NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

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

to the

Transport and Industrial Relations Committee

on the

Immigration Amendment Bill (No 2)

P O Box 6645
Wellington
February 2014

1. Summary of recommendations

1.1. The CTU supports the proposed change to section 351 removing the disparity between penalties for exploitation of legal and illegal migrants.

1.1. 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. The introduction of possible custodial sentences should be explored in relation to the worst offences. Penalties for breaches of the Parental Leave and Employment Protection Act 1987 should also be reintroduced.

1.2. It is concerning and illogical that the Holidays Act 2003 and the Minimum Wage Act 1983 do not allow the Employment Relations Authority to levy penalties at the suit of a worker. The 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 minimum code breach. Guidance for Authority members on the award of penalties should be developed in consultation with the Employment Court and key stakeholders.

1.3. New Zealand is significantly out of step with international best practice in relation to the number of Labour Inspectors as recommended by the International Labour Organisation. For example, Australia has almost three times the proportionate resourcing. We recommend that the number of Labour Inspectors should be immediately doubled to eighty and over the next three years raised to 110 Labour Inspectors.

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

- 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 could be considered as part of this.

1.5. The Government should repeal changes to employment law that have made the situation of migrants, other vulnerable workers and New Zealand workers in general worse off. In relation to migrants the effects of the Employment Relations Amendment Act 2008 and the Employment Relations Amendment Act 2010 are particularly invidious. The Employment Relations Amendment Bill is regressive in its overall effect and should not be passed.

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3. Introduction

3.1. 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.

3.2. 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.

3.3. We have confined our comments in this submission to the issue of worker exploitation.

3.4. It is difficult to estimate the size of the problem of migrant exploitation in New Zealand because it is often a hidden problem. Migrant workers often depend on their employers for their food, board, wages and compliance with visa conditions. Language barriers and limited understanding of New Zealand laws may prevent many migrants from discovering breaches of their rights.

3.5. Despite the challenges of detection, a long list of recent high-profile cases indicates that migrant exploitation is a major problem in New Zealand.[1]

[1] Some 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

3.6. In many cases, unions such as FIRST Union and Unite Union have been instrumental in bringing these cases to light and advocating for the workers. In the first reading of this Bill, several MPs acknowledged the tireless work of Dennis Maga as the head of the Union Network of Migrants within First Union in bringing these issues to light. The CTU endorses the submission of FIRST Union on the Bill.

3.7. Employment Relations Authority determinations also shine some light on the deplorable behaviour of some employers. Amberley James reviewed some recent cases for a 2011 article in *New Zealand Lawyer* entitled 'Immigrant workers in New Zealand: The truly vulnerable employees?'[2] She notes:

> 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.
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> 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 holidays 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 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

- 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

[2] http://www.nzlawyermagazine.co.nz/Archives/Issue175/175F8/tabid/3908/Default.aspx

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.

3.8. The Human Rights Commission's 2012 inquiry into conditions in the residential aged care sector *Caring Counts* heard that migrant workers, particularly those with temporary visas were extremely vulnerable to exploitation and that many had suffered discrimination in their work.[3]

3.9. As a country we must do more to protect these workers and make them welcome. This is not just a moral issue. Making workers welcome is good for community relationships, good for business and also good for our international reputation. The CTU argues that we should make every effort (including the provision of ongoing training opportunities) to fill vacancies with those workers already in New Zealand before migrant workers are offered such jobs. But when we do extend job opportunities to migrant workers, it is essential that they are treated fairly.

3.10. The exploitation of vulnerable workers can also work to undermine conditions for all workers. The CTU has explored the issue of insecure work in our October 2013 report *Under Pressure.*[4] Insecure work and exploitation of workers are, we suggest, the legal and illegal faces of the same coin. In *Under Pressure*, we recommend changes that would reduce the vulnerability of all workers in insecure work.

3.11. We support the proposed measures to introduce significant penalties for employers who exploit lawful migrants. The CTU believes that issues of migrant worker exploitation are the most acute symptom of a chronic systemic malaise of inadequate and unenforced worker protections. More must be done.

3.12. The Bill alone does not adequately address issues of worker exploitation. Other measures that should be undertaken include:

[3] Available at: http://www.hrc.co.nz/eeo/caring-counts-report-of-the-inquiry-into-the-aged-care-workforce
[4] Available at: http://union.org.nz/underpressure

- Addressing gaps and inadequate levels of penalties for breaches of core employment standards to provide a serious disincentive for bad employers;

- Adequate resourcing of the Labour Inspectorate to enable a robust and credible compliance strategy and educational outreach to vulnerable workers regarding their rights;

- The repeal of recent changes to employment law that have worsened the lot of migrants and other vulnerable workers including 90 day trial periods, reduced personal grievance rights and limitations on union access to workplaces.

- The non-enactment of planned changes to employment law including attacks on the rights of vulnerable workers in transfer of employment situations and attacks on unions through changes to collective bargaining.

3.13. Our submission deals with each of these points in turn.

4. Reducing exploitation of lawful migrants and workers generally

4.1. The CTU supports the proposed change to section 351 removing the disparity between penalties for exploitation of legal and illegal migrants. We agree with the characterisation at [10] of the Regulatory Impact Statement 'Protecting Migrant Workers from Exploitation' ('the RIS')[5] that "those who exploit lawful migrant workers face low risks of being held to account [and] there is an uneven legislative response to exploitation depending on the immigration status of the migrant."

4.2. However, a sole focus on exploitation migrant workers cures only the most acute symptom of a chronic malaise. Plainly put, New Zealand does not adequately detect and deter breaches of employment standards.

[5] (27 May 2013) available at: http://www.mbie.govt.nz/about-us/publications/ris/protecting-migrant-workers-from-exploitation.pdf. While we draw different conclusions the authors of the RIS, we note that the quality of the option analysis is higher than usual. The CTU regularly raises concerns with the quality of analysis in RISs (across a range of government departments) so we want to give credit for a relatively well-reasoned example.

4.3. It is difficult to gauge the incidence of illegal behaviour given the strong incentives for employers to hide it. However, results from Statistics New Zealand's Survey of Working Life ('the SOWL') are instructive. Analysing the results of the 2008 SOWL, Sylvia Dixon notes that:[6]

> Temporary employees were much more likely than permanent employees to be unaware that they had a paid annual leave entitlement, or not know what their entitlement was. Twenty-six percent of temporary workers said they had no leave entitlement, and 15 percent either did not know what leave entitlement they had or believed their leave was less than the statutory minimum. Among temporary workers, casual and temporary agency workers had the lowest level of knowledge

4.4. Similarly, analysing the 2012 SOWL, Patrick Ongley et al. found that:[7]

> Temporary workers were more likely than permanent workers to report they were not aware of being on either individual or collective agreements (22 percent compared with 9 percent). The figure was highest among casual and temporary agency workers, with around 3 in 10 saying they were not aware of being on any agreement.

4.5. Failure to grant annual leave or a leave loading at the minimum statutory rates and failure to provide a written employment agreement are breaches of employment standards and are suggestive of exploitation.

4.6. The raw percentages above should be treated with a modicum of caution. A 1997 study conducted for the Department of Labour found that casual employees are less informed about their conditions of employment than permanent employees.[8]

4.7. The RIS states the issue with enforcement concisely at [15] and [16]:

> [T]he civil sanctions available may not provide a sufficient deterrent. The employment relations framework provides a system for resolving employment disputes within civil legislation. In cases of serious and wilful breaches of employment standards, the current legislative framework may not always provide for sanctions proportionate to the harm caused. Similarly, the current legislation may not always

[6] Dixon, S (2009) *A Profile of Temporary Workers and Their Employment Outcomes – Summary* at 7. Available at: http://www.dol.govt.nz/publications/research/temporaryworkers/temporary-workers-summary.pdf
[7] Ongley, P., Lum, R., Lynch, C.,and Lu, E. 'A snapshot of New Zealand's temporary workers: Results from the 2012 Survey of Working Life' Statistics NZ at 8.
[8] Department of Labour (1997) 'Survey of Labour Market Adjustment under the Employment Contracts Act' prepared by Colmar Brunton Research, August 1997.

eliminate the gain achieved from non-compliance, or act as an adequate deterrent. Currently, the maximum penalties available under employment legislation are $10,000 for an individual and $20,000 for a company. Monies owing can also be awarded to the employee. Sanctions imposed are usually much less than the maximum. These sanctions can be lower than the gain achieved from non-compliance and may not act as an adequate deterrent.

4.8. We agree. An instructive comparison may be drawn between penalties for breach of employment standards and breaches of health and safety standards.[9]

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 (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.

4.9. Under the Exposure Draft of the Health and Safety Reform Bill sent for public consultation late in 2013, it is proposed that sentences would come into line with those in Australia. If enacted, the maximum sentence for reckless

[9] 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.

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.[10] There is a new intermediate offence and relatively less serious offences (somewhat equivalent to existing s 50) would have a maximum sentence of $500,000 for corporations and $100,000 for individuals.

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

4.11. 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. The introduction of possible custodial sentences should be explored in relation to the worst offences. Penalties for breaches of the Parental Leave and Employment Protection Act 1987 should also be reintroduced.

4.12. A further significant problem with the compliance system is a peculiar inconsistency between the various pieces of minimum code legislation as to when workers may seek penalties for breaches of their rights.

4.13. Under the Employment Relations Act 2000, workers may seek penalties for 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).

4.14. 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).

[10] 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).

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.

4.15. 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….

4.16. As noted above, the penalty provisions in the Parental Leave in Employment Act 1992 were repealed in 1991.

4.17. 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.

4.18. 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.

4.19. 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]

4.20. Again, an instructive comparison may be drawn with health and safety law. Through case law[12] 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 gravely needed. 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.

5. Inspection and compliance

5.1. A critical element of the system to prevent breach of employment standards and exploitation is an effective system of inspection and compliance monitoring.

[11] We have avoided critique of specific determinations in our submission. The Committee might ask officials for a summary of penalties awarded over the last few years and a précis of the circumstances of each award to get a sense of this issue.

[12] 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.

5.2. Determining adequate resourcing for this system is not straightforward given that doing so depends on a detailed understanding of the characteristics and incentives in the system along with the roles of the various actors.

5.3. 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.'[13]

5.4. 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.

5.5. Given there are approximately 40 labour inspectors employed in New Zealand for a working population of 2,272,000[14] it appears at first glance that our ratio is desperately out of step at 1/56,800.

5.6. 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. Add another 110 Health and Safety Inspectors and the ratio falls to 1/15,140. New Zealand does not meet the ILO benchmark for an industrialised country but it is not so dire as it appears.

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[13] Available here: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_297_esp_3_en.pdf

[14] Household Labour Force Survey, September 2013 quarter http://www.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/HouseholdLabourForceSurvey_HOTPSep13qtr.aspx

5.7. 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 than 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. Given travel and administrative cost, we question whether this split is the most effective use of scarce resource.

5.8. 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[15] for a workforce of 11,636,000.[16] The ratio of 1 Fair Work Inspector per 19,390 workers is nearly three times greater than New Zealand's.

5.9. 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).

5.10. This additional resource would have a massive effect on issues of worker exploitation particularly when coupled with stronger enforcement levers.

6. Protected disclosure reform

6.1. 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).

[15] See Fair Work Ombudsman (2012) *Portfolio Budget Statements 2012-2013* at 5. Available at: http://www.fairwork.gov.au/Publications/Budget/FWO-Portfolio-budget-statement-2012-2013.pdf.
[16] Australian Bureau of Statistics (2014) *December Key Figures*. Available at http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0

6.2. 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.[17]

6.3. Gregor Allan 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.

[17] 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.

6.4. 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:

- 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.[18]

7. Other changes to employment law

7.1. The CTU supports measures that protect vulnerable workers from exploitation. The proposals in the Bill go some way towards this and the Government should be commended for attempting to address the issue.

7.2. However, it is reflective of this Government's peculiarly unprincipled approach to employment law that many other law changes since 2008 have stripped migrant and other workers of rights and protections. These changes include:

- The introduction of 90-day "dismissal at will" trial periods in 2008 and their extension in 2010. 2012 Survey of Working Life data indicates that trial periods are used much more frequently on recent migrants.[19] Recent migrants had the highest likelihood of starting on a trial period (51 percent) followed by those who had been in the country between 5 to 10 years (41 percent). By

[18] We note [38] of the 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?

[19] See Ministry of Business, Innovation and Employment (2013) *Trial Periods at a Glance* http://www.dol.govt.nz/publication-view.asp?ID=452

comparison, around a third (34 percent) of New Zealand born employees started on a trial period;

- The introduction of a requirement for employer consent to union workplace access from 2010. This allows employers to hide exploitation;

- The weakening of justification needed by employers to dismiss workers (also from 2010).

7.3. 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. For many migrants, this will mean no longer getting a meal break during long shifts;

- 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. These industries employ a higher proportion of migrants than the general workforce.

- 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.

7.4. We call upon the Government to repeal the changes to employment law that have made the situation of migrants, other vulnerable workers and New Zealand workers generally worse off (including the Employment Relations Amendment Act 2008 and the Employment Relations Amendment Act 2010).

The Employment Relations Amendment Bill is regressive and should not be passed.[20]

8. Conclusion

8.1. Changing the Immigration Act 2009 to protect the rights of migrant workers is a step in the right direction. This Government's previous record in relation to worker's rights has meant that it has been accompanied by two steps back. We urge the Government to leap forward in protecting New Zealand workers from being exploited regardless of their arrival date in the country.

[20] The CTU supports the changes to Part 6AA Flexible Working proposed by the Employment Relations Amendment Bill and there may be a case for retaining these changes. In overall effect, however, the Bill is deleterious and should be discharged.