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

to the

Ministry of Business, Innovation & Employment

on

Playing by the rules: Strengthening enforcement of Employment Standards

P O Box 6645

Wellington

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INTRODUCTION

This submission is made on behalf of the 37 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 330,000 members, the CTU is one of the largest democratic organisations in New Zealand.

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

We congratulate the Ministry of Business, Innovation and Employment on an excellent discussion document. Worker exploitation is a scourge on New Zealand society and jeopardises our health, happiness, productivity and reputation as a nation. The case studies in the document are saddening.

We support many of the proposals in the document and look forward to further engagement on these issues.

Our major criticism of the proposed approach is the failure of the Government to recognise the protective role that unions play in relation to workers' rights and employment standards. The sustained attacks on the trade union movement by this Government are counterproductive to the goals of reducing worker exploitation and should be halted and reversed.

The CTU has read the submission of our affiliate, the Service and Food Workers Union- Nga Ringa Tota. We endorse and support the comments made in their submission.

ENFORCING EMPLOYMENT STANDARDS – THE PROBLEM

1. How widespread do you think the problem of non-compliance with employment standards is? What types of non-compliance are you aware of (ie not receiving the minimum wage, not having an employment agreement, not receiving entitlements relating to annual holidays/public holidays/sick leave/bereavement leave/parental leave, illegal deductions from wages)?

1.1. Non-compliance with employment standards (particularly deliberate non-compliance) is often hidden and difficult to measure. The research shows that many of the groups who are disproportionately represented in the statistics around employment standards have poor knowledge of their employment rights. For example:

- Children and young persons are likely to have poor understanding of their employment rights. In surveying 11-15 year olds in work, Gasson et al. (2003) found that only 15% were aware of any employment rights at all while 40% did not know and a third avoided the question. A further 8% confused rights with role responsibilities.
- We agree with the discussion document that migrant workers appear particularly vulnerable to exploitation. As Yuan, Cain, and Spoonley (2014) note, migrant workers who do not speak English face particular issues of exploitation.
- Temporary workers have a poorer grasp of their entitlements than permanent workers. As Dixon (2009) noted, temporary workers were much less to be aware that they had a paid leave entitlement or what that entitlement was. Dixon's survey results found that 26% of temporary workers said they had no leave entitlement and 15% either did not know what leave entitlement they had or believed their leave entitlement was less than the statutory maximum.

1.2. Migrant workers, young people and temporary workers are large parts of the New Zealand workforce. It is likely that other disproportionately

disadvantaged groups (such as those listed in *Playing by the Rules* at 14) face similar knowledge barriers. This means that breaches of minimum entitlements are likely to be systemically underreported in survey questions such as those in the *Survey of Working Life* unless these questions and the sampling for the survey are very carefully constructed.

1.3. Direct data collated through proactive inspections by the Labour Inspectorate is likely to indicate the real scope of the problem better than survey data or self-reporting. This is why it is so concerning to see, for example, a media release from MBIE (28 April 2014) that almost three-quarters of (31 of 44) dairy farms visited between December 2013 and April 2014 were in breach of minimum employment standards. That is an epidemic of law-breaking at the expense of New Zealand workers.

1.4. All of the breaches of minimum standards listed in the question are prevalent in New Zealand workplaces. We believe that the most prevalent breaches of concern:

- the requirement to have a written employment agreement;
- the requirement to keep proper wage and time records;
- the requirement to pay the minimum wage for all time worked;
- payment for annual leave and public holidays;
- disguised employment relationships (such as ostensible contractor relationships that are in reality employment relationships); and
- false fixed term or casual employment agreements.

1.5. By way of examples of these breaches, we note media stories, case law and research findings in relation to specific groups such as migrants, agricultural workers, and schoolchildren below in our replies to questions 6 and 7 below.

2. Why do you think some employers do not comply with employment standards?

2.1. The chances of being caught are currently very low for many employers and the consequences of being found guilty are also minimal. Sad to say, given the current system it appears that for many employers choosing to breach the law is a rational economic decision to maximise their profits. It is a logical extension of the low wage business model which is prevalent in New Zealand and particularly in some sectors.

2.2. One of the most significant gaps in the current employment standards system is the capacity of labour inspectors and other actors in the system to enforcement minimum employment standards.

2.3. New Zealand has extremely low staffing levels for the Labour Inspectorate. We acknowledge that a few additional staff have recently been recruited but it is far too little given the scale of the issues and international comparisons.

2.4. We are aware that the Labour Inspectorate has decided to "deprioritise" (which we read as "discontinue") certain elements of its mandate (such as enforcement of Easter shop trading laws, provision of education, and proactive investigation of employers outside of targeted sectors). A regulator deciding which aspects of the law it can afford to enforce is farcical and a significant signal to poor employers. Some degree of targeting of efforts will always be necessary, but with the low staffing level of the inspectorate and the clear signals that certain areas will essentially be left alone, poor employers are incentivised not only to break the existing rules but also to agitate for rules to be repealed and against new and better standards on the grounds that they are impractical because they cannot be enforced.

2.5. The International Labour Organisation ('ILO') has attempted to benchmark an adequate number of labour inspectors. In 2006, the Governing Body of the ILO prepared a useful paper for the International Labour Conference entitled 'Strategies and practice for labour inspection.'

2.6. In relation to the question of resourcing the report notes at [13]:

> Article 10 of Convention No. 81 [on Labour Inspection, ratified by New Zealand] calls for a "sufficient number" of inspectors to do the work required. As each country assigns different priorities of enforcement to its inspectors, there is no official definition for a "sufficient" number of inspectors. Amongst the factors that need to be taken into account are the number and size of establishments and the total size of the workforce. No single measure is sufficient but in many countries the available data sources are weak. The number of inspectors per worker is currently the only internationally comparable indicator available. In its policy and technical advisory services, the ILO has taken as reasonable benchmarks that the number of labour inspectors in relation to workers should approach: 1/10,000 in industrial market economies; 1/15,000 in industrializing economies; 1/20,000 in transition economies; and 1/40,000 in less developed countries.

2.7. Given there are approximately 40 labour inspectors employed in New Zealand for a working population of 2,195,100[1] it appears at first glance that our ratio is desperately out of step at 1/54,900.

2.8. However, the definition of 'labour inspector' is not consistent between countries and the ILO role encompasses both employment standards and occupational health and safety inspection. Include the 110 health and safety inspectors and the ratio falls to 1/14,600. New Zealand does not meet the ILO benchmark for an industrialised country but it is not as dire as it initially appears.

2.9. Splitting the labour inspection and occupational safety functions creates significant challenges, however, particularly where there are nearly three times as many health and safety inspectors as labour inspectors and the two roles have separate remits and powers. A health and safety inspector visiting a workplace will not check for breaches of employment standards and vice-versa for labour inspectors. We explore this issue in greater depth in our reply to question 24 below.

2.10. With specialisation comes the need for additional resource. Australia also maintains separate inspectorates for labour standards and occupational health. By way of comparison, Australia employs more than six hundred Fair Work Inspectors[2] for a workforce of 11,636,000.[3] The ratio of 1 Fair Work

[1] Statistics New Zealand (2014), counting employees and self-employed.
[2] See Fair Work Ombudsman (2012)
[3] Australian Bureau of Statistics (2014

Inspector per 19,390 workers is nearly three times greater than New Zealand's.

2.11. In addition, the high levels of exploitation and breaches of employment law that have motivated this review justify a higher proportionate number of inspectors, at least until breaches have been brought down to level that is manageable with international benchmark ratios.

2.12. We recommend that the number of labour inspectors should be immediately doubled to 80 and over the next three years raised to 110 labour inspectors (equal to the current number of health and safety inspectors). This additional resource would have a significant effect on issues of worker exploitation and allow the Labour Inspectorate to carry out its full mandate effectively.

Unions

2.13. We support moves to make labour inspectors more effective and to create stronger disincentives for breaches of minimum employment standards. However, it is typical of this Government's peculiarly split personality on employment relations that it should show some intention to do this at the same time as it directly attacks the ability of unions to protect workers from exploitation.

2.14. Unions offer expert advice and representation to their members, and do so in a much more timely fashion than the Labour Inspectorate.

2.15. It is no coincidence that the three industry groups which between them made up more than half of the employment standards issues dealt with by labour inspectors (accommodation and food services; agriculture, forestry and fishing; retail trade) are among the least unionised industries in New Zealand.

2.16. There are (at least) three potential reasons for this apparent correlation. First, unions educate their members on employment rights through meetings, training and union information.

2.17. Second, unions pick up cases that would otherwise have been referred to the Labour Inspectorate. Unions and workers do not have the limited mandate of labour inspectors to only remedy breaches of the minimum code. Unions and workers can press claims for issues such as unjustified dismissal, unjustified action causing disadvantage, and discrimination.

2.18. Third, workers on collective agreements are much less likely to have entitlements below the statutory minima. There is a proven 'union wage' premium and union negotiators will not agree collective agreements below the legal 'floor.'

2.19. Industries with active unions are therefore less likely to face exploitative practices.

2.20. Despite the value of unions' role in this sphere, the Government has proceeded with changes to employment law that make it more difficult for workers to speak up or unions to assist workers including:

- The introduction of 90-day "dismissal at will" trial periods in 2008 and their extension in 2010;
- The introduction of a requirement for employer consent to union workplace access in 2010. This allows employers to hide exploitation;
- The weakening of justification needed by employers to dismiss workers (also from 2010).

2.21. Changes proposed under the Employment Relations Amendment Bill currently before the House would also mean that:

- The statutory right to meal and rest breaks will be removed and replaced by loosely-defined compensatory measures.
- Employees in industries deemed most vulnerable (cleaning and catering along with orderly and laundry services in particular industries) will lose protections against having their conditions ratcheted down or loss of employment in certain circumstances.

- Unions' ability to negotiate collective agreements will be weakened resulting in fewer collective agreements, more legal action and less resource put into working with un-unionised sites and new workers.

2.22. If the Government is serious about the protection of employment standards it will embark upon a programme of strengthening and extending the role and ability of unions to protect basic employment standards.

2.23. This should include the repeal of legislation hindering unions' ability to represent and assist workers.

2.24. The inspectorate should also enforce the right of workers to belong to a union, and not to suffer intimidation or disadvantage from employers as a consequence of taking steps to join or remain in a union.

3. Generally speaking, what do you consider are the main impacts of not complying with employment standards?

3.1. The discussion document sets out the major reasons why non-compliance with employment standards has consequences for the well-being of workers affected (and their families), consequences for the New Zealand labour market and respect for the rule of law. We agree with the discussion paper's analysis of the main impacts.

3.2. We would add that the widespread breaches of employment standards are a consequence of the prevalence in several sectors of the economy of business models that rely on driving down the cost of labour.

3.3. Competition on labour costs often comes at the expense of long term productivity and skills development – the 'low wage, low skill, low productivity' equilibrium. The causes for this are multifaceted but notably include issues of management competence, particularly with regard to personnel management. We explore these issues in depth in Section 1 of

Part 1 of our submission on the 2013 Employment Relations Amendment Bill and refer you to our comments there.[4]

4. As an employee, does non-compliance with employment standards have an impact on you? If so, how?

4.1. Little if any New Zealand research has been carried out on the effects of breaches of employment standards on the workers (and their families) who suffer them.

4.2. This is a disappointing gap given that the workers are clearly identified by (for example) labour inspection, news stories (such as the examples given above) and cases bought through the Employment Mediation Service, Employment Relations Authority and the Employment Court. We recommend that the Ministry of Business, Innovation and Employment undertakes research to understand the effects of breaches of employment standards on these workers (from the minor to the extreme). This form of victim impact research would ideally ultimately be part of consideration during sentencing or assessment of penalties by the Employment Relations Authority or Court.

4.3. We discuss evidence of breach of employment standards below in the agriculture and forestry sectors. As the Independent Forestry Safety Review Panel comments below at [6.5] it seems probable that breaches of employment standards may be linked to poorer health and safety outcomes.

[4] http://union.org.nz/sites/union.org.nz/files/Employment-Relations-Amendment-Bill-Main-Sub.pdf

5. As an employer, does non-compliance with employment standards affect you or your industry? If so, how?

6. Is non-compliance with employment standards a bigger issue in some industries? If so, which ones, and why?

6.1. We use agricultural and forestry workers as an example below. These industries have been the subject of recent study but we suspect widespread breaches of employment standards in other industries also (such as hospitality and retail trade). The discussion below is by way of example therefore.

Agricultural and forestry workers

6.2. As the results of the Labour Inspectorate's visits to 44 dairy farms suggest, compliance levels with basic employment standards in agriculture appear very low.

6.3. Unattractive working conditions, very long hours and common breaches of the minimum code have led industries such as dairy farming to an increasing reliance on migrant labour. Tipples, Trafford and Callister (2010) note at 6:

> Dairy farming is often seen by young people as hard, dirty work with long, unsociable hours. Wilson & Tipples found the dairy farmers/dairy farm worker population worked longer hours than the New Zealand working population; 40 percent of employees, 45 percent of employers and 49 percent of those self-employed without employees worked over 60 hours per week compared to 10 percent of the total New Zealand working population working more than 60 hours per week. (Wilson & Tipples, 2008). Certainly, long working hours are an issue. Managers describe working days of 12-16 hours (Trafford, 2010)… [These hours have] implications for worker's social interactions, quality of life and health and welfare (Johnston, 2010). In addition to the long working days, rosters are typically long. They are routinely 11 days on and 3 days off or 12 on and four off (Pangborn, 2010). These factors led a Caring Dairying project brief (2010) to suggest that many large dairy farms are not farming in a socially responsible way. Their 2009 survey of large herd practice revealed poor standards of management, high staff turnover, poor staff training, poor worker understanding of the basics of farming and low animal care status.

6.4. Callister and Tipples (2010) note at 12 regarding wages that:

> When the long hours worked by dairy workers are taken into consideration, they are very low at an average level. … [O]nly 39.4 percent of farmers record staff hours, leaving considerable scope for paying an hourly rate of pay below the minimum hourly rate of pay set for a normal 40 hour week (Minimum Wages Act 1983).

6.5. Given that many of the same issues are present in forestry as agriculture we would be unsurprised if labour inspection uncovered a similar picture of non-compliant employers. The Independent Forestry Safety Review Panel (2014) commented at 62 that:

> Many forestry employers and principals are well versed in and uphold minimum working conditions in both their written agreements and contracts and on the forest block itself. However, the Review Panel has heard feedback that there are some who appear to have a lack of understanding about minimum conditions and the provisions of the Employment Relations Act 2000 and other laws that affect working conditions. It appears that some stakeholders in the forestry sector lack the basic business skills to ensure all conditions are met. A number of the Coroners' reports suggest that such employers and principals are over-represented in forest fatalities. The Review Panel is also aware that there is currently little work carried out by WorkSafe New Zealand (WorkSafe) and the Ministry of Business, Innovations and Employment (MBIE) labour inspectorate to ensure compliance with employment legislation on the forest block. Recent work in the dairy sector has shown very poor compliance in this regard and the Review Panel does not believe that small-to-medium enterprises (SMEs) in other rural industries are any better.
>
> The Review Panel is concerned that workers may not understand their minimum employment standards and entitlements. This means they may not recognise when those standards are not being met. They may not know their rights to redress and those who do might choose not to exercise those rights due to the culture on the forest block. … It believes that the lack of understanding and upholding of minimum employment standards will be contributing to the number of forestry workers operating in unsafe working conditions

6.6. Where vulnerable workers (such as migrants or young people) are placed in industries with poor compliance with minimum employment entitlements, the results can be disastrous. For example, Anderson, Jamieson and Naidu (2012) looked at work experiences of 93 international students and recent graduates on job search visas working in the horticultural industry in Hawkes Bay. All 93 students or recent graduates surveyed, mainly from India, were being paid below the minimum wage. Just under half the workers had no formal written employment agreement. Similarly Anderson and Naidu (2010) found in another study of 74 university students working in the hospitality, service and agriculture sectors that 38 per cent were paid below the minimum wage. 75% of those working in the agriculture and horticulture sector reported being paid below the minimum wage.

7. Is non-compliance with employment standards a bigger issue for some groups of workers? If so which ones, and why?

7.1. We comment below specifically on breaches relating to migrant workers and schoolchildren. We do not think that these are the only groups facing particular issues of non-compliance but more research has been done on these groups than others.

Migrant workers

7.2. Despite the challenges of detection, a long list of recent high-profile cases indicates that migrant exploitation is a major problem in New Zealand.[5]

7.3. Case law provides examples of extreme exploitation of migrants. James (2011) reviewed a number of recent Employment Relations Authority determinations. She notes that:

> Cases on this topic reveal some common themes. First, most of the cases considered have involved employees working long hours for low wages. For example, in *Singh v Gunveer Enterprises Ltd* [2011] NZERA Wellington 155, Mr Singh, an experienced Indian chef, was paid $50-$100 per week and was required to work both lunch and dinner shifts seven days per week. Similarly, in *Chen v Aaron & Coma Limited* [2011] NZERA Auckland 373, Mr Chen was not paid the minimum wage and was required to work 10 or 11 hours a day, seven days per week.
>
> Another common theme noted in the cases is employees who receive little or no time off and who are not paid their annual, public, or alternative holiday entitlements. In *Singh v Gunveer,* Mr Singh worked every day for nine months (except for Christmas Day). In *Kumar v Jays Kitchens and Shop Fitters PVT Ltd* [2011] NZERA Auckland 361 and Tan v Wong (Employment Relations Authority, Christchurch CA189A/10, 6

[5] Examples include:

- One News (2 February 2012) 'Slave labour probe in Central Auckland' *One News* http://tvnz.co.nz/national-news/slave-labour-probe-in-central-auckland-4709863
- One News (26 May 2012) 'Employers exploiting migrant workers' *One News* http://tvnz.co.nz/national-news/employers-exploiting-migrant-workers-4901118
- Tan, L (12 February 2013) '$2 an hour 'common' for migrants' *New Zealand Herald*: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10864817
- Hollingworth, A (21 December 2013) 'South Auckland liquor shop accused of exploitation' *3 News*: http://www.3news.co.nz/South-Auckland-liquor-shop-accused-of-exploitation/tabid/423/articleID/326038/Default.aspx
- Lynch, J (23 December 2013) 'Migrant exploitation 'rife' in restaurants' *Waikato Times*: http://www.stuff.co.nz/national/9546069/Migrant-exploitation-rife-in-restaurants
- Meier, C (7 January 2014) 'Migrant workers ripped off in city rebuild, union claims' *Dominion Post*: http://www.stuff.co.nz/business/industries/9581896/Migrant-workers-ripped-off-in-city-rebuild-union-claims

> October 2010, Helen Doyle), the employees were not paid their annual holidays or alternative holidays, and did not receive time and a half for working on public holidays.
>
> Mistreatment, threats, and unjustified dismissal are also disturbingly common occurrences in these cases. In *Singh v Gunveer*, it was alleged that the employer had doctored Mr Singh's income records by copying Mr Singh's signature from another document. Mr Singh's employer also confiscated his passport for the entire course of his employment. When Mr Singh raised these issues with his employer, he was told there was no more work for him and that if he left or complained he would be accused of stealing from the restaurant.

7.4. The evidence from the Labour Inspectorate presented in *Playing by the Rules* that suggests high levels of migrant exploitation is therefore unsurprising.

7.5. As Yuan, Cain, and Spoonley, (2014) note several groups of migrants are particularly vulnerable to exploitation in the workplace:

- migrants who are not native English speakers
- migrants who are low-skilled or unskilled workers
- migrants from low-income source countries
- remittance workers
- women (especially those in the sex industry or domestic service)
- young adults (including international students and working holidaymakers)
- workers with precarious migrant status and
- undocumented or trafficked labourers.

Schoolchildren

7.6. O'Neill (2010) helpfully summarises the research around schoolchildren's minimum employment standards (while acknowledging a need for further research). Among other things he notes at 35-38:

> The most useful insight into schoolchildren's employment agreements comes from Pugh's (2007) survey of over 3,000 secondary students in the Taranaki region, which found that half of student workers said they had a written employment agreement (49%) while half did not (49%), with 2% not knowing. Given it is a legal requirement to have one, this is a concerning outcome. …

> [An included graph] represents the proportion of schoolchildren in main industry groups with an employment agreement as identified by Pugh (2007; 2009 analysis). …[T]he main employers found in the Pugh (2007) study are retail (31% [of schoolchildren have written employment agreements]), hospitality-related accommodation, food and restaurants (26%) and agriculture, forestry and fishing (15%), followed at some distance by other services (6%) and information media (4%).
> …
> Gasson et al. (2003) found that most 11–15-year-olds were not entitled to receive sick pay (60%) in their main job or holiday pay (75%).

7.7. While there is no minimum wage for children under the age of 16, studies cited by O'Neill (2010) found between 4-11% of schoolchildren earned less than $2.00 per hour (less than a third of the youth minimum wage at the time).

8. Do you have any further comments on the nature and extent of the problems associated with non-compliance with employment standards?

Triangular employment relationships

8.1. A major problem for workers in triangular employment relationship is the enforcement of actions to enforce minimum employment standards (and other causes of action) where the responsibility for their employment is split between a host company that controls their work day to day and a supply company which they have a direct contract with.

8.2. As *Playing by the Rules* identifies, New Zealand has very low levels of protection for workers within so-called 'triangular employment relationships.' According to OECD (2013) New Zealand has the lowest level of temp agency regulation and protection for agency workers in the OECD. A related problem is the use of related companies and the corporate veil to minimise liabilities.

8.3. Current legal protections around 'deemed' employment relationships are ineffectual. We recommend the consideration of a mechanism such as that contained in the Employment Relations (Triangular Employment)

Amendment Bill,[6] a Labour Party members' bill currently in the ballot. That Bill contains a useful mechanism for the joinder of personal grievance claims.

8.4. Under the Bill, two new definitions are inserted into the relevant section of the Employment Relations Act 2000:

> **primary employer**, for the purposes of sections 56(1)(c) and 102A, means any person who employs a person to do any work for hire or reward under a contract of service.
>
> **secondary employer**, for the purposes of sections 56(1)(c) and 102A, means any person who enters into any contract or other arrangement with a primary employer whereby the employee of that primary employer performs work for the benefit of that person and where that person exercises or is entitled to exercise control or direction over the employee equivalent or substantially equivalent to that which would normally be expected of an employer.

8.5. Additionally a new s 102A would be inserted into the Employment Relations Act 2000. As set out in the Bill this relates to personal greivances but could be expanded to include breaches of other minimum standards.

> **102A Joinder of parties to personal grievance**
>
> (1) Where an employee employed by a primary employer raises a personal grievance against that employer the employee may, if the grievance has also been raised with any secondary employer of that employee, apply to the Authority or court to join that secondary employer to the grievance.
>
> (2) For the subsequent determination of a personal grievance the actions of any secondary employer are deemed to be the actions of the primary employer.
>
> (3) Any secondary employer joined under this section is jointly liable with the primary employer for any remedies awarded to the employee unless the Authority or court makes an order determining the proportion of any award to be made by each party.
>
> (4) The Authority or court must grant leave if—
>
> (a) the actions of the secondary employer have resulted in or contributed to the grounds of a personal grievance as defined in section 103; and
>
> (b) it considers it just to do so.

[6] http://www.parliament.nz/en-nz/pb/legislation/proposed-bills/50HOH_MEMBILL202_1/employment-relations-triangular-employment-amendment

SANCTIONS FOR BREACHES OF EMPLOYMENT STANDARDS

9. What is working well with the current sanctions regime? What is not working well?

9.1. The major positive feature of the current sanctions regime is the ability for workers and their representatives to access specialist expert mediation and adjudication at relatively low cost compared to the general court system. The significant increase to Employment Court fees and mooted changes to the Employment Mediation Service threaten this.

9.2. As the discussion document identifies there are significant issues of appropriateness of procedure in some cases (such as mediation for breach of minimum employment standards).

9.3. The 'low' cost of access to the Employment Relations Authority is relative to the high cost of accessing the general courts, however and must be considered in light of the low quantum of available remedies and penalties.

9.4. Many employment disputes (including those involving breaches of employment standards) are often simply uneconomic for workers and their representatives to take because the projected cost recovery (including damages, costs awards and penalties) is significant outweighed by issues such as court fees, legal costs and disbursements. This is a significant issue throughout the employment law jurisdiction. It is incumbent on the regulators to design a system where there is access to justice for all material breaches of the law.

9.5. We are concerned that the range and quantum of remedies (including penalties) available for breaches of employment standards lags considerably behind employment standards jurisdictions in other countries and comparable parallel legal jurisdictions in New Zealand. We consider employment standards alongside current and proposed health and safety law in our submission given the close links and overlap between these areas of law.

9.6. As we discuss below in our replies to questions 11 and 12, we agree that the penalties under the various pieces of minimum code legislation are niggardly, inconsistently applied and unfit for purpose. We propose below that these are consolidated into a new consistent and effective sanctions regime. The logical legislative home for this regime is the Employment Relations Act 2000 with cross references from other legislation.

9.7. We agree with *Playing by the Rules* that a remedy need not always be sought through the Employment Relations Authority or Employment Court and support proposals for labour inspectors to have more power to make certain determinations (subject to appeal).

10. Should we introduce performance disclosure measures, such as naming and shaming, for non-compliant employers? If so, what kinds of measures should be used, and for what kinds of breaches?

10.1. We strongly support giving the Employment Relations Authority and Employment Court these powers.

10.2. The Government proposes to introduce similar 'adverse publicity orders' for health and safety offences under cl 171 of the Health and Safety Reform Bill as follows:

> **171 Adverse publicity orders**
>
> (1) A court may make an order (an adverse publicity order) requiring an offender—
>
> (a) to take either or both of the following actions within the period specified in the order:
>
> (i) to publicise, in the way specified in the order, the offence, its consequences, the penalty imposed, and any other related matter:
>
> (ii) to notify a specified person or specified class of persons, in the way specified in the order, of the offence, its consequences, the penalty imposed, and any other related matter; and
>
> (b) to give the regulator, within 7 days after the end of the period specified in the order, evidence that the action or actions have been taken by the offender in accordance with the order.
>
> (2) The court may make an adverse publicity order on its own initiative or on the application of the person prosecuting the offence.

> (3) If the offender fails to give evidence to the regulator in accordance with subsection (1)(b), the regulator, or a person authorised in writing by the regulator, may take the action or actions specified in the order.
>
> (4) However, the regulator may apply to the court for an order authorising the regulator, or a person authorised in writing by the regulator, to take the action or actions specified in the order if—
>
> > (a) the offender gives evidence to the regulator in accordance with subsection (1)(b); and
> >
> > (b) despite that evidence, the regulator is not satisfied that the offender has taken the action or actions specified in the order in accordance with the order.
>
> (5) If the court makes an order under subsection (1), the regulator may recover as a debt due to the regulator in any court of competent jurisdiction any reasonable expenses incurred in taking an action under subsection (3) or (4).

10.3. We support the introduction of a similar power for the Employment Relations Authority and Employment Court. The power must be discretionary for the Authority or Court. There is no good reason, however, to restrict the ability to apply for such orders to the regulator. Adverse publicity orders should be available as a discretionary remedy for workers and their representatives as well.

10.4. This power should be available across the board for both breaches of minimum employment standards and other breaches of employment law. As with the proposed health and safety law, the Courts should be left to develop jurisprudence as to when and how this discretionary power is exercised.

10.5. A further useful tool would be a linkage of breaches of employment standards (and breaches of health and safety law) with company records and, where appropriate, individual director records in the Companies Register and related databases for charitable trusts, partnerships and other business entities.

10.6. Given the relative ease of shutting down companies, we suggest that officers of employers be given duties and responsibilities analogous to those proposed under the Health and Safety Reform Bill. We discuss this proposal further in relation to Question 17 below.

10.7. This information could also form a key part of a responsible procurement initiative.

11. Should we extend the range of financial penalties available for breaches of the legislation? If so, what penalties do you think are appropriate?

11.1. We strongly endorse MBIE's analysis that "available sanctions and penalties do not provide a sufficient deterrent, particularly for serious breaches of employment standards." The average penalty cited of $2,826.14 is much too low to act as an adequate disincentive to poor employer behaviour.

11.2. A recent example of the inadequacy of the current system is provided by the case of *Labour Inspector (Brown) v Su t/a Kippers East* [2014] NZERA Wellington 68. In that case, an employer failed to provide wage and time records of employment agreements for his staff when given a compliance notice by the labour inspector. The Employment Relations Authority levied a penalty of $5,000 for failure to produce the requested records. However, given that the requested records cover 3 employees per shift over five years, it is very likely that the employer saved tens of thousands of dollars by failing to comply with employment standards and refusing to cooperate with the labour inspector. This makes a mockery of the enforcement system.

11.3. It is informative to compare this situation with the panoply of penalties available to the Inland Revenue Department. Many of these penalties are set with reference to the quantum of tax avoided unlawfully and can go up to 125% of that sum along with additional penalties for obstruction (up to 25% of the sum) and various other offences.[7]

[7] See http://www.ird.govt.nz/how-to/debt/penalties/ or the Tax Administration Act 1994 for further information.

11.4. Another instructive comparison may be drawn between penalties for breach of employment standards and breaches of health and safety standards.[8]

Penalty for breach of employment standards	**Maximum sentence for breach of health and safety standards**
Breaches of Employment Relations Act 2000, Minimum Wage Act 1983, Wages Protection Act 1983 or Holidays Act 2003 are subject to a maximum penalty of $10,000 individual or $20,000 for a company. Breaches of Parental Leave and Employment Protection Act 1987 are not subject to a penalty (the penalty provision s 69 repealed in 1991)	Under s 49 Health and Safety in Employment Act 1992 a person who knowingly takes action (or omits to take action to prevent) likely to cause serious harm is liable on conviction to two year's prison and up to a $500,000 fine. Under s 50 Health and Safety in Employment Act 1992 all other offences are strict liability (no proof of intention required) and carry a maximum sentence of up to a $250,000 fine. The exception is failure to warn visitors to the workplace of a known significant hazard (s 16(3)). This carries a fine of $10,000.

11.5. Under the Health and Safety Reform Bill currently being considered by the Transport and Industrial Relations Select Committee, it is proposed that sentences would come into line with those in Australia. If enacted, the maximum sentence for reckless conduct risking death or serious injury (the equivalent of existing s 49) would rise to $3,000,000 for corporations or $600,000 and 5 year's prison for individuals.[9] There is a new intermediate offence and relatively less serious offences would have a maximum sentence of $500,000 for corporations and $100,000 for individuals.

[8] It is important to draw a distinction between remedies generally and penalties. Remedies are granted to put the aggrieved party in the position they would have been had the breach not occurred: examples include awards of lost wages or other contractual or statutory benefits (such as money required to 'top up' wages to the minimum wage) along with payment for stress, hurt and humiliation. Penalties are designed to punish and disincentivise bad employer (and worker and union) behaviour: They are awarded at the discretion of the court and usually payable directly to the Crown, not the claimant.

[9] The Australian model delineate between individuals who are officers or 'Persons in Control of a Business or Undertaking' (PCBU) on one hand and other individuals (such as workers) on the other. Maximum sentences for the latter group are lower but not comparable to penalties for employers (who will almost always be officers of PCBUs).

11.6. Risk of death or serious injury is certainly worse than even very serious breaches of employment standards (although many workers have been driven to self-harm or suicide). We question however whether it is twenty-five or fifty times as bad (or under the new rules up to three hundred times worse).

11.7. The penalties for breach of employment standards should be immediately raised by amendment to the core minimum code enactments to provide a maximum penalty of $100,000 for a corporation or $50,000 for an individual. Further, larger fines should be available for sustained and substantial breaches as they are in France and Australia.

11.8. Anecdotal feedback from union lawyers and the Labour Inspectorate also suggests that there is no consistent approach by the Members of the Employment Relations Authority to the award of penalties. Some felt that the determinations of the Authority on the question of penalties were idiosyncratic.

11.9. Again, an instructive comparison may be drawn with health and safety law. Through case law[10] the High Court has laid down detailed guidance for the District Court as to sentencing criteria and guidelines. Detailed guidance on the application of penalties for breaches of employment standards is long overdue.

11.10. We submit that MBIE and the Employment Court should be tasked with developing and promulgating these guidelines in consultation with the social partners and key stakeholder groups. Guidance may also be developed through case law but this is inherently slower and the principle of *stare decisis* means that not all aspects of a higher court's decision will be necessarily binding on the lower courts and tribunals.

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[10] See *Department of Labour v de Spa and Co Ltd* [1994] 1 ERNZ 339 and more recently *Department of Labour v Hanham & Philp Contractors Limited Anors* [2008] 6 NZELR 79.

11.11. The Government should use the powers it has under the Sentencing Council Act 2007 to constitute a Sentencing Council. The Sentencing Council could then authoritatively provide guidance on appropriate levels of penalties.

12. Should other parties be able to seek penalties directly from the Employment Relations Authority, without needing to go through a labour inspector? If so, in what circumstances should this apply?

12.1. Under the Employment Relations Act 2000, workers may seek penalties for a breach of the Act along with damages (s 135(1)). Penalties may therefore be sought for unjustified dismissal, unjustified disadvantage, breach of good faith, failure to provide a written employment agreement and many other breaches. Similarly, penalties under the Wages Protection Act 1983 may be sought by either the worker concerned or a labour inspector (s 13).

12.2. The question of whether a worker may seek a penalty under the Minimum Wage Act 1983 was considered in *Yu v Da Hua Supermarket Central Ltd* [2013] NZERA Auckland 344. The Authority found that Da Hua paid Ms Yu only $8 per hour (instead of the adult minimum wage of $13.50 at the time). Among other remedies, Ms Yu sought a penalty (paid to the Crown) of $1,000 for breach of the Minimum Wage Act 1983. In relation to this penalty, Member Anderson found at [18] and [19]:

> [18] Finally, there is the matter of the breach of the Minimum Wage Act 1983 for which a penalty is sought. Section 10 of this Act provides in regard to "**Penalties and jurisdiction**":
>
> > *Every person who makes default in the full payment of any wages payable by that person under this Act and every person who fails to otherwise comply with the requirements of this Act is liable to a penalty recoverable by a Labour Inspector, and imposed by the Employment Relations Authority, under the Employment Relations Act 2000.*
>
> [19] Therefore, while I am satisfied that there has been a breach of the Minimum Wage Act, for a penalty to be recovered for the breach, an action must be brought to the Authority by a Labour Inspector hence the Authority does not have the jurisdiction to impose a penalty without proceedings being commenced by a Labour Inspector.

12.3. Sections 75 and 76 of the Holidays Act 2003 state (*inter alia*):

> **75 Penalty for non-compliance**
>
> (1) An employer who fails to comply with any of the provisions listed in subsection (2) is liable,—
>
> (a) if the employer is an individual, to a penalty not exceeding $10,000:
>
> (b) if the employer is a company or other body corporate, to a penalty not exceeding $20,000.
>
> (2) [Lists sections relating to: a worker's entitlement to and payment for annual holidays, public holidays, sick leave, bereavement leave and record keeping – essentially the whole gamut of rights under Holidays Act 2003.]
>
> **76 Proceedings by Labour Inspector for penalty**
>
> (1) A Labour Inspector is the only person who may bring an action in the Authority against an employer to recover a penalty under section 75….

12.4. The penalty provisions in the Parental Leave in Employment Act 1992 were repealed in 1991.

12.5. A two tier system for penalties is illogical. It is concerning that two of the three most significant pieces of minimum code legislation (the Holidays Act 2003 and the Minimum Wage Act 1983) do not allow the Employment Relations Authority to sanction sometimes despicable employer behaviour if a worker applies rather than a Labour Inspector.

12.6. The various elements of minimum code legislation should be amended to create a consistent and logical framework that allows workers to ask the Employment Relations Authority to levy a penalty for all types of breaches of minimum employment standards along with other breaches such as breach of good faith, unjustified dismissal and other types of personal grievance.

13. Should we introduce measures that would restrict the ability of non-compliant employers to do business? If so, what measures, and in what circumstances?

13.1. Above and beyond our proposal to create a register of previously non-compliant employers, directors and other officers (see [10.4] above and [17.1] and [17.2] below), we support measures to prevent the worst and repeated

offenders from continuing to do business. In particular, bans on directorships and holding of senior office are appropriate.

14. Should we introduce criminal sanctions, including imprisonment, for the most serious offences? If so, for what breaches, and what should the sanctions be?

14.1. We strongly support the introduction of criminal sanctions for the most serious breaches of employment standard. However, considerable policy work is needed to introduce them.

14.2. A useful starting point would be the introduction of an offence of 'exploitation of employees' based on s 351 of the Immigration Act 2009. As amended by the Immigration Amendment Bill (No 2) currently before the House, that Act criminalises the exploitation of unlawful migrant workers and lawful migrant workers on temporary visas. While we recognise the pressing need to protect migrant workers, it is odd and iniquitous that New Zealand workers treated in exactly the same fashion should be given much lesser protections by the Criminal Law.

14.3. Subject to drafting refinements, an offence based on s 351 might look like:

> **351 Exploitation of employees**
>
> (1) Every employer commits an offence against this Act who,—
>
> (a) while allowing an employee to work in the employer's service,—
>
> (i) is responsible for a serious failure to pay to the employee money payable under the Holidays Act 2003; or
>
> (ii) is in serious default under the Minimum Wage Act 1983 in respect of the employee; or
>
> (iii) is responsible for a serious contravention of the Wages Protection Act 1983 in respect of the employee; or
>
> (b) while allowing an employee to work in the employer's service, takes an action with the intention of preventing or hindering the employee from—
>
> (i) leaving the employer's service; or
>
> (ii) leaving New Zealand; or

(iii) ascertaining or seeking his or her entitlements under the law of New Zealand; or

(iv) disclosing to any person the circumstances of his or her work for the employer.

(2) For the purposes of subsection (1)(a), the following are questions of fact:

(a) whether a failure to pay to a person money payable under the Holidays Act 2003 is serious:

(b) whether a default under the Minimum Wage Act 1983 in respect of a person is serious:

(c) whether a contravention of the Wages Protection Act 1983 in respect of a person is serious.

(3) For the purposes of subsection (1)(a), the following matters may be taken into account in deciding whether a failure, default, or contravention is serious:

(a) the amount of money involved:

(b) whether it comprises a single instance or a series of instances:

(c) if it comprises a series of instances,—

(i) how many instances it comprises:

(ii) the period over which they occurred:

(d) whether or not it was intentional:

(e) whether the employer concerned has complied with the record-keeping obligations imposed by the Act concerned:

(f) any other relevant matter.

14.4. This offence should also be punishable by up to seven years imprisonment. The fine level should be lifted considerably: We recommend $500,000 for a corporation and $100,000 for an individual.

15. Could the process for enforcing judgment debts be improved? If so, how?

16. Could more be done to make directors and other officers of a company liable for non-compliance (for example, expanding the applicability of section 234 of the Employment Relations Act)? If yes, then what?

16.1. It is difficult to see the rationale for the restriction of s 234 of the Employment Relations Act 2000 to arrears of minimum wages and holiday pay or to

applications at the suit of a labour inspector only, except perhaps for a weak 'floodgates' argument and a protection of the limited liability status of the company. Asset-stripping and phoenixing constitute deliberate abuse of limited liability.

16.2. We agree therefore that actions for recovery under s 234 should be able to be taken for penalties imposed by the Employment Relations Authority under any of the employment standards enactments.

16.3. We do not understand the rationale for restricting these actions to labour inspectors alone as opposed to workers through their representatives and unions given that this would be a discretionary power of the Employment Relations Authority. We submit that this power should be broadened.

17. Do you have any other suggestions for, or comments on, improving the sanctions regime?

Officers' duty of due diligence

17.1. A useful concept contained in the Health and Safety Reform Bill is that of an officer's duty of due diligence under cl 39. It places a proactive duty on the officers of the company (including directors) to take reasonable steps to ensure that they have up-to-date knowledge of work health and safety matters, the nature and operations of their business, and put in place appropriate systems or procedures ensure that the business complies with its duties under the Bill.

17.2. We suggest that an analogous duty may be valuable under the employment standards framework including duties to take reasonable steps:

- To acquire and keep up-to-date, knowledge of employment standards (compare Health and Safety Reform Bill cl 39(2)(a)); and
- To ensure that the employer has, and implements, processes for complying with any duty or obligation of the employer under the minimum code legislation.

- Penalties for breaches of officers duties?

Other powers of the court

17.3. The Health and Safety Reform Bill contains a number of very useful discretionary remedies (based on those granted to the Australian courts under the Model Work Health and Safety Act). Along with adverse publicity orders, the Court may:

- Make an order for the payment of the regulator's costs in bringing the prosecution (cl 170 of the Bill). This allows the Court to order an offender to pay a sum it thinks "just and reasonable" towards to the costs of prosecution (including the costs of investigation).
- Make an order requiring an offender to undertake a specified project for the general improvement of work health and safety within a specified period. This power could be adapted to the employment standards context relatively easily.

IDENTIFYING AND INVESTIGATING BREACHES OF EMPLOYMENT STANDARDS

18. Should the requirements for record keeping be aligned across the different pieces of employment legislation?

18.1. Yes. It is remarkably odd that these requirements are not aligned given that employers will be required to comply with all three of the Employment Relations Act 2000, the Minimum Wage Act 1983 and the Holidays Act 2003.

18.2. It is an odd loophole that an employer may seemingly escape some of their record-keeping obligations under the Minimum Wage Act 1983 by choosing to record their hours under the Employment Relations Act 2000.

18.3. We support a consultation process with the social partners to determine the key record keeping requirements needed under each of these Acts and to draft legislation that aligns these requirements into one cohesive record.

19. Should employers of low paid salaried and/or piece workers be required to keep accurate time records?

19.1. This requirement is important. Salarisation should not permit employers to pay their low-paid workers less because they are on salary. As Chief Judge Colgan stated in *Law (and others) v Board of Trustees of Victoria House* [2014] NZEmpC 25 at [54]:

> [54] The MW Act exists to provide minimum essential terms and conditions of employment and to avoid the exploitation of employees with little or no bargaining power. It should be interpreted accordingly and not so artificially that it could easily be rendered impotent. The MW Act can hardly be said to create a bonanza of riches for employees covered by it. Those who should justifiably expect its protection should not be turned away from it by the technicality of an employer's choice of an annual salary as the method of remuneration payment.

19.2. Both piece rate and low paid salaried workers require accurate time records to assess compliance with the Minimum Wage Act 1983. According to the Minimum Wage Order, piece rate workers will be assessed as hourly workers for the purposes of assessing the minimum wage.

19.3. It would also be helpful if records for piece rate workers were required to include the number of pieces completed (albeit for their enforcement of contractual rights rather than minimum standards).

20. Do you have any additional suggestions for, or comments on, improving record keeping requirements?

21. Should the range of information that labour inspectors can require from employers be extended? If so, what additional information should they be able to collect?

21.1. We support broadening of the range of information that can be collected from employers by the labour inspectors. We agree that appropriate privacy safeguards should be put in place.

22. Should the powers of labour inspectors to access information be extended? If so, what additional powers should they have?

22.1. We agree with the proposal to allow labour inspectors powers to enter workplace and to seize documents where required.

23. Should the powers of labour inspectors to make binding determinations be extended? If so, in relation to what matters?

23.1. We support the extension of the power of labour inspectors to make binding determinations as discussed in the document.

23.2. In particular, the ability for labour inspectors to determine the employment status of workers is something that we have long advocated for because the need to apply to the Employment Relations Authority is a significant issue of access to justice that prevents many 'disguised' employees from ever challenging their status. It is acknowledged that employment status questions always involve a weighing up of various factors and the answer may be finely balanced. Labour inspectors would need significant training in these tests. The Inland Revenue Department (2011) has created excellent interpretation guideline to determining employment status (see references section for citation).

23.3. Alongside employment status in the wider sense of whether a person is an employee or not, we submit that labour inspectors should be entitled to

determine whether a person is a permanent, fixed term or casual employee and the genuineness of any fixed term.

23.4. A labour inspector should also be empowered to determine what an employees' regular hours are. This information is often misrepresented in employment agreements and sometimes wage and time records. It is critical to determining whether entitlements such as annual leave and the minimum wage are paid correctly.

23.5. It is important that a labour inspector's decision be subject to appeal through the Employment Relations Authority and appellate courts. A useful mechanism under the Health and Safety Reform Bill is to make a number of the inspectors' decisions subject to internal review. We support this provision with the proviso that the review should be by another warranted inspector. It may make sense to implement this system in relation to labour inspector's decisions also.

23.6. An attempt to provide labour inspectors with powers to make some of these determinations was contained in the Employment Relations Amendment Bill (No 3) which was introduced to Parliament in 2008 but discharged by the incoming Government before receiving its first reading. The Bill followed a considerable amount of work by the Department of Labour relating protecting to casual and temporary workers in particular.

23.7. Cl 11 of that Bill added a proposed s 65AAB of the Employment Relations Act 2000 as follows:

> **65AAB Power to determine certain terms and conditions of employment**
> (1) This section applies if an employee and employer cannot agree about 1 or more of the following:
> (a) whether or not the employee is employed for a fixed term:
> (b) whether or not the times the employee is to work are fixed:
> (c) if the employee's times of work are fixed, what the times of work are.
> (2) A Labour Inspector or the Authority may, if requested by the employee or the employer, determine 1 or more of the matters specified in **subsection (1)**.
> (3) In making a determination, a Labour Inspector or the Authority must have regard to the following matters:

(a) any written agreement containing, in whole or in part, the employee's terms and conditions of employment; and
(b) whether, for the purposes of **subsection (1)(a)**, section 66 has been complied with; and
(c) the employee's patterns of work; and
(d) whether the employee works for the employer only when work is available; and
(e) the employer's work rosters or any other method of allocating work; and
(f) the employer's expectations as to whether the employee, when requested, will be available for work; and
(g) any other relevant factors.

(4) In making a determination, the Labour Inspector or the Authority must comply with the principles of natural justice.
(5) For the purposes of **subsection (3)**, a Labour Inspector or the Authority is not to treat as a determining matter any written agreement containing, in whole or in part, the employee's terms and conditions of employment.
(6) A determination by a Labour Inspector or the Authority under this section—
(a) is binding on the employee and employer; and
(b) is to be treated as a term or condition of the employee's terms and conditions of employment and therefore may be varied by subsequent agreement between the employee and employer; but
(c) in the case of a determination by a Labour Inspector, is subject to any determination of the Authority.
(7) In relation to a determination by a Labour Inspector, this section applies despite section 161(1)(a).

23.8. There remains considerable merit in the proposed wording (though it does not deal with the question of employee or contractor).

24. Do you have any additional suggestions for, or comments on, improving the powers of labour inspectors?

24.1. We suggest consideration of the range of powers granted to health and safety inspectors under cl 185 of the Health and Safety Reform Bill as a comparison.

24.2. We recommend that labour inspectors and health and safety inspectors have duties to work in close cooperation with each other because of the frequently close connections between health and safety issues and employment standards issues. Both should have a basic knowledge of each other's area of responsibilities, sufficient to be able to identify warning signs and to collect material information as described in our answer to the next question.

24.3. Two examples may help to illustrate this:

- Under s 10(3) of the Health and Safety in Employment Act 1992 an employer is forbidden from either requiring an employee to provide their own protective clothing or equipment or by giving an employee an allowance instead of providing the equipment. In the labour hire industry it is quite common for employers to require their employees to pay them back for personal protective equipment supplied (effectively an illegal deduction from their pay). These issues span the boundary of health and safety and labour standards.
- According to Callister and Tipples (2010) under 40% of dairy farmers keep required wage and time records for their workers. This is alongside typical high season working hours of 70+, 80+ or even 90+ hours per week and 12 days on: 4 days off working patterns. Long working hours are also a significant issue in forestry. These sorts of extreme hours contribute to agriculture and forestry's exceptionally high serious injury and fatality rates (in 2013 more than half of the accidental workplace deaths recorded by WorkSafe occurred in these two industries).

24.4. In addition to close connection between issues, poor performance in one can be a warning signal of poor performance in the other. Alerts from labour inspectors could help health and safety inspectors more effectively target their efforts and may warn them of impending problems, and vice versa. For example long working hours on an extended basis raises the risk of accident due to fatigue; high worker turnover raises the risk of accidents; poor employment relationships increases the likelihood that the cooperation that is required for good health and safety practices and worker participation in health and safety will be lacking or absent. The same may hold the other way around: poor cooperation in health and safety matters is likely to be a sign of other problems in the workplace; a raised accident rate may indicate problems such as high worker turnover or excessive working hours which in turn are indicators of risk of breach of employment standards. A firm in

financial stress raises risks for both employment standards and health and safety.

25. How could changes to legislation improve information sharing between government agencies for the purpose of improving enforcement of employment standards?

25.1. Both labour inspectors and health and safety inspectors should be empowered to collect information that is relevant to each other's mandates and share this information as a matter of routine. Given the significant crossover between labour inspection and health and safety and the limited resources of each, this is important.

25.2. Consideration should be given to sharing information regarding businesses' financial health and business startup and close down information between agencies as these can provide vital warning signs of increased risk.

26. Do you think that mediators should be able to raise breaches of employment standards with enforcement agencies if these breaches come to their attention in a confidential mediation? If yes, in what circumstances and how could the possible risks to the mediation process be managed?

26.1. There are significant countervailing interests at play here between the value of free and frank discussion as a critical part of mediation against the value of detecting and deterring breaches of employment standards. This is not an easy balance to strike.

26.2. Goldblatt comments in Spiller (2007) at 75 that:

> Confidentiality is a distinguishing feature of the mediation process. The ability to speak freely and honestly assists in transforming a relationship if that is a goal. The ability to make offers, disclosures and even admissions without fear of acknowledging legal liability encourages parties to reach a satisfactory settlement of their justiciable disputes. All in all, the confidential elements of the process are an incentive to attempt resolution through consensual means.

26.3. The Courts have considered confidentiality of employment mediations on several occasions. In *Just Hotel v Jesudhass* [2007] ERNZ 817 (CA), the Court of Appeal said:

> [31] … All communications "for the purposes of the mediation" attract the statutory confidentiality, except possibly (as we discuss later in this Judgment at [41] to [43]) where public policy dictates otherwise….
>
> [33] Documents which are prepared for use in or in connection with a mediation therefore come within the ambit of s 148(1). So do statements and submissions made orally at the mediation, or a record thereof. Only documents which come into existence independently of the mediation are excluded.
>
> [34] There is nothing surprising in this conclusion. To the contrary, it reflects the desirability of encouraging the parties to a mediation to speak freely and frankly, safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute does not prove capable of resolution at mediation.
>
> [35] As this Court said in *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343 at 349, "the very nature of a mediation requires that, in principle, it be conducted on a confidential basis, with the parties encouraged to 'lay bare their souls' for the purpose of facilitating a conciliation and resolution of the dispute"….
>
> [41] We now return to the question of public policy considerations. As the Employment Court stated, it may be that such considerations require s 148 be interpreted so as to permit evidence of serious criminal conduct during a mediation to be called, including evidence from the mediator.
>
> [42] An example given by Sinclair J in *Milner v Police* (1987) 4 NZFLR 424 (HC) at 427 (an authority to which Mr Corkill referred in the course of his argument) provides a good illustration of why there should possibly be an exception for criminal conduct. The Judge said:
>
> > *For example, if a counsellor has before him [or her] a husband and wife and in the course of the counselling session one party physically attacks another and causes either serious injury or death to the other party then surely it would be necessary to have the counsellor available to give evidence as to what actually occurred.*
>
> [43] It is not, however, necessary for us to decide on this appeal whether there should be such an exception.

26.4. In *Te Ao v Chief Executive of the Department of Labour* [2008] ERNZ 311, the Employment Court found that the ability of an employment relations mediator to testify as to an incident at mediation which led to his alleged unfair dismissal was such a public policy exemption.

26.5. In *Rose v Order of St John* [2010] NZEmpC 163, the Employment Court summarised the principles from the prior cases as follows:

> [8] This section has been interpreted on a number of occasions by this Court and the Court of Appeal. The first case in this Court was *Shepherd v Glenview*

> *Electrical Services Limited*. Next was *Jesudhass v Just Hotel Ltd* at both first instance in the Employment Court and on appeal. The latest case was *Te Ao v Chief Executive of the Department of Labour*, another judgment of this Court.
>
> [9] The principles distilled from these cases are as follows. All communications in mediation "for the purposes of the mediation" attract the statutory confidentiality except possibly where public policy dictates otherwise. Documents which are prepared for use in, or in connection with, a mediation come within the ambit of s 148(1) as do statements and submissions made orally at the mediation or a record thereof. Only documents which come into existence independently of mediation are excluded from this confidentiality. The important distinction is that documents or other communications that exist independently of mediation may be admissible or discoverable even if they were referred to or even had their genesis in mediation. The *Te Ao* case illustrates one exception to confidentiality on the public policy basis enunciated by the Court of Appeal in *Jesudhass.* That concerned the entitlement in law of the mediator to give evidence at what had occurred in a mediation chaired by him as a result of which he was himself dismissed and subsequently challenged this by personal grievance.

26.6. The case law is not straightforward but suggests that in certain circumstances, mediators may breach the confidentiality of mediation on public policy grounds. Depending on the seriousness of the evidence suggesting breach of employment standards this may constitute a sufficient reason to disclose particularly where the evidence is of criminal behaviour.

26.7. In the absence of a specific exemption, it would be a brave mediator who disclosed this information and hoped for the Court's permission retrospectively.

26.8. Strongly preferable would be a specific exemption from mediation confidentiality in relation to evidence of criminal behaviour by one of the parties either before or during the mediation. This proposal dovetails with the criminalisation of exploitation of workers described above at [14.2] and proposed in [14.3].

27. Do you have any other suggestions for, or comments on, improving information sharing between the Labour Inspectorate and other agencies?

IMPROVING COMPLIANCE WITH EMPLOYMENT STANDARDS

28. As either an employer or employee, do you receive adequate information about your rights and obligations relating to compliance with employment standards? Does this information come from the Ministry or other sources? If it comes from other sources, which ones? And what is the quality of the information you receive (either from the Ministry or elsewhere)?

28.1. Widespread non-compliance with employment standards suggests that insufficient information about employment standards and basic workers' rights is available throughout the system as a whole.

28.2. CTU-affiliated unions give detailed and comprehensive employment advice and assistance to their members including information relating to compliance with employment standards. Many CTU-affiliated unions maintain call-centres staffed by specialist advisors and it is part of the 'offer' of union membership that in most cases where employment issues arise that the union will provide specialist representation.

28.3. The CTU and our member unions also provide general employment law advice and topics of interest through union magazines, newspapers and websites.

28.4. For workers outside of traditionally unionised industries, the CTU runs an advice service called Together (http://www.together.org.nz/). Many of the resources on the Together website relate to minimum standards and are freely available. For $1 per week, workers can join Together and access specialist advice services.

28.5. The unions are specialist in the industries their members are employed in so this 'local knowledge' means that the quality of the information they provide is generally higher than that provided by generalist call centres such as that run by MBIE.

28.6. That said, MBIE's website and call centre provide good quality advice. They are hampered by their inability to sort out issues between the parties but it is a valuable service.

29. As either an employer or employee, do you know where to go to get advice and information about your rights and obligations relating to compliance with employment standards?

30. As either an employer or employee, do you use the Ministry's website for information and tools to help you understand your rights and obligations? Is the information accessible, easy to understand and up-to-date? Is there any information missing? How could the information be improved?

30.1. The information presented on the website is good, though a little dry for workers who may face literacy or learning issues or may simply be unused to receiving information in large blocks of text.

30.2. We recommend consideration of other methods of presenting the information such as video.

31. What particular groups of workers and/or industry sectors could be targeted to improve awareness of obligations, entitlements and processes for resolving complaints?

31.1. As mentioned in our response to question 1, Gasson et al. (2003) found that of 11-15 year olds surveyed only 15% were aware of any employment rights at all. Given this shocking dearth we believe that knowledge of work rights, minimum standards and the world of work should be taught much more strongly as part of the core curriculum in New Zealand schools. We are happy to work with MBIE, the Ministry of Education and Business New Zealand on a mutually acceptable curriculum.

31.2. Migrant workers must be better informed of their rights at work. The MBIE language hub (http://www.dol.govt.nz/languagehub/) sets out information documents in a number of other languages. There is a reasonable amount of

information in some languages (such as Samoan) but the range and detail of translated information is appallingly low for many languages spoken less in New Zealand. Non-English speaker from Kiribati, Solomon, Tuvalu and Vanuatu must make do with a basic RSE explanation that does not fully explain the employment standards[11] and, somewhat unbelievably, a factsheet on cooking and nutrition in New Zealand.[12] It is little wonder that Pacifika are less likely to receive their entitlements when the information provided to them by the regulator is so inadequate. We strongly call for MBIE to undertake a translation exercise to make the full range of guidance available in the full range of languages spoken by the most frequent migrants to New Zealand (and with a particular emphasis on our Pasifika cousins).

32. What more could be done to ensure adequate protection for workers who want to speak out but are afraid to do so?

32.1. We note that while the discussion paper largely puts the need for protection in the context of fear of consequences external to the employment relationship such as loss of immigration status, much more frequently the fear comes from consequences within the employment relationship such as disadvantage, reduced likelihood of pay rises or promotion, breakdown in the relationship making the job no longer tenable, or even dismissal. This could be related to a complaint in its own right or to actions taken by the worker to prevent or remedy a breach such as approaching or joining a union.

32.2. A potentially significant way to combat exploitation of migrant worker and workers generally is to encourage workers (and others) to 'blow the whistle' when they experience or witness exploitative or unlawful behaviour by employers (or others such as immigration agents).

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[11] English translation here: http://www.dol.govt.nz/initiatives/strategy/rse/factsheets/english.asp

[12] English translation here: http://www.dol.govt.nz/initiatives/strategy/rse/healthy-workers/english-eat-for-health.pdf

32.3. New Zealand's whistleblowing legislation, the Protected Disclosures Act 2000, has been criticised for weak private sector whistleblowing provisions that could act as a disincentive to potential whistleblowers.[13]

32.4. Allan (2013) notes the strong public sector focus of the Protected Disclosures Act 2000. He notes particularly the requirement on public sector entities (and not private sector companies) to establish whistleblowing policies and the strong public-sector focus of the definition of "serious wrongdoing" that is the gateway to the Act's protections. He states:

> The PDA therefore imposes obligations upon public, but not private, sector entities to establish internal whistleblowing procedures. Further, the protection offered by the Act extends to disclosures of "serious wrongdoing" – an elusive concept only defined as including "serious" public risks (to health, safety, and the maintenance of law and order), other public sector wrongdoings defined by reference to misuse of public funds, oppressive or negligent conduct by a public official, and, lastly, acts that constitute an offence.
>
> Although none of this precludes the application of the PDA to private sector wrongdoing, the question any private sector whistleblower would ask is: when do private interests seriously implicate the public interest? Are the interests of privately employed coal miners serious public interests? Or those of commercial tenants in a multistorey commercial building in Christchurch? An employee of Pike River Coal or an engineer inspecting the CTV building might be excused for wondering this, even though both cases concern "safety" interests, so fall in the "serious wrongdoing" ballpark.
>
> What if purely financial interests are at stake? The Ministerial Review ventured that "the range of public interest issues which are likely to arise in the private sector should be more limited than in the public sector". Yet, as the heads of the Serious Fraud Office and Financial Markets Authority have (again) recently lamented, private sector activity can engage the public interest in ways that public sector activity cannot: the public cost of the finance company collapses is estimated to be over $3 billion.

32.5. In light of these issues, the Protected Disclosures Act 2000 is overdue for review. We recommend that the Law Commission be asked to undertake this review. The Law Commission should be specifically asked to look at:

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[13] For a good summary see Allan, G. (18 October 2013) 'Whistling Dixie?' *New Zealand Lawyer* 219. Available at http://www.nzlawyermagazine.co.nz/LinkClick.aspx?link=5613&tabid=5596. A more in-depth treatment is contained in Hirsh, R. and Watson, S. (2010) 'Blowing the Whistle on Protection for Corporate Whistleblowers: a Lacuna in New Zealand Law' available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695797.

- The definition of 'serious harm' and its utility in relation to private sector whistleblowing;

- Whether the American system of incentivising whistleblowing has merit or not.

- The interaction of whistleblowing with visa conditions for migrants on temporary visas might be considered as part of this including whether genuine whistleblowing might lead to better visa outcomes.[14]

32.6. However even this would be unlikely to address issues that concern a breach of the rights of the worker himself or herself on its own. The inspectorate should have the power and use it to ensure that workers suffer no disadvantage as a result of actions they take to defend their rights or speak out. This includes the right to contact, join and remain in a union, and to contact other advice services such as MBIE's Labour Contact Centre or inspectors. Confidential help lines should be available which guarantee the caller their identity will not be revealed to an employer without their consent, and anonymous call lines could be considered.

33. Do you have any further comments on the provision of information, advice and education in the employment standards system?

34. Should the role of the Labour Contact Centre be expanded? If so, how? What additional functions do you think it should take on?

34.1. See our response to question 32 at [32.6] above.

[14] We note [38] of the Immigration Amendment Bill (No 2) RIS: "Proposed changes to immigration instructions will allow immigration officers to disregard any previous breach of the work-related conditions of an applicant's current visa if he or she has cooperated with INZ and/or the Labour Inspectorate by providing evidence of workplace exploitation against him or herself. They will not however, offer better visa outcomes that the applicant would have been entitled to if he or she had not been exploited." We ask however which the greater issue is: the real problem of migrant exploitation or the hypothetical one of malicious, unwarranted whistleblowing?

35. Should less serious breaches be fast-tracked through a separate system or process? If so, how would this work? And which breaches would this be appropriate for?

35.1. We are concerned at the feasibility of this approach.

35.2. In relation to claims by the Labour Inspectorate, the problem is that, as currently configured, they only have a mandate to investigate issues relating to minimum employment standards. This minimal mandate means that they are unlikely to understand and bound not to investigate issues relating to breach of contract or personal grievance (or health and safety issues).

35.3. The Australian approach of a Small Claims Court for employment-related claims under $20,000 is superficially attractive but a better approach is to gear the Employment Relations Authority to be better able to deal with these sorts of issues.

36. What do you think the appropriate role for mediation services is in relation to resolving employment standards issues?

36.1. While superficially attractive, the concept of removing employment standards issues from mediation is fraught with difficulty. Many breaches of employment standards will also be breaches of contract or the personal grievance provisions of the Employment Relations Act 2000.

36.2. A partial solution would be to expand the ability of the Employment Relations Authority to refuse to refer the issue to mediation where the matter relates to minimum employment entitlements. This is the purpose of s 159(1A) in relation to claims by the labour inspector but this approach could profitably be extended to claims by workers and their representatives.

37. Do you have any other suggestions for, or comments on, improving the processes for dealing with breaches of employment standards?

CONCLUSION

38. Are there any issues relating to enforcement of, and compliance with, employment standards that we have missed in this discussion document?

39. Do you have any further comments you would like to make on the issues discussed in this document?

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