



NEW ZEALAND COUNCIL OF TRADE UNIONS  
*Te Kauae Kaimahi*

**Submission of the  
New Zealand Council of Trade Unions  
Te Kauae Kaimahi  
on the  
Employment Standards Legislation Bill**

P O Box 6645  
Wellington  
October 2015

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## **1. Introduction**

- 1.1. This submission is made on behalf of the 36 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi ('the CTU'). With 325,000 members, the CTU is one of the largest democratic organisations in New Zealand.
- 1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.
- 1.3. The CTU and our affiliates have actively campaigned on each of the issues covered in the Employment Standards Legislation Bill ('the Bill') for many years. Regrettably, issues of worker exploitation (including the growth of non-standard work) has gone hand-in-hand with the decline of the influence of the union movement. While there are useful changes in the Bill, they are sticking plasters on suppurating wounds. The real cure is educating and empowering workers to address these issues. Doing so requires the Government to strengthen the union movement rather than attack us.
- 1.4. This submission is split into three parts corresponding to the three broad policies implemented by the Bill:
  - Part A considers amendments to the Employment Relations Act 2000 and Wages Protection Act 1983 relating to availability for work outside of contracted hours, shift cancellation, secondary employment and wage deductions;
  - Part B considers amendments to the Parental Leave and Employment Protection Act 1992 to extend entitlement and access to the parental leave scheme; and
  - Part C considers proposals to strengthen enforcement of minimum employment standards under the so-called minimum code legislation (the Employment Relations Act 2000, the Minimum Wage Act 1983, Wages Protection Act 1983, the Holidays Act 2003 and the Equal Pay Act 1972).
- 1.5. Each part begins with a general overview of the problem to be addressed. We then comment on specific provisions of the Bill and then discuss other elements that we think could and should be addressed by the Bill.

- 1.6. This Bill is an odd amalgam. It contains a number of measures that we support strongly to protect the most vulnerable workers from exploitation through strengthening the Labour Inspectorate's hand. We also support the changes to make parental leave fairer and more accessible. However, changes relating to availability, shift cancellation and secondary employment do not achieve the Government's stated intention. We oppose these changes as they stand and ask the Transport and Industrial Relations Committee ('the Committee') to correct these mistakes.
- 1.7. The breadth of issues canvassed by the Bill stretch the credibility of the omnibus provisions of the standing orders to the point of misuse. Standing Order 263 states that:
- An omnibus bill to amend more than one Act may be introduced if—
  - (a) the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy, or
  - (b) the amendments to be effected to each Act are of a similar nature in each case, or
  - (c) the Business Committee has agreed to the bill's introduction as an omnibus bill.
- 1.8. The policy positions covered by the Bill are clearly distinguishable except on very broad grounds, such as that they relate to the employment relationships and the rights of workers. As we note below, we do not agree that all of the changes will protect workers. Nor are the amendments of a similar nature to one another.
- 1.9. The misuse of the omnibus provisions have negative consequences for the passage of this Bill. The requirement that parental leave changes be in force by 1 April 2016 has stunted the submission timeframe on complex and controversial legislation. Along with reducing public comment, doing so also reduces the ability of the Committee to unpick difficult issues and reach just solutions.
- 1.10. It is unclear from the Standing Orders whether the Committee has the power to recommend the splitting of the Bill into two or three separate Bills and to consider each separately. We recommend that the Committee seek advice on whether this is possible.

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## **PART A: AVAILABILITY, CANCELLATION OF SHIFTS, RESTRICTIONS ON SECONDARY EMPLOYMENT AND UNREASONABLE PAY DEDUCTIONS**

### **3. Outline of Part A of our submission**

3.1. This part begins with a brief discussion of some examples regarding the scope of the problems that this aspect of the Bill attempts to address.

3.2. Next we discuss an important conceptual distinction between casual work and permanent employment and how availability clauses can blur this distinction.

3.3. We move then to comment on the specifics of the five proposals in Bill which attempt to address four interrelated issues:

- The first is the lack of certainty around recording of hours of work in employment agreements.
- The second is the practice of requiring employees to be available for some or all of their hours of work without any guarantee that the hours will be provided.
- The third is the practice of cancelling shifts at little or no notice including immediately before or during a shift.
- The fourth is the practice of restricting workers' ability to seek secondary employment in situations where no reasonable interest is being protected by that restriction.

3.4. The Bill also proposes changes to the Wages Protection Act 1983 to prevent employers from making unreasonable deductions from workers' wages such as the garnishing of wages when customers drive off without paying for petrol.

3.5. There are three further issues which bear comment under this section. First, we discuss our proposal for a casual loading. Second, we discuss the interaction of casual and zero hours agreements with the benefit system and the need for change there. We also provide examples of some interesting approaches undertaken in Europe to the regulation of these issues.

#### 4. The scope of the problem

4.1. It is difficult to pin down the number of workers on zero-hour contracts, minimum-hours agreements, agreements that contain restrictions on temporary employment or agreements which allow short term cancellation of shifts.

4.2. We suspect however, that there is a large and growing problem here. We understand that our affiliates have provided you with evidence of significant issues.

4.3. Many major industry players are complicit in these practices. We have seen an extract from a Restaurant Association of New Zealand individual employment agreement (prepared by Hesketh Henry). This agreement was being used by a franchise of a mid-sized chain.

4.4. Upon change of ownership the worker was required to go from 20 regular hours a week per week to a clause which stated:

##### 4. Hours of Work

4.1 Your hours of work will be displayed on a roster. As the business may be open up to 365 days per year you may be rostered on any day of the year.

4.2 It is your responsibility to find out in advance the contents of the roster. You consent to work on the days and times rostered.

4.3 Your remuneration [\$14.75 per hour] recognises that you may be required to work additional hours, or outside of usual hours.

4.4 You acknowledge that flexibility is essential to providing staff to cover variable demands and accordingly your times and days may be varied by the employer.

4.5. We have also seen an individual employment agreement for a worker in a Kiwifruit Packing House that stated “Shift: Mon-Sun 8-7.30 pm (as required)” and “The employee is subject to a roster system therefore regular hours of work will change.”

4.6. The Ministry of Business, Innovation and Employment (‘MBIE’) is also failing in the advice it provides to workers and employers. MBIE’s Employment Agreement Builder contains example clauses which reinforce poor practice. Among the hours of work clauses that the employer may select are the following:<sup>1</sup>

##### **Rostered Hours with no minimum hours of work to be provided**

The parties agree that the Employee's hours of work shall be set by the Employer in advance in accordance with a roster. Unless there are exceptional circumstances, the Employee shall be given at least 7 days notice of a new roster. In setting the roster the Employer shall provide the Employee with [insert number] consecutive days off within a reasonable period.

##### **Casual Employment with no minimum number of hours of work**

The parties agree that because the Employee is being employed on an as required basis, the Employee has no fixed hours of work, nor any minimum number of hours of work. The hours of

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<sup>1</sup> <http://dol.govt.nz/Tools/EmploymentAgreementBuilder/Guide/default.aspx?sID=6>

work and days to be worked will be as agreed between the Employer and Employee from time to time. The Employee shall take all reasonable steps to be available when required.

#### **Piece Work without set hours**

The parties agree that the Employee will be available on an as required basis to meet the deadlines for delivery of items, with no fixed hours of work.

4.7. The CTU particularly wishes to endorse the work that our affiliates have undertaken in negotiating work arrangements that minimise unfair outcomes for their members. Particular mention must go to Unite Union's campaign on zero hours and the major victories there.

### **5. Casual work versus agreements without fixed hours**

5.1. Casual work has been part of our industrial relations landscape since the Nineteenth Century. Despite its longevity, casual work remains ill-understood and legally tricky. Dickinson and Walker put it well: "Agreements for casual employment are strange beasts."<sup>2</sup>

5.2. Because casual work has been primarily a creature of negotiated awards and contracts, it has not been defined in the main statutes dealing with employment. The common law has been left to map the contours of casual work but holes remain.

#### *The nature of casual work*

5.3. The most important thing to understand about casual employment is that it is not an ongoing employment relationship but rather an open-ended series of fixed term engagements. The overall agreement is an option contract or agreement to agree. This is why the ability to refuse to undertake work is so central to the definition of casual work. In *Drake Personnel (New Zealand) v Taylor* [1996] 1 ERNZ 324 at 326 the Court of Appeal held:

It is clear that once an assignment has been completed Drake has no obligation to offer any further assignments, and the employee has no obligation to accept any further assignments. In such a situation, it cannot be said that there is a continuing contractual relationship of employment. The Chief Judge [Goddard in the Employment Court] was clearly correct in his conclusion that each assignment was a separate engagement, so that holiday pay became payable at the end of each assignment. The position would be different if a further assignment was offered and accepted before the completion of the first, as in such a case the employment period would be extended. Once an assignment is completed without any further assignment having been agreed, however, the employment relationship has been terminated.

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<sup>2</sup> David Dickinson and Andrea Walker 'How casual is casual? Recent case law and proposed legislative changes' [2008] ELB 96

- 5.4. The leading case on casual employment is *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225. Following a similar line of reasoning to the Court of Appeal in *Drake Personnel*, Judge Couch stated at [40]-[42]:

[40] ... Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship

[41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

[42] It is important to recognise that an employment arrangement may be varied over a period of time to the extent that its essential nature changes. Occasionally, such change will be the result of an explicit agreement between the parties. Much more often, changes occur in day to day conduct which justify the conclusion that the parties have implicitly agreed to vary their original agreement. Many of the decided cases deal with this sort of implied variation.

- 5.5. In *Muldoon v Nelson Marlborough District Health Board* [2011] NZEmpC 103, Chief Judge Colgan noted at [36] that "Case law has yet to tackle the not altogether easy question of where casual and fixed-term employment intersect."
- 5.6. Our view is that given the clear legal status of casual employment as a series of fixed-term engagements, there is nothing in the Employment Relations Act 2000 that permits derogation from s 66 of that Act in relation to each engagement of casual employment.
- 5.7. This means that, under the requirements of s 66, casual work will only be permissible where it occurs for a genuine reason based on reasonable grounds and that reason is set out in writing. We do not contend that this must occur before each engagement (the reason for the fixed term may be negotiated when the casual employment agreement is first drafted) but where the reason for the fixed term changes, this must be recognised by written amendment.
- 5.8. It would be valuable for s 66 of the Employment Relations Act 2000 to clarify that, for the avoidance of doubt, fixed term employment includes each engagement of casual employment but that the genuine reason for the work may be set out in the employment agreement (rather than being explained and negotiated at each engagement unless the reason changes).

## *Availability clauses*

5.9. A significant challenge with agreements which have no fixed hours but a requirement for the employee to remain available for work is that they contain one half of the casual work test (no obligation on the employer to provide work) and not the other. They do not fit easily into the taxonomy of fixed term versus permanent employment (and for workers have many of the worst features of both).

5.10. *Jinkinson* is an important case with regard to the issues canvassed by the Bill because Ms Jinkinson's employment agreement with Oceana Gold contained both an availability clause and a clause restricting secondary employment. In relation to the availability clause, Judge Couch commented at [60] and [61] that:

[60] Considering the agreement as a whole, it clearly imposed some ongoing mutual obligations on the parties. These included an obligation on Ms Jinkinson to accept work offered to her but not a corresponding obligation on Oceana Gold to offer her work. On the contrary, the agreement specifically provided that there was no guarantee of any hours of work. Although Oceana Gold assumed several ongoing obligations under the agreement, none of them required payment to Ms Jinkinson in the absence of work.

[61] I find that the obligations imposed by the agreement alone were not sufficient to reach the "*irreducible minimum of mutual obligation necessary to create a contract of service*". It must be an essential element of any contract of service that the employee have an opportunity to receive payment of wages or other money. The agreement did not provide for Ms Jinkinson to be paid any money other than wages, for example a retainer. The absence of any obligation to provide work therefore meant that she could have no legitimate expectation of payment of any sort.

5.11. The problem with proposals in the Bill regarding availability in exchange for payment is that they muddy the fundamental question of employment. Is a person receiving some form of compensation to remain available an employee when they are not undertaking a shift? Under the proposals in the Bill it would be possible for a person to never work an hour for their putative employer and yet remain an employee for some (possibly indefinite) period of time. These are not minor questions.

5.12. While the Bill forbids zero hours clauses without compensation, that protection is nugatory given the lack of any test of reasonableness of compensation.

## **6. Agreed hours of work (cl 87; proposed ss 67C and 67D)**

6.1. Under s 65(2)(a)(v) of the Employment Relations Act 2000, individual employment agreements are only required to contain "an indication of the arrangements relating to the times the employee is to work."

6.2. The problem with this description is that it is open to abuse by way of clauses that set out hours in the broadest general terms. This allows employers (who control the

timing and amount of work in most cases) to use rostering as a tool of control and favour. This control is evident in the clauses cited in [4.4]-[4.6] (including those in MBIE's Employment Agreement Builder).

6.3. There are circumstances where flexible work arrangements are needed and suit both parties such as situations where there is genuinely unpredictable demand.

6.4. There is a balance to be struck here. In the policy development process we have advocated for a presumption that "wherever practicable, employment agreements include the days and hours of work, including, where possible, start and finish times."

6.5. In a briefing to the Minister of Workplace Relations and Safety on 18 May 2015<sup>3</sup> MBIE considered the merits of our proposal. They note at [21]-[23] that:

21. [The CTU] are concerned that that the proposals do not include some initiative to stem the use of contracts with no guarantee of hours. Specifically, they have suggested that the proposals include a requirement that employment agreements, "where practicable, include the days and hours of work, including where possible start and finish times."

22. Our view is that this in itself would not be sufficient to address the issue with the lack of certainty of hours. This is because the provision would be relatively straightforward to game. For example, employers whose business models are based on a flexible workforce could conceivably argue that providing such certainty is not practicable. Equally, if employers were to provide some certainty, there would be nothing in the law preventing employers from setting out a de minimus threshold in the employment agreement, with the ability to flex the number of hours worked upwards or downwards at will.

23. However we do not think that including a requirement for employment agreements, to include "wherever practicable, include the days and hours of work, including where possible start and finish times" creates any significant risks. Firms that use flexible labour (for example casual work or shift workers) will still be able to not specify such times in their employment agreements on the basis it is not practicable to do so.

6.6. MBIE went on to recommend that our proposal was included in the Bill. However, it appears that through the Cabinet approval process, this option was discarded.

6.7. A further briefing on 23 June 2015 canvassed the proposal which became ss 67C and 67D along with another option. In relation to the option which became ss 67C and 67D, MBIE commented that:

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<sup>3</sup> MBIE (2015) Briefing: Cabinet Paper: Zero Hour Contracts and other Practices in the Employment Relationship

12. The impact on employees is that they may have little certainty about the amount of hours they will work, making it difficult for them to plan their work and lives. However, balancing this is the related proposal that where employees are required by the employer to be available above their 'agreed hours' they are able to decline this work without penalty, or receive compensation for being available. This will incentivise employers to give more certainty over the amount of work hours where they are able to.
- 6.8. Proposed s 67C and s 67D provide that where hours of work are agreed, they must be specified in:
- Proposed and actual individual employment agreements; and
  - Proposed and actual terms and conditions of employment for workers on a collective agreement (for workers on a collective agreement).
- 6.9. The problem with this proposal is that it provides no lever apart from bargaining strength to ensure that agreement is reached regarding hours of work. Many of the workers most in need of these protections are not in a position to negotiate (and will be sanctioned by Work and Income for refusing work).
- 6.10. The protections offered by ss 67C and 67D are largely illusory (particularly when coupled with the weak protections for availability under s 67E). If the Government is serious about protecting vulnerable workers it will strengthen these (and can do so with relatively minor compliance costs).
- 6.11. However, we accept MBIE's criticisms that our proposed solution is too easy to game. The missing element is a requirement that agreements contain statements of agreed hours insofar as that is possible (rather than as a dichotomy between fully certain hours and completely uncertain hours).
- 6.12. We recommend that both individual employment agreements and additional terms and conditions contain "wherever and to the extent practicable the days and hours of work, including, where possible, start and finish times."
- 6.13. The next issue is how to enforce such a requirement.
- 6.14. Our recommendation (discussed in subpart 41 of our submission below) is that Labour Inspectors should be empowered to issue determinations of working hours and times. An employee and a labour inspector may also be empowered to seek penalties for failure to comply.

6.15. A final issues is that the proposal is ambiguous as to whether agreed hours can (as now) be varied by conduct or verbally. This is an important protection for workers and must be retained.

## **7. Availability clauses and compensation (cl 87; proposed ss 67E and 67F)**

7.1. The Bill attempts to address the practice of imposing requirements on workers through the introduction of availability provisions.

7.2. An availability provision is defined in s 67E(1) as a provision in an employment agreement under which:

- (a) the employee's performance of work is conditional on the employer making work available to the employee; and
- (b) there is no obligation on the employer to make work available to the employee; but
- (c) the employee is required to be available to accept any work that the employer makes available.

### *Adequacy of compensation*

7.3. An availability provision must include compensation to the worker for making themselves available (proposed s 67F(3)). This compensation may be rolled up into salary. If no compensation is payable then a worker must not be "treated adversely" for refusing to accept work (proposed s 67F).

7.4. An employer is required to pay compensation for availability however there is no lower threshold for how low this compensation can be. Contract law in the common law countries has historically recognised a single peppercorn as the lowest possible unit of valuable consideration (hence peppercorn rentals). If the Bill passes in its current form, the demand for pepper is going to increase.

7.5. The idea that a requirement to agree acts as any reasonable safeguard on the interests of the parties is an inaccurate bromide in light of the economic pressures placed on workers to accept a role and the inherent inequality of bargaining power. A good example of how a duty to agree works in practice is set out in relation to negotiation of 90-day trial periods in MBIE's Evaluation of the Short-Term Outcomes of the 2010 Changes to the Holidays Act and Employment Relations Act (2014). The researchers summarise employer and workers attitudes at section 2.1.5:

Employers interviewed who used trial periods entered them as a standard clause in employment agreements for most, and sometimes all, new appointments. ...

Most employees who had experienced trial periods said that trial periods were applied to them as part of a standard, written employment agreement. ...

Both employers and employees interviewed said that, as trial periods were part of the employment agreement, there was little room for negotiation. No employer said their staff had ever questioned the provision, so they were unable to provide information on how they might negotiate it.

- 7.6. We note that for much of the earlier policy development of the Bill, it was intended that compensation for availability and shift cancellation should be “reasonable compensation.”<sup>4</sup>
- 7.7. It is important to realise that an availability provision is effectively a contractual guarantee that a worker will be ready, willing and available for work when told to come in. This will prevent an employee from working for another employer during the specified times and may prevent them from undertaking many other activities such as childcare and travel. Unlike purely casual work, an employer may discipline a worker for failure to be available.
- 7.8. The lack of a requirement of reasonable compensation for availability and shift cancellation is our most fundamental concern with the Bill as it stands.
- 7.9. We urge the Committee to reinstate a test of “reasonableness” for compensation under proposed s 67E(3) and 67F(2)(b).
- 7.10. We have considered other options (such as a percentage of usual wage) for availability as other possible options. We note that this is the approach in Ireland where a period of availability must be compensated by an allowance constituting 25% of the usual wage (see [13.1] below). However, we note the wide range of situations that may be covered by an availability agreement and think that it makes more sense for the Courts to develop guidance that may be used in various situations.
- 7.11. We think that MBIE’s mistrust of the judiciary is unfounded. However, there will also be a role for the Government as regulator to develop guidance on interpreting this section. This may be done informally through MBIE’s website and publications or more formally through a code of employment practice developed under s 100A of the Employment Relations Act 2000.

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<sup>4</sup> This was the basis on which most of the earlier consultation occurred. However, by way of a Briefing entitled Final Cabinet Paper on Addressing Unconscionable Practices in Employment Relationships (28 April 2015) MBIE raised concerns (we think largely unwarranted) with the prospect of ultimately the Courts being asked to determine what constituted reasonable compensation.

7.12. To provide guidance to the Courts and more certainty for workers and employers we recommend that the Bill include a non-exhaustive list of factors to be taken into account when determining reasonableness of compensation such as:

- The quantum of payment;
- The proportion of time the employee is required to work during their availability period;
- The number of hours the employee is required to remain available;
- The proportion of availability requirement to contracted hours of work;
- The times at which the employee is required to be available including:
  - Whether and to what extent the availability requirement compromises the ability of the employee to undertake other employment (particularly within usual office hours);
  - Whether and to what extent the availability requirement compromises or disrupts an employee's usual rest and sleep times;
  - Whether and to what extent the availability requirement compromises or disrupts an employee's ability to spend time with their family, undertake cultural or sporting commitments, or attend to personal matters;
- The notice period for undertaking work;
- Restrictions which may constrain an employee's right to undertake other activities (such as a requirement to remain alcohol-free, to stay in cellular phone reception at all times or to remain within a certain travel distance of work.

*Salariation of availability compensation*

7.13. Proposed s 67E(5) of the Bill states that compensation for availability may be rolled into a global payment of salary.

- 7.14. We recognise that it is common for salaried employees' agreements to state that their remuneration is intended to compensate them for any additionally hours worked.
- 7.15. However the proposed wording is likely to encourage employers to place low paid and part-time workers onto salaries to avoid paying additional compensation. There is no principled basis for excluding salaried workers from the same protections as others.
- 7.16. Our recommendation is that proposed s 67(5) is deleted. This would mean that salaried employees expected to work above and beyond fixed hours would be must be compensated for doing so.

#### *Availability-only agreements*

- 7.17. Availability clauses may also be used in relation to some or "all work performed under the agreement" under proposed s 67E(2)(a).
- 7.18. An agreement based solely on the premise that a worker will be available for work with no contracted hours is problematic legally. There is no requirement that compensation be paid on a regular basis. If a workers is "on the books" with a requirement to remain available but are never offered work when do they cease to become a worker? As outlined at [5.11] above, this idea does significant violence to the whole concept of employment as a mutual obligation to provide and undertake work.
- 7.19. Availability only agreements also pose challenges in relation to various service-based entitlements such as annual leave and sick leave.
- 7.20. We fundamentally oppose the imposition of availability only employment agreements. Proposed s 67E(2)(a) should be deleted. Employers who wish to place workers on call should be required to guarantee at least some hours.
- 7.21. We recommend that availability is capped as a proportion of contracted hours. This may be 100% so that an employee with a guaranteed 8 hour shift could be asked to be available for a further eight hours.

## 8. Notice and payment for cancellation of shifts (cl 87; proposed s 67G)

- 8.1. Proposed s 67G allows an employer to include a clause in the employment agreement setting out a period of reasonable notice for the cancellation of a shift along with compensation payable if the shift is cancelled without such notice ('a cancellation clause').
- 8.2. Under the proposal, if the employer cancels a shift without relying on a cancellation clause, the employee is only notified at the beginning of the shift or the remainder of a shift is cancelled after it starts then an employee is entitled to "what he or she would have earned for working a shift" under proposed s 67G(5).
- 8.3. Shift work is defined in proposed s 67G(6) as "any period of work that an employer has agreed to make available to an employee."

### *Payment for agreed work*

- 8.4. We support the general proposition that shift cancellation should result in the employee being paid what they would have earned for working the shift. This is consistent with general contract law where if a worker is contracted to undertake a shift and ready to work then they have fulfilled their side of the contract and are entitled to be paid.
- 8.5. We note that the phrase in proposed s 67G(5) "An employee is entitled to what they would otherwise have earned for working a shift" is new to the minimum code legislation. For clarification we recommend adding the concept of "relevant daily pay" under the Holidays Act 2003 by stating "An employee is entitled to what they would otherwise have earned for working a shift (including their relevant daily pay as that term is defined in the Holidays Act 2003).

### *The definition of shift work*

- 8.6. The definition of shift work is easily gamed. A devious employer may argue that any period of work they have agreed to make available to an employee allows the splitting of a usual work day into a series of shorter shifts. An eight hour shift may therefore be split into eight one-hour shifts. Under the operation of the proposed changes, an employer who decided that an employee was no longer needed may be liable for the payment for the first one-hour shift but only the nugatory compensation payment for the remaining seven shifts.

- 8.7. The idea of work as something that an employer “has agreed to make available to an employee” is also an offensive phrasing which smacks of *noblesse oblige*. Work is performed for benefit of employers and workers.
- 8.8. We submit that the definition of shift work in proposed s 67G(6) should be revised to state: “**shift work** means any period of continuous or effectively continuous work that that employer and employee have agreed should be worked by the employee.”

*Cancellation of shifts*

- 8.9. Our concern with the proposed clause is that it introduces a statutory right to cancel shifts without reasonable notice in exchange for minimal compensation and, by implication, to cancel a shift with reasonable notice without any compensation at all.
- 8.10. Cancellation of shifts may contravene an employee’s right to work. In *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* [1995] 1 ERNZ 672 (WEC37/95), Chief Judge Goddard addressed the idea that the duty to maintain the employment relationship had come to involve “a social dimension of ensuring the employee a function within the enterprise”. The Chief Judge observed:

That day has arrived in New Zealand, as the cases in this country show. There is implicit statutory recognition of the position. That is why statutory intervention has been necessary to permit suspension in limited circumstances during the currency of a strike. But it is not allowed otherwise unless expressly authorised by contract (for example, seasonal contracts). The employment contract is a continuous wage/work bargain, with neither side at liberty to suspend its operation against the will or without the consent of the other, except as authorised by law or by the contract itself. This rule has many implications, but it is necessary to mention only some of those that affect the employer. They include the proposition that its employees have the right to work, and that that right has an intrinsic value of its own and may not be taken away or prejudiced against the employee’s will. At any rate, where there is work to be done; it cannot be helped if there are fluctuations in available work, then it may be enough to pay the employee for being available but otherwise the employee must be allowed the satisfaction of doing his or her work. It is not enough to pay the wages, withholding the work.

- 8.11. We oppose the introduction of a right to cancel shifts and recommend that the parts of the Bill authorising this are deleted (proposed ss 65G(2)-(4) along with necessary amendments to s 65G(5).

*Additional protections for workers- reasons, compensation, notice period*

- 8.12. We do not support the introduction of a right to cancel shifts and ask that this is reconsidered. However, if the Committee is determined to press ahead with this proposal, four amendments are needed to prevent widespread abuse.
- 8.13. First, there is no requirement in the Bill for an employer cancelling a shift (either under a cancellation clause or with reasonable notice) give any sort of valid or fair

reason for the cancellation of the shift. This allows an employer to use shift cancellation as a tool of punishment or control (or to make employees wear the risk of sloppy management practices).

- 8.14. Any cancellation of shifts (either under a cancellation clause or with reasonable notice) should either by specific agreement to any cancellation or, where undertaken unilaterally by the employer, for reasonable and genuine reasons outside of the employer's control.
- 8.15. Second, like compensation for availability no minimum level or reasonableness test is set in compensating an employee for loss of a shift. This means that an employer may compensate a worker for a cancelled shift with (for example) meal vouchers or nominal payments. The fundamental issue of how employees with little or no bargaining power get a fair deal is unaddressed (see our comments above in relation to availability payments).
- 8.16. We submit that compensation for cancellation must be expressed as *reasonable* compensation in proposed s 67G(2)(b).
- 8.17. The concept of reasonable notice is difficult.
- 8.18. An example which has already arisen in the media is the question of weather-dependent industries such as some horticulture. We make three observations:
- First, this is a question of who is best placed to wear the risk. An employee's financial obligations and rights to income security are not dependent on weather or other conditions. Many of the adverse conditions faced by employers are predicable over the course of a year and can be built into business models.
  - Second, what constitutes reasonable notice may vary significantly between types of work and industry.
  - Third, an employer may ask an employee to undertake other work that is not dependent on weather or other adverse conditions rather than simply cancelling their shift.
- 8.19. We do not think a requirement as to "reasonable notice" alone is a sufficient guarantee of employee's rights because the employees are unlikely to test these clauses in court except infrequently. A backstop is needed.

8.20. We submit that proposed s 67G(3) should state: “For the purposes of subsection 2(a) the period of notice must be reasonable and, in any case, not less than 48 hours.”

8.21. Fourth, it is unclear what affect the proposed sections have on existing employment agreements and in particular whether this creates a new statutory right to cancel shifts which overrides the terms of the contracts.

8.22. We submit that a new subsection should be added to state “for the avoidance of doubt, this section does not allow employers to cancel shifts in breach of employment agreements whether with reasonable notice or otherwise.”

## **9. Restrictions on secondary employment (cl 87; proposed s 67H)**

9.1. This proposal is intended to make prohibitions on secondary employment (either in general or unless the employer consents) unenforceable unless there is a genuine reason based on reasonable grounds and that reason is set out in the employment agreement (proposed s 67H(1) and (2)).

9.2. Examples of genuine reasons are given as protecting an employer’s commercially sensitive information, protecting an employer’s intellectual property rights, protecting an employer’s commercial reputation and preventing a real conflict of interest (proposed s 67H(3)).

9.3. The section is expressed as not limiting or affect the law relating to restraint of trade (proposed s 67H(4)).

9.4. We suspect that good policy intent here has been tripped up by clumsy drafting.

9.5. The formulation of the clause appears to have been influenced by s 66 of the Employment Relations Act 2000 regarding fixed term employment agreements regarding genuine reasons based on reasonable grounds.

9.6. However, restrictions on secondary employment are more complex than fixed term employment agreements because the reasonableness of a fixed term is assessed at the point of making the employment agreement (was the fixed term for a genuine reason based on reasonable grounds when it was proposed?) whereas the reasonableness of a restraint on secondary employment must always be judged by comparing the current and proposed employment.

- 9.7. Under current law, the question of whether accepting other work breaches an employee's duty to their employer will always depend both on the nature the interest that the employer is trying to protect and whether the new job infringes on this interest.
- 9.8. For example, working as a software developer developing smart metering technology for 20 hours per week and then accepting another job working as a bartender for 20 hours per week would not offend current law. However, accepting another job working for a rival software company on a similar product might.
- 9.9. The proposal allows an employer to say in an employment agreement, for example "You are not permitted to work for any other company because of the commercially sensitive information you are privy to." While we believe the intent of the law is that such a clause may be unenforceable, we invite the Committee to consider the likely effect of such a clause on a worker without detailed knowledge of the law.
- 9.10. A clearer and more detailed approach is needed.
- 9.11. First, there should be a general ban on clauses restraining employees from undertaking secondary employment unless the restraint is for a genuine reason based on reasonable grounds, in writing and the employee has had the reason explained to them and an opportunity to seek advice on it.
- 9.12. Second, proposed s 67H(2) should be expressed more clearly to state that:
- (2) A restraint on secondary employment is unlawful except to the extent that—
- (a) \_\_\_\_\_ The restraint has been set out in a lawful clause under [the subsection which permits restraints on secondary employment on reasonable grounds only];
- (b) \_\_\_\_\_ Undertaking work for another person is likely to contravene the genuine reason based on reasonable grounds set out in that clause; and
- (c) \_\_\_\_\_ The employer and employee have discussed the matter in good faith.
- 9.13. Third, an employer who contravenes this section should be liable to both a personal grievance (as proposed in cl 88) and a penalty under the Act.
- 9.14. Fourth, the proposal that an employer could place a worker who has no guaranteed hours under a restraint on secondary employment is deeply troubling. We are aware that such practices occur. For example, the Court noted in Jinkinson at [58]:

[58] Clause 9.4 of the agreement provided:

**9.4 Other Employment**

*During the course of your employment you will be expected to devote your full energies to this position and for this reason, together with a need to protect the Company's commercial interests, you are not permitted to engage in any other business activities without the Company's prior written consent.*

This clause clearly contemplated full time employment and was therefore inconsistent with casual employment. In particular, it was inconsistent with the statement in clause II that Ms Jinkinson was employed "to undertake work that is only required irregularly."

9.15. The section should specifically render restraints on secondary employment unlawful where no fixed hours have been agreed.

**10. Deductions from wages (cl 131)**

10.1. Clause 131 of the Bill proposes to amend the Wages Protection Act 1983 to restrict "unreasonable deductions" from wages regardless of whether these are consented to by workers.

10.2. This proposal is useful as far as it goes but is effectively statement of existing law.

10.3. The more important question is what constitutes an unreasonable deduction. A much more significant issue for workers is what can be subject to deductions from wages subject to a general deduction clause. We think that the case law is clear that a fair process should be followed and specific consent sought for any deductions for loss caused.

10.4. There is a useful discussion of this question in the commentary on the Wages Protection Act 1983 in *Mazengarb's Employment Law* at [3105.8]:

[T]he general principle remains that employers may not lawfully make deductions from wages (or withhold them) in order to compensate for loss caused by the worker. See, for example, *Sharp v Douglas* [1980] ACJ 183 (farmer held not to be entitled to deduct amounts from wages representing loss caused by damage to equipment and stock for which the worker was allegedly responsible). Also *Wright v Ocean Towing and Salvage NZ Ltd* [1999]2 ERNZ 384 (no deduction for loss of potential salvage reward arising from alleged disobedience).

In *Harrison v Tuckers Wool Processors Ltd* [1998] 3 ERNZ 418 (WC63/98), a clause in a collective employment contract stated that "where the employee is responsible for any loss or damage to the company's property, the company reserves the right to make reasonable deduction from the employee's wages to cover the replacement cost of such property". The Employment Court held that the clause was harsh and oppressive under [s 57](#) of the EC Act, since it allowed for self-help in circumstances which would otherwise have required proof of culpability and quantum in civil proceedings. Chief Judge Goddard added that "Having regard to the Wages Protection Act 1983, the clause is probably of no effect in the way in which it is expressed because the defendant purports to reserve the right to make reasonable deductions

from the employee's wages without express permission to cover the replacement cost of property where the employee is responsible for any loss or damage to it" (at 468).

- 10.5. As Chief Judge Goddard noted in *Amaltal Fishing Company Ltd v Morunga* [2002] 1 ERNZ 692:

[33] The second matter is the appellant's practice of deducting such sums of money as it sees fit from the employees' wages to reimburse itself after it has decided to make a payment to a third party based on its perception that there is some moral or indirect legal obligation on it to make the payment. ...

[35] The Wages Protection Act 1983 prohibits any deductions from wages that have not been requested or authorised by the employee in writing, whether the deductions seem justifiable or not. This is because employees have earned their wages which may not then be the subject of any deduction merely because the employer still has their money in its possession and so is in a position of some power. ... Their entitlements are not subject to arbitrary diminution at the instance of their employer. Wages have to be paid in money and not partly in money and partly by discharging debts which seem valid to the employer but the existence or amount of which the employee may wish to dispute or at least to control the timing of their payment having regard to other commitments and needs.

- 10.6. In *Jonas v Menefy Trucking* [2013] NZEmpC 200, Judge Ford noted at [62]:

The provisions of the Wages Protection Act 1983 are mandatory. Under those provisions, an employer must pay the entire amount of wages payable to a worker without deduction unless the worker otherwise consents or, in certain circumstances, where there has been an overpayment. In cases such as the present, however, where a general deductions clause in an employment agreement is relied upon rather than an individualised written consent then, consistently with its good faith obligations under the Act, an employer must, at a minimum, consult with the worker before making any deduction. Without such a safeguard, the protection intended to be afforded by the Wages Protection Act 1983 would be illusory. It may also be that no deduction can be made on the basis of a general clause without that worker's express consent, although this was not submitted by the plaintiff and, therefore, does not fall to be decided.

- 10.7. Regrettably, the tucking away of this information in obscure case law allows bad employers to violate workers' rights.

- 10.8. We submit that "unreasonable deductions" should explicitly include deductions from workers' wages for loss or damage beyond their control and deductions for loss or damage caused by the worker unless those deductions are subject to a fair and reasonable process in good faith and explicit subsequent written consent to the specific deduction.

## 11. Casual loading

- 11.1. Like work generally, casual work changed its tenor significantly with the demise of the award system. Campbell and Brosnan have a useful summary of casual work under the award system:<sup>5</sup>

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<sup>5</sup> Iain Campbell and Peter Brosnan, 'Relative Advantages: Casual Employment and Casualisation in Australia and New Zealand' [2005] NZJER 30(3) 33-45 at 38-39.

As in Australia, the use of casual labour in New Zealand pre-dates the arbitration system. ...As labour regulation developed, casual labour was integrated into the system. New Zealand's Court of Arbitration would seem to have led the way. Explicit casual loadings had been in New Zealand's awards for about a decade before Higgins' 1913 decision in Australia.

... New Zealand awards, like those in Australia, defined rights and benefits for permanent employees but allowed room for other forms of employment through special clauses. *Casual clauses* were common, but they were not in all awards. ...The *definitions* of 'casual' varied from award to award, but ...often explicitly incorporated a notion of restriction in the use of casual workers. They tended to stress that the engagements of casuals should be on an "as needs" basis, and they often imposed limits on the engagement of casuals; the maximum duration of employment – usually about a week, and a minimum period of payment (and hence of work) – usually about three hours a day. When the definition was restrictive, there was little need for a separate *mechanism of control*. It is difficult to gauge the precise extent of the *exemptions from standard rights and benefits* that were associated with casual work. However, the general principle of casual wage as work with only a basic entitlement to an hourly wage seems to have been influential. In common with Australia, the clauses often stipulated a *casual loading* on the hourly rate of pay... these loadings sometimes were designed to penalise employers for using casual labour, and sometimes to compensate the worker for lost earnings due to the casual nature of the work. Once the awards constrained the use of casuals, the first intention became the main one. In some awards the casual loading was non-existent; in others it was at least as high as one-third (e.g. Wellington District Grocers' Assistants Award, 1931).

11.2. Casual loadings are not therefore new concepts but a return to the situation that applied for nearly 100 years before the Employment Contracts Act 1991 swept the accrued rights and protections of hundreds of thousands of workers away.

11.3. Many of these protections have been maintained in Australia. The OECD recently summarised the status of Australian casual workers including the following:<sup>6</sup>

In some industries, including construction, hospitality and some manufacturing sectors, employers must convert casual contracts to part-time or full-time contracts upon request if the employee has worked for a certain period of time and fulfilled criteria such as a minimum number of hours worked per week over the period of engagement. Typically, if a casual worker has been working regular hours for six or 12 months and requests to have their contract converted to a permanent full-time or part-time contract, employers cannot unreasonably refuse to do so. In fact, according to a recent decision of the Federal Court "true casual" employment is characterised by informality, uncertainty and irregularity of work, which cannot follow a fixed, regular schedule for a whole year (see *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321). ...

In compensation for a lack of other entitlements, casual employees receive a loading of around 25% on top of their hourly pay. In other regards, they should receive the same pay as other employees for doing the same work, including additional payments for working at non-standard times or on public holidays. In some industries, employers must pay casual employees for a minimum amount of work each time they are called in (e.g. three hours in the retail industry and two hours in the hospitality industry). Casual employees are also eligible to receive contributions to superannuation (Australia's private pension scheme) in the same way as other workers.

11.4. Casual loadings were common in New Zealand until the abolition of the Award System in 1991. They remain common in Australia.

11.5. The current situation where employers are only liable to pay for annual leave means that there is a systemic bias towards the employment of casual workers as it is

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<sup>6</sup> Organisation for Economic Cooperation and Development (2014) *OECD Employment Outlook 2014* Box 4.2 at 149

cheaper to do so. There is no requirement to load for public holidays, sick leave, bereavement leave, health and safety representative training leave, employment relations leave, jury duty, notice periods or payment in lieu of notice. Casual workers also have no access to personal grievance protections for unfair dismissal. Effectively these are cost transfers from the employer to the worker.

11.6. By its very nature, temporary work frequently leaves workers at a much greater than usual disadvantage when arguing for higher pay. If they are on a benefit, they may be penalised for refusing the work. There is now robust evidence that people in casual, labour hire or seasonal work have a pay disadvantage that cannot be attributed to their personal characteristics or the nature of the job or occupation. Pacheco and Cochrane<sup>7</sup> found a pay temporary work hourly wage pay penalty of 20% for temporary agency workers, 20-25% for casual workers and 15% for seasonal workers. There was no significant difference in pay for fixed term temporary workers. The gap may be even larger because the researchers were unable to identify if the hourly wage included an 8 percent pay loading for annual leave. Temporary workers are therefore more likely to be on or near the minimum wage.

11.7. We note that s 28 of the Holidays Act 2003 (allowing the payment of annual leave as part of base pay) is in some senses a *de facto* casual loading.

11.8. We submit that the Bill should include the reintroduction of a more comprehensive casual loading including at least:

- 20 missed annual leave days (as currently recognised by the 8% loading);
- 11 missed public holidays;
- 5 days sick and bereavement leave;
- and another 5% for other lost benefits.

11.9. This would create a more accurate aggregate casual loading of 21.0%: This is considerably less than casual loadings under many previous New Zealand awards and current Australian ones but would go a long way towards 'levelling the playing field.'

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<sup>7</sup> Pacheco and Cochrane (2015) "Decomposing the Temporary-Permanent Wage Gap in New Zealand." (AUT University Economics Department Working Paper 2015/7)

11.10. The best solution would be to keep the elements of this loading disaggregated and applied to other fixed term and variable hours workers as appropriate.

11.11. It is important to note that this loading is intended to shift otherwise externalised employment costs back onto the employer. There is no loading applied, for example, to recognise the negative social costs of casual work nor possible additional or proportionately higher costs such as travel for only a few hours work or the need to find child care at short notice.

## **12. Interaction with benefit system**

12.1. A huge issue with temporary work and casual contracts is that, when considered in tandem with the benefit system, the worker's choice to accept work offered vanishes. Work and Income tells beneficiaries with work obligations that:<sup>8</sup>

If you do not take any offer of suitable work, including temporary work, or work that is seasonal or subsidised, without a good and sufficient reason, your benefit will be reduced by up to half (if you have dependent children) or stopped (if you don't have dependent children) for 13 weeks.

12.2. The choice for a prospective worker to accept work or not is constrained by severe sanctions if they do not take any job that comes their way (including casual work or zero hours agreement).

12.3. This requires a change to the definition of suitable employment in both the Social Security Act 1969 and the guidance provided to Work and Income case managers to ensure that suitable work includes a guarantee of a minimum number of hours over a minimum period.

12.4. This would 'turn off the tap' for employers who are using casual work for their own convenience knowing that workers have no effective choice.

12.5. Another significant challenge relating to variable hours is the clumsiness of the abatement mechanism for benefits when workers declare extra hours. This issue was recently reported on by Radio New Zealand.<sup>9</sup> The item includes Hayley's story:

Hayley, which is not her real name, works 18 hours a week in retail in the Bay of Plenty. Her partner is also on a low hour contract.

They are entitled to claim assistance, but Hayley said they decided not to go on the benefit due to the hassles of having to declare extra income if they did manage to get more hours.

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<sup>8</sup> <http://www.workandincome.govt.nz/individuals/obligations/not-meeting-your-obligations.html>

<sup>9</sup> <http://www.radionz.co.nz/news/national/259483/insecure-workers-forgoing-benefits>

"Sometimes he gets more hours, sometimes I get more hours - not very often. We have to declare that every week and it's just a complete stuff-around to WINZ (Work and Income New Zealand) - especially on my part to get extra help from them if I have to keep declaring my income every week."

- 12.6. Work is needed on the mechanism that allows workers to declare variable or additional hours to ensure that they are not unfairly penalised by Work and Income.

### 13. Regulation in Europe

- 13.1. Adams and Deacon have an interesting summary of regulatory approaches to the regulation of zero hours agreements (called ZHCs in the text) in Italy, Ireland, Switzerland and the Netherlands:<sup>10</sup>

#### Italy

In many countries, the extreme flexibility of the ZHC form is not recognised; to take advantage of the 'on-call' category, the employer must offer some guarantee of income during periods in between hirings. In Italy, legislation governing on-call work (*lavoro intermittente*) was introduced in 2003. Under this law, any use of on-call work must be justified by reference to production peaks and organisational needs; it may not be relied on to supply the enterprise's general needs. The contract requires the worker to be available to be engaged by the employer for a pre-established period of time. Thus, like the ZHC, the contract requires availability, without guaranteeing work. However, in contrast to the ZHC, the employer may make use of the worker for only a limited number of days during this period. The employer must notify the worker that their services are needed at least one working day in advance, and the contract must stipulate a monthly allowance to be paid to the worker during the period when they are on standby, whether or not work is provided. The employer must notify the labour office each time the worker is called on.

#### Ireland and Switzerland

In Ireland and Switzerland, forms similar to the ZHC have recently emerged, but as in Italy, they are regulated in a way which provides some income security to the worker. In Ireland, employees are entitled to be paid at a minimum of 25% of the normal wage for any contract hours during which they are required to be available for work, up to a maximum of 15 hours per week. This creates a right to a minimum weekly income which assists financial planning. In Switzerland, an employee is compensated in full for on-call time spent at the workplace, and on a part-wage basis for on-call time at home.

#### Netherlands

In the Netherlands, on-call work was largely unregulated until the passage of the Flexibility and Security Act (FSA) in 1999. The FSA introduced a minimum wage guarantee for on-call workers employed for less than 15 hours per week, under which they are entitled to at least 3 hours' pay for each work call. After three months of paid work consisting of 20 hours or more of work per month, an employment contract is implied, under which the worker is guaranteed to receive at least the number of hours they had worked over the previous 3 month period. The aim of the law, in addition to the protection of the worker, was to stop the employer using the on-call contract as a veil for what should be standard employment. During the initial three month period, the employer's needs and those of the worker can be explored and regularised, but, unlike the British ZHC, the worker does not bear all the risk of fluctuations in demand.

- 13.2. There are some valuable ideas in the approaches of these countries which compare favourably to clumsy attempts to regulate in the United Kingdom (and parts of this Bill). In particular, we think that officials should be asked to brief the Committee on the compensation mechanisms in Italy, Ireland and Switzerland and the deeming of hours of work in the Netherlands.

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<sup>10</sup> Zoe Adams and Simon Deakin *Re-regulating Zero Hours Contracts* (2014) Institute of Employment Rights: Liverpool at 28-29.

## **PART B: PARENTAL LEAVE CHANGES**

### **14. CTU policy on parental leave**

- 14.1. The extension of eligibility of workers in casual and seasonal work to paid parental leave is a welcome and a necessary addition to the Parental Leave and Employment Protection Act 1987. We also welcome the change to access to paid parental leave that replaces attachment to a single employer to being in employment generally. These changes will result in more women, men and families gaining access to paid parental leave.
- 14.2. We also welcome the extension of unpaid leave to workers who have been with their employer for more than six months (but less than twelve) as a standard six month leave period (inclusive of the eighteen weeks' paid leave). The changes in the thresholds will also have a positive impact for employees on fixed term agreements applying for paid parental leave.
- 14.3. Even with these improvements, New Zealand still lags behind comparable countries and falls short of international standards regarding the length of paid parental leave and the level of paid parental leave payments. The Bill and current Government policy does not deal with these gaps, which compromise the objectives of the Parental Leave and Employment Protection Act 1987.
- 14.4. The CTU advocates for the progressive realization of 52 weeks paid parental leave alongside a month of paid paternity / partner leave available solely for the father / partner. The CTU therefore supports the Bill currently before Parliament –the Parental Leave and Employment Protection (Six Month's Paid Leave and Work Contact) Amendment Bill – which moves us towards that target.
- 14.5. Another significant issue is slippage in the level of paid parental leave payments. At the time of the introduction of paid parental leave in 2003, the maximum weekly payment was \$5.00 above the minimum wage for forty hours' work. Currently the maximum payment is \$516.85, before tax; well below to the weekly minimum wage of \$590 for forty hours' work. The maximum paid parental leave payment is now 87 % of the minimum wage.
- 14.6. A guide to standards in parental and maternity leave is the International Labour Convention Organisation (ILO) Maternity Protection Convention 2000 (No. 183). The

Convention states that payments should be no less than two-thirds of previous earnings but recommends the payments reflect the full amount of previous earnings.

14.7. While New Zealand has not ratified ILO Convention No. 183 it represents best practice internationally. Some progress has been made with the length of time with the increase to 18 weeks paid leave which is the ILO recommended standard, but we are well short of meeting the standard on payment levels.

## **15. Extending paid parental leave to temporary, casual and seasonal workers**

15.1. The CTU welcomes the proposal to extend eligibility of paid parental leave to casual and seasonal workers. The ineligibility of workers in seasonal and casual work to paid parental leave is a major inequity. The consequences are made worse by the fact that seasonal and casual workers are more likely to be low-income workers.

15.2. The changes also improve the access of workers on fixed-term agreements to paid parental leave. Workers in the education sector, where there is a high prevalence of fixed agreements, will benefit from the changes as a result of the changes in the employment tests and thresholds.

15.3. The change to provide seasonal and casual workers access to paid parental leave meets an international obligation. In 2012 the Committee of Experts on the Convention of the Elimination of Discrimination against Women (CEDAW) urged progress on our obligations under the CEDAW maternity protections and ILO Conventions recommending that:<sup>11</sup>

The state party introduce appropriate legal measures to ensure parental leave including paid parental leave for men as well as paid leave for seasonal or fixed term workers with multiple employment relationships.

15.4. This changed eligibility proposed in the Bill recognises a changing labour market and the increase of New Zealand workers in non-standard work. The 2012 Survey of Working Life<sup>12</sup> confirmed that women are more affected by casual and temporary employment. Temporary workers were more likely to be women and had a younger age profile than people in permanent jobs. Women made up 58 percent of temporary employees, compared with 48 percent of permanent employees. Women made up the majority of workers in fixed term and casual jobs.

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<sup>11</sup> NZCTU, Te Kauae Kaimahi. (2014). NZCTU Submission on “Modernising Parental Leave.” Wellington, N.Z.

<sup>12</sup> Statistics New Zealand. (2014). Flexibility and Security in Employment: Findings from the 2012 Survey of Working Life. Wellington.

- 15.5. Seasonal and casual workers are more likely to be low-income workers and because of this less likely to have their own savings and so more reliant on replacement income when taking parental leave. In addition, seasonal and casual workers are also less likely to have access to any employer-provided top-up schemes.
- 15.6. Providing paid parental leave to casual, seasonal and temporary workers may have a positive impact on Māori and Pacific employment equity. The Regulatory Impact Statement<sup>13</sup> for this Bill reported on a range of labour market research showing that Māori and Pacific mothers are over-represented in the types of jobs and employment arrangements that tend to exclude mothers from being eligible for parental leave.
- 15.7. One of the biggest issues in providing seasonal and casual workers with paid parental leave entitlement is that casual and seasonal workers have lower levels of awareness of their entitlements compared to permanent workers.<sup>14</sup>
- 15.8. The Regulatory Impact Statement partially acknowledged this stating that, “there is a risk that workers and employers may be confused about their rights and obligations following the changes.”
- 15.9. It is unclear where obligation/ requirement to inform seasonal and casual workers of their rights will lie. If it is with employers, in the same way that it is for permanent employees, then there are real issues about the capacity, capability and willingness of many employers in the seasonal and casual work sectors to do so. But already there are issues with the timeliness of employers in some sector to process parental leave applications as this example from a union organiser demonstrates:
- “...had two cases recently where the employer had not processed the application and members were left without pay in their first few weeks. We have generally got the employer to advance a few weeks’ pay but it is very stressful for the member, right at the time they are generally giving birth.  
We are not talking about the approval so much as simply the provision of employment information so that they application can be processed by the IRD. There don’t seem to be any specific timeframes or penalties for the employer if they don’t provide the information in a timely way”.
- 15.10. Non-compliance with employment rights is regrettably more common in areas with high levels of casual and seasonal employment. If employers have to inform

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<sup>13</sup> Ministry of Business, Innovation and Employment. (2015). Regulatory Impact Statement: Modernising Parental Leave. 2015: Ministry of Business, Innovation and Employment

<sup>14</sup> Dixon, S. (2009). A profile of temporary workers and their employment outcomes. Wellington: Department of Labour.

seasonal and casual workers of their paid parental leave rights the resources need to be available to ensure they are well equipped to do this.

- 15.11. A targeted education campaign and ongoing resources are required to inform workers in areas where there are high levels of seasonal, casual and fixed term agreement of the extended eligibility to paid parental leave under the changes to the Parental Leave and Employment Protection Act 1987.

**16. Maternity leave and primary carer leave (cl 6)**

- 16.1. The Bill proposes to replace references to “maternity leave” with “primary carer leave.” We recommend that reference to ‘maternity leave’ be retained.
- 16.2. One of the primary purposes of the Parental Leave and Employment Protection Act 1987 is to protect the rights of employees during pregnancy and to allow the expectant mother a period of time before and after giving birth, to prepare for and recover from the delivery.
- 16.3. The stated purpose of the Parental Leave and Employment Protection Act 1987 set out in s 1A of the Act is to:
- (a) set minimum entitlements with respect to parental leave for male and female employees; and
  - (b) protect the rights of employees during pregnancy and parental leave; and
  - (c) entitle certain employees and self-employed persons to up to 16 weeks of paid parental leave.
- 16.4. Maternity leave acknowledges the importance of maternal health and wellbeing for the biological mother after child birth as well as the promotion of breast feeding and the World Health Organisation recommendation to breast feed for six months.
- 16.5. Removing reference to ‘maternity’ removes recognition of the biological role that women as birth mothers have in relation to pregnancy and childbirth, which are recognised as one of the primary purposes of the Act.
- 16.6. An important reason for the establishment of paid parental leave and parental leave was to address the inequity and disadvantage that women face from having to take leave out of the workforce to have, and typically to provide the early care for children. Maternity leave recognises this as a particular aspect related to women in the labour market. This is not to suggest that men shouldn’t be encouraged to take more parental leave, but that it is women who are giving birth who ‘must’ take some parental leave

- 16.7. Retaining the term “maternity leave” is important for reporting at an international level. New Zealand forwards reports and data to both the OECD and the ILO on parental leave. Both organisations use the standard terms of maternity and paternity and parental leave.
- 16.8. There is precedent for this with a clear parallel in the current Act which uses the term paternity / partner leave.
- 16.9. Acceptance of the retention of maternity would mean the definition in proposed s 7 would change to “Meaning of maternity / primary carer” and proposed s 8 “Entitlement to maternity leave / primary carer leave. Subsequent changes would need to be made to other proposed Sections in the Bill replacing it each time with maternity leave / primary carer leave e.g. cls 9, 10, 11 and 12 and will apply in other parts of the Bill as well.
- 16.10. The CTU recommends that the word “maternity” is retained in the Parental Leave and Employment Protection Act 1987 and that the term used is “maternity / primary carer leave”.

## **17. Lowering the hours threshold**

- 17.1. Removing the one hour requirement for access to paid parental leave is significant and immediately extends eligibility of paid parental leave to many more workers. This is welcome.
- 17.2. We recommend that the average hours per week threshold be reduced to 7.5 hours on average over any 26 weeks out of the 52, instead of the 10 hours proposed in the Bill. This fits with the employment history and pattern of workers who may only be working one day or shift per week.
- 17.3. Some of our affiliates, recommend a level below the 7.5 hours to accommodate workers who work half a shift a week – 4 hours. For example, it is not uncommon in the health sector for nurses to be working four hours a week. There is a case that these workers may be better off financially accessing the Parental Tax Credit – unless they are very well paid. However, that does mean resignation from their employment and loss of job attachment and continuity.
- 17.4. An evaluation of the paid parental leave scheme, as recommended in [26.2] below should include a review of the effectiveness of changes to the hours threshold.

## **18. Negotiated carer leave (cl 34 inserting new Part 3A)**

- 18.1. New Part 3A in the Bill is proposed to provide for workers who are not eligible for maternity / primary carer leave to request a period of “negotiated carer leave” to enable them to receive parental leave payments and take extended leave e.g. if an employee has been in the job under six months they would be ineligible as they do not meet the six month employment test or if they do not meet the hours threshold. This is important as there is a necessity for leave and avoids the person having to resign.
- 18.2. We commend the intention behind and the development of a mechanism to accommodate a new anomaly that will be brought in by the changes to the Parental Leave and Employment Protection Act 1987 but the mechanism proposed does not provide enough certainty for leave.
- 18.3. The provision in new Part 3A is modelled on provisions in the Employment Relations Act 2000 providing the right to request flexible work arrangements. Problems relating to the uptake of this provision (Part 6AA) were found in the 2011 review of the Flexible Working Hours arrangements.<sup>15</sup> The review of Part 6AA found (among other findings) that:
- Awareness of Part 6AA has declined in New Zealand between 2008 and 2010.
  - Almost all requests for flexible work arrangements took place without any recourse to Part 6AA, and likewise the majority of requests were accepted by employers without referring to the provisions of the Part.
- 18.4. There appear, from this review, to be widespread practice of flexible working practices but that the provisions in Part 6AA of the ERA are not being used. We are therefore concerned that new provisions based on Part 6AA will not be adequate and provide enough certainty to get leave.
- 18.5. The fundamental problem with the flexible work request provisions is they are, in effect, a procedural right only and similarly in this Bill. Having only the right to request leave and not the right to leave is a weak entitlement. Therefore we contend that new Part 3A needs strengthening if it is intended to ensure that some

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<sup>15</sup> Department of Labour. (2011). Review of Part 6AA: Flexible Working Arrangements. Wellington, N.Z.: Department of Labour.

workers who are not eligible for paid parental leave e.g. because of a recent job change, or who work very few hours, are not disadvantaged.

- 18.6. New Part 3A should provide the right to negotiated maternity / carer leave not just the right to request negotiated maternity / carer leave. If there is not to be a statutory right to maternity / primary carer leave, for those that do not meet the six month test or the hours threshold then the grounds in Part 3A for rejecting the request should be tightened. This could be achieved by adding a reasonableness test for the employer's decision and allowing workers to challenge this reasonableness.
- 18.7. We recommend that proposed section 30E(1) is amended to state that the employer may refuse a request only if the employer determines that "the request cannot reasonably be accommodated on one or more of the grounds specified in proposed Section 30E subsection (2).
- 18.8. Strengthening these provisions should also include amending proposed s 30F to provide that a worker may challenge the reasonableness of their employer's refusal and should be renamed "Challenging Employer's Refusal" and amending proposed s 30F(2) to state:

An employee may challenge his or her employer's failure to respond to a request for "negotiated carer leave", or failure to respond adequately to a request or failure to grant the request if the employee believes his or her employer has not complied with Section 30D or (proposed amended ) Section 30E.

## **19. Penalties for breaches relating to parental leave**

- 19.1. The Bill has a penalty in proposed s 30J of \$2,000 if an employer has not complied with the requirements under new Part 3A for maternity / primary carer leave. The return of penalties for non-compliance with the Parental Leave and Employment Protection Act 1987 is welcome to ensure that employers follow legal process. But the penalty level is inadequate. The penalty for employers not complying with the Act compared to the increased penalty for employees providing fraudulent information (an increase from \$5,000 to \$15,000) are hardly consistent.
- 19.2. The penalties for non-compliance by employers with the Parental Leave and Employment Protection Act 1987 should be consistent with the penalties in s 135 of the Employment Relations Act 2000.
- 19.3. We recommend that new section 30J which states that there is to be a \$2,000 upper limit on the penalty that may be imposed on the employer for breach of new section

30D is removed and instead the penalty is cross-referenced to the penalty sections of the Employment Relations Act 2000.

**20. Labour Inspectors and parental leave (cl 45, 46)**

- 20.1. The Bill proposes adding a new section 30G to provide that a Labour Inspector may provide assistance to employers and employees for the purposes of the new Part 3A.
- 20.2. New Zealand has inadequate numbers of Labour Inspectors. This is discussed below in subpart 33 of our submission.
- 20.3. Increasing the role of Labour Inspectors to enforce new provisions in the Parental Leave and Employment Protection Act 1987 relating to parental leave is problematic because the Labour Inspectorate has decided to “deprioritise” certain elements of its mandate to focus on areas where bigger impact changes can be made. This includes the investigation of individual complaints in many workplaces.
- 20.4. The provision of information on parental leave is specific, can be time consuming and is almost always time pressured because of impending births, adoptions, notice periods and the immediate care needs of babies/ children. We recommend that MBIE ensure that there are additional Labour Inspectors with a specific focus on the Parental Leave and Employment Protection Act 1987.
- 20.5. Proposed ss 30H and 30I of the Parental Leave and Employment Protection Act 1987 allow for issues relating to an alleged noncompliance to be referred to mediation and subsequently to the Employment Relations Authority for determination. However, s 30H(3) only allows referral to mediation following Labour Inspectorate intervention. This is problematic where the Labour Inspector cannot or will not intervene.
- 20.6. We recommend changes to Section 30H to enable workers to be able to access mediation for the purpose of parental leave issues without first needing to access the services of a Labour Inspector.

**21. Employee’s notice in relation to return to work (cl 39)**

- 21.1. The Bill proposes to amend cl 39 of the Parental Leave and Employment Protection Act 1987 to provide that if an employee’s employment agreement requires a longer

period of notice of resignation than 21 days then the statutory requirement in the Act of 21 days' notice of not returning to work does not apply.

21.2. The very long notice periods in some employment agreements (three months in employment agreements are not uncommon in the health and education sectors) should not apply as they are unreasonable in the context of maternity / parental leave.

21.3. We oppose the amendment that provides for an employment agreement to override the requirements of 21 days' notice of not returning to work.

21.4. We welcome the change that enables employees to resign and still receive the parental leave entitlements which is consistent with the changes extending eligibility to seasonal, fixed term and casual workers who have no guarantee of returning to employment following paid parental leave.

## **22. Changes to Order in Council notifications (cl 68)**

22.1. Clause 68 replaces a section which related to the annual adjustment of paid parental leave to be adjusted by Order in Council at 1 July and not require this to be done by Order in Council. Instead the Minister must publish the adjusted rate on an Internet site.

22.2. We support the change in the Bill which does not require annual adjustments to be done by Order in Council.

## **23. Keeping-in-touch days (cl 55)**

23.1. The CTU generally supports the thinking behind Keeping-in-touch days but have some concerns about the mutual agreement provisions. We recognize that there are situations where with mutual agreement the employee returns to work for the purposes of for example training or handover. Keeping-in-touch days are a response to some situations where employees have been deemed to return to work and lost their right to paid parental leave because they came back to work while on paid parental leave.

23.2. We do not think the uptake will be very high. We have some concerns that there could be situations where employees could feel pressured to come into work. This could be improved by adding that there shall be no element of coercion.

- 23.3. An issue to consider keeping-in-touch days is the consequences if a person inadvertently goes over their 40 keeping-in-touch hours. Adequate information is essential to avoid this. One such mechanism to consider is a trigger letter from IRD to a person who is earning (from keeping-in-touch days) to warn them that this provision is limited to 40 hours.
- 23.4. An unmet need in parental leave policy is to return to work following extended parental leave with different work arrangements. Despite the government and business rhetoric about New Zealand workplaces needing to provide more “flexibility”, there are many anecdotal experiences from union organisers and union members and workers where their requests to change hours or working arrangements following parental leave have been flatly turned down, have been unwelcome and there has been no ability or willingness to discuss other arrangements.
- 23.5. We recommended in our submission on “Modernising Parental Leave”<sup>16</sup> and repeat our recommendation that legislative changes to specifically enable parents returning to work after parental leave to access different work arrangements for the purpose of child care needs.

## **24. Calculating hours for paid parental leave entitlements**

- 24.1. There will be issue for workers in seasonal and casual work in calculating their hours retrospectively for the purpose of paid parental leave payments, when workers have multiple jobs and if they are working for a small to medium-sized employer who has not kept hours and wages records. The Regulatory Impact Statement notes that a statutory declaration will be sufficient and this has been confirmed by MBIE officials. This is welcome.

## **25. Public awareness campaign and ongoing resources**

- 25.1. We were pleased to see the Regulatory Impact Statement acknowledge the need to improve the information for pregnant employees or employees going on maternity / primary carer leave about their statutory paid parental leave entitlements there is a need for ongoing information and easy to access resources that support workers and employees to exercise their rights and paid parental leave parameters.

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<sup>16</sup> NZCTU, Te Kauae Kaimahi. (2014). NZCTU Submission on “Modernising Parental Leave.” Wellington, N.Z.

- 25.2. Both an education campaign and ongoing information are needed for the new eligibility entitlements and general parental leave information. One suggestion is improved information and resources from Lead Maternity Carers and midwives (this will target pregnant employees), Primary Health Care practices and antenatal clinics. Resources should be multi-lingual and in clear, easy-to-understand language. For adoptive parents and other carers taking on maternity care and primary care roles there should be appropriate information from government agencies, especially Child Youth and Family and primary health care and children's organisations.
- 25.3. The lack of awareness and the decrease in awareness of Part 6AA between 2008 and 2010 is attributable in part to the failure to promote the rights of workers to flexible working arrangements over that period.
- 25.4. A public education campaign on the changes is essential and work needs to start now with engagement with stakeholders on the most effective ways to provide information especially to workers newly eligible to paid parental leave.
- 25.5. There is a particular need to target seasonal work and areas of work where there is a greater prevalence of non-standard work: this would particularly apply to the hospitality, retail and service sectors.

**26. An evaluation of paid parental leave is a priority**

- 26.1. Parental leave plays a critical role in sustaining women in the workforce and promoting equality through financial support and connection with employment. We support and have raised with MBIE the need for new research and evaluation of the parental leave scheme. The RIS for this Bill identified this also but qualified it with "a review will depend on available resources and other competing priorities".<sup>17</sup> An evaluation of the parental leave scheme should be an MBIE and government priority.
- 26.2. We recommend that an evaluation of the parental leave scheme be a MBIE and Government priority and commenced 12 months following the enactment of the proposed changes in the Bill.

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<sup>17</sup> Ministry of Business, Innovation and Employment. (2015). Regulatory Impact Statement: Modernising Parental Leave. 2015: Ministry of Business, Innovation and Employment

## **27. Annual leave following parental leave (s 42)**

- 27.1. Section 42 of the Parental Leave and Employment Protection Act 1987 provides that when leave is accrued while on parental leave or in the 12 months following return to work from parental leave, what someone is paid for that leave is calculated based on their earnings over the preceding 12 months. This will more often than not mean that parents receive no paid holiday leave on returning from parental leave at the very time when paid holiday leave is most needed.
- 27.2. This is a long standing issue of concern and has had significant media profile. To address it some employment agreements rule this out with collective agreements providing clauses which provide for paid leave in the first year back and some at the full rate of pay.
- 27.3. We recommend the repeal of s 42(2) of the Parental Leave and Employment Protection Act 1987.

## **28. Paternity / partner leave**

- 28.1. New Zealand's parental leave legislation and policy is out of step with other OECD countries in having no provision for paid paternity / partner leave. The 2005/2006. The evaluation found that most fathers take some sort of leave around the birth or adoption of a child but very few fathers take unpaid leave and are instead using annual leave at the time of the birth/ adoption of their child.
- 28.2. Many OECD countries provide a month's paid leave for the father / partner within the first 12 months of a child's life. The entitlement is on a use or lose it basis. While some employment agreements provide for paid paternity/ partner leave – by the employer – this is not widespread New Zealand practice. Paid paternity / partner leave will encourage fathers to take more leave, improve gender equity in the home and enable more equal sharing of domestic responsibilities.
- 28.3. We recommend that entitlement to paternity / partner leave be increased to one month paid leave.

## **29. The low levels of New Zealand's paid parental leave payments**

- 29.1. New Zealand's paid parental leave payments are low with a cap at a maximum weekly rate of \$516.85 which is 87 percent of the minimum wage. The Regulatory Impact Statement acknowledges the low level of New Zealand's paid parental leave

payments. According to the 2006/2007 evaluation <sup>18</sup> the biggest barrier to taking the full 12 months of parental leave was financial.

- 29.2. The paid parental leave has lost relativity with the minimum wage from the time paid parental leave was introduced. The adjustments to the paid parental leave payments are made according to average wage movements. Because increases in the minimum wage (especially between 2002–2008) were higher than the increases in the average wage, paid parental leave payments have dropped relative to the minimum wage.
- 29.3. We recommend that there be an immediate rise in the maximum paid parental leave payment to the minimum wage level of \$590.
- 29.4. We recommend the paid parental leave payments should rise annually by the greater of the increase in the minimum wage and the increase in the average wage.

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<sup>18</sup> Parental Leave in New Zealand 2005/2006 Evaluation (2007) Department of Labour.

## PART C: ENFORCEMENT OF MINIMUM STANDARDS

### 30. The scope of the problem

- 30.1. For obvious reasons, it is difficult to accurately measure the scope of breaches of minimum employment standards. Nonetheless, it appears clear that these pose a significant and growing problem.
- 30.2. We note MBIE's comments in the Regulatory Impact Statement<sup>19</sup> that 17 percent of respondents to the Statistics New Zealand Survey of Working Life 2012 reported that they were not receiving one or more basic entitlements.
- 30.3. Non-compliance with employment standards (particularly deliberate non-compliance) is usually 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.<sup>20</sup>
  - Temporary workers have a poorer grasp of their entitlements than permanent workers. As Dixon (2009) noted, temporary workers were much less likely 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.<sup>21</sup>

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<sup>19</sup> Regulatory Impact Statement 'Strengthening Enforcement of Employment Standards' at [25].

<sup>20</sup> Gasson, N R, Linsell, C, Gasson, J and Munder-McPherson, S (2003) Young People and Work. University of Otago College of Education, Dunedin.

<sup>21</sup> Dixon, S (2009) A profile of temporary workers and their employment outcomes. Department of Labour, Wellington.

- 30.4. 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.
- 30.5. A better proxy for true levels of non-compliance is likely to be targeted audits conducted by the Labour Inspectorate. When the Labour Inspectorate visited 44 dairy farms up and down the country between December 2013 and early April 2014 Inspectors found 31 of these were in breach of minimum employment rights.<sup>22</sup>
- 30.6. A further set of inspections in dairy farming between late November 2014 and late February 2015 found essentially the same story.<sup>23</sup> Of 29 farms visited, 22 were in breach of minimum employment standards and 19 were in such significant breach of minimum standards as to warrant enforcement action. In all, MBIE found 71 different kinds of breaches across the 22 farms.
- 30.7. Similarly, 23 companies involved in the Christchurch Rebuild were audited by the Labour Inspectorate over the past six months including 18 labour hire and 5 construction companies. MBIE announced in November 2014 that 16 companies were found in breach of employment laws (12 labour hire, 4 construction).<sup>24</sup>
- 30.8. If New Zealand is similar to Australia then these rates may sadly be typical. In their comprehensive study of the work of Australia's Fair Work Ombudsman, Howe, Hardy and Cooney (2014) note that:<sup>25</sup>

[T]he average rate of non-compliance in national audits finalised by the FWO in the 2010-2011 financial year was around 33 per cent. Approximately, one half to one third of the contraventions identified in these campaigns related to underpayment of wages and/or allowances. In some industries, ranging from hospitality to real estate, and regions from regional Victoria to the Gold Coast, employer non-compliance was found to be greater than 50 per cent. These findings are supported by a recent study of low-paid workers in Victoria which similarly found that many were not receiving their statutory entitlements

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<sup>22</sup> <http://www.mbie.govt.nz/about/whats-happening/news/2014/dairy-farm-visits-show-majority-of-farmers-breaching-employment-laws>

<sup>23</sup> <http://www.mbie.govt.nz/about/whats-happening/news/2015/mbie-takes-enforcement-action-for-dairy-farm-employment-law-breaches>

<sup>24</sup> <http://www.mbie.govt.nz/about/whats-happening/news/2014/mbie-audits-find-christchurch-companies-in-breach-of-employment-laws>

<sup>25</sup> Howe, J., Hardy, T. and Cooney, S. (2014) *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's activities from 2006-2012*, University of Melbourne: Melbourne at 44-45

It is not only the breadth, but the depth of non-compliance which is of concern, as revealed by successful civil litigation by the FWO in recent years. For example, in 2011, the FWO brought a case on behalf of a number of section 457 workers who had been recruited from China by a Western Australian construction company. The qualified tradesmen were paid as little as \$3 an hour and required to work 10 to 11 hours a day, six to seven days a week with no penalty rates or leave entitlements. In addition, pay of up to four months' wages was withheld by the employer for expenses associated with organising their work visas. The five workers were ultimately found to have been underpaid approximately \$240,000. Unfortunately, this is not an isolated case. Similar instances of extreme and deliberate exploitation have been found in respect of other vulnerable employees working in various industries from call centres<sup>13</sup> to convenience stores to Japanese restaurants, amongst others.

30.9. It seems clear that we have a significant and growing problem on our hands. Action by the Government to address these issues is therefore welcome.

### 31. Migrant exploitation

31.1. Evidence suggests that there is a particularly egregious issue of migrant exploitation in New Zealand. We note the recent enactment of the Immigration Amendment Act 2015 and welcome its provisions. More must be done though.

31.2. Case law provides examples of extreme exploitation of migrants. James (2011)<sup>26</sup> 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 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.

31.3. The Employment Relations Authority determination in *Nguyen and Anor v Hue Kim Thi Ta t/a Little Saigon Restaurant* [2014] NZERA Christchurch 173 ('the *Little*

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<sup>26</sup> James, A (2011) 'Immigrant workers in New Zealand: The truly vulnerable employees?' *New Zealand Lawyer*

*Saigon case*) provides a window into some of the worst exploitation. Vu Ho Van Nguyen worked at Little Saigon for on average 66.5 hours per week for nearly five years and the Authority could only find evidence that he was paid a total of \$1,500 for that time along with board in the employer's garage and meals at the restaurant.

31.4. The *Little Saigon* case is also notable for the significant quantum of the award of wage and holiday pay arrears payable to Mr Ho Van Nyugen of \$162,029.15 plus interest, payment for other lost remuneration, compensation and penalties.

31.5. The *Little Saigon* case is a case study in the vulnerability of new migrants. The Authority outlined some of the circumstances at [15]-[17] of the determination:

[15] Ms Ta [the employer] supported Bao's and Vu's applications to Immigration New Zealand (INZ) for work permits to work for her at Little Saigon. The brothers are the sons of a cousin of Ms Ta. Their mother lives in Vietnam and owes Ms Ta money that equals about \$12,000 NZD. Ms Ta's cousin has no prospect of being able to earn the money herself to repay that debt. She suggested to Ms Ta that Vu could work for her to repay the debt.

[16] At the investigation meeting Vu said he accepted that as a dutiful son he should take on that responsibility. That arrangement between Ms Ta and Vu's mother and Vu was not made until Vu was already working for Ms Ta.

[17] The brothers did not speak English when they came to New Zealand, and do not now. From the time they started working for Ms Ta they were accommodated in a furnished garage on her residential property, along with one or two other employees. They took all their meals with Ms Ta's family usually at the restaurant. They were transported to and from work by Ms Ta or her husband.

31.6. 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:<sup>27</sup>

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.

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<sup>27</sup> Tipples, R, Trafford, S and Callister, P (2010) 'The factors which have resulted in migrant workers being 'essential' workers on New Zealand dairy farms' Paper presented to Labour, Employment and Work Conference 2010

31.7. 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).

31.8. Where vulnerable workers 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.

## **32. The role of the Labour Inspectorate**

32.1. 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.

32.2. New Zealand has low staffing levels for the Labour Inspectorate. We acknowledge that additional staff have recently been recruited but it is too little given the scale of the issue.

32.3. 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). 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 to break the rules.

- 32.4. There are approximately 49 labour inspectors employed in New Zealand for a working population of 2,360,000<sup>28</sup>: a ratio of 1/47,200.
- 32.5. By way of comparison, Australia employs more than six hundred Fair Work Inspectors<sup>29</sup> for a workforce of 11,636,000.<sup>30</sup> The ratio of 1 Fair Work Inspector per 19,390 workers is two-and-a-half times greater than New Zealand's.
- 32.6. The lack of resource in the Labour Inspectorate poses a significant challenge to the proposed operation of the Bill. Many of the new powers are useable by the Labour Inspectorate only so without bodies to enforce these standards they will be paper tigers.
- 32.7. We recommend that the number of Labour Inspectors should be doubled to 100 and over the next three years raised to 150 Labour Inspectors (equal to the current number of Health and Safety Inspectors).

### **33. The role of unions in relation to minimum standards**

- 33.1. 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.
- 33.2. Unions offer expert advice and representation to their members, and do so in a much more timely fashion than the labour inspectorate.
- 33.3. 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.

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<sup>28</sup> Statistics New Zealand (2015) Labour Market Statistics: June 2015 quarter

<sup>29</sup> Fair Work Ombudsman (2012) *Portfolio Budget Statements 2012-2013*.  
<http://www.fairwork.gov.au/Publications/Budget/FWO-Portfolio-budget-statement-2012-2013.pdf>.

<sup>30</sup> Australian Bureau of Statistics (2014) *December Key Figures*. Available at  
<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0>

- 33.4. There are (at least) three potential reasons for this apparent correlation. First, in unionised industries, unions pick up cases that would otherwise have been referred to the labour inspectorate. Unions and workers do not have the artificially limited mandate of labour inspectors to only remedy certain statutory breaches. Unions and workers can press claims for issues such as unjustified dismissal, unjustified action causing disadvantage and discrimination.
- 33.5. Second, 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.’
- 33.6. Third, unions educate their members on employment rights through meetings, training and union information.
- 33.7. Industries with active unions are therefore less likely to face exploitative practices.
- 33.8. Despite the valuable role of unions, 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);
  - The removal of the statutory right to meal and rest breaks and replacement by loosely-defined compensatory measures;
  - Loss of protections for employees in industries deemed most vulnerable (cleaning and catering along with orderly and laundry services in particular industries); and
  - Weakening of 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.

33.9. 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.

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

#### **34. The proposals in the Bill relating to enforcement of minimum standards**

34.1. Overall, the CTU strongly supports these provisions. We comment on specific elements below. We provide specific comment below on:

- Adequacy of penalties and remedies for breaches of employment standards and the introduction of the new "serious breach" category;
- Increased accountability of directors and others (including banning orders)
- Infringement notices;
- The role of mediation in relation to employment standards;
- Information sharing between the Labour Inspectorate and other agencies

34.2. We also propose additional powers for labour inspectors to make determinations of employment status and hours of work and make a proposal regarding triangular employment.

#### **35. Adequacy and consistency of penalties and remedies (cls 86, 89, 90, 117, 119, 125, 126, 133, 135)**

35.1. This subpart discusses the general adequacy of penalties and compensation as a disincentive to breach of employment standards along with proposed changes to make the penalty framework more consistent.

35.2. In the *Little Saigon* case, Member Hickey stated at [126]:

[126] I consider penalties should be imposed on Ms Ta to send an *unequivocal message* that breaches of minimum employment standards are totally unacceptable in New Zealand. There is an increasing number of cases in which vulnerable migrant workers have been subject to exploitation. Section 3(a)(ii) of the Act sets out that one of the purposes of the Act is to acknowledge and address the inherent inequality of power inherent in employment relationships. This inequality is greatly increased for workers such as Vu and Bao Ho Van Nguyen, who were very vulnerable to exploitation being able to work only under work permits specifically allowing them to

work for Ms Ta, who do not speak English, who were likely unaware of their rights as employees and who were bound by complex personal and family loyalty to Ms Ta despite her illegal practices.

[127] In addition, I agree with the view expressed by Member Arthur recently that: In addition to the harm done to such workers, it is also an affront to those many other businesses that do make the effort of cost and time to properly observe the expected community standards as expressed in the legislation enacted by Parliament.

- 35.3. The Authority went on to impose a global penalty of \$5,000. This is consistent with the run of penalties imposed in other cases. MBIE notes in *Playing by the Rules* at 19 that between January 2008 and March 2013, the average penalty awarded in cases where labour inspectors sought penalties was \$2,826.14.
- 35.4. This level of penalty is inadequate to provide a sufficient disincentive for bad behaviour by employers. There are several reasons for the low level of penalties.
- 35.5. First, penalties have been set at a low level by statute. Under the Employment Contracts Act 1991, the maximum penalties were \$2,000 for an individual and \$5,000 for a company. Section 135 of the Employment Relations Act 2000 as originally enacted raised this bar to \$5,000 and \$10,000 respectively and the Employment Relations Amendment Act 2010 doubled these to their current levels.
- 35.6. The Employment Court and Employment Relations Authority have historically been reluctant to impose significant penalties. In *Xu v McIntosh* [2004] 2 ERNZ 39 (EmpC), Chief Judge Goddard noted at [44]-[45]:

[44] It is more common to hear complaints that penalties imposed by the Authority, and previously by the Employment Tribunal are inadequate. The table of penalties imposed in the last 3 years... bears out the usually modest level of such penalties. ... I agree with the practice of imposing a global penalty, particularly where one of the breaches is not especially serious or where all of the breaches arise out of a single transaction or if they consist of a repetition of the same breach. However, such an approach risks confusion and a doubling of the remedies.

[45] If an employee seeks recovery of money underpaid or lost as a result of personal grievance that is also or includes a breach of an employment agreement, then it seems wrong that a penalty should also be imposed unless there are special facets of the breach calling for punishment of the employer on top of compensation for the employee. In particular, a penalty is not a mechanism for topping up compensation.

- 35.7. Imposing a global penalty serves to significantly restrict the overall quantum of possible penalties where there are multiple or sustained breaches. We agree also that a penalty ought to serve a different purpose from compensatory remedies. The challenge is that both penalties and compensation are too low in the employment jurisdiction.

- 35.8. Judge Inglis noted the potential inadequacy of awards for stress, hurt and humiliation (under s 123(1)(c)(i) of the Employment Relations Act 2000) in the recent case of *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, at [87]:

The plaintiff sought a compensatory award under s 123(1)(c)(i) of \$20,000 in respect of the suspension and \$45,000 in relation to the dismissal (\$65,000 in total). His first point was that the quantum of compensatory awards has fallen woefully behind in both the Authority and this Court. I have some considerable sympathy for this view. Commentators have recently noted that average compensatory awards made by the Court have remained at stagnant levels for the last 20 years, despite the inflationary effect that might otherwise be expected to have increased them. They further note that while in *NCR (NZ) Corp Ltd v Blowes* the Court of Appeal attempted to set an “upper limit” on compensatory awards of \$27,000, consistent with inflation from the award of \$20,000 made in *Telecom South v Post Office Union Inc*, if a similar inflationary approach was applied today an upper limit for compensation would be \$33,000. By contrast, between July 2013 and July 2014 awards in this Court were said to have ranged from between \$3,000 and \$20,000, with the average award before taking contribution into account being \$9,687.50.

- 35.9. Judge Ford noted Judge Inglis’s comment in *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 34 at [133] and stated further:

The situation has no doubt been highlighted in the public mind in recent times by the extensive publicity given to two high profile decisions of the Human Rights Review Tribunal - *Hammond v Credit Union Baywide* and *Singh v Singh anor* where damages were awarded for humiliation, loss of dignity and injury to feelings in the amounts of \$98,000 and \$45,000 respectively. Although it would not be appropriate to attempt to compare the facts of those cases with the present, the awards in question do appear to be substantially in excess of awards made in both the Authority and in this Court for arguably similar wrongs committed on employees.

- 35.10. Penalties and awards of compensation are failing to act as a reasonable disincentive to poor employer behaviour. While penalties and compensation are conceptually distinct, it is the overall quantum of the two together (along with legal and other costs) that acts as a disincentive to breach of minimum standards. It is in this context that we turn to the proposals in the Bill itself.
- 35.11. We support the insertion of new s 133A (by cl 90) setting out matters to be taken into account in determining penalties and we agree with the list of matters set out for the consideration of the Authority and Court. We think this is likely to assist in transparency of the penalty setting process.
- 35.12. However, we are sceptical that the introduction of s 133A will have any tangible effect on the quantum of penalties levied by the courts. The factors set out do not differ significantly from the considerations of harm and culpability set out in *In Xu v McIntosh* [2004] 2 ERNZ 39 (EmpC), Chief Judge Goddard noted at [47]-[49]. It is our view that effectively s 133A is a codification of the existing approach.

35.13. We understand from discussion with senior union lawyers that their usual practice is not to seek penalties in most cases because the potential quantum is so low. MBIE's average of \$2,826.14 quoted in *Playing by the Rules* is indicative.

35.14. An analogy could be drawn with sentences for breaches of health and safety law where a parallel problem of the courts imposing very low fines relative to the maximums. In *Affco New Zealand Ltd v Department of Labour* (HC, Wellington, 17 September 2008, Gendall J, CRI-20080283-12) BC200893146 Gendall J said:

[34] The aim of legislation is to prevent workplace harm. References have been made in other cases to sentences not merely being at 'licence level' and that sentences should 'bite', so as to reflect the increase in penalty. Some have asked why should they bite? The reason that they should 'bite' is to ensure that there is general and personal deterrence, and that major companies, especially, who offend, do not simply regard them as an unfortunate business expense.

35.15. As we will discuss below, we support moves to give new powers to labour inspectors to pursue and deter serious breaches. However, the vast bulk of cases taken are by workers and their representatives not labour inspectorates. These cases must also have credible deterrent value.

35.16. We submit that there ought to be a doubling of maximum penalties under s 135(2) of the Employment Relations Act 2000 to \$20,000 for an individual and \$40,000 for a company.

35.17. The CTU has been a strong advocate of rationalisation of the penalties regime to ensure that, in general, workers and labour inspectors have the same rights to seek penalties.

35.18. We support the changes proposed in the Bill to effect this and other recovery of monies owed.<sup>31</sup>

### **36. Additional provisions relating to breach of employment standards (cl 95 inserting Part 9A)**

36.1. We support the proposed ability of Labour Inspectors to seek declarations of breach and the stepped approach allowing Inspectors to seek pecuniary penalty orders.

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<sup>31</sup> Specifically: CI 86 re retention of individual employment agreements; CI 89 re penalties for failure to keep wage and time records; CI 117 re penalties under the Holidays Act 2003; CI 119 recovery of arrears of wages under the Holidays Act 2003; CI 125 re recovery of penalties under the Minimum Wage Act 1983; CI 126 re arrears of wages under the Minimum Wage Act 1983; CI 133 re arrears of wages under the Wages Protection Act 1983; CI 135 re penalties under the Wages Protection Act 1983

compensation orders and banning orders either at the same time or subsequent to the declaration of breach.

- 36.2. We think the overall framework is sound. However, we have some comment on particular issues below relating to limitation periods for pecuniary penalties, the relationship between pecuniary penalties and compensation orders, standing to seek compensation orders and sentences for breach of banning orders.

*Limitation periods for pecuniary penalties (proposed s 142I)*

- 36.3. Proposed s 142I provides that applications for pecuniary penalties must be made within twelve months after the earlier of the date which the breach first became known to a Labour Inspector or the date when the breach should reasonably have become known to a Labour Inspector.
- 36.4. This appears to be modelled on s 135(5) of the Employment Relations Act 2000 which holds that an action for the recovery of a penalty must be commenced within twelve months of the earlier of the date the cause of action became or should have become known to the person bringing the action.
- 36.5. This model overlooks an important distinction between penalties and pecuniary penalties. Pecuniary penalties may be sought either during or after an application for declaration of breach (proposed s 142E(2)(b)). By not seeking penalties immediately, the Labour Inspector can put the person on strong notice that they need to remedy the breach. However, the effectiveness of this approach is weakened by giving pecuniary penalty orders such a brief timeframe for action. It is likely that a Labour Inspector will have to seek a pecuniary penalty at the same time as seeking a declaration of breach to ensure they do not run out of time.
- 36.6. In order to better facilitate a stepped enforcement model, we recommend that proposed s 142I is amended to state that:

An application for a pecuniary penalty order under this Part may only be made against a person in respect of whom the court has made a declaration of breach within twelve months of that declaration.

*Relationship between pecuniary penalty and compensation orders*

- 36.7. One of the more useful parts of the existing penalty regime is the ability of the Authority or the Court to order that the whole or any part of a penalty recovered must be paid to any person (s 136 of the Employment Relations Act 2000).

- 36.8. The relationship between pecuniary penalties and compensation orders is more blurred by their status as separate (and potentially independent) causes of action. It would be disappointing for the Court to discover that they were unable to compensate an aggrieved employee because all available funds had been used to pay a pecuniary penalty to the Crown accounts.
- 36.9. We recommend that a new s 142IA is inserted as follows:

**Application of pecuniary penalties recovered**

The Court may order that the whole or any part of any pecuniary penalty recovered must be paid to any person. This may be done of the Court's own motion or in fulfilment of a compensation order (either contemporaneously or subsequently).

*Standing to seek compensation (proposed s 142J)*

- 36.10. It is odd that only a Labour Inspector may seek a compensation order given that the effect is to compensate an aggrieved employee who has suffered or is likely to suffer loss or damage because of the breach.
- 36.11. This means that an employee who has suffered significant loss but who may be out of time for raising a personal grievance for unjustified disadvantage or even a breach of contract claim is therefore unable to seek compensation despite the declaration of breach constituting conclusive proof (s 142C). This is flawed law making.
- 36.12. A more sensible approach would be to amend proposed s 142J(3) to state that an application for a compensation order may be made by either a Labour Inspector or an aggrieved employee.

*Convictions for breach of banning order (proposed s 142Q)*

- 36.13. Proposed section 142Q creates an offence of breaching a banning order punishable on District Court conviction by a fine not exceeding \$200,000 or a term of imprisonment not exceeding 3 years.
- 36.14. However, very similar offences under the Companies Act 1993 (s 382 acting as a manager while banned and s 383 acting as a director while banned) carry the same maximum fine but a maximum term of imprisonment of 5 years.
- 36.15. There is no reason these nearly identical offences should carry different punishments.

36.16. We submit that the maximum term of imprisonment under s 142Q should be 5 years.

*Defences for breach of minimum entitlement provisions (proposed s 142ZA & 142ZB)*

36.17. While we understand the reasons for the proposed defences to breach of minimum entitlement provisions, we are concerned that the section is drafted overly broadly and may have unwelcome (and perhaps) unintended flow-on effects.

36.18. Section 142ZA provides a defence in any proceeding under the Employment Relations Act 2000 for a person in breach of minimum entitlement provisions if:

- The breach was due to reasonable reliance on information supplied by another person;<sup>32</sup> or
- The defendant took reasonable precautions and exercised due diligence to avoid the breach and the breach was:
  - Due to the actions or default of another person;
  - Due to an accident;
  - Due to circumstances beyond the defendant's control

36.19. Section 142ZB provides a defence to any proceeding under the Employment Relations Act 2000 for any person involved in breach of minimum entitlement provisions if:

- The defendant's involvement in the breach was due to reasonable reliance on information supplied by another person; or
- The defendant took all reasonable and proper steps to ensure that A complied with the provision.

36.20. The first problem with these generalised defences is that they apply to any proceeding for breach of minimum entitlement proceedings. It is at least arguable that many types of breach of contract or personal grievance claims will involve, at least tangentially, breaches of minimum entitlements such as holiday pay or wages. We are concerned that an employer who can show (for example) reasonable

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<sup>32</sup> Another person does not include a director, employee or agent of the defendant under proposed s 142ZA(2) and 142ZB(3)

reliance on an article or textbook which gave the wrong advice may thereby have a complete defence against proceedings.

- 36.21. The proposed provisions of s 142ZC that a employee retains an entitlement to notwithstanding the availability of a defence is logically incoherent. Is it intended that the courts would find a defendant has a valid defence but is still liable for the breach. If not that person then who is liable?
- 36.22. The second problem is that the sections are oddly drafted. Why, for example, should a person be required to take reasonable precautions and exercise due diligence in relation to the acts of others but not in terms of the provenance of information they then relied upon?
- 36.23. The third problem is that these clauses directly undercut the operation of s 234 of the Employment Relations Act 2000 as very recently examined by the Full Bench of the Employment Court in *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157.
- 36.24. That case is not straightforward and we recommend that the Committee ask for a briefing from officials on the effect of the decision.
- 36.25. To summarise, the conclusion of the majority of the Court was that where a company does not have the assets to reimburse breaches of minimum wages the Authority may authorise a Labour Inspector to bring an action against an officer, director or agent of the company making them jointly or severally liable for the debt.
- 36.26. This is an important decision which provides a significant disincentive to asset-stripping or phoenixing companies to avoid paying employees their minimum entitlements (a sadly common occurrence). We are concerned that the defences introduced by the Bill could prevent the operation of s 234 in many cases.
- 36.27. We recommend that proposed ss 142ZA-ZC are not enacted. If the Committee intends to proceed with the enactment of some version of the general defences, they should seek a briefing from officials on:
- The effects of the proposed sections on actions under the Employment Relations Act 2000 generally;
  - Who is liable to pay employees' minimum entitlements where all parties have a defence; and

- The effect of the proposed sections on s 234 following the Employment Court's decision in *Labour Inspector v Cypress Villas Ltd.*

*Other orders*

- 36.28. As noted in the CTU's submission on *Playing by the Rules*, there are a number of other useful remedies for the regulator contained within what was then the Health and Safety Reform Bill and is now the Health and Safety at Work Act 2015.
- 36.29. Our view is that the Employment Court should be empowered to make orders in a flexible manner that best suits the overall justice of the situation. We think that pecuniary penalties, compensation and banning orders may be blunt instruments in some circumstances (even alongside compliance orders and injunctions).
- 36.30. There are four further orders that we think the Employment Court should also be empowered to give upon a declaration of breach:
- Orders for the payment of regulator's costs in bringing the prosecution;
  - Adverse publicity orders;
  - Employment standards project orders; and
  - Training orders
- 36.31. Each of these may be adapted from the equivalent section in the Health and Safety at Work Act 2015. The equivalent sections are:

**152 Order for payment of regulator's costs in bringing prosecution**

(1) On the application of the regulator, the court may order the offender to pay to the regulator a sum that it thinks just and reasonable towards the costs of the prosecution (including the costs of investigating the offending and any associated costs).

(2) If the court makes an order under subsection (1), it must not make an order under section 4 of the Costs in Criminal Cases Act 1967.

(3) If the court makes an order under subsection (1) in respect of a Crown organisation, any costs and fees awarded must be paid from the funds of that organisation.

**153 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).

#### **155 Work health and safety project orders**

(1) A court may make an order requiring an offender to undertake a specified project for the general improvement of work health and safety within the period specified in the order.

(2) The order may specify conditions that must be complied with in undertaking the specified project.

#### **158 Training orders**

The court may make an order requiring an offender to undertake, or arrange for 1 or more workers to undertake, a specified course of training.

### **37. Infringement offences (cl 110)**

37.1. We support the introduction of an infringement offence regime for breaches of minimum standards.

37.2. We are unclear how infringement notices would work in relation to recurrent breaches of record keeping requirements. Is an employer who has never kept adequate wage and time records for an employee liable to a single fine of \$1,000? If so that may compromise the effectiveness of infringement notices dramatically.

37.3. Howe, Hardy and Cooney comment in relation to the Australian equivalent that:<sup>33</sup>

While record-keeping and payslip contraventions are generally characterised as 'trivial' or 'technical' by the FWO, the problem is that without this information, employees are often left in the dark and investigations often come to a grinding halt. For example, without proper pay slips employees may not be able to determine whether they have been paid in accordance with the relevant legal obligations, which may discourage them from making a complaint. Further, without detailed time and wage records, it is difficult for the FWO to obtain sufficient evidence to support civil remedy litigation or form a reasonable belief that a contravention has occurred (and enter into an enforceable undertaking or issue a compliance notice). The resulting effect may be that the less the employer does in terms of complying with the provisions of the FW Act and FW Regulations, the less likely a sanction will be imposed, which may potentially undermine the entire enforcement regime.

37.4. A New Zealand example of a similar problem is *Labour Inspector (Brown) v Su t/a Kippers East* [2014] NZERA Wellington 68. In that case, an employer failed to provide remotely sufficient 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 Mr Su saved thousands of dollars by effectively refusing to cooperate with the labour inspector. This makes a mockery of the enforcement system.

37.5. It is unclear whether the proposed s 235G stating that infringement fees and fines are not payable for the same conduct applies to pecuniary penalties under proposed ss 142E-142I as well as 'standard' penalties in accordance with ss 133-136 of the Employment Relations Act 2000. If so, an infringement fee may represent a very cheap way to escape liability (notwithstanding the usual rules around recovery of wages without records).

37.6. We recommend that proposed s 235G be amended to refer specifically to "penalties sought under s 135 of this Act."

37.7. Additionally, setting the maximum infringement fee in primary legislation makes amendment cumbersome. The likely result is stagnation of the fee relative to inflation.

37.8. By way of comparison, the Health and Safety at Work Act 2015 sets infringement fees via regulation instead.<sup>34</sup>

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<sup>33</sup> Howe, J., Hardy, T. and Cooney, S. (2014) *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's activities from 2006-2012*, University of Melbourne: Melbourne at 236

37.9. We submit that regulation is a better way of implementing these fees. Implementing this suggestion would involve amending proposed s 235E(1) to delete the specific quantum for offences specified in s 235(a) and altering cl 111 (amending s 237) to include prescribing infringement fees under s 235A(a) and removing the \$1,000 cap.

**38. The role of mediation in relation to employment standards (cls 83, 97, 98, 100-101)**

38.1. The Bill proposes a new s 159AA of the Employment Relations Act 2000 where if a matter before it relates substantially to an alleged breach of employment standards relating to an employee, the Authority must not direct the parties to use mediation or further mediation unless:

- The facts of the alleged breach are in dispute and the Authority is satisfied that mediation will be a cheaper and quicker way to clarify the facts;
- The alleged breach appears to be minor and inadvertent;
- Both parties agree; or
- The Authority is satisfied that in the circumstances and having regard to one of the purposes of the Act (the effective enforcement of minimum employment standards) mediation is appropriate.

38.2. While we sympathise with the harm that this amendment is attempting to cure, this is a poorly thought-through proposal for several reasons.

38.3. First, much depends on the manner in which the courts interpret the phrase “relates substantially to an alleged breach of employment standards.” Substantially has two distinct meanings. In ordinary usage, substantially means to a great extent or for the most part.<sup>35</sup> However, there is also a distinct legal usage that means something

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<sup>34</sup> MBIE has recently been consulting on these proposed regulations. See the exposure draft at: <http://www.mbie.govt.nz/info-services/employment-skills/workplace-health-and-safety-reform/development-of-regulations-to-support-the-new-health-and-safety-at-work-act/document-and-image-library/hsw-infringement-offences-fees-regulations.pdf>

<sup>35</sup> See definition in the Oxford English Dictionary.

like material.<sup>36</sup> If the courts accept the latter meaning then a broad swathe of cases will no longer be directed to mediation by the Authority.

- 38.4. While mediation is a voluntary process under the Employment Relations Act 2000, it is voluntary in the shadow of a law which almost always directs participants back to mediation. Employers may refuse to attend mediation where an issue of employment standards is at stake.
- 38.5. Mediation is free, open to successful results for unrepresented parties and carries no legal risk. Authority processes carry significant costs and risk. In terms of the objects of the Employment Relations Act 2000 to “promote mediation as the primary problem-solving mechanism” (s 3(a)(v)) and “reduce the need for judicial intervention” (s 3(a)(vi)) an increase in the proportion of cases deal with by the Authority at first instance will be deeply problematic. It will also place significant additional pressure on the Authority.
- 38.6. The proposed section is also poorly drafted. The suggestion in proposed s 159AA(a) that “mediation will be a cheaper and quicker way to clarify the facts” is misguided.
- 38.7. Mediation cannot be used to clarify facts before the Authority or Court. The confidentiality requirements of mediation under s 148 (described by the Court in *Shepherd v Glenview Electrical Services Ltd* [2004] 2 ERNZ 118 at [46] as “clear, absolute and draconian”) would prevent anything said at mediation being given in evidence (except in very limited circumstances).
- 38.8. The CTU recommends that proposed s 159AA is deleted. There are more elegant solutions.
- 38.9. Section 148A, added in 2010, provides minimum standards safeguards for individual employees by forbidding mediators from signing agreements where employees agree to forgo their minimum entitlements.
- 38.10. Section 159(1A), also added in 2010, provides that if an action was brought by a Labour Inspector and relates to an employee’s minimum entitlements then the Authority must consider whether mediation is appropriate before directing the parties to mediation.

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<sup>36</sup> See definitions of substantial evidence and substantial cause in Black’s 9th Legal Dictionary for examples of this usage.

38.11. This part could be strengthened to address the concern that recalcitrant employers are delaying action through mediation by further tightening up this section.

38.12. We propose the following replacement to s 159(1A):

(1A) If the matter before the Authority was brought by a Labour Inspector and relates to an employee's minimum entitlements, the Authority must not direct the matter to mediation or further mediation.

### **39. Information sharing between the Labour Inspectorate and other agencies (cl 108)**

39.1. Broadly speaking, we support the information sharing process set out in the Bill. In particular, the CTU strongly supports information sharing between labour and health and safety inspectors as a matter of routine.

39.2. In many jurisdictions, the roles of labour and health and safety inspector are merged.<sup>37</sup>

39.3. Poor performance in either area may be a warning signal of a high risk of poor performance in the other. Alerts from labour inspectors would 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.

39.4. 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.

39.5. Taken to a logical conclusion, there may be considerable value in a partly merged operational intelligence function between the two agencies.

39.6. We have two concerns with information sharing between various agencies. First, the range of proposed agencies who may share information with MBIE is broad

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<sup>37</sup> For example, references at the International Labour Organisation to labour inspection encompass the health and safety inspection function. This can lead to confusion in benchmarking adequate numbers.

(immigration officers, the Inland Revenue Department, the Ministry of Social Development, the Police, the Registrar of Companies, WorkSafe or anyone else defined as a regulatory agency). This means that a range of extremely sensitive personal information (including personnel files, criminal investigation notes, medical histories) may potentially be disclosed to a very wide range of persons and agencies. We are worried that this is being enabled without adequate safeguards. We are also concerned that persons may be more reluctant to disclose information if they believe it is likely to be passed on to other agencies.

39.7. We recommend that:

- Proposed s 233B(6)(g) is deleted. Addition of other regulatory agencies should only occur by amendment of primary legislation and, given the potential sensitivity of the information at hand, should not be passed on to persons or agencies outside of the State sector;
- The sharing of information between agencies must be governed in all cases by an Approved Information Sharing Agreement (AISA). As with other AISAs, this must be publically available;
- Similarly any Memoranda of Understanding between MBIE and other regulators must be publically available; and
- Any shared information must be subject to the usual information privacy principles wherever possible particularly rights of access (principle 6) and correction (principle 7).

39.8. We also disagree with the operation proposed s 233A as a bar on disclosure of information by the Labour Inspectorate. In some cases, the Inspectorate may become privy to personal information about a person that they are not otherwise able to get (perhaps because that information is being withheld by their employer or is otherwise lost).

39.9. There should be an exemption from s 233A for personal information in accordance with the Privacy Act 1993.

#### **40. Additional powers for Labour Inspectors**

40.1. A missing piece of the Bill is an ability for Labour Inspectors to determine the employment status of workers.

- 40.2. The need to apply to the Employment Relations Authority to determine whether one is an employee is an access to justice issue that preventing many employees who have been disguised as independent contractors from challenging their status.
- 40.3. It is acknowledged that employment status questions always involve a weighing up of various factors and the answer may be finely balanced. However, it would become possible for the Labour Inspectorate to build up substantial expertise in these matters and their decisions may be subject to appeal rights.
- 40.4. 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.
- 40.5. A Labour Inspector should also be empowered to determine what an employee's regular hours are.
- 40.6. 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.

#### **41. Labour hire and triangular employment**

- 41.1. Significant problems exist in relation to triangular employment arrangements. The paradigmatic problem is faced in relation to labour hire companies.<sup>38</sup>
- 41.2. A neat mechanism is contained in a Labour Party Member's Bill called the Employment Relations (Triangular Employment) Amendment Bill. Two new definitions are inserted into the interpretation section of the Employment Relations Act 2000:

**primary employer**, for the purposes of section... 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 section... 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.

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<sup>38</sup> The classic study of issues with Labour Hire companies in New Zealand is the horrific conditions identified by WEB Research (2004) Report of Exploratory Case Study Research into Precarious Employment <http://employment.govt.nz/pdfs/precarious-employment.pdf>. The WEB Research Study found widespread precarity and non-compliance with minimum standards in the Labour Hire industry along with a transient and oppressed population of workers. It makes for hard reading.

41.3. The mechanism permitting joinder is contained within a proposed s 102A of the Employment Relations Act 2000:

**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.

41.4. We submit that this mechanism should be added to the Employment Relations Act 2000.