

In Confidence

Office of the Minister for Workplace Relations and Safety

Chair, Cabinet

100-Day Commitments: A Fairer Workplace Relations System

Proposal

- 1 This paper seeks Cabinet's agreement to amend the *Employment Relations Act 2000* (the Act) to give effect to the following Government commitments as part of our 100-day policy programme:
 - a) restoring key minimum standards and protections for employees, including by reinstating the right to prescribed rest and meal breaks and restoring key protections for vulnerable employees;
 - b) a suite of changes to promote and strengthen collective bargaining and union rights in the workplace.

Executive Summary

- 2 This paper gives effect to the Government's 100-day policy programme to introduce legislation to restore fairness to workplaces in New Zealand. This is aimed at boosting workplace relationships that in turn will contribute to improving New Zealand's overall productivity. These include restoring key protections for employees in the workplace by:
 - a) reinstating the right to prescribed rest and meal breaks;
 - b) restoring key protections to Subpart 1 of Part 6A of the ER Act by:
 - repealing the exemption for Small to Medium Employers (SMEs) which will restore the right for vulnerable workers to elect to transfer to incoming employers;
 - extending timeframes for employees to elect to transfer to incoming employers and requiring employers to notify employees of their right to review and ask for corrections of personal information (including disciplinary matters and personal grievances);
 - c) restoring reinstatement as the primary remedy available where an employee has been unjustifiably dismissed.
- 3 In its 2017 election manifesto, the Labour Party also made a number of policy commitments that sought to undo several of the changes made by the previous Government which have exacerbated the inherent inequality of bargaining power between workers and employers. I recommend meeting these commitments through restoring key elements of collective bargaining and union rights in the Act by:

- a) requiring employers to provide the applicable collective agreement, union contact details and the option to join the union at the same time they provide the intended individual employment agreement to the employee;
- b) requiring that unions provide information about the role of unions to employers and that this information is provided when the intended employment agreement is given to employees;
- c) reinstating the '30 day rule' and requiring employees to make a choice at the end of the first 30 days of employment about whether they would like to join the relevant union and be covered by the collective agreement;
- d) reinstating a union's advantage in relation to the initiation of collective bargaining;
- e) reinstating the principle that the duty of good faith requires parties to conclude a collective agreement and repealing the provisions that enable the Employment Relations Authority (the Authority) to determine bargaining has concluded;
- f) removing the ability for employers to opt out of multi-employer collective bargaining once bargaining has been initiated;
- g) requiring that collective agreements must set rates of pay and that rates of pay must be agreed during collective bargaining;
- h) expanding the grounds of a discrimination claim in the Act to include an employee's intention to join the union and extending the timeframe for which an employee's union action could contribute to an employer's discriminatory behaviour from 12 months to 18 months;
- i) requiring employers to allow union representatives time to perform their duties within working hours;
- j) repealing an employer's ability to deduct pay as a response to partial strikes.

4 In order to give effect to these 100-day commitments, I propose that an Employment Relations Amendment Bill be introduced to the House in the last week of January 2018, with a full select committee process and with the aim of the Bill being passed by Parliament by the middle of 2018.

5 I am continuing to work on proposals for a fast, fair and simple referee system for trial periods and providing union representatives access to workplaces without the need to first gain employer consent. I plan to bring further proposals to Cabinet in early 2018.

6 I have decided to consider the issue of 'passing on', where an employer breaches good faith by passing on collectively agreed terms and conditions to non-union employees, as part of the longer term 12-month review of bargaining fees. This involves non-union employees paying a bargaining fee in order to receive collectively agreed terms and conditions.

7 Alongside this, further long term proposals will follow these amendments. These will look more broadly at the workplace relations settings, with any legislative amendments to give effect to those proposals intended to be introduced in late 2018.

- 8 Overall, I expect that the main benefits to employees will include improved wages and more favourable working conditions as a result of increased collective bargaining power, and a greater level of security of work and conditions among vulnerable employees.
- 9 Employer groups have indicated that the proposed changes would create some increased costs for employers and would create greater inefficiency in the bargaining environment. Some were concerned that, as a whole, some of the proposals would introduce significantly more caution from employers when engaging in the market. While this will increase some of the direct compliance costs for firms, employers will stand to benefit through the productivity gains stronger employment relationships can bring. As the changes apply across the majority of the labour market, the competitive pressure on employers to reduce labour costs should ease. As many of the changes reverse amendments by the previous government, which undermined collective bargaining and worker protections, they should be relatively simple to implement.

Background

- 10 Employment relationships in New Zealand are regulated primarily through the *Employment Relations Act 2000* (the Act). The Act provides a framework for employers and employees to build productive employment relationships in good faith in all aspects of the employment environment and relationship.
- 11 The Act acknowledges that there is an inherent imbalance of power between employers and employees, and seeks to address this through promoting effective enforcement of minimum standards and the promotion of collective bargaining. It sets out the parameters for collective bargaining between trade unions and employers, individual employment agreements and the enforcement of employment standards and protections for both unionised and non-unionised employees. The Act promotes mediation as the primary form of dispute resolution, and sets out the enforcement powers of Labour Inspectors, the Employment Relations Authority and Employment Court to uphold employment standards.
- 12 Under the previous government, key protections for employees were diminished by removing the right to prescribed rest and meal breaks, removing protections for certain vulnerable workers and removing reinstatement as the primary remedy. Employees' bargaining position was also weakened by undermining support for collective bargaining. New Zealand has committed to promote collective bargaining by ratifying International Labour Organisation Convention 98 on the Right to Organise and Collective Bargaining.
- 13 For too many New Zealanders, the current employment relations system is failing to deliver on essential outcomes of fair wages for workers and adequate terms and conditions of employment. While the past few years have seen economic growth, the proportion of these gains being shared by workers is falling. The share of national income going to labour has fallen from a high of 56 per cent in the 1970s, to 45 per cent in 2015.¹ Recent forecasts indicate little expected growth in real wages over the next several years.²
- 14 As the nature of work changes, workers need to be confident in the security of their work and their ability to make an income. This is particularly relevant for vulnerable workers in

¹ Source: StatisticsNZ National Accounts

² Source: The Treasury Pre-Election Economic and Fiscal Update 2017

low-paid positions, who may not have access to effective collective bargaining. Vulnerable groups such as Māori, Pasifika and young people are more likely to be in these types of employment relationships.

- 15 New Zealand must have a highly skilled and innovative economy that provides well-paid, full-time jobs, and delivers on economic growth and productivity. To achieve these outcomes, working people need to have a voice in their workplace through effective collective bargaining and trade unions, and vulnerable workers need to be protected through core minimum standards.
- 16 The proposals in this paper seek to strengthen protections for workers and address the power imbalances between employers and employees. I am also conscious of the need for these changes to strengthen employment relationships and contribute to workplace productivity. There may be some concerns that the changes may impact on flexibility of our labour market generally and that this could have a perverse impact on employment. I do not believe that the proposed changes will have such an impact. Most of these changes are reverting the law to a pre-2014 position. There is no evidence that the changes that were made at that time yielded any ongoing employment or other benefits.

Proposed Changes

- 17 I propose to amend the *Employment Relations Act 2000* through an Employment Relations Amendment Bill (the Bill) to give effect to the following Government commitments as part of our 100-day policy programme:
 - a) restoring key minimum standards and protections for employees, including by reinstating the right to prescribed rest and meal breaks and restoring key protections for vulnerable employees;
 - b) promoting and strengthening collective bargaining and union rights in the workplace, which will provide employers and workers with a balanced framework to take advantage of new technologies and changing employment opportunities.
- 18 I am continuing to work on our proposals for a fast, fair and simple referee system for trial periods and providing union representatives access to workplaces without the need to first gain employer consent. I plan to bring further proposals to Cabinet in early 2018.
- 19 I have decided to consider the issue of 'passing on', where an employer breaches good faith by passing on collectively agreed terms and conditions to non-union employees, as part of the longer term 12-month review of bargaining fees. This involves non-union employees paying a bargaining fee in order to receive collectively agreed terms and conditions.

Restoring key protections for employees

Reinstating prescribed rest and meal breaks with limited exceptions

- 20 Rest and meal breaks are important to ensure that employees have enough time to rest, eat and refresh before returning to work. In many situations, rest breaks are also important for the health and safety of workers.
- 21 The previous government moved from a system of prescribed rest breaks to one where the duration and number of breaks is to be agreed between parties. In situations where

agreement cannot be reached the employer can decide what rest and meal breaks should apply. In some instances employers may not grant breaks for operational reasons, instead employees are given compensatory measures. These compensatory measures are not prescribed – they may be time-in-lieu, monetary compensation or another arrangement.

- 22 I propose to reinstate prescribed rest and meal breaks that entitle employees to receive at least a minimum number and duration of breaks based on the hours they have worked. This protects the health and safety of employees and gives them some personal time during work hours. The details of these breaks will be those that applied prior to the amendments made by the Employment Relations Amendment Act 2014:
- a) one 10-minute paid rest break if the employee's work period is two hours or more, but not more than four hours;
 - b) one 10-minute paid rest break and one 30-minute meal break if the employee's work period is more than four hours but not more than six hours;
 - c) two 10-minute paid rest breaks and one 30-minute meal break if the employee's work period is more than six hours but not more than eight hours
 - d) where the work period is more than eight hours, breaks as set out above for each subsequent time period that may be applicable.
- 23 The law also provided that rest breaks and meal breaks are to be observed during an employee's work period in the following manner:
- a) at the times agreed between the employee and the employer; or
 - b) in the absence of an agreement, at equivalent intervals.
- 24 I recognise that, in some very limited circumstances, prescribed breaks may be difficult to provide. Therefore, I propose an exception from providing prescribed breaks for certain businesses where the following three conditions are met:
- a) That due to the nature of work, the cost of substituting an equally skilled employee to cover the break is unreasonably high; and
 - b) the continuity of the business is critical to either public safety or the provision of an essential public service; and
 - c) where the employer and employee have agreed in the relevant employment agreement to take breaks in a different manner than prescribed or have agreed to compensatory measures for those breaks.
- 25 Given the combination of these three conditions, the exception is likely to be met in a very small number of circumstances, for example, sole-charge air traffic controllers in small, regional airports. Therefore, allowing this exception will, not undermine the intention that all workers should have a right to a minimum number and duration of breaks based on the hours worked by the employee.

Restoring key protections to Subpart 1 of Part 6A for vulnerable employees

Repeal the Small to Medium Enterprise (SME) exemption from Subpart 1 of Part 6A

- 26 Subpart 1 of Part 6A of the Act provides important protections for vulnerable workers on the sale or transfer of business. Specifically this subpart obliges employers who take over a contract (the incoming employer) to take on the employees from the previous employer (the outgoing employer). The incoming employer is obliged to maintain all employees' existing employment terms, conditions and entitlements.
- 27 The previous government made several changes to these provisions in 2015. This included an SME exemption for incoming employers who employed less than 20 people. These companies were not required to employ the new workers on the same terms and conditions with their entitlements intact.
- 28 This significantly weakened the bargaining position of workers in these industries, who by definition, are already vulnerable. It created uncertainty about ongoing work for vulnerable employees and created a race to the bottom in terms of employment standards. The exemption conflicted with the recommendations from the Review of Part 6A (the findings of which were released in 2012) which recommended retaining the protections for employees covered by Subpart 1.
- 29 I propose to restore protections for these workers by repealing the SME exemption and allowing vulnerable employees to transfer to incoming employers.
- 30 Removing the exemption may mean that SMEs will face additional costs associated with having to take on transferring employees. However, this will level the playing field between SMEs and larger businesses, and will provide incentives for firms to compete on productivity issues, rather than on cost reductions in respect of their workforce.

Employees are notified of the type of personal information that would be provided to an incoming employer

- 31 Under the Act, the outgoing employer is required to give the incoming employer the employees' individualised employee information, including any disciplinary matters and personal grievances. There is no general statutory obligation on the outgoing employer to ensure that this information is complete, accurate and not misleading before transfer. Inaccurate or misleading information can have adverse consequences on the employment relationship with the incoming employer.
- 32 The outgoing employer has an obligation to notify employees that '*certain information*' will be provided to an incoming employer and of their right, under the Privacy Act 1993, to request their personal information and ask for corrections. However, employees are unlikely to be aware that disciplinary information or their personal grievances may be transferred to an incoming employer. They are more likely to consider this information relates to their entitlements and wages. If employees are unaware of the nature of information that is being transferred they are less likely to ask to review their personal information and ask for corrections.
- 33 To address this, I propose that, employers are required to notify employees that their personal information, including any disciplinary matters or personal grievances, will be transferred to the incoming employer and of their right, under the Privacy Act 1993, to review this information and request corrections. Transfer timeframes will need to be

sufficient to allow employees an opportunity to request their personal information and to ask for corrections of the information.

Extend timeframes that employees have to elect to transfer to the incoming employer

- 34 The 2015 changes specified that employees were provided five working days to elect to transfer to any incoming employer. If an employee did not exercise his or her right within this timeframe, they lost the right to transfer on the same terms and conditions.
- 35 Given the vulnerable nature of the workers in these industries and the importance of seeking legal advice about the right to transfer, I propose extending this timeframe from five working days to 10 working days. This will require extending existing timeframes in the Act for the Principal (the company awarding the contract) to notify and provide information to the outgoing employer of the restructure and for outgoing employers to inform employees of their right to elect to transfer before the restructure takes place. This may impact on contracting practices and will require additional time during the process from notification of restructure to the restructure taking effect. It will, however, ensure that workers who elect to transfer understand the implications of doing so. This will likely improve engagement with the incoming employer that will likely have spill-over benefits for subsequent labour productivity.

Reinstatement as a primary remedy for unjustifiable dismissals

- 36 Currently, when an employee seeks reinstatement as a remedy the Authority may provide for reinstatement if it is practicable and reasonable to do so.
- 37 I propose to restore reinstatement as the primary remedy in cases where a worker has been unjustifiably dismissed and is seeking reinstatement as a remedy. I do not anticipate this will have a major impact as I understand that many employees often do not wish to be reinstated. However, employees who have been unjustifiably dismissed can opt to seek reinstatement when a case comes to the Authority or Employment Court.

Proposals that promote, protect and strengthen collective bargaining

Improving access to union information

- 38 Many employees, especially those who are new to the workforce, are not aware of what a collective agreement is and how it may operate to benefit them. Under the Act employers are only required to provide union contact information, the collective agreement and inform an employee of their right to join the union. This information is provided at the point when an employee 'enters into' the individual employment agreement.
- 39 By this stage it is too late for an employee to contact the union and seek advice on the proposed offer of employment or possible benefits of union membership and how the collective agreement may benefit them. Equally, this information is not required to explain why joining a Union may be beneficial.
- 40 I propose to require an employer to inform an employee of the union's contact details, their right to join the union and be provided with the collective agreement, at the time that the employer gives the employee their intended individual employment agreement.

41 In addition to this, I propose that unions be required to provide to employers information about their role in the workplace and that employers pass on this information to employees. This will help to increase awareness and educate employees about their choice to be employed on the collective agreement or an individual employment agreement.

Reinstating the 30-day rule for new employees who are not union members

42 Following the 2015 amendments to the Act, employers were no longer required to place new employees who are not union members on the same terms and conditions of the applicable collective agreement for an employee's first 30 days of employment (the so-called 30-day rule). This removed protections for new employees which intended to address the inherent imbalance of bargaining power between an employer and an employee.

43 I propose to reinstate the 30-day rule. Employers will still be free to negotiate terms and conditions that are not inconsistent with the collective agreement. The 30-day rule protects employees from agreeing to unfavourable terms and conditions, providing, at a minimum, the same terms and conditions as the applicable collective agreement.

44 In order to strengthen protections provided to new employees by the 30-day rule, I propose that:

- a) at the end of the first 30 days of employment, employees be required to make an active choice about whether they wish to join the relevant union and be employed on the collective agreement or remain on an individual employment agreement;
- b) an employee may opt out of having their choice be provided to the relevant union where they choose to be employed on an Individual Employment Agreement.

45 This will provide unions with better information about new employees in order to meet the needs of prospective members more effectively.

46 Requiring an active choice after 30 days means employees have more time to become informed about the collective agreement and its benefits. It also means employees have time to become informed about the union, its role in the workplace and what benefits membership may provide before making their decision over the type of employment agreement they wish to be employed on and whether they want to join the union.

Reinstating the ability for a union to initiate collective bargaining 20 days before employers

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

48 Following the 2015 changes, the timeframe for initiating bargaining became the same for both employers and unions. This creates potential gaming around who initiates bargaining and means that cross-initiation can occur. This can lead to disagreement regarding intended coverage and may lead to disputes about who initiated first, creating extra costs and generally prolonging the bargaining process.

- 49 I propose to reinstate the previous law where the union could initiate bargaining 20 days in advance of the employer. For a single collective agreement between a union and employer, initiation by a union could take place within 60 days of the expiry of the collective agreement, and within 40 days for an employer.
- 50 For multiple collective agreements that bind one or more unions and one or more employers, initiation could take place within the later of:
- a) 120 days before the date on which the last applicable collective agreement expires; or
 - b) 60 days before the date on which the first applicable collective agreement expires.
- 51 For employers, this would be 100 days and 40 days, respectively.

Reinstating the duty to conclude

- 52 When employers and unions undertake collective bargaining there is a duty for both parties to enter the process with good faith, with the intention of settling a collective agreement. The Act was amended in 2015 specifically to provide that the duty of good faith did not require parties to conclude collective bargaining. In addition, it allowed parties to apply to the Authority to determine that bargaining has concluded because of difficulties in coming to a settlement. This may encourage poor bargaining behaviour, such as 'surface bargaining' where one party has no intention of concluding an agreement and participates only to avoid a good faith complaint.
- 53 These changes were not consistent with the government's obligations to promote collective bargaining under ILO Convention 98.
- 54 I propose restoring the requirement that a collective agreement be concluded unless there is a genuine reason based on reasonable grounds not to. I also propose to remove the ability of the Authority to determine bargaining has concluded. These changes should encourage parties to stay at the bargaining table and reach agreement, where they may have otherwise stopped bargaining under the current framework.

Removing the ability for employers to opt out of multi-employer collective bargaining

- 55 Following the 2015 amendments to the Act, employers are able to choose to opt out of multi-employer bargaining at the outset. Where an employer receives notification of initiation of bargaining for a multi-employer collective agreement (MECA), or for agreement for the employer to become a party to a concluded MECA, they can opt out of bargaining by giving written notice to the union(s) and other parties within 10 days of receiving the notification. If an employer did not opt out within this time period then the employer would be required to participate in bargaining in good faith towards concluding a MECA.
- 56 The ability for employers to opt out of multi-employer collective bargaining impacts on employee and union choice regarding their preferred form of collective bargaining. This is inconsistent with. It also undermines the objectives of the Act to promote collective bargaining and International Labour Organisation (ILO) Convention 98 on the Right to Organise and Collective Bargaining, which New Zealand has ratified.

57 I propose to repeal the ability for employers to opt out of multi-employer bargaining for a collective agreement when they receive notice of initiation for bargaining.

Requiring wages to be bargained for in collective bargaining

58 In the recent case of *First Union Inc v Jacks Hardware and Timber Limited*³, the Employment Court determined that the employer's choice to refuse to bargain matters of pay and insistence that all remuneration should be set unilaterally with individual employees and not collectively, amounted to an opposition in principle to bargain wages and it was not a genuine reason to not conclude the collective agreement.

59 In the recent case of *New Zealand Public Service Association Te Pukenga Here Tikanga Mahi v Lieutenant General Tim Keeling – Chief of New Zealand Defence Force*⁴ the Authority also confirmed that unions are entitled to have a discussion about how wages are to be agreed, but noted that this did not mean that a scale will ultimately be included in a resulting collective employment agreement.

60 In order to provide legal clarity around this, I propose to legislate that rates of pay must be included in collective bargaining. I also propose that those rates of pay must be agreed during collective bargaining. This would require the parties to come to an agreement on matters relating to pay. Pay is a key term of employment and the ability to exclude pay from collective bargaining will significantly undermine the ability of collective bargaining to address the inherent power imbalances in the employment relationship. I think this will make pay more transparent generally. I consider that this will not only help the bargaining position of workers, but will also go some way to addressing some of the gender and ethnic pay gaps.

61 The proposal would require employers who do not currently include wage bargaining in collective agreements to adjust their procedures in order to do so. This is likely to have a particular impact in the state sector, where wages are frequently determined using other mechanisms. It would not apply to collective agreements already settled before the Bill was brought into effect, until such collective agreements expire and bargaining for a new collective agreement is initiated.

Increasing protections against discrimination

Remove the timeframe from a union activity to an employer's act of discrimination

62 In some situations an employer will take a discriminatory action based on the fact that an employee was involved in union activities such as participating in a lawful strike. If an employer chose to offer better terms and conditions to certain non-union employees 18 months later because of that strike, this would not amount to discrimination under the current settings. This is because there is a 12 month limitation from the employee's union action to the employer's discriminatory action. This timeframe is overly prohibitive and means that after a 12 month period an employer could discriminate without repercussion.

³ *First Union Inc v. Jacks Hardware and Timber Limited T/A Mitre 10 Mega Dunedin and Mitre 10 Mosgiel* [2015]. NZEmpC 230. Note that this case was determined prior to the 2015 changes coming into effect.

⁴ [2017] NZERA 90

63 I propose to extend the timeframe from 12 months to 18 months. This will not prevent an employer from responding to a discrimination claim based on involvement in union activities by presenting an alternative and valid justification for their actions as a defence, but will extend the restriction on discrimination claims being raised.

Extend the grounds for discrimination to include an employee's intention to join a union

64 There is anecdotal evidence and case law that show a small number of employers continue to look for ways to discourage their staff from joining a union. While the law currently prevents some action (that is the law prohibits an agreement from providing preferential terms and conditions on the basis that the worker is not a union member), union stakeholders have informed my officials that this is not always effective. An employer should not be able to dissuade an employee from joining a union by promoting or taking an action that dissuades an employee from making this choice freely.

65 In order to prevent this practice I propose to extend the discrimination provisions to include an employee's intention to join a union as a ground of discrimination.

Allowing reasonable time for union delegates to perform their role in the workplace

66 The Act does not currently include provisions to provide employees time off work to perform their elected union workplace representative function, except where attending two union meetings per year of up to two hours duration. Union workplace representatives (or delegates) play an important role in the workplace, including helping to resolve workplace problems, collective bargaining, involving members in workplace decisions and supporting members who ask for help.

67 The roles and responsibilities for union workplace representatives can range depending on the experience of the representative, and can vary in scope from activities related to their specific workplace or the wider union. I consider that the provisions should take into account these factors.

68 Due to these considerations, I propose to introduce a general obligation on employers to allow employees reasonable paid time during working hours to perform their role as an employee representative, if doing so will not unreasonably disrupt:

- a) the employer's business; or
- b) the employee's performance of their employment duties.

69 I also propose that the time spent performing union representative duties is in respect of the employees of the employer.

70 Employee representatives and employers may require additional clarification on applying the provisions. A code of employment practice could be developed at a later date to set out the specific duties that are included in the worker representative role.

Removing pay deductions as a response to partial strikes

- 71 Partial strikes are usually undertaken on a substitution basis (other work is undertaken instead of the normal work). Changes made to the Act in 2015 allowed employers to deduct wages for partial strikes. Allowing employers to deduct wages for partial strikes means that workers are more likely to abandon the partial strike action, weakening worker bargaining position or it may force workers to fully withdraw labour, causing disputes to escalate.
- 72 The partial strike process also allows employers to deduct a flat 10 per cent from an employees' pay regardless of the scope of the actual action taken. This has resulted in employees losing pay for low level action such as breach of uniform policies (for example wearing union t-shirts in place of standard uniforms).
- 73 I propose to repeal the ability for employers to be able to deduct pay when workers partially strike.

Consultation

- 74 My officials have engaged a number of unions and employer groups on the proposals in the paper. The union groups broadly supported the proposals but expressed concern that some proposals did not go far enough. The employer groups indicated that the proposed changes would create some increased costs for employers and would create greater inefficiency in the bargaining environment. Some employer groups were specifically concerned that as a whole some of the proposals would introduce significantly more caution from employers when engaging in the market.
- 75 The Ministry of Business, Innovation and Employment has consulted with the following government departments on this paper: State Services Commission, Ministry of Education, Ministry of Health, The Treasury, Ministry of Social Development, Ministry for Women, Ministry of Justice, Te Puni Kōkiri and the Ministry for Pacific Peoples. The Department of the Prime Minister and Cabinet (PAG) has been informed about this paper.

Financial Implications

- 76 The proposals have no financial implications.

Human Rights

- 77 The Ministry of Business, Innovation and Employment considers that the proposals appear to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. In particular, the proposals support freedom of association. A final view will be determined with the draft Bill.

Compliance with ILO Convention 98

- 78 The International Labour Convention (ILO) 98 requires that workers enjoy the right to organise and collectively bargain in their employment. One of the purposes of the Convention is to ensure adequate protection against acts of anti-union discrimination in employment. Another is that ratifying states should promote the setting of terms and conditions by way of collective bargaining. The proposals in this paper are consistent with ILO Convention 98.

Legislative Implications

- 79 The *Employment Relations Act 2000* will need to be amended to give effect to the proposals outlined in this paper.
- 80 The amendment to the Act will bind the Crown to the same extent as the current Act which applies to most public sector agencies through sections 27 and 67 of the State Sector Act 1988. I propose that the Bill to amend the *Employment Relations Act 2000* is placed on the 2018 legislation programme with a priority of Category 2 – must be passed in 2018.

Regulatory Impact Analysis

- 81 The Regulatory Impact Analysis requirements apply to the proposals in this Cabinet Paper. A Regulatory Impact Statement (RIS) is attached.

Quality of Impact Analysis

- 82 The Treasury Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Ministry of Business, Innovation and Employment and associated supporting material. Treasury comments are based on revised expectations for RIS's covering 100 Day Plan priorities.

Treasury Comment

- 83 Given the constraints that have been highlighted in the Impact Statement, the Impact Statement appropriately reflects the analysis and consultation that has been able to be completed.
- 84 The potential impacts of the proposed approach have been broadly identified, and the analysis is methodical and thorough. Gaps in evidence, risks and downsides are acknowledged. The presentation of the stakeholders' views is informative and comprehensive.
- 85 It will be important to develop a thorough monitoring and evaluation process for the proposed changes and keep the performance of the revised employment relations regime under close review.

Gender Implications

- 86 The Ministry for Women commented that women are disproportionately represented among the vulnerable workers whose conditions this paper seeks to improve (such as cleaners, food service and hospitality workers). Just under one third of employees in 2016 were working for small and medium enterprises (employers in enterprises employing under 20 people), and are vulnerable as a result of the SME exemption from Part 6A of the Act. Repealing this exemption means that vulnerable workers in industries where contracts frequently change hands (such as in cleaning or catering) will have their terms and conditions (including their current entitlements) transfer to the incoming employer.
- 87 Including rates of pay in collective agreements will go some way to make pay more visible to employees and may form part of the cultural shift required to close gender and ethnic pay gaps.

Privacy Implications

- 88 The Privacy Commissioner has considered the proposals in this paper and supports the proposal that employees are notified of their right to check and ask for corrections of personal information in accordance with Information Privacy Principle 7 of the Privacy Act 1993.
- 89 However, the Commissioner does not support the proposal for an employee's name and choice of employment agreement to be communicated by the employer to unions unless they opt out. The Commissioner considers that any obligations should be placed on employers rather than employees, and that employees should provide their express consent prior to their choice of employment agreement being communicated to unions. The Commissioner is happy to continue working with Ministers and officials on potential alternative approaches. This could include requiring employers to provide a prescribed form to employees about their rights. Also, given this is a workplace regulatory environment the Commissioner would be interested in exploring the potential role of labour inspectors in ensuring employers comply with their obligations.
- 90 I consider that the privacy risks in this proposal are low, as the only information that would be passed on to union would be the new employee's name and the fact that they have made an active decision on union membership. The proposal strikes a balance between privacy implications and the wider policy goals of promoting collective bargaining and freedom of association.

Disability Perspective

- 91 The proposals outlined in this paper raise no specific implications for people with disabilities.

Publicity

- 92 I will make an announcement on these policy decisions in due course. The Ministry of Business, Innovation and Employment will publish a copy of this paper and associated policy advice papers on its website, subject to any necessary redactions.
- 93 The improvement in employee protections and the strengthening of collective bargaining and union rights within the workplace are likely to be received favourably by unions, employees and some employers. Some employers may be concerned that these proposals impact on the flexibility and efficiencies of their business.

Recommendations

I recommend that Cabinet:

- 1 **Note** that the changes I am seeking will progress the Government's 100 day commitments to restore key protections to employees and strengthening collective bargaining;

Restoring Key Protections for Employees

Reinstating prescribed rest breaks and meal breaks with limited exceptions

- 2 **Agree** to provide employees with an entitlement to rest breaks and meal breaks, and place an obligation on employers to provide these entitlements;
- 3 **Agree** to the rest break and meal break entitlements as follows:
 - a) one 10-minute paid rest break if the employee's work period is two hours or more, but not more than four hours;
 - b) one 10-minute paid rest break and one 30-minute meal break if the employee's work period is more than four hours but not more than six hours;
 - c) two ten-minute paid rest breaks and one 30-minute meal break if the employee's work period is more than six hours but not more than eight hours;
 - d) where the work period is more than eight hours, entitlement to breaks as set out above for each subsequent time period that may be applicable;
- 4 **Agree** that rest breaks and meal breaks are to be observed during an employee's work period in the following manner:
 - a) at the times agreed between the employee and the employer; or
 - b) in the absence of an agreement, at equivalent intervals;
- 5 **Agree** to an exception from providing the prescribed rest breaks and meal breaks where:
 - a) the cost of substituting an equally skilled employee to cover the break is unreasonably high; and
 - b) the continuity of the business is critical to public safety or the provision of an essential public service; and
 - c) there is written agreement between the employer and employee that provides breaks in a different way than prescribed or provides compensation for those breaks;

Restoring key protections to Subpart 1 of Part 6A for vulnerable workers

- 6 **Agree** to remove the current exemption for small and medium enterprises in Subpart 1 of Part 6A of the *Employment Relations Act 2000* to allow employees affected by restructuring or a change in employer in such enterprises to transfer to an incoming employer;
- 7 **Agree** that outgoing employers in restructurings covered by Subpart 1 of Part 6A of the *Employment Relations Act 2000* must notify employees in writing of their right under the *Privacy Act 1993* to check and request corrections to their personal information, including disciplinary information and personal grievances.

- 8 **Agree** to extend the timeframe an employee has to elect to transfer to an incoming employer under Part 6A of the *Employment Relations Act 2000* from five working days to ten working days;
- 9 **Agree** to amend other timeframes by five working days, as necessary, to reflect the extension in time for an employee to make their election to an incoming employer.

Reinstatement as a primary remedy for unjustifiable dismissals

- 10 **Agree** that where an employee requests reinstatement as a remedy to a personal grievance, the Employment Relations Authority must order reinstatement wherever that is practicable and reasonable;

Proposals that promote, protect and strengthen collective bargaining

Improving access to union information

- 11 **Agree** that an employer must provide the collective agreement, union contact details and inform the employee of the right to join the union at the same time the employer offers the proposed employment agreement to the employee;
- 12 **Agree** that unions are required to provide union-specific information to the employer about their role and function and that the employer must provide this to the employee with any proposed employment agreement;
- 13 **Note** that a code of employment practice may be required at a later date to give further guidance on how to provide for union access;

Reinstating the 30 day rule for new employees who are not union members

- 14 **Agree** that new employees whose work is covered by a collective agreement, but who are not union members, must be employed on the terms and conditions of the collective agreement and any other terms and conditions not inconsistent with the collective agreement for their first 30 days of employment;
- 15 **Agree** to require that an employee must make a choice after the first 30 days of employment to elect either to become a union member and be employed on the collective agreement or to remain employed on an individual employment agreement;
- 16 **Agree** that unless an employee expressly opts out, an employee's choice to either join the union or be employed on an individual employment agreement, must be communicated by the employer to the relevant union as soon as practicable.

Reinstating the ability for a union to initiate collective bargaining 20 days before an employer

- 17 **Agree** that if there is an applicable collective agreement in force a union must not initiate bargaining earlier than 60 days before the date on which the collective agreement expires and an employer must not initiate bargaining earlier than 40 days before the date on which the collective agreement expires;
- 18 **Agree** that if there is more than one applicable collective agreement in force that binds one or more unions or one or more employers, or both, that are intended to be parties to the bargaining then:

- a) a union must not initiate bargaining before the later of the following dates:
 - 18.a.1 the date that is 120 days before the date on which the last applicable collective agreement expires;
 - 18.a.2 the date that is 60 days before the date on which the first applicable collective agreement expires;
- b) an employer must not initiate bargaining before the later of the following dates:
 - 18.b.1 the date that is 100 days before the date on which the last applicable collective agreement expires;
 - 18.b.2 the date that is 40 days before the date on which the first applicable collective agreement expires;

Reinstating the duty to conclude

- 19 **Agree** to specify that the duty of good faith in the *Employment Relations Act 2000* includes a duty to conclude a collective agreement during collective bargaining, unless there is genuine reason, based on reasonable grounds not to;
- 20 **Agree** to remove the ability of the Employment Relations Authority to determine that bargaining has concluded under section 50K of the *Employment Relations Act 2000*;

Removing the ability for employers to opt out of multi-employer collective bargaining

- 21 **Agree** to remove the ability of employers to opt out of multi-employer collective bargaining when they receive a notice from a union of initiation for bargaining;

Requiring wages to be bargained for in collective bargaining

- 22 **Agree** that the *Employment Relations Act 2000* specify that that rates of pay must be included in collective agreements and agreed during collective bargaining;

Increasing protections against discrimination

- 23 **Agree** to extend the timeframe for an employee's union action to contribute to an employer's discriminatory behaviour from 12 months to 18 months;
- 24 **Agree** to extend the discrimination grounds to include an employee's intention to join a union as a ground of discrimination;

Allowing reasonable time for union representatives to perform their role in the workplace

- 25 **Agree** to introduce an obligation on employers to allow employees reasonable time during working hours to perform their union representative role unless it will unreasonably disrupt the employer's business or the employee's performance of their employment duties;
- 26 **Agree** that any time employees of an employer spend performing union representative duties must be in respect of the employees of that employer;

- 27 **Note** that a code of employment practice may be required at a later date to give further guidance to parties on the union representatives role while at work;

Removing pay deductions as a response to partial strikes

- 28 **Agree** to remove the ability of employers to deduct pay of those employees who undertake a partial strike;

90 day trial periods and union access

- 29 **Note** that I intend to report to Cabinet early 2018 with further proposals regarding reform of 90 day trial periods and union access provisions.

Approval for drafting

- 30 **Invite** the Minister for Workplace Relations and Safety to issue drafting instructions to the Parliamentary Counsel Office to amend the *Employment Relations Act 2000* in a way that gives effect to the policy recommendations in this paper;
- 31 **Invite** the Minister for Workplace Relations and Safety to issue drafting instructions to the Parliamentary Counsel Office regarding any other necessary consequential amendments to, or repeal of, any other legislation to give effect to these recommendations;
- 32 **Authorise** the Minister for Workplace Relations and Safety to make changes, consistent with the policy intent of this paper, on any issues that arise during the drafting process;
- 33 **Agree** that the Employment Relations Amendment Bill be included in the 2018 legislation programme, with a Category 2;
- 34 **Note** that I intend to return to Cabinet in January 2018 to seek approval to introduce the Employment Relations Amendment Bill to the House by the end of January 2018;

Publicity

- 35 **Note** that I will release a media statement confirming Cabinet's support for the recommendations;
- 36 **Note** that the Ministry of Business, Innovation and Employment will publish a copy of this paper and associated policy advice papers on its website, subject to any necessary redactions.

Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety