done, the Court of Appeal had observed that a dismissal might be seen as "harsh" but also fair.

62. In 2004, the select committee considering the amendment of that year examined the substituted test of what a fair and reasonable employer "would" have done. The majority correctly took the view that determining objective fairness required a court to draw its own conclusions on the facts and that the guideline of asking what a fair and reasonable employer "would" have done reflected this reality.

[6] See, for example, *Angus v Ports of Auckland Limited* [2011] ERNZ 292 at [15].
[7] *Angus v Ports of Auckland Limited (No.2)* [2011] ERNZ 466 at [65].
[8] See, for example, *Salt v Fell* [2006] 2 ERNZ 949 (CA).

63. In our submission, therefore, the test of justification should be restored to that inserted in 2004, a test which asks what a fair and reasonable employer would have done.

64. Therefore, the CTU recommends that s 103A(2) be changed from “could” to “would”.

Recommendation: Reinstatement will be restored as the primary remedy to unfair dismissal (Cls 38 – 39) and the test of justification in s103A.

Cls 38 – 39 be enacted with deletion of the word ‘reasonable’.

The CTU recommends that s 103A(2) be changed from “could” to “would”.

iv. Clauses 30 – 34: Restoring protections and providing further protections for employees in the “vulnerable industries” (Part 6A).

65. Subpart 1 of Part 6A of the Act provides important protections for vulnerable workers on the sale or transfer of business. Specifically this subpart obliges employers who take over a contract (the incoming employer) to take on the employees from the previous employer (the outgoing employer). The incoming employer is obliged to maintain all employees’ existing employment terms, conditions and entitlements.

66. The ER Amendment Bill 2018 overturns the harmful changes to Part 6A brought in under the previous Government by the Employment Relations Amendment Act 2014, including repealing the small and medium enterprise (SME) exemption whereby that business (together with associated companies) employing fewer than 20 workers were excluded from coverage, and the truncated and artificially limited opportunity for workers in the so-called “vulnerable industries” to elect to transfer to a new employer.

67. Those retrograde changes significantly weakened the bargaining position of workers in these industries, who by definition, are already vulnerable. It created uncertainty about ongoing work for vulnerable employees and created a race to the bottom in terms of employment standards. The exemption conflicted with the recommendations from the Review of Part 6A (the findings of which were released in 2012) which recommended retaining the protections for employees covered by Subpart 1.

68. The CTU critically addressed the amendments in its submission on the Employment Relations Amendment Act 2014 and the contents of that submission is still relevant now.

Repealing SME Exemption

69. The CTU supports the repeal of the Small to Medium Enterprise (SME) exemption from Subpart 1 of Part 6A.

70. The exemption for incoming SMEs was always illogical. It was against officials’ advice at the time of consideration and implementation, and the views of many in the sector.

71. 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 fewer than 20 people.

72. In a May 2012 aide memoire[9] 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."

> 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.

73. According to an MBIE Briefing to the Minister of Labour[10] 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**

[9] Discussion on the Review of Part 6A of the Employment Relations Act 2000 (18 May 2012 12/02603).
[10] Part 6A: Exemption for Small to Medium Enterprises (21 September 2012 12/05192).

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.

74. 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.

75. As to the mechanics of the amendments, the SME exemption inserted the key operational provision for being declared an 'exempt employer' from the usual requirements of Part 6A. In summary, on certain dates[11] 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.

76. 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.[12]

77. S69DA provides the definition of associated person referred to in 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.

78. Some of these tests are 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.

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

79. 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 was a dead letter law from commencement.

80. 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, importing all or part of the Income Tax Act 2007 definition of associated persons would have been prudent.

81. At that time the CTU submitted that 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.

82. The amendments provided for 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.[13] The Authority may also impose a penalty for false warranty.

83. An employer to whom the false warranty was provided may commence proceedings for damages in a court of competent jurisdiction.[14] 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 sought to create a separate cause of action for breach of warranty they would be leaving a considerable amount of detail to be decided by the Courts (including the correct measure for calculation of damages).

84. 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 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.

85. The Minister notes removing the exemption may mean that SMEs will face additional costs associated with having to take on transferring employees. However, as noted by

[13] s 69OAA(2).
[14] s 69OAA(4).

the Minister and agreed with by the CTU, this will level the playing field between SMEs and larger businesses, and will provide incentives for firms to compete on productivity issues, rather than on cost reductions in respect of their workforce.

Right to elect to transfer

86. The 2015 changes specified that employees were provided five working days to elect to transfer to any incoming employer. If an employee did not exercise his or her right within this timeframe, they lost the right to transfer on the same terms and conditions.

87. The amendments replaced the pre-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.

88. The CTU supports the proposal in the ER Amendment Bill 2018 the provision of more time for employees to decide whether to transfer to a new employer.

Timeframes

89. The timeframe for provision of information 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.

90. The window for workers to decide to transfer was 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."[15]

91. The cabinet paper 'Proposals for amendments to the Employment Relations Act 2000' clearly sets out the problems with this proposal: [16]

> 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.

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

93. 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.[17]

Method of election

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

Part II

94. 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."[18] It is proposed that that the election must be in writing, signed by the employee and sent to the (pre-restructuring) employer.[19] 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).

95. The election must be treated as valid if sent by post, fax or email.[20] 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)."[21] 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.

96. 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 pre-existing "reasonable opportunity to make an election" should have been retained or a longer default timeframe such as 20 working days should be allowed.

97. 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.

98. The CTU supports the proposal to extend the timeframe from five working days to 10 working days. This will require extending existing timeframes in the Act for the Principal (the company awarding the contract) to notify and provide information to the outgoing employer of the restructure and for outgoing employers to inform employees of their right to elect to transfer before the restructure takes place. It will, however, ensure that workers who elect to transfer understand the implications of doing so. This will likely improve engagement with the incoming employer that will likely have spill-over benefits for subsequent labour productivity.

Disclosure of information relating to transferring workers

99. The CTU supports the proposal in the ER Amendment Bill 2018 to repeal requirements to transfer certain personal information when a worker transfers, the provision of more time for employees to decide whether to transfer to a new employer, and greater safeguards on transfer of inaccurate information including that employees will notified of the type of personal information that would be provided to an incoming employer.

100. Under the Act as it stands currently, the outgoing employer is required to give the incoming employer the employees' individualised employee information, including

[18] *Doran v Crest Commercial Cleaning Ltd* [2012] NZEmpC 97 at [52].
[19] s 69G(2)(d) and 69G(5).
[20] Proposed s 69G(5).
[21] Proposed s 69G(2)(e).

any disciplinary matters and personal grievances. There is no general statutory obligation on the outgoing employer to ensure that this information is complete, accurate and not misleading before transfer.

101. Inaccurate or misleading information can have adverse consequences on the employment relationship with the incoming employer.

102. The outgoing employer has an obligation to notify employees that 'certain information' will be provided to an incoming employer and of their right, under the Privacy Act 1993, to request their personal information and ask for corrections. However, employees are unlikely to be aware that disciplinary information or their personal grievances may be transferred to an incoming employer. They are more likely to consider this information relates to their entitlements and wages. If employees are unaware of the nature of information that is being transferred they are less likely to ask to review their personal information and ask for corrections.

103. The 2015 amendments created 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."

104. It also inserted a new 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."[22]

105. 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"[23] to immediately notify the new employer that the information is out of date and what the new information is.[24]

106. 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.

107. 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.

108. Additionally, the 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

[22] s 69OE(3).
[23] s 69OE(4).
[24] s 69OE(5).

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).

109. The Office of the Privacy Commissioner's comment in the Cabinet Paper 'Proposals for amendments to the Employment Relations Act 2000' is valid:[25]

> **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.

110. 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 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]."

111. Section 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.[26]

112. The right to correct incorrect personal information becomes nugatory when the timeframes for information access and correction under the Privacy Act 1993[27] 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.

113. 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.[28] 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

[25] CBC(12)(79) 30 August 2012 at [71].
[26] Proposed sections 69G(8) and 69OEA(6) respectively.
[27] 20 working days for each under s 40 of the Privacy Act 1993.
[28] S 69OEA(4)(b).

many circumstances will be prevented by confidentiality from providing an accurate picture.

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

115. 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.

116. As a result of the foregoing, the CTU supports the current proposals in the ER Amendment Bill 2018 and the CTU notes the Privacy Commissioner has considered the proposals in the ER Amendment Bill 2018 and supports the proposal that employees are notified of their right to check and ask for corrections of personal information in accordance with Information Privacy Principle 7 of the Privacy Act 1993.

Ability to add workers to Schedule 1A

117. The amendments repealed s 237A. Doing so removed the ability to amend Schedule 1A (so-called 'vulnerable workers') by order in council.

118. The CTU did 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.

119. There are 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.

120. The CTU submits that the extension of the right to transfer should be applied to other problematic industries including security, care workers, bus drivers, pizza delivery, waste and recycling and other council-controlled services.

121. The CTU urges the Government to consider a review to determine whether protections could be extended to a much greater range of industries. The CTU acknowledges this is not a straightforward question however and would require another inquiry.

Recommendation: Restoring protections and providing further protections for employees in the "vulnerable industries" (Part 6A) (Cls 30 – 34).

Cls 30 – 34 should be enacted with amendments. The repealed s 237A should be restored.

Part II

D. Collective bargaining and union rights

i. Clauses 9 & 11: Restoration of the duty to conclude bargaining and clause 14 &15: Repeal of determination that bargaining concluded.

122. Clauses 9 and 11 of the Bill restore the duty to conclude collective bargaining by inserting a new s 31(aa) which provides that the duty of good faith in section 4 requires parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to, and by replacing the current s 33 with the following:

> ***33 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to***
>
> *(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.*
>
> *(2) For the purposes of subsection (1),* ***genuine reason*** *does not include—*
>
> > *(a) opposition or objection in principle to—*
> > *(i) bargaining for, or being a party to, a collective agreement; or*
> > *(ii) including rates of wages or salary in a collective agreement; or*
> > *(b) disagreement about including a bargaining fee clause under Part 6B in a collective agreement.*

123. Part I of this submission sets out the fundamental right to collective bargaining and the benefits flowing from it. The promotion of collective bargaining is important to building a high wage, high skill economy.

124. When employers and unions undertake collective bargaining there is a duty for both parties to enter the process with good faith, with the intention of settling a collective agreement.

125. Despite the ER Act being underpinned by duties of good faith, the ER Act was amended in 2015 specifically to provide that the duty of good faith did not require parties to conclude collective bargaining. In addition, it allowed parties to apply to the Authority to determine that bargaining has concluded because of difficulties in coming to a settlement.

126. This encouraged poor bargaining behaviour, such as 'surface bargaining' where one party has no intention of concluding an agreement and participates only to avoid a good faith complaint.

127. A general objection the CTU had to the 2015 reform was 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.

128. These changes were not consistent with the government's obligations to promote collective bargaining under ILO Convention 98, of which New Zealand has ratified.

Part II

129. The CTU supports the proposal to restore the requirement that a collective agreement be concluded unless there is a genuine reason based on reasonable grounds not to and the removal of the ability of the Authority to determine bargaining has concluded. These changes should encourage parties to stay at the bargaining table and reach agreement, where they may have otherwise stopped bargaining under the current framework.

130. In *New Zealand Public Service Association v Secretary for Justice*[29] the Employment Court 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 ER Act. 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.

131. The termination of bargaining has potentially serious negative consequences for unions and their members engaged in bargaining. As Chief Judge Colgan noted in in the above case[30]

> 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?

132. The then Department of Labour itself identified other risks with the removal of the duty to conclude:[31]

> [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.

133. The signalling effects were extremely problematic. 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

[29] [2010] NZEmpC 11.
[30] [2010] NZEmpC 11 at [2].
[31] 'Regulatory Impact Statement: Improving how collective bargaining operates' (26/4/2012) at [53]-[54].

are unnecessary in legislation because good employers will naturally treat their workers well and bad employers will not be constrained by legal requirements:[32]

> 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 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.

134. 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.[33]

135. While the ER Act 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:[34]

> The ERA brought together a set of legislative requirements and institutional arrangements that would ostensibly create a more favourable environment for unions and collective bargaining. Yet, after more than a decade-and-a-half of the ERA, the share of workforce covered by collective agreements had continued to fall.

136. The ILO Committee on Freedom Association's jurisprudence regarding bargaining in good faith is also relevant:[35]

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[32] Ellen Dannin, "Good Faith Bargaining, Direct Dealing and Information Requests: The U.S. Experience" (2001) 26(1) *NZJIR* 45, 52-53.
[33] Report No 295, November 1994. Case No 1698 (New Zealand).
[34] Blumenfeld, S and Ryall, S 'Trends in Collective Bargaining: A review of the 2016/2017 year' in Blumenfeld, S., Ryall, S. and Kiely, P. (2017) *Employment Agreements: Bargaining Trends & Employment Law Update 2016/2017* Victoria University of Wellington Industrial Relations Centre, 94.
[35] *'Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO'* Fifth (revised) edition 2006.

> 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.

137. Sections 50K and 50KA enable the Employment Relations Authority to determine that bargaining has concluded, similarly discourage confidence in collective bargaining,[36] undermine the section 3 object of promoting bargaining and breach International Labour Organisation Convention 98 on the Right to Organise and Collective Bargaining. We note that the Government at the time was warned both by the Human Rights Commission and departmental officials that section 50K was in breach of the Convention.

138. The CTU supports the repeal of these sections under clause 14, as this restores NZ's international obligations with respect to collective bargaining and contributes to the development of a high wage, high skill economy.

139. The CTU further supports clause 15, amending s 53 consequentially on the repeal of the above provisions.

140. Furthermore, the CTU strongly encourages the government to consider further legislative reform to give effect to principle underpinning the proposed amendment, such as reviewing the processes of facilitated bargaining and fixing.

CTU concern with proposal

141. The CTU identifies there is a need to ensure the duty to conclude bargaining relates back to the nature of the bargaining.

142. Clause 11 is intended to effectively reinstate the good faith obligation to conclude collective bargaining as applied under the 2004 amendment to s33 ER Act; and clause 13 is intended to remove the present ability for employers to opt out of Multi-Employer Collective Agreement (MECA) bargaining under ss.44A – 44C ER Act where a union has initiated for MECA .

143. The CTU has a concern that despite the Bill's attempt to address upfront the issue of MECA opt-outs by repealing ss44A – 44C, there is still a 'back-door' by which employers may effectively seek to avoid their good faith bargaining obligations that would otherwise apply following union initiation for a MECA.

144. The Courts' previous application of the 2004 amendment to s33 ER Act is instructive. As noted per Lexis Nexis [ERA33.4], the Employment Court in both *SFWU v Auckland DHB*[37] and *AUS v Vice-Chancellor Auckland University*[38] emphasised that s 33 made requirements of bargaining that were applicable only to bargaining for collective agreements generally and did not "particularise the expected nature of the

[36] See, for example, the facts in *AFFCO NZ Ltd v NZ Meat Workers Union Inc* [2016] NZEmpC 17.
[37] (2007) 4 NZELR 697.
[38] [2005] ERNZ 224.

bargaining or the resultant agreements". This approach appears to have been approved by the Court of Appeal in *EPMU v Witney Investments*.[39]

145. Therefore an employer could satisfy s 33 obligations as contemplated under clause 11 by seeking to bargain/conclude a Single Employer Collective Agreement (SECA), notwithstanding union initiation for a MECA.

146. If the government's intention is to prevent employers opting out of MECA bargaining, then a more effective way of achieving this end will be to amend clause 11 making it express that the obligation to conclude relates back to the type of bargaining contemplated under the s 42 initiation notice.

Recommendation: Duty to conclude bargaining (cl 9 and 11) and Repeal of determination of bargaining concluded (cl 14).

Cls 9 and 11 should be enacted with amendments to express that the obligation to conclude relates back to the type of bargaining contemplated under the s 42 initiation notice.

Cl 14 and 15 to be enacted.

ii. Clause 10: Restoration of the duty to continue bargaining.

147. Clause 10 of the Bill returns the formerly repealed 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."

148. The intended significance of the original repeal of s 32 (1)(ca) in 2015 was 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."[40] The explanatory note to that Bill similarly stated "[t]he repeal of section 32(1)(ca) relates to the replacement of s 33.

149. 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).

150. The provision reflects the approach earlier taken by the Employment Relations Authority in *NZ Amalgamated Engineering etc Union (Inc) v Independent Newspapers Ltd*[41] where, amongst other things, some employer respondents had refused to bargain on other issues until resolution had been reached on an impasse around the question

[39] (2007) 5 NZELR 435.
[40] 'Employment Relations Amendment Bill 2012 paper one: collective bargaining and flexible working arrangements' 3 May 2012 at [12].
[41] (2001) 6 NZELC 96,360 (WA 51/01).

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.

151. 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.

152. If it was 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 5 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.

153. Further, any 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."

154. Clause 10 is premised on correcting 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) did not make sense and should not have occurred.

155. Therefore, CTU supports the enactment of cl 10 of the Bill.

Recommendation: Requirement to continue bargaining (Cl 10).

Cl 10 should be enacted.

iii. Clause 12: Restoration of the earlier initiation timeframes for unions in collective bargaining.

156. Prior to the 2015 amendments to the ER Act, the Act provided for the ability of unions to initiate collective bargaining 20 days before employers.

157. The purpose of the union initiation advantage was set out in *Association of University Staff Inc v The Vice-Chancellor of the University of Auckland*[42] where the Full Court held that the 20-day initiation head start gives unions a statutory tactical advantage and that the notice initiating bargaining "sets the agenda for that bargaining in many respects."

158. In 2015, s 41 of the ER Act was amended 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 later of 120 days before the last collective agreement expires or 60 days before the first collective expires applies. This only applies to existing collective agreements or in relation to work which was previously covered by

[42] [2005] 2 NZELR 277 at 279.

another collective agreement (s 40: unions remain the only ones able to initiate in greenfields sites).

159. As a result the current Act provides for the ability for unions and employers to formally initiate bargaining where there is already a collective agreement in place between the parties. Initiating bargaining extends the collective agreement for 12 months past its expiry date to afford members the same terms and conditions while negotiations to replace the collective agreement take place

160. The reforms created potential gaming around who initiates bargaining and means that cross-initiation can occur. This can lead to disagreement regarding intended coverage and may lead to disputes about who initiated first, creating extra costs and generally prolonging the bargaining process.

161. The CTU supports the proposal to reinstate the previous law where the union could initiate bargaining 20 days in advance of the employer.

Recommendation: Restoration of the earlier initiation timeframes for unions in collective bargaining (Cl 12).

Cl 12 should be enacted.

iv. Clause 13: Removal of the MECA opt out.

162. Following the 2015 amendments to the ER Act, employers are able to choose to opt-out of multi-employer bargaining at the outset. Where an employer receives notification of initiation of bargaining for a multi-employer collective agreement (MECA), or for agreement for the employer to become a party to a concluded MECA, they can opt-out of bargaining by giving written notice to the union(s) and other parties within 10 days of receiving the notification. If an employer did not opt out within this time period then the employer would be required to participate in bargaining in good faith towards concluding a MECA.

163. As the then Department of Labour identified in their initial regulatory impact statement for the Bill which introduced MECA opt-out, the provision was clearly in breach of ILO Conventions C87 and C98. Allowing employers to opt out of MECA coverage denies workers an opportunity to bring bargaining leverage to bear on the question of employer coverage. The 'Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO' states:

> 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).

164. The ability for employers to opt out of multi-employer collective bargaining impacts on employee and union choice regarding their preferred form of collective bargaining and undermines the objectives of the ER Act to promote collective bargaining and International Labour Organisation (ILO) Convention 98 on the Right to Organise and Collective Bargaining, which New Zealand has ratified.

165. Unions remain concerned that employers may use the MECA opt out tactically by using an opt out notice to end MECA negotiations and simultaneously initiating bargaining for a single employer collective agreement (SECA) with unfavourable proposed coverage.

166. Unions needed to be very careful around their timing in terms of initiation of MECA bargaining as a carefully timed opt-out notice may result in the expiry of an existing collective (where it is validly sent after the printed expiry of the current collective agreement).

167. Unfortunately, it appears impossible for unions to contemporaneously initiate for both multi- and single employer collective agreements as a form of insurance against opt out notices following the decision of the full bench of the Employment Court in *Service & Food Workers Union Nga Ringa Tota v Auckland District Health Board*[43]. The Court held in that case at [76]:

> Under the scheme of the Act, bargaining for a collective agreement between the same parties covering the same employees can be initiated only once. The parties are then required to conclude a collective agreement unless there are genuine reasons based on reasonable grounds not to. A process permitting cross- or counter- initiation would give rise to multiple bargaining processes all of which would impose on the parties to them obligations to conclude collective agreements. Although the Act does not exclude expressly cross- or counter-initiation, an interpretation that there can only be one initiation of bargaining for a collective agreement accords more closely with the scheme of the legislation. This includes, most significantly, promoting orderly collective bargaining. To allow for subsequent initiations between the same parties would be inimical to this objective.

168. As a result of the foregoing, the CTU supports the repeal of the ability for employers to opt-out of multi-employer bargaining for a collective agreement when they receive notice of initiation for bargaining.

Recommendation: Removal of the MECA opt out (Cl 13).

Cl 13 should be enacted.

v. Clause 18: Restoration of the 30 day rule where for the first 30 days new employees must be employed under terms consistent with the collective agreement.

169. Clause 18 of the Bill proposes to replace the current s 62 of the Act to re-instate what is understood as the '30 day rule'.

170. The '30 day rule' was introduced as s 63 of the Employment Relations Act 2000 (as enacted in August 2000). It remained in force until repeal in 2015 by the Employment Relations Amendment Act 2014.

171. Under the current Bill, the '30 day rule' is proposed to be restored as an addition to s 62 of the Act, and is identical to the former s 63 of the ER Act prior to the 2015 repeal.

[43] [2007] ERNZ 553.

172. The former s 63 of the Act provided that for the first 30 days of employment, new workers were 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.

173. The repeal of s 63 meant employers were no longer required to place new employees who are not union members on the same terms and conditions of the applicable collective agreement for an employee's first 30 days of employment.

174. This removed protections for new employees which were intended to address the inherent imbalance of bargaining power between an employer and an employee.

175. This had a very significant impact on workers and unions and is outlined in section 6 of Part I of our submissions and we refer to the Committee to that section.

176. This repeal of the '30 day rule' was a deliberate increase to the vulnerability of new workers, undermined collective agreement terms and conditions, was specifically aimed to reduce wages for new workers, promoted terms inconsistent with the collective agreement, and removed a valuable protection for new workers. It increased the ability of the employer to impose unilateral terms and conditions of employment.

177. The removal of the 30 day rule was an attack on terms and conditions for new workers. Indirectly it is also an attack on the terms of existing collective agreements.

178. The CTU supports the reinstatement the 30-day rule. The 30-day rule protects employees from agreeing to unfavourable terms and conditions, providing, at a minimum, the same terms and conditions as the applicable collective agreement. Employers and employees remain be free to negotiate terms and conditions that are not inconsistent with the collective agreement.

179. Requiring an active choice after 30 days means employees have more time to become informed about the collective agreement and its benefits. In conjunction with new proposed ss 59AA and 63AA, it also means employees have time to become informed about the union, its role in the workplace and what benefits membership may provide before making their decision over the type of employment agreement they wish to be employed on and whether they want to join the union.

<u>New proposed clause s62(4)</u>

180. In relation to proposed new s 62(4), the NZCTU questions the purpose of the provision. This provision returns the former section s 63(2A). The new proposed s 62(4) states: "However, the new employee's terms and conditions of employment do not include any bargaining fee payable under Part 6B".

181. The CTU seeks clarification that s 62(4) only applies to the first 30 days of employment.

Recommendation: Restoration of the 30 day rule where for the first 30 days new employees must be employed under terms consistent with the collective agreement (Cl 18).

Cl 18 should be enacted, subject to it being made clear that s62(4) only applies to the first 30 days of employment.

vi. Clauses 21 – 23: Repeal of partial strike pay deductions and s86A notice requirements for strikes

Repeal of partial strike pay

182. Clauses 21 to 23 of the ER Amendment Bill 2018 repeal the ability for employers to deduct a fixed or estimated amount of pay when workers take part in a partial strike action.

183. This was bad law from its inception.

184. Partial strike action is usually undertaken on a substitution basis (other work is undertaken instead of the normal work) and under the current law this work is effectively unpaid. 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.

185. In the first instance the law was not compliant with ILO Convention 98 which requires that workers enjoy the right to organise and collectively bargain in their employment. One of the purposes of the Convention is to ensure adequate protection against acts of anti-union discrimination in employment. Another is that ratifying states should promote the setting of terms and conditions by way of collective bargaining.

186. Secondly, there was no evidence of a problem to be addressed.

187. Before the provision for employers to deduct wages for partial strikes was introduced, work stoppages had already reached record lows. In 2012, there were 10 work stoppages (6 complete strikes, 3 partial strikes and 1 lockout). In 2013, there were 13 work stoppages (12 complete strikes, no partial strikes and 1 lockout). In 2014, the latest data published by MBIE, there were six stoppages, all complete strikes.[44] By way of comparison there were 206 work stoppages in 1986.

188. There was no evidence of a significant problem to be addressed and the proposed 'solution' has the capacity to escalate legal disputes. The deduction of 10 percent of workers' pay is in breach of ILO jurisprudence in many situations.

189. The disadvantages to workers proposing to undertake partial strike action are clear.

190. Allowing employers to deduct wages for partial strikes had the effect of intimidating workers and means that workers are more likely to abandon the partial strike action, weakening worker bargaining position, or it may force workers to fully withdraw labour, causing disputes to escalate.

191. 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

[44] MBIE. 2015. Annual Work Stoppage Statistics: 2014 Calendar Year. http://www.mbie.govt.nz/publications-research/research/employment-relations/work-stoppages-2014-report.pdf, p3.

and resources for both unions and employers. As the then Department of Labour noted in the Regulatory Impact Statement for the 2014 Bill: "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."

192. 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.

193. The proportion of wages deducted is based on an unscientific estimate by the employer of "how much time an employee (or group of employees) usually spends doing this type of work during a day." Absent time-and-motion studies, an employer is unlikely to have a clear idea of how much time a worker spends on a given task in a day and their estimate may be wildly inappropriate (and sometimes punitive).

194. As an alternative to estimating the time taken, employers may also deduct a flat 10 percent of the workers' pay for partial strike action. This has resulted in employees losing pay for low level action such as breach of uniform policies (for example wearing union t-shirts in place of standard uniforms).[45]

195. In a case where the deductions of pay were higher than the amount corresponding to the period of the strike, the then Select Committee recalled that the imposition of sanctions for strike action was not conducive to harmonious labour relations.

196. The law creates potential for increased litigation to cause damage to the ongoing and long-term employment relationship between the employer and the union. It can have long term consequences in terms of trust between the parties and their dealings on a day to day basis and in future collective bargaining. Legislative reform which results in increased litigation and escalation of industrial action, and which enhances confusion, rather than providing clarity, is not, therefore in the interests of employers, unions or employees.

<u>Notice requirement for strikes</u>

197. The ERA Amendment Bill 2013 inserted new notice requirements for strikes and lockouts (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 MBIE. 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 Employment Relations Authority declares bargaining over, these changes imposed significant restrictions on unions and workers who wish to take industrial action.

198. The formal notice requirement for all strike action means that failure to meet these strict technical requirements in a strike notice renders 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:

[45] https://www.stuff.co.nz/business/88154183/st-john-ambulance-staff-face-10pc-pay-deduction-for-industrial-action

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.

199. 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.

200. 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 is an undue restriction on unions' ability to take industrial action.

201. 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).

202. However, these requirements are much less defensible outside of the essential services context where they simply become grounds for seeking to end industrial action by way of injunction relief or as grounds for damages. As the CFA has stated:[46]

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.

203. 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: …

1.1. (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;

1.2. (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

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

Part II

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

> 1.3. 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.

205. A key element of progressive realisation is the avoidance of retrogression where possible. As Joss Opie notes:[47]

> The flipside of the duty of progressive realisation is the obligation not to take unjustifiable retrogressive measures (that is, measures 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."

206. The wording of s86A makes it possible for an employer to challenge a strike notice based on technicalities which would not affect a reasonable understanding of the notice. This is a violation of the legal maxim "de minimis non curiat lex" (the law does not concern itself with trifles: commonly abbreviated to the de minimis rule).

207. The requirement that all strike action is subject to notice is an unjustified derogation from the right to strike guaranteed by New Zealand's ratification of ICESCR and fundamental rights of freedom of association.

208. In particular, the requirement to notify the chief executive of MBIE of any strike serves no practical purpose and is unduly onerous.

209. The lack of a de minimis clause in s86A means that minor errors that would not affect a reasonable understanding of the notice can still be used to declare the notice invalid. This is unnecessary and unduly onerous.

Recommendation: Repeal of partial strike pay deductions and notice requirements for strikes (s86A).

Clauses 21 – 23 should be enacted.

Notice requirement for strikes (s 86A): Section 86A should be repealed.

[47] 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.

Part II

vii. Clauses 5 – 8: Restoration of union access without prior employer consent.

210. As is recognised in s 20 of the ER Act, it is uncontroversial that union representatives are entitled to enter a workplace for purposes related to the employment of its members or related to the union's business. This is an important part of the right to freedom of association, an internationally recognised human right.

211. Following the 2011 changes to the Act, union representatives must gain consent from employers in order to access the workplace. Employers must not unreasonably withhold consent, but must advise the union representative of their decision no later than one working day following the request. Consent is treated as being obtained if the employer does not respond to the request within two working days.

212. Although consent may only be declined in very limited circumstances, case law and anecdotal evidence suggests some employers may use the notification and consent process to delay access to the workplace.

213. The union is then required to take action to challenge the reasonableness of the refusal, a process that is likely to take considerable time and in many cases will be uneconomic.

214. This can be detrimental in circumstances where employees have reported concerns to union representatives and those union representatives cannot access the workplace to investigate those concerns or support members. The notification and consent process can create unnecessary costs and delays.

215. The intention behind removing the right of access was clearly to hinder unions in their ability to organise. The results of that change have ranged from misuse of the notification and consent process to delay access and undermine collective bargaining,[48] to cases where union representatives have been followed, trespassed and even assaulted for attempting to exercise reasonable access rights.[49]

216. The proposal in the current Bill would revert to the previous position in law, where union representatives were able to access the workplace without consent where their members are employees. The proposal would retain the conditions around access to a workplace, which were broadly unchanged by the 2011 amendments.

217. This requires that union representatives access a workplace at reasonable times and in a reasonable way taking into account normal business operations, comply with reasonable health and safety or security requirements in accessing the workplace and produce and hold identification when accessing a workplace. The proposal would also retain the provision that if a union representative cannot find an employer, they must leave information about their entry in a prominent place.

218. As it did before the law was changed, concern from some quarters that unfettered access may lead to unintended consequences was addressed by exemptions that are being retained in the proposal. Exemptions apply where union access may involve harming the security of New Zealand, undermining health and

[48] *NZ Meatworkers Union Inc v South Pacific Meats Ltd* [2012] NZERA Christchurch 21.
[49] *NZ Meatworkers Union Inc v South Pacific Meats Ltd* [2017] NZERA Christchurch 121 and *NZ Meatworkers Union Inc v South Pacific Meats Ltd and Michael Anthony Talley* [2016] NZERA Christchurch 13..

safety practices or in exceptional circumstances the investigation or detection of offences, and on certain limited religious grounds.

219. Reverting to the previous position will improve the ability of union representatives to perform their roles effectively, while retaining a reasonable level of control and oversight of all personnel present at a workplace.

220. The 2011 change had little justification. The then Minister of Labour in her advice to the Cabinet Business Committee acknowledged that[50]

> While the rules around union access to a workplace generally work well in practice, and have been well-clarified by case law, in principle the relative freedom of union officials to access a worksite, prevents employers from fully exercising this legitimate control.

221. There did not appear to be a problem to solve. Instead the change was brought in "as part of the 2008 election manifesto commitments" (at 1) and a "principle" of enabling employers to exercise greater control.

222. The lack of justification or evidence of need was further reinforced in an evaluation of the 2010 changes to the ER Act commissioned by MBIE and published in 2014. The evaluation found[51]:

> Unions were asked how much of a difference the law change on union access had made to employment relations at workplaces. Most said this had a minimal impact (Table 4). None said it had a positive impact, while seven noted a negative impact because they found it harder to make regular contact with staff.
>
> Employers in workplaces with a union presence interviewed about the effect of the changes to union access noted little impact as well. Some stressed the importance of strong interpersonal relationships with union representatives, and as a medium-sized employer in the health sector said:
>
> *"I mean it's fine to have the legislation but I think it's more about having a working relationship with them and being straight with each other*."
>
> Most employers with a union presence in their workplace noted that they already had a good constructive working relationship with unions, who had tended to contact employers before visiting workplaces as a 'common courtesy'. As a medium-sized manufacturer said:
>
> *"I don't think we had an issue in the past anyway because we had a good relationship with those unions, so in terms of access, it was operating that way previously."*
>
> However, some union responses noted that the changes meant it took longer and made it more difficult for them to contact staff as they had to go through further channels.
>
> In terms of the law change affecting communications with employees during collective bargaining processes, few employers or key commentators noticed any changes and considered the change was unnecessary if the personal contact worked well.

[50] Minister of Labour (2010), "Proposal to amend the Employment Relations Act 2000 and related work", at 28. Available at http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/pdf-library/employment-relations-act-2010.pdf,

[51] MBIE (2014). "Evaluation of the Short-term Outcomes of the 2010 Changes to the Employment Relations Act and Holidays Act", at 36. Available at http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/pdf-library/short-term-outcomes-2010-changes-era-and-ha.pdf

222. In line with the Minister's comments, the CTU does not consider there will be significant impacts as a result of this change.

Recommendation: Restoration of union access without prior employer consent (Cls 5 – 8).

Cls 5-8 should be enacted.

Part II

E. New proposals

i. Clause 16: A requirement to include pay rates in collective agreements.

223. Clause 16 of the Bill seeks to amend s 54(3), and add a new s54(4), to the ER Act to require wage rates to be included in collective agreements. In the proposal, pay rates may include pay ranges or methods of calculation.

224. Pay is a key term of employment and the ability to exclude pay from collective bargaining significantly undermines the ability of collective bargaining to address the inherent power imbalances in the employment relationship. The fundamental right to have pay included in collective agreements has been caught up in litigation in New Zealand.

225. The Explanatory Note to the Bill explains the purpose of the proposed reform is to clarify legal uncertainties arising as a result of the Employment Court case of *First Union Inc v Jacks Hardware and Timber Limited*[52] and the Employment Relations Authority case of *New Zealand Public Service Association Te Pukenga Here Tikanga Mahi v Lieutenant General Tim Keeling – Chief of New Zealand Defence Force*.[53]

226. In *First Union Inc v Jacks Hardware and Timber Limited,* the Employment Court determined that the employer's choice to refuse to bargain matters of pay and insistence that all remuneration should be set unilaterally with individual employees and not collectively, amounted to an opposition in principle to bargain wages and it was not a genuine reason to not conclude the collective agreement.

227. Chief Judge Coglan said:

> *employment agreements must contain, statutorily, information about the remuneration to be paid to the employee. There is, however, no such statutory requirement of a collective agreement. That is perhaps because it is so obvious that collective agreements will deal with remuneration, or at least minimum remuneration, that it has always been assumed that a collective agreement will contain such a term or condition. So, too, is it a fundamental underlying assumption of employment relations that remuneration will be the subject of agreement between the parties and not by unilateral imposition by the employer based on its own assessment of the employee's performance of his or her job…*[54]

228. However, in the recent case of *New Zealand Public Service Association Te Pukenga Here Tikanga Mahi v Lieutenant General Tim Keeling – Chief of New Zealand Defence Force* the Authority also confirmed that unions are entitled to have a discussion about how wages are to be agreed, but noted that this did not mean that a scale will ultimately be included in a resulting collective employment agreement.

[52] *FIRST Union Inc v Jacks Hardware and Timber Ltd* [2015] NZEmpC 230.
[53] [2017] NZERA Wellington 95 3003912.
[54] Above n 45 at [147].

Part II

229. In order to address the issues raised by these cases it is proposed to legislate that rates of pay must be included in collective bargaining and that rates of pay must be agreed during collective bargaining.

230. The CTU supports the requirement to include pay rates in collective agreements and for such rates to be agreed in writing during collective bargaining, but does not consider the proposed provisions have struck the right balance to rectify the policy and legal problem identified.

231. The CTU proposes the following amendments to ss 53(3)(a)(ii) and 54(4) in cl 16 of the Bill.

232. Section 54(3)(a)(ii)

(3)(a)(ii): the rates of wages or salary payable to employees for each category of work.

233. Section 54(4)

s54(4): For the purpose of sub-section 3(a)(ii), a collective agreement does not contain the rates of wages or salary payable to employees for each category of work unless the collective agreement contains:

(a) a description of the work to which the relevant rate of wages or salary applies; and,

(b) the specific criteria for identifying what rate of wages or salary is to be paid for the work; and,

(c) the specific criteria required to be met by an employee for any increase in wages or salary payable during the term of the collective agreement.

234. As is identified in the Explanatory Note, this is likely to have a particular impact in the state sector, where wages are frequently determined by mechanisms which lie outside of collective agreements.

235. The CTU has long held concerns regarding public sector enterprise agreements not providing transparent pay rates. The amendments as they currently exist facilitate the continuing uncertainty around wage rates not being included in collective agreements.

236. The purported need for wage ranges in collective agreements is most frequently claimed by employers in the public service. However, as can be seen from the case law it is also an issue in the private sector. The Centre for Labour, Employment and Work ('CLEW') at Victoria University reports that[55]

> … whereas only 6 percent of collective agreements in private sector organisations do not include pay rates, 11 percent of private sector collective agreements include only the minimum rate paid rather than stipulating pay rates or specifying wage ranges for different occupations or across groups of employees…. It is, nonetheless, becoming

[55] Ryall, S. and S. Blumenfeld (2018), "Government begins employment law overhaul", *CLEWd In,* February 2018, at 2.

more common for wages to be specified as a range of rates (currently 39 percent of private sector employees) and this is the most common way that wages are specified in public sector collective agreements.

237. The proposed amendments will authorise and formalise this process for the private sector.

238. Also Labour's policy commitment was to put wage rates into collective agreements; not ranges of rates.

239. If the provision proceeds as it is, it will gravely weaken collective bargaining especially in the private sector as the institution of collective bargaining turns on the capacity to negotiate wage rates. Wage rates are the mechanism to ensure employees receive a fair reward for their efforts and their needs. It is important both for the wellbeing of New Zealand's two million employees and their dependents, and economically in distributing the income generated, creating demand for the goods and services the employees' work produces.

240. These provisions, correctly balanced as contained in the CTU proposed amendments will make pay more transparent generally, which will assist the bargaining position of workers, and go some way to addressing some of the gender and ethnic pay gaps.

Recommendation: A requirement to include pay rates in collective agreements (Cl 16).

The new sections should be enacted with the CTU's proposed amendments:

Section 54(3)(a)(ii)

(3)(a)(ii): *the rates of wages or salary payable to employees for each category of work.*

Section 54(4)

s54(4): *For the purpose of sub-section 3(a)(ii), a collective agreement does not contain the rates of wages or salary payable to employees for each category of work unless the collective agreement contains:*

(a) a description of the work to which the relevant rate of wages or salary applies; and,

(b) the specific criteria for identifying what rate of wages or salary is to be paid for the work; and,

(c) the specific criteria required to be met by an employee for any increase in wages or salary payable during the term of the collective agreement.

Part II

ii. Clause 4: A requirement for employers to provide reasonable paid time for union delegates to represent other workers (for example in collective bargaining).

241. Union workplace representatives (or delegates) play an important role in the workplace, including helping to resolve workplace problems, collective bargaining, involving members in workplace decisions and supporting members who ask for help.

242. We note the Act does not currently include provisions to provide employees time off their normal duties to perform their elected union workplace representative function, except when attending two union meetings per year of up to two hours duration.

243. The CTU supports the introduction of a statutory entitlement for union delegates to reasonable paid time to represent employees and notes the Minister's comment that the roles and responsibilities for union workplace representatives can depend on the experience of the representative, can vary in scope from activities related to their specific workplace or the wider union, and that the provisions should take these factors into account.

244. It is the case that such entitlements already exist in collective agreements, and in custom and practice in many workplaces, which operate to the mutual advantage of both employers employees.

245. Unfortunately, however, in some workplaces, the legitimate role of union delegates is not recognised. The enactment of this proposal will go some way to ameliorating that lack of access to exercising delegates' rights.

246. New proposed section 18A(2)(a) provides that an employee is entitled to spend reasonable paid time undertaking union activities during the employee's normal hours of work if, in addition to other requirements set out in s 18A(2)(a) and (b), the activities would not unreasonably disrupt the employer's business or the union delegate's performance of employment duties.

247. The CTU supports the submissions of the New Zealand Meatworkers Union and is open to strengthening provisions to address concerns raised by that union.

248. Furthermore, it should be made clear in the proposal that where custom and practice exists providing for the performance of the role of union delegates should not be impacted by this provision.

249. The CTU proposes the following changes to proposed new s18A:

18A Union delegates entitled to reasonable paid time to represent employees

(1) An employee is entitled to spend reasonable paid time undertaking union activities during the employee's normal hours of work if—

(a) the employee has been appointed as a union delegate to represent other employees of the employee's employer who are members of the union on matters relating to their employment; and

(b) the activities relate to representation of employees of the employer or other union business; and

(c) the activities would not unreasonably disrupt the employer's business or the union delegate's performance of employment duties.

(2) Before undertaking activities under subsection (1), an employee must—

(a) agree with the employer that the employee may undertake activities under this section from time to time without notice; or

(b) notify the employer—

(i) when the employee intends to undertake the activities; and

(ii) how long the employee intends to spend undertaking the activities.

(3) The employer may refuse to allow an employee to undertake the activities only if the employer is satisfied, on reasonable grounds that the activities would unreasonably disrupt the employer's business or the union delegate's performance of employment duties.

(4) Any employer who seeks to refuse pursuant to sub-section (3) must inform the union in writing of its reasons and attempt to resolve the matter in mediation before limiting or abridging the entitlements set out in sub-section (1).

(5) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

Recommendation: A requirement for employers to provide reasonable paid time for union delegates to represent other workers (for example in collective bargaining) (Cl 4).

The new clause 18A should be enacted consistent with CTU's proposed amendments as follows:

18A Union delegates entitled to reasonable paid time to represent employees

(1) An employee is entitled to spend reasonable paid time undertaking union activities during the employee's normal hours of work if—

(a) the employee has been appointed as a union delegate to represent other employees of the employee's employer who are members of the union on matters relating to their employment; and

(b) the activities relate to representation of employees of the employer or other union business; and

(c) the activities would not unreasonably disrupt the employer's business or the union delegate's performance of employment duties.

(2) Before undertaking activities under subsection (1), an employee must—

(a) agree with the employer that the employee may undertake activities under this section from time to time without notice; or

(b) notify the employer—

(i) when the employee intends to undertake the activities; and

(ii) how long the employee intends to spend undertaking the activities.

(3) The employer may refuse to allow an employee to undertake the activities only if the employer is satisfied, on reasonable grounds that the activities would unreasonably disrupt the employer's business or the union delegate's performance of employment duties.

(4) Any employer who seeks to refuse pursuant to sub-section (3) must inform the union in writing of its reasons and attempt to resolve the matter in mediation before limiting or abridging the entitlements set out in sub-section (1).

(5) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

iii. Clause 18: A requirement for employers to pass on information about unions in the workplace to prospective employees along with a form for the employee to indicate whether they want to be a member.

250. The CTU supports the proposal contained in cl. 18 (new ss. 63 and 63AA) of the Bill to require employers when bargaining for terms and conditions of employment of new employees under s 62 to pass on information about unions in the workplace to prospective employees, along with, in accordance with new s 63AA, a form for the employee to indicate whether they want to be a member of the union - the 'employee choice form', but suggests some improvements on the proposal.

251. The CTU supports the proposal contained in cl. 18 (new ss. 63 and 63AA) of the Bill to require employers when bargaining for terms and conditions of employment of new employees under s 62 to pass on information about unions in the workplace to prospective employees, along with a form for the employee to indicate whether they want to be a member of the union - the 'employee choice form', but suggests some improvements on the proposal.

Information

252. Under the proposed new s 63, employers are required to inform an employee of the union's contact details, their right to join the union and be provided with the collective agreement *when bargaining for terms and conditions of employment for new employees* under s 62.

253. This is beneficial as many employees, especially those who are new to the workforce, are not aware of what a collective agreement is and how it may operate to benefit them. Under the current Act employers are only required to provide union contact information, the collective agreement and inform an employee of their right to join the union at the point when an employee 'enters into' the individual employment agreement (IEA).

254. By this stage it is too late for an employee to contact the union and seek advice on the proposed offer of employment or possible benefits of union membership and how the collective agreement may benefit them. Equally, this information does not explain why joining a Union may be beneficial.

255. This proposal works in tandem with the restoration of the '30 day rule' and the process whereby at the end of the first 30 days of employment, employees are required to make an active choice about whether they wish to join the relevant union and be employed on the collective agreement or go on to an IEA.

Employee Choice Form

256. New s63AA requires that when an employer 'enters into' an individual employment agreement, the employer must, within 10 working days after the employee commences employment with the employer provide the employee with an approved form for the employee to complete indicating whether the employee elects to join a union and any objection to the employer providing the employee's election to the union, or any other union.

257. Section 63AA(4) provides that the employee may complete and return the form during the period beginning 10 days after the employee commences employment and ending 40 days after the employee commences employment.

258. After the expiry of that period, as per s63AA(5), the employer must within 20 working days, provide the name of the employee, the completed form, or that the employee did not complete the form, to the union that is a party to the collective agreement that covers the work to be done by the employee, unless the employee has objected. A penalty is attached to non-compliance with this requirement.

259. An employee may opt -out of having their choice provided to the relevant union where they choose to be employed on an IEA.

260. The employee choice form will provide unions with better information about new employees in order to meet the needs of prospective members more effectively.

261. Affiliates have raised with the CTU that the statutory timeframes attached to the employee choice form should be considered in context with the new proposed s 62 which reintroduces the 30 day rule.

262. Affiliates have suggested that the employer should have an obligation to provide the employee choice form on the 30th day of employment, so that the employee clearly expresses a choice whether to join the union or to negotiate an individual employment agreement.

263. Moreover, the employee choice form should be mandatory to complete, unless the union has elected for a different process to occur. On this basis the references to 'may' at sub (2) and (3) (a) in the proposed sections should be amended to reflect the mandatory nature of the requirements.

264. The form should clearly provide an explanation that there is a union and that the work they will be doing is covered by a collective agreement. They can then choose to either go onto an IEA (supplied) or join the union and be covered by the CA (supplied).

Part II

265. If the employee chooses to join the union, the employee should provide sufficient details and sign. This should be considered a union application and the form should be forwarded to the union. If the employee chooses to go onto an IEA they can tick a box to indicate this on the form and sign the Individual Employment Agreement.

266. As such the CTU proposes the following replacement provisions:

267. s63 (3):

(3) The employer must also

(a) provide to the employee a copy of the collective agreement; and

(b) provide to the employee any information about the role and functions of the union that the employer is required to provide to new employees under section 59AA.

(c) if the employee agrees, inform the union as soon as practicable that the employee has entered into the individual agreement with the employer.

268. Section 63AA Employee choice form:

(1) This section applies to an employer who enters into an individual employment agreement with a new employee under section 62.

(2) The employer must, on the nearest working day to the 30th day after the employee commences employment with the employer, provide the employee with a form approved by the chief executive under s 237AA that the employee must complete and return for the purposes of –

a. Notifying the employer whether the employee elects to join a union (or a particular union)
b. Applying to join a union (or a particular union) if the employee has elected to join a union.

(3) The employer must as soon as practicable provide the form to each union that is a party to a collective agreement that covers the work to be done by the employee.

(4) The requirement in subsection (2), for the employee to complete and return the form may be waived by agreement between the employer and the unions that are party to a collective agreement that covers work to be done by the employee.

(5) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

Part II

Privacy Implications

269. The CTU notes the Privacy Commissioner has considered the employee choice form in s63AA and indicated it does not support the proposal for an employee's name and choice of employment agreement to be communicated by the employer to unions. The Commissioner considers that any obligations should be placed on employers rather than employees, and that employees should provide their express consent prior to their choice of employment agreement being communicated to unions.

270. Despite the above, in the Explanatory note to the Bill the Minister states that the privacy risks in the proposal are low, as the only information that would be passed on to union would be the new employee's name and the fact that they have made an active decision on union membership. The proposal strikes a balance between privacy implications and the wider policy goals of promoting collective bargaining and freedom of association.

271. Section 14 of the Privacy Act 1993 provides that the Privacy Commissioner is to have regard to certain matters, including due regard for the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information and recognition of the right of government and business to achieve their objectives in an efficient way and to take account of international obligations accepted by New Zealand

272. One of the functions of the Privacy Commissioner is (at section 13(f) of the Privacy Act 1993) is to examine proposed legislation that makes provision for the collection and disclosure of personal information. In carrying out this function he is required to carry out the balancing exercise described above in s 14.

273. We disagree with the stated view of the Privacy Commissioner as we do not consider the balancing exercise has been correctly applied. When the important human rights (being the right to freedom of association and the right to bargain collectively) and New Zealand's international obligations (ILO Conventions and treaties) are balanced against the minimal information concerned and the fact that the "employee choice form" clearly provides an ability for the employee to object to the disclosure of the information, the proposed amendments should not be considered an interference with privacy. The proposal does not infringe privacy principles.

Recommendation: A requirement for employers to pass on information about unions in the workplace to prospective employees along with a form for the employee to indicate whether they want to be a member (Cl 18).

Cl 18 should be enacted consistent with the CTU's proposed amendments as follows:

s63 (3):

(3) They must also
(a) provide to the employee a copy of the collective agreement; and
(b) provide to the employee any information about the role and functions of the union that the employer is required to provide to new employees under section 59AA.
(c) if the employee agrees, inform the union as soon as practicable that the employee has entered into the individual agreement with the employer.

Section 63AA Employee choice form:

(1)This section applies to an employer who enters into an individual employment agreement with a new employee under section 62.

(2)The employer must, on the nearest working day to the 30th day after the employee commences employment with the employer, provide the employee with a form approved by the chief executive under s 237AA that the employee must complete and return for the purposes of –

a.Notifying the employer whether the employee elects to join a union (or a particular union)
b.Applying to join a union (or a particular union) if the employee has elected to join a union.

(3)The employer must as soon as practicable provide the form to each union that is a party to a collective agreement that covers the work to be done by the employee.

(4)The requirement in subsection (2), for the employee to complete and return the form may be waived by agreement between the employer and the unions that are party to a collective agreement that covers work to be done by the employee.

(5)Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

iv. Clause 17: Union may provide employer with information about role and functions of union to pass on to new employee.

274. In addition to the proposal outlined at clause 18 of the Bill regarding reinstating the 30-day rule for new employees, requiring employers to pass on information about unions in the workplace to prospective employees, and the employee choice form, clause 17 of the Bill additionally proposes a new s 69AA which provides that unions be required to provide to employers information about their role in the workplace and that employers pass on this information to employees. This will help to increase awareness and educate employees about their choice to be employed on the collective agreement or an individual employment agreement.

275. The new proposed s 59AA applies where a union is a party to the collective agreement. The CTU proposes this could be expanded to additionally include circumstances where bargaining has been initiated where no existing collective agreement covers the proposed employees.

276. The CTU notes the proposed s59AA(3) and (4) may be internally inconsistent and suggests drafting re-consideration.

277. Furthermore, the CTU considers that a timeframe for compliance with the union request under s59AA should be made more explicit.

Recommendation: Union may provide employer with information about role and functions of union to pass on to new employee (Cl 17).

Cl 17 should be enacted with amendments to extend the provision to additionally cover circumstances where bargaining has been initiated where no existing collective agreement covers the proposed employees.

v. Clauses 24 – 27: Greater protections against discrimination for union members including an extension of the 12 month threshold to 18 months relating to discrimination based on union activities and new protections against discrimination on the basis of being a union member.

278. The CTU supports clause 24 to 27 of the Bill which are intended to protect union members from unfair treatment by an employer because of their involvement in a union by—

a extending the grounds for discrimination to include an employee's union membership;

b clarifying that it is not discriminatory to offer different terms and conditions of employment to an employee which differ from those of another employee as a consequence of the employee being a member of the union; and,

c extending the time frame under section 107 for which an employee's union activities may be considered to contribute to an employer's discriminatory behaviour from 12 months to 18 months.

<u>Extend the grounds for discrimination to include an employee's intention to join a union</u>

279. The CTU supports clause 24 which extends the protection from discrimination to cover grounds of an employee's intention to join a union. It is a fundamental human right recognised in international law, and domestic New Zealand law, to be able to join a union.

280. The amendment provides that conduct described in paragraphs (a) to (c) of section 104(1) by reason directly or indirectly of an employee's union membership status is discrimination for the purposes of section 104.

281. An employer should not be able to dissuade an employee from joining a union by promoting or taking an action that dissuades an employee from making this choice freely.

282. The reform is needed as there is anecdotal evidence and case law that show a small number of employers continue to look for ways to discourage their staff from joining a union.

<u>Clarifying that it is not discriminatory to offer different terms and conditions of employment to an employee which differ from those of another employer as a consequence of the employee being a member of the union</u>

283. Clause 25 amends section 106, which provides for exceptions in relation to discrimination.

284. New section 106(4) provides that an employee is not discriminated against because of the employee's union membership status simply because the employee's terms and conditions of employment are different from those of another employee employed by the same employer because the employee is a member of a union. New section 106(5) provides that section 104 must be read subject to section 9(3), which provides that the Act does not prevent a collective agreement from containing a term or condition that is intended to recognise the benefits of a collective agreement or arising out of the relationship on which a collective agreement is based.

Extending the time frame under section 107 for which an employee's union activities may be considered to contribute to an employer's discriminatory behaviour from 12 months to 18 months.

285. There is currently a 12 month limitation on protection from discrimination on the basis of trade union activities.

286. The 12 month timeframe is overly prohibitive and means that after a 12 month period an employer could discriminate without repercussion. In some situations an employer will take a discriminatory action based on the fact that an employee was involved in union activities such as participating in a lawful strike. If an employer chose to offer better terms and conditions to certain non-union employees 18 months later because of that strike, this would not amount to discrimination under the current settings.

287. In addition to cl 24 which extends discrimination protection to include intended union status, cl 26(2) extends the protection from discrimination to 18 months.

288. In addition clause 27 amends section 119, which provides for a presumption in discrimination cases that an employer who engages in conduct described in section 104(1) discriminated against the employee for the reason alleged by the employee. The Bill provides the presumption now applies for 18 months.

289. This will not prevent an employer from responding to a discrimination claim based on involvement in union activities by presenting an alternative and valid justification for their actions as a defence, but will extend the restriction on discrimination claims being raised.

290. In order to promote consistency in New Zealand discrimination law, the CTU considers the protection from discrimination on the basis of union membership or activities should be a protected ground in s 21 of the Human Rights Act 1993 and calls for the Select Committee to consider inclusion of the protection in that Act.

Recommendation: Greater protections against discrimination for union members including an extension of the 12 month threshold to 18 months relating to discrimination based on union activities and new protections against discrimination on the basis of being a union member (Cls 24 – 27).

Cls 24 – 27 to be enacted. Consideration given to amending the Human Rights Act 1993 to include union membership/activities as a protected ground.

Part II

F. Other

i. Schedule: Transitional, savings and related provisions

291. The CTU raises no concerns with the proposed provisions contained in the Schedule.

Recommendation: Schedule: Transitional, savings and related provisions.
Schedule: Transitional, savings and related provisions to be enacted.

G. Appendix: History and further analysis of Rest and Meal Breaks

1.1. Rest and meal breaks are vital to the health and safety of workers and important to ensure that employees have enough time to rest, eat and refresh before returning to work.

1.2. The previous government moved from a system of prescribed rest breaks to one where the duration and number of breaks is to be agreed between parties. In situations where agreement cannot be reached the employer can decide what rest and meal breaks should apply. In some instances employers may not grant breaks for operational reasons, instead employees are given compensatory measures. These compensatory measures are not prescribed – they may be time-in-lieu, monetary compensation or another arrangement.

1.3. The CTU was very disturbed that the Government relaxed rest and meal breaks provisions for workers. We did not believe that there was any justification for a legislative change.

1.4. The reinstatement of prescribed rest and meal breaks entitles employees to receive at least a minimum number and duration of breaks based on the hours they have worked.

1.5. 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 and the Employment Relations Amendment Act 2014. These comments remain relevant and are restated here.

<u>History of rest and meal breaks</u>

1.6. Rest and meal breaks in New Zealand employment law have a long and tortuous history.

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

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

1.9. 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.

1.10. The CTU strongly supported the re-establishment of rest and meal breaks in law in when it occurred in 2008 under a Labour Government by the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008.

1.11. In 2009, the National Government sought to dismantle, once again, regulation regarding rest and meal breaks, by the Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill 2009, which was discharged on 26 February 2013.

1.12. There had only been isolated problems with the meal breaks legislation since its enactment in 2009. The problems that had occurred had been either been settled, or were entirely capable of finding an acceptable solution under the law as it was in 2018.

1.13. The National Government's reforms in the Employment Relations Amendment Act 2014 (2014 No61), represented an overreaction to the complaints of a very few employers and to issues that were resolvable. It was developed in haste and without adequate consultation. We note that the Regulatory Impact Statement for the Bill stated, "Officials have advised they have concerns about developing the proposed amendments to the rest breaks and meal breaks provisions of the principal Act at speed and without adequate consultation".

Comment on the Current Law

1.14. The thrust in the 2015 amendments forcing the dismantlement of rest and meal breaks was flexibility and that rest breaks and meal breaks create burdens and impose administrative costs. This was, 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: that is secondary to the primary role of government, namely to maintain and enforce standards.

1.15. The law as it stands presently purports to provide compensatory measures, in the form of time off at the end of a shift, and this cannot substitute for a meal break or for rest periods. The CTU maintains particular concerns about putting a price on rest breaks and meal breaks.

1.16. The proposition that rest breaks and meal breaks are to be taken at a time agreed between the employee and employer completely fails to recognise the inherent inequality in the employment relationship.

The real meaning of flexibility

1.17. The General Policy Statement in the 2009 Bill states, "relaxing legislative provisions on rest and meal breaks… will move the focus from prescription to flexibility". Such a statement incorrectly framed the debate about rest breaks as one about burdensome regulation hindering some inherently desirable natural dynamic. Such framing is entirely false.

1.18. 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 was no problem in the 2008 law with rest and meal breaks that exceeded the existing law. There was only a problem with breaks that do not meet the standard – the Bill sought the "flexibility" to undermine basic minima.

1.19. 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 was 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.

1.20. The Regulatory Impact Statement for that Bill stated that the then 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".

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

1.22. The Regulatory Impact Statement also stated that the then 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.

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

<u>The danger of allowing employers to impose breaks</u>

1.24. The dismantling of rest and meal breaks was contrary to the principle of good faith in employment relations and indifferent to the unequal power dynamic in the employment relationship.

1.25. Clause 3 of the ER Act 2000 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".

1.26. The 2015 amendments, in principle, provide that rest and meal breaks will be taken at times agreed between employee and employer. But s 69ZE of the Act states, "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".

1.27. 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 that provision enacted.

1.28. 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.

1.29. 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.

1.30. 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".

1.31. In the absence of agreement the employee's only protection is that the imposition by an employer should be "reasonable", with such protection very limited.

1.32. But that limited protection is further undermined by the next 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."

1.33. 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".

1.34. The law as it stands has resulted 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 ER Act 2000 will be undermined.

<u>The real meaning of compensatory measures</u>

1.35. The General Policy Statement in the 2009 Bill, which it is presumed underpinned the 2014 Bill as well, stated 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.

1.36. As obvious as it seems, the tenor of the law 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.

1.37. 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.

1.38. Having established that an employer is not required to provide rest and meal breaks, the Act states (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.

1.39. As it stands the Act 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".

1.40. The CTU opposes the principle of putting a price on breaks.

<u>Legislating for the non-existent exception</u>

1.41. In 2009, when the then Minister first announced her intent to introduce the 2009 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.

1.42. 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".

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

1.44. First, the Minister appeared 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."

1.45. But even then, the exceptions seem perfectly capable of reaching an acceptable solution under what was then the prescribed breaks. 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.

1.46. 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. Far from their problems being the existence of minimum rights, it is that resourcing and staffing levels make it difficult for those workers to take their rest and meal breaks. Minimum standards are a help, not a hindrance, in resolving this. There is every chance that any complaints are a result of employer belligerence and/or failure to adapt wider work practices to accommodate statutory rest breaks.

1.47. This amendments to the rest breaks and meal break provisions in the ER Act were 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 relaxation of rest break and meal break provisions and the introduction of flexibility into the timing of rest breaks and meal breaks to suit service or production continuity stripped away fundamental employment rights of workers.

1.48. 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.

1.49. As a concise and trenchant critique of the problems with the amendments, employment law expert John Hughes's conclusion to his article 'The Proposed Changes to Rest and Meal Breaks' 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 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 ER Act 2000, there is one unusual distinction between the two measures. Unlike the provisions triggering other proposed amendments to the ER 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.

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

Justification for rest and meal breaks

1.51. Rest and meal breaks are necessary to ensure and protect health and safety and ensure worker well-being.

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

1.53. 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.

1.54. 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.

1.55. 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.[56] 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.[57]

1.56. 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.

[56] P Tucker, S Folkard and I Macdonald, "More frequent rest breaks could reduce industrial accidents", Lancet, Vol 361, Issue 9358, 2003, p680
[57] Working Time and Health: Fact Sheet, International Labour Office, Geneva, 2004.

Rest and meal breaks are necessary for reasons of fairness

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

1.58. 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.

1.59. However one of the primary effects of the Employment Contracts Act was a significant reduction in collective bargaining and union membership. And while the ER Act 2000 sought to extensively promote collective bargaining it has only stemmed the decline.

1.60. 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.

Rest and meal breaks are necessary to protect vulnerable workers

1.61. 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.

1.62. 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.

1.63. 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.

1.64. E Tu union reports 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.

ILO Conventions

1.65. 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.

1.66. 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.

The International Context

1.67. When New Zealand removed statutory minimum provisions for rest and meal breaks, it departed from the international mainstream and become part of a minority of countries, particularly in the context of developed countries.

1.68. 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[58]. 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.

1.69. 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.

1.70. 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.

1.71. 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

[58] McCann, D. (2005) Working Time Laws: A Global Perspective, International Labour Office.

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

1.72. Another requirement regarding daily hours is in 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. However, those countries have also implemented legislation to this affect. The EU Working Time Directive "…lays down minimum safety and health requirements for the organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work."

1.73. In Ireland the Organisation of Working Time Act 1997 outlines legislated arrangements for meals and rest breaks. The Act entitles most employees (there are exceptions for the Armed Forces and Police) to a break of 15 minutes after a 4 ½ hour work period and a further break of 15 minutes after a 6 hour work period. There is no entitlement to be paid during these breaks.

1.74. Canada operates a Federal Government system which has seen the introduction of legislation in most jurisdictions that stipulates that an employee is entitled to a meal break of at least one-half hour after each period of five consecutive hours of work. Many jurisdictions provide that the meal break can be suspended during an emergency or unforeseeable event, and that employees may, in certain circumstances, shorten or forego the meal break. Employers are not normally required to pay employees for time spent on a meal break. However, in some jurisdictions, employees who are required to remain at their work station or to be available for work during a meal break must be paid for that period as if work was being performed.

1.75. The labour market in Iceland is for the most part regulated by means of collective bargaining. The social partners therefore play an important role in deciding wages in different sectors of the economy, working time arrangements and various employment rights of workers. Collective agreements cover approximately 88% of the workforce.

1.76. Labour law enacted by the Parliament supports this system by providing the social partners with a legal framework which deals with certain aspects of collective bargaining, the right to strike and dispute resolution. Meal and coffee breaks are regulated in collective agreements. These rules cover the length of these breaks and whether they are paid for or not. The

duration of a meal break varies between sectors of the labour market, ranging from 30 minutes to 1 hour. The lunch break is not counted as working time and is therefore unpaid

1.77. Meal breaks during overtime are considered as working time and are paid for with an overtime rate. The same applies to coffee breaks during over time hours. Workers are usually entitled to two coffee breaks during daytime work - breaks during daytime count as normal working time and are paid for.

1.78. Collective agreements allow for workplace agreements where one or both coffee breaks are skipped or reduced, given that the total working time is reduced by the same measure.

1.79. Work can only be performed during meal and coffee breaks provided that the workers agree. Work during meal or coffee breaks during the day count as overtime and must be paid for as such.

1.80. In Australia, the modern award system provides comprehensive prescription for rest and meal breaks for all employees.