Coversheet: 100 day commitments in Employment Relations

Advising agencies	The Ministry of Business, Innovation and Employment
Decision sought	Agreement to amend the Employment Relations Act 2000
Proposing Ministers	The Minister for Workplace Relations and Safety

Summary: Problem and Proposed Approach

Problem Definition

What problem or opportunity does this proposal seek to address? Why is Government intervention required?

The suite of changes gives effect to the Government's 100 day commitments relating to the *Employment Relation Act 2000* (the Act). These changes are:

- restoring key protections for employees in the workplace by:
    - reinstating the right to prescribed rest and meal breaks
    - restoring key protections to Subpart 1 of Part 6A by repealing the exemption for Small to Medium Employers (SMEs) which would restore the right for vulnerable workers to transfer to incoming employers, extend timeframes for employees to elect to transfer to incoming employers and require employers to notify employees of their right to review and ask for corrections of personal information (including disciplinary and personal grievance matters)
    - restoring reinstatement as the primary remedy available where an employee has been unjustifiably dismissed.
- restoring key elements of collective bargaining in the Act by:
    - requiring employers to provide the applicable collective agreement, union contact details and the option to join the union at the same time they provide the individual employment agreement to the employee
    - requiring that unions provide information about the role of unions to employers and that this information is provided when the intended employment agreement is given to employees
    - reinstating the "30 day rule", requiring employees to make a choice at the end of the 30 days of employment about whether they would like to join the relevant union and be covered by the collective agreement and providing information about the choice to the relevant union (unless the employee withholds consent)
    - reinstating a union's advantage in relation to the initiation of collective bargaining

- reinstating that the duty of good faith requires parties to conclude a collective agreement and repealing the provisions that enable the Employment Relations Authority (the Authority) to determine bargaining has concluded
- removing the ability for employers to opt out of multi-employer collective bargaining once bargaining has been initiated
- requiring that collective agreements must set rates of pay and that rates of pay must be agreed during collective bargaining
- expanding the grounds of a discrimination claim in the Act to include an employee's choice to join the union and expand the time limit for which an employee's union action could contribute to an employer's discriminatory behaviour from 12 months to 18 months
- requiring employers to allow union representatives time to perform their duties within working hours
- repealing an employer's ability to deduct pay as a response to partial strikes.

Proposed Approach

How will Government intervention work to bring about the desired change? How is this the best option?

New Zealand's minimum employment protections and standards and collective bargaining arrangements are regulated via the Act*, Holidays Act 2003* and other legislation. This regulatory system is underpinned by a compliance regime (the Labour Inspectorate, Employment Services, the Employment Relations Authority (the ERA) and the Employment Court) to ensure regulatory requirements are upheld.

The primary aims of the legislation are to address the power asymmetries in the employment relationship and that New Zealanders' expectations of minimum standards of conduct are adhered to. A number of changes to the regulatory system in recent years have been aimed at facilitating flexibility for employers.

The Government is concerned that these changes undermine expectations about minimum standards and skew the balance of power in the employment relationship towards employers. The Government seeks to make changes to the legislation to address these concerns.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

Employee protections and minimum standards

Employees – A number of the provisions (for example, relating to continuity of employment, unjustified dismissal and rest and meal breaks) would provide greater certainty and security for employees. Such security and certainty in work should enable

workers to participate more effectively in work and society.

Employers – It is a well-established principle that more engaged employees correlate with improved labour productivity within firms[1]. Our view, as such, is that these changes could have a positive effect on in firm productivity and may help meet health and safety obligations. The actual impact will depend on firm's approaches to managing the costs of the proposal to leverage any productivity benefits.

Collective bargaining

Unions – unions are likely to benefit from these provisions as they are broadly focused on increasing their role within workplaces. Proposals that increase awareness of unions and their activity among new and existing employees are likely to increase union membership. Bargaining provisions are likely to increase the potential bargaining power of unions, providing them more ability to extract wage and condition concessions from employers.

Employees – employees are expected to benefit via increased wages and conditions, subject to the success of collective bargaining negotiations.

Employers – employers may see labour productivity increase in firms which may enable firms to improve overall productivity.

Where do the costs fall?

The costs for these proposals are expected to fall primarily to employers. This includes monetary costs in the form of:

- increased wages and conditions as a result of strengthened collective bargaining
- business interruption due to a loss of flexibility (particular in relation to meal and rest breaks)
- compliance costs to employers who do not currently set wages through collective bargaining and agreements, who would have to adjust their bargaining approach and pay-setting mechanisms
- greater wage liabilities during partial strike action
- the relative monetary costs involved in retaining wages and conditions for vulnerable workers to transfer to incoming employers.

The combined effect of the collective bargaining proposals will likely strengthen collective bargaining and rights in relation to worker representation. These proposals will likely increase wage pressures in the state sector and the state funded sector.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

Broadly, the primary risks and unintended consequences associated with the proposals are:

[1]Gallup Q12 Met-Analysis, Gallup, http://strengths.gallup.com/private/Resources/Q12Meta-Analysis_Flyer_GEN_08%2008_BP.pdf

- reduced employment due to changed incentives on employers to hire new workers
- an increase in industrial action and protracted bargaining due to the need to conclude agreements and include wages in collective agreements
- an increase in partial strikes as removing pay deductions for partial striking may remove the disincentive to take partial strike action
- reinstating the right to prescribed meal and rest breaks could lower firm productivity by not accounting for the necessary flexibility to avoid business interruption. There could be safety risks for essential services if breaks were mandated. Insufficient flexibility may produce significant non-compliance among employers. The risk could be significant but would be mitigated by allowing for exemptions in cases where the cost of employee substitution for breaks is high, or business continuity is critical to public safety or a public need.

Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.
None identified.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty
While there are gaps in the available evidence for this analysis (outlined in key limitations/constraints section), the information that has been used is considered to be reliable.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:
The Treasury
Quality Assurance Assessment:
The Treasury Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Ministry of Business, Innovation and Employment and associated supporting material. Treasury comments are based on revised expectations for RISs covering 100 Day Plan priorities.
Reviewer Comments and Recommendations:
Given the constraints that have been highlighted in the Impact Statement, the Impact Statement appropriately reflects the analysis and consultation that has been able to be completed. The potential impacts of the proposed approach have been broadly identified, and the analysis is methodical and thorough. Gaps in evidence, risks and downsides are acknowledged. The presentation of the stakeholders' views is informative and

comprehensive.

It will be important to develop a thorough monitoring and evaluation process for the proposed changes and keep the performance of the revised employment relations regime under close review.

Impact Statement: 100-day commitments in Employment Relations

Section 1: General information

Purpose
The Ministry of Business, Innovation and Employment (MBIE) is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by or on behalf of Cabinet.
Key Limitations or Constraints on Analysis
The proposals are part of the Government's 100 day plan. As such there have been significant constraints and limitations on this analysis, relating to • the timeframes to undertake a thorough analysis or consultation on the proposals and • the availability of data about the issues at hand. We note that while these were significant limitations, many of the proposals had been previously considered by officials. This has mitigated some of the limitations. However, such analysis had not been consistently undertaken across all proposals and the environment in which any previous analysis was undertaken has since changed. ### Timeframes The proposals in this paper have been assessed in a significantly truncated timeframe. This has limited the ability to robustly test the proposals. A shortened timeframe to undertake the policy analysis was necessitated to allow sufficient time for drafting legislation for introduction before the end of the 100 day period. ### Data Some data was immediately available and accessible on some of the proposals. However, there is no or limited data for many of the proposals. We have noted these limitations where appropriate when discussing each proposal below. Key research and data relied on for the purposes of this analysis are: • the Review of Part 6A conducted by the Department of Labour over 2009/2010 and 2012 • data held by MBIE relating to union density • statistics relating to when reinstatement has been awarded by the Employment Relations Authority
Responsible Manager (signature and date):

Date: /11/2017

Jivan Grewal

Employment Relations Policy

Labour and Immigration Policy

Ministry of Business, Innovation and Employment

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

The suite of changes gives effect to the Government's 100 day commitments relating to the *Employment Relation Act 2000* (the Act). Many of the changes were outlined in the Labour Party 2017 election manifesto chapter on workplace relations.

These changes aimed to restore key protections for employees and restore provisions that promote and strengthen collective bargaining and union rights in the workplace.

The government proposed to restore key protections for workers by:

- reinstating the right to prescribed rest and meal breaks
- restoring key protections to Subpart 1 of Part 6A by repealing the exemption for SMEs which would restore the right for vulnerable workers to transfer to incoming employers, extend timeframes for employees to elect to transfer to incoming employers and require employers to notify employees of their right to review and ask for corrections of personal information (including disciplinary and personal grievance matters)
- restoring reinstatement as the primary remedy available where an employee has been unjustifiably dismissed.

The government commitments seek to strengthen an employee's bargaining position through restoring key elements of collective bargaining in the Act by:

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

working hours

- repealing an employer's ability to deduct pay as a response to partial strikes.

2.2 What regulatory system, or systems, are already in place?

The Act provides the framework for employment standards and collective bargaining in New Zealand. The object of the Act is:

- to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
    - by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
    - by acknowledging and addressing the inherent inequality of power in employment relationships; and
    - by promoting collective bargaining; and
    - by protecting the integrity of individual choice; and
    - by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
    - by reducing the need for judicial intervention; and
- to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court; and
- to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

Employment standards

Rest and Meal Breaks

Employees are currently entitled to rest and meal breaks that give them a reasonable chance during work periods to rest, refresh and take care of personal matters and are appropriate for the length of their working day. Where the parties cannot agree the employer may determine reasonable breaks. In some instances, where breaks cannot be reasonably provided, the employer and employee may agree to compensatory measures in replace of the breaks.

Part 6A

The objective of Subpart 1 of Part 6A is to provide protection to specified categories of employees if their work is to be performed by another person as a result of restructuring, including rights to elect to transfer their employment on their existing terms and conditions of employment (including entitlements to annual leave and sick leave), and rights to possible redundancy entitlements. The groups of employees protected by Subpart 1 of Part 6A include cleaners, caterers, caretakers and orderly and laundry service providers.

The law provides for an exemption from Subpart 1 of Part 6A for SMEs that employ 19 or fewer employees. The exemption was put in place because there was some evidence that SMEs were less able to absorb the costs associated with transferring employees (compared to large employers). This exemption means that workers in some industries where contracts frequently change hands (such as in cleaning or catering) are not able to transfer (with their terms and conditions including current entitlements) to the incoming employer.

Reinstatement

Currently, where an employee seeks reinstatement as a remedy, the Employment Relations Authority (the Authority) may reinstate where they think it is reasonable and practicable to do so. In addition to the option to award reinstatement, the Authority has a number of other options available to it when awarding remedies to settle a personal grievance. These include reimbursing the employee for wages, awarding a sum for compensation for humiliation, loss of dignity and injury to feelings, and loss of benefit.

Collective bargaining framework

When collective agreement and union information must be provided

Under the Act, employers only need to provide the relevant collective agreement, union contact details and the option to join a union when an employee *enters* into the individual employment agreement. There is no requirement on employers to enter into an employment agreement that is based on, or is not inconsistent with, any applicable collective agreement.

Initiating bargaining

Currently the timeframe for initiating bargaining is the same for both employers and unions. Both can initiate bargaining within 60 days of the expiry of a collective agreement. If there is more than one collective agreement covering one or more unions and/or employers, the timeframe for initiation is:

- 120 days before the date on which the last applicable collective agreement expires; or
- 60 days before the date on which the first applicable collective agreement expires.

Where a collective agreement is in place, initiating bargaining by either a union or employer for the purposes of replacing the agreement extends the terms and conditions of the collective agreement by up-to 12 months while bargaining continues.

Good faith duty does not include a duty to conclude

Under the Act, when businesses undertake collective bargaining, fairness dictates there is a duty for both parties to enter the process with good faith, with the intention of concluding an agreement. The current good faith obligation does not however include a requirement to conclude. Parties can apply to the ERA, which can make a determination that bargaining has concluded.

Multi-employer collective bargaining

The Act provides the ability for one or more unions to bargain with two or more employers for a single collective agreement, known as multi-employer collective bargaining. Before initiating multi-employer collective bargaining, the union or unions must hold a secret ballot across its

members employed by each employer.

If two or more ballots are in favour of multi-employer collective bargaining, the union may initiate bargaining with the employers by giving notice within the required initiation timeframes for multi-employer bargaining. Employers can currently opt-out of multi-employer collective bargaining within ten days of the initiation of bargaining by giving notice to the unions and other employers. Opting out brings the bargaining process to an end for that employer. They or the union may reinitiate bargaining thereafter.

Including wage rates in bargaining

There are no current provisions in the Act that require parties to undertake collective bargaining in respect to wages, or to include wages in a collective agreement. However, recent case law has found that as part of the duty of good faith between bargaining parties, a refusal in principle to include wages in a collective agreement is not a genuine reason to conclude bargaining.

Discrimination

Under the Act, union members are protected against any discrimination if they participate in certain union activities such as a lawful strike. Any discriminatory action taken by an employer within 12 months of the employee participating in union activities would be prohibited. Currently, the grounds of discrimination do not include an employee's choice to join a union.

Pay deductions for partial strikes

Currently unions can initiate industrial action that falls short of a full strike, such as a go slow order, partial discontinuance of work or failure to accept work that forms part of normal duties.

The law currently allows firms to make pay deductions for such partial strikes, either based on a proportion of the employees' usual hours spent on the strike, or a deduction of ten per cent. To deduct pay from a group of workers in either manner, each employee must be performing work of the same or similar nature. Employers are required to give notice of pay deductions.

There are some exceptions to when an employer can make a pay deduction, including if the strike is lawful on the grounds of health and safety concerns, if employees are paid by piecework and reduce their normal output as a result, if the strike involves refusing to work overtime or if it is a refusal to attend call-out work that is paid at a special rate.

Pay deductions from partial strikes are exempt from provisions requiring that employees receive the minimum wage.

2.3 What is the policy problem or opportunity?

Employment standards

Rest and Meal Breaks

The current rest and meal breaks provisions give flexibility to employers. This, however, may be impacting on more vulnerable workers due to the inherent imbalance of power in bargaining. This may mean that employees agree to breaks that are not giving them adequate time to rest and refresh during working hours.

There is have anecdotal evidence that some employees are receiving less frequent breaks of a shorter duration and some indication that breaks are being replaced by compensatory measures. This may mean that employees are not receiving adequate time within the workplace to rest, refresh and attend to personal matters. It may also mean that employees are more fatigued, have more accidents or are less productive in the workplace.

An employee is unlikely to challenge whether the breaks they receive are reasonable because:

- There is uncertainty about what 'unreasonable breaks' look like, as this may differ based on the nature of work;
- The time involved with raising a claim and the costs associated with doing so are likely to dissuade an employee from raising a personal grievance claim based on disadvantage;
- An employee is agreeing to breaks in the employment agreement before they commence work, which means they may not appreciate how many breaks they require and what length of break would be appropriate.

Part 6A

SME exemption

The current SME exemption means that workers in some industries where contracts frequently change hands (such as in cleaning or catering) are not able to transfer on the same terms and conditions (including their entitlements to annual leave and sick leave) to the incoming employer.

According to Statistics New Zealand Business Demography statistics, as at February 2012 there were 4,131 enterprises employing 19 or fewer employees in the cleaning and catering sectors and 4,313 enterprises in total[2]. Collectively these enterprises employed 7,040 employees out of 27,760 total employees employed in the cleaning and catering sectors[3].

In addition, workers in these industries were largely women (approximately 60% at the 2013 census) and included over representation from non-European ethnicities were overrepresented (approximately 38%).

A key driver behind this original provisions in the Act was to prevent the competitive tendering process from undermining the terms and conditions of employees who were subject to frequent restructuring and who lacked the bargaining power to necessarily negotiate favourable outcomes each time their contracts of employment were renewed.

It also creates an uncertainty about ongoing work for vulnerable employees and means that entitlements to annual leave and sick leave do not accrue over time; every time an employee starts work for a new employer that is an SME their entitlements reset (ie an employee will not be entitled to sick leave until they have worked with an employer for 6 months or annual leave until they have worked for 12 months).

The review undertaken in 2012 (prior to the creation of the exemption) recommended maintaining the protections for employees, while improving the notification and compliance processes within the Act to improve certainty around obligations and compliance costs for business. Specifically it

[2] MBIE Departmental Report for the Transport and Industrial Relations Committee on the *Employment Relations Amendment Bill 2013* pg. 43

[3] MBIE Departmental Report for the Transport and Industrial Relations Committee on the *Employment Relations Amendment Bill 2013* pg. 44

found that the provisions in Subpart 1 of Part 6A had improved the security and continuity of employment for the identified employees. It also found that while there were operational issues impacting on the affected businesses, these industries had remained highly competitive.

Worker groups have expressed concerns that the exemption has exacerbated worker insecurity with no discernible impact on competitiveness of the relevant industries.

Employee's personal information

Currently, outgoing employers are required to give the incoming employer the employee's personnel information, including any disciplinary matters and personal grievances. Employees are notified that *certain information* is provided to the incoming employer, and they can ask to review this information and request corrections (as per their rights under the *Privacy Act 1993*). Employees are unlikely to be aware of the type and nature of the information that incoming employers receive, as they most likely will consider this relates to their entitlements and wages. As a result they are unlikely to request to review the information because they may be unaware that it includes disciplinary matters and personal grievances. This may mean that the information provided to the incoming employer may be incomplete, inaccurate or misleading, given that it may only provide the employer's view of disciplinary matters.

Timeframes to transfer

Employees are required within five working days to elect to transfer to any incoming employer. If employees do not provide their election to transfer within time, they would not have the right to transfer to the incoming employer on the same terms and conditions.

Five working days is a small window of time for employees to consider their options (which include bargaining with the current employer for an alternative arrangement). It may also be especially challenging if the employees are represented by one or more unions who may need to organise meetings of affected employees as part of the process. Employees may need more time to seek legal advice regarding bargaining any alternative arrangements.

In addition the timeframes do not allow employees sufficient time to check the individualised employee transfer information for accuracy before it is sent on.

Any timeframes need to be balanced with the incoming employer's need to know how many employees would be transferring and ensuring that businesses can still contract efficiently.

Reinstatement

Reinstatement is an important provision because where unjustified dismissal has been made out, reinstatement is the only mechanism that places the employee back in to the same position had they not been dismissed. Reinstatement, however, has historically been used in very limited circumstances, e.g., only 14 out of 882 determinations in 2006 resulted in a remedy of reinstatement. Reinstatement was removed as the primary remedy for unjustified dismissal claims in April 2011. Since then the numbers for reinstatement orders have reduced slightly (approximately 9 reinstatement awards out of 798 determinations).

We do not have data for how often an employee applied for reinstatement, only when reinstatement was awarded. However, we have anecdotal information that suggests that reinstatement is often sought in mediation. Mediators have indicated that the availability of reinstatement as a primary remedy often serves as inducement for employers to settle disputes. The removal of reinstatement as the primary remedy has potentially diminished this incentive.

Collective bargaining provisions

In the context of falling union membership, there is significant risk that the inherent imbalance of power in bargaining is worsening and, in some industries, may be potentially reducing terms and conditions of employment as a result. We note union density across the economy has fallen from over 30% in the early 1990s to approximately 15% in 2016.[4]

Providing the collective agreement and union information

Currently, an employee may not receive the collective agreement and union contact details until they enter into the individual employment agreement. This is a timing asymmetry which means that an employee may not be able to have all the information to make an informed choice about whether to be employed on an individual employment agreement or the collective employment agreement.

Minimum terms and conditions – the 30 day rule

The previous position in the Act required that non-union employees be employed for the first 30 days of employment on terms and conditions that are not inconsistent with the applicable collective agreement covering the workplace. After 30 days, employees could then choose to be employed on the collective agreement, or remain on the individual agreement with their employer (with parties free to negotiate inconsistent terms and conditions from the collective).

The repeal of the rule in 2015 has meant that employers and employees can negotiate terms and conditions that are inconsistent with the collective agreement at the start of an employee's employment. This may not give employees enough time to fully consider whether they are better off on the collective or an individual agreement.

Collective bargaining can be an effective way of addressing the power imbalances in employment relationships. The power imbalance is often also heightened in the initial stages of the employment relationship. In such cases, a collective agreement can impose higher standards on employers and protect employees from agreeing to unfavourable terms and conditions. The current law facilitates a race to the bottom on terms and conditions in sectors where there is significant competition for jobs.

Initiating collective bargaining

Currently the timeframe for initiating bargaining is the same for both employers and unions, this can create gaming around which party initiated bargaining first and cross-initiation can occur. This can take the focus away from bargaining and may lead to legal disputes about initiation, creating extra costs and generally prolonging the bargaining process.

The duty to conclude

The Employment Relations Act was amended in 2015 specifically to provide that the duty of good faith did not require parties to conclude collective bargaining. In addition, it allowed parties to apply to the ERA to determine that bargaining has concluded because of difficulties in coming to a settlement. This may encourage poor bargaining behaviour, such as 'surface bargaining' where one party has no intention of concluding an agreement and participates only to avoid a good faith complaint.

[4] Victoria University Centre for Labour, Employment and Work: Unions and Union Membership in New Zealand – report on 2015 Survey

This can lead to deterioration of the employment relationship and see an increase of staff turnover, particularly where there is a strong union presence and commitment to collective bargaining. There is also a risk that fewer collective agreements will be concluded under the current provisions.

Multi-employer collective bargaining

The ability for employers to opt out of multi-employer collective bargaining impacts on employee and union choice regarding their preferred form of collective bargaining. This is seen by unions as being inconsistent with the statutory objective of the Act to promote collective bargaining and International Labour Organisation (ILO) Convention 98 on the Right to Organise and Collective Bargaining, which New Zealand has ratified. While ILO Convention 98 does not contain any express prohibition on employers opting out of multi-employer bargaining, unions argue the MECA (Multi-employer collective agreement) opt-out undermines the Convention's intent to encourage collective bargaining.

Bargaining for wages

Employers are currently not required to include rates of pay in collective bargaining. This means that collective agreements can be bargained for and settled without addressing wage rates or wage increases for employees.

This may weaken an employee's bargaining position and may mean employees commence employment with low pay rates, with employers having very little incentive to renegotiate pay increases over time.

Discrimination

The Act currently protects against discrimination where an employer takes an action based on an employee's activity with the union i.e. an employee's involvement in a lawful strike. However, if an employer chose to offer better terms and conditions to certain non-union employees 15 months later because of that strike, this would not amount to discrimination under the current settings. This is because there is a 12 month limitation from the employee's union action to the employer's discriminatory action. This timeframe is overly prohibitive and means that after a 12 month period an employer could discriminate without repercussion.

There is concern that the Act doesn't provide for situations where an employee discriminates based on an employee's choice to join the union. Such discrimination could undermine union membership and have a perverse impact on the effectiveness of unions to address power imbalances in the employment relationship.

Workplace union representatives

Under the current law, it is unclear what rights workplace union representatives (also known as delegates) have to undertake their representative role in the workplace. This can lead to disputes between employers and representatives around what is appropriate, and also risks undermining the role of a representative to support other union members in a workplace, and resolve low-level disputes between employers and members without further escalation.

Partial strikes and pay deductions

Partial strikes are usually undertaken on a substitution basis, where other work is undertaken instead of the normal work. There is potential unfairness in deducting pay from employees who are still performing their broad responsibilities in the workplace as partial strike action can include

low-level activities (such as uniform non-compliance) that do not necessary affect productivity.

Allowing employers to deduct wages for partial strikes means that workers are more likely to abandon or refuse to participate in the partial strike action, weakening workers' bargaining position, or it may force workers to fully withdraw labour causing disputes to escalate.

2.4 Are there any constraints on the scope for decision making?

The proposals have been constrained by the Government's 100 day commitments. This, in large part, has committed to making specific changes. Our analysis has focused on the potential impacts of those choices for change, and where relevant, matters of detail that were not specified in the commitments.

There are also longer term pieces of work to consider. Most notably the Government has committed to looking at how bargaining fees interact with the existing framework. That work will also play a part in strengthening fairness at work by improving collective bargaining.

2.5 What do stakeholders think?

MBIE undertook limited consultation with state sector agencies, as well as employer and worker representative groups in November and December 2017.

Employment standards

Rest & Meal breaks

Unions are supportive of returning to prescribed rest and meal breaks. Unions also understood, but indicated concern about the need to carve out an exception in very limited circumstances where, due to the nature of work, it is impracticable to provide breaks. Unions suggested that if it was required this should only be where both parties have agreed in the alternative arrangements for breaks in an employment agreement.

Some employers believe the prescription is overly burdensome and impacts on flexibility and the continuity of business. Others were less concerned with reverting to the previously prescribed rest and meal break provisions.

Agencies noted that some state-sector workforces would be affected by this proposal, particularly in the education sector, where in certain occupations (particularly in relation to early childhood education) adult/children ratios would need to be maintained.

Part 6A

Unions thought the exemption for SMEs from Subpart 1 of Part 6A of the Act should be repealed because many employees were unable to transfer on the same terms and conditions to the incoming employer, meaning that terms and conditions were being eroded. Some unions thought personal grievance and disciplinary information should not be provided to the incoming employer because the incoming employer did not receive any context around disciplinary matters. Some unions also thought that an employee should be notified of their right to check their personal

information (specifically the personal grievance/disciplinary matters) and correct it where necessary, in line with the Privacy Act provisions.

Some employer groups thought that an exemption for SMEs was important as the costs associated with the Part could be overly burdensome. Some employer groups wanted the Part repealed in its entirety.

The Ministry for Women supported the removal of the exemption, noting that one third of employees in New Zealand are employed by SMEs. They also support enforcement of the notification obligations for employers.

Reinstatement

Unions were supportive of reinstatement becoming the primary remedy. Some employer groups thought it was overly burdensome in situations where the relationship of trust and confidence between the employer and employee had broken down.

Collective Bargaining

General

Business groups generally are concerned that strengthening bargaining will undermine the ability of firms to innovate and compete. They were also concerned with a rise in litigation and risks for firms. They tend to view the net impact as negative.

Unions have expressed general support for the proposals, and consider they would support effective collective bargaining and correct imbalances between employees and employers.

Agency views were broadly technical in nature and are covered below.

Information requirements

Unions were supportive of the information proposals, and also wanted to focus on how to best inform employees of the union and its benefits. They wanted employees to be presented with timely, standardised information, a clear binary choice and for that choice to be submitted to the union.

Requiring wages collective bargaining in agreements

State Sector agencies indicated that a number of state sector employers currently address wage setting outside the collective bargaining process through other mechanisms that can involve or consult unions. They considered that the proposal would have significant impacts for employers around the design and implementation of their pay systems, and the capacity of employers to bargain for pay.

Agencies also queried the potential wider impacts of the proposal, such as the ability of state sector employers to deploy flexible working arrangements across their workforces.

Requirement to conclude bargaining

One employer group was concerned about the impact of the duty to conclude on firms who require re-structuring.

Providing time off for union representatives

Agencies requested that further clarification be developed on union representative responsibilities

and guidance on what would constitute 'reasonable' in relation to time spent performing representative duties. This could be done through a code of employment practice on the proposal.

They also highlighted that High Performance Engagement between employers and unions would be another way to help parties determine the appropriate amount of time for representatives to spend on union duties.

Partial strikes

Some employers thought there needed to be a reasonable test for partial strikes given their limited option to respond. Employers were concerned that the proposal would negatively affect productivity negatively. As a result, they support notification requirements so they know partial strikes were scheduled in advance and would be able to plan resources accordingly.

Some agencies considered that the proposal could result in employers resorting to locking out workers in lieu of the option to deduct pay, and a likely increase in partial strikes.

Section 3: Options identification

3.1 What options are available to address the problem?

Employment standards

Rest and Meal Breaks

Option 1: Restore prescribed rest and meal breaks

One option is to reinstate prescribed rest and meal breaks, consistent with the previous iteration of the Act:

- one 10 minute paid break for any period of work between two and four hours
- one 10 minute paid break and one 30 minute paid break for any period of work between four and six hours
- two ten-minute paid rest breaks and one 30-minute meal break if the employee's work period is more than six hours but not more than eight hours
- breaks as set out above for each subsequent time period that may be applicable where the work period is more than eight hours.

Under this option, rest breaks and meal breaks are to be observed during an employee's work period in the following manner:

- at the times agreed between the employee and the employer; or
- in the absence of an agreement, at equivalent interval.

Option 2: Restore prescribed rest and meal breaks with an exception for some businesses

During consultation, employer groups indicated that for some businesses, shutting down or hiring an additional resource to cover breaks may be economically unviable or impracticable due to the nature of work. For example, a sole air traffic controller in a small airport may be required to take a half hour break between their fourth and sixth hour of work, meaning planes that arrive off-schedule cannot land during the employee's half hour break. Another example may be a pilot

where the plane is experiencing turbulence; it would be impracticable for this employee to be required to take their half hour break during this time.

As such, another option would be to prescribe meal breaks but include an exception in limited circumstances for some businesses. This option would deal with those businesses that, for some public need or public safety reason, may need flexibility in providing breaks to employees. This exception would only apply if all of the following conditions are met:

- the cost of hiring an additional resource is unviable due to the employee's skillset (i.e. an air traffic controller is unlikely to accept a role to cover breaks for half an hour and a full additional resource may be too costly to the business)
- there is a public safety reason or public need that requires flexibility of breaks
- the employee and employer agree to different breaks in the employment agreement or compensation where breaks cannot be provided.

For comparison, the United Kingdom has prescribed rest and meal breaks with limited exemptions from that prescription. Workers are not entitled to the three general types of rest break if they work in:

- the armed forces, emergency services or police and they're dealing with an exceptional catastrophe or disaster;
- a job where the worker freely chooses what hours they work (such as a Managing Director) or where the work is not measured (ie no set hours);
- sea transport; or
- air or road transport (known as 'mobile' workers).

Australia's rest and meal breaks are governed by Awards and differ industry by industry.

Part 6A – continuity of work

SME exemption - Option: repeal the SME exemption from Subpart 1 of Part 6A

The option would repeal the SME exemption from Subpart 1 of Part 6A of the Act. Repealing the SME exemption would mean that businesses with 19 or fewer employees would be required to take on those employees who elect to transfer to them and would be impacted by the associated costs. It would also mean that all employees in Schedule 1A of Part 6A of the Act would be able to elect to transfer to an incoming employer when a restructuring takes place.

Information provided to incoming employers - Option: employees are notified of their right to check and correct personal information which includes disciplinary and personal grievance information held by the employer

This option requires an employer to notify an employee of their right to check and correct information, specifying that this information includes any disciplinary and personal grievance information, before the employee elects to transfer to a new employer.

Timeframes to transfer - Option: extend timeframes from five working days to ten working days

This option would extend the current timeframe for an employee to elect to transfer to an incoming employer from five working days to ten working days.

Reinstatement

Option: Restore reinstatement as the primary remedy of the Act

This option would restore reinstatement as the primary remedy wherever practicable and reasonable.

Collective bargaining provisions

Providing employees union information and the collective agreement

Option: providing the collective agreement and other union information at the same time as any intended employment agreement

This option would require that when an employee receives their individual employment agreement they would also receive any applicable collective agreement, the union contact details and be notified of the right to join the union.

In addition to being provided the collective agreement and the union contact details, an employee would also receive information about a union's role in the workplace. This information would be provided by unions to the employer, who would then pass this information to the employee.

The 30-day rule

Option: restore the 30 day rule so that non-union employees are employed on terms and conditions not inconsistent with the applicable collective agreement

This would mean that if the work of a new employee is covered by a collective agreement and the employee is not a member of the relevant union, the employee would be employed on the terms and conditions in the collective agreement for their first 30 days of employment.

Employers and employees are able to agree to additional terms and conditions of employment that are not inconsistent with the collective agreement. This is referred to as the "30-day rule".

After 30 days, if the employee does not join the relevant union, the employer and employee are able to vary the individual employment agreement as they see fit (i.e. terms and conditions can be increased or decreased).

Option: Making an active choice at the end of the 30-day period

After an employee has worked for 30 days, employees must make an active choice about whether they wish to be employed on the collective agreement or the individual employment agreement. This choice would be communicated to the relevant union unless the employee withholds their consent

When bargaining may be initiated

Option: Reinstate the ability for a union to initiate collective bargaining

This option would provide that where there is an applicable collective agreement in force, unions are able to initiate bargaining for a new collective agreement 60 days before the expiry of the current collective agreement. Employers would be able to initiate bargaining 40 days before the expiry of the current collective agreement, provided the union has not already initiated. Where there is more than one collective agreement in force these dates are extended but the union is still able to initiate bargaining 20 days earlier than the employer.

Duty to conclude

Option: restore the requirement that collective agreements be concluded unless there are genuine reasons based on reasonable grounds not to

This option would amend the Act to reflect the previous position that the duty of good faith requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there are genuine reasons based on reasonable grounds not to.

Multi-employer bargaining

Option: remove the ability for employers to opt out of multi-employer collective bargaining

This option proposes removing the ability for employers to opt-out from multi-employer collective bargaining. If unions conducted ballots to initiate bargaining, employers would be required to bargain in good faith with the union or unions subject to the initiation.

Require wages to be bargained as part of collective bargaining

Option: put into legislation the requirement for collective agreements and bargaining to include wages

Recent common law has found that as part of the duty of good faith between bargaining parties, a refusal in principle to include wages in a collective agreement is not a genuine reason to conclude bargaining.

This option would make it a legislative requirement for negotiations to include discussion of wages, and for wages to be included in collective agreements.

Discrimination

Option: extend the discrimination provisions to include an employee's membership or non-membership of a union as ground for discrimination

This option would address situations where an employer may try to influence an employee's choice to join or not join a union by offering better terms and conditions, promotion or taking an action that dissuades an employee from making this choice freely. This would be in addition to the current discrimination provisions that prevent employers from taking a discriminating action after an employee participates in a union activity such as a lawful strike.

Option: remove the time limitation applicable for an employee's involvement in union activities and an employer's resulting act of discrimination

The Act protects against discrimination where an employer takes an action based on an employee's activity with the union, ie an employee's involvement in a lawful strike. There is a 12 month limitation from the employee's union action to the employer's discriminatory action. This option would extend the timeframe from 12 months to 18 months.

Providing union workplace representatives with reasonable time in working hours to perform role

Option: require employers to give employees reasonable time in the workplace to perform their union representative role

This option proposes to place an obligation on employers to allow employees reasonable time during working hours to perform their role as an employee representative. This would be subject to not unreasonably disrupting an employee's performance of their employment duties or not unreasonably disrupting the employer's business. Duties covered under this proposal would also

be limited to duties related to the employees of the employer.

Partial strikes and pay deductions

Option: remove the ability for employers to deduct pay for partial strikes

This option would remove the ability for employers to deduct wages for partial strikes. This would mean employers faced with a partial strike action only have three options available for response: suspension, lockout or accept partial/substitute performance.

3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

Employment standards

Rest and meal breaks and reinstatement

The criteria to assess the impacts for rest and meal breaks and reinstatement proposals are:

- Increases protections for employees
- Mitigates risks to businesses
- Improves legal certainty
- Minimises costs to parties.

There is a trade-off between increasing protections to employees which may mean the costs to business can increase.

Part 6A

The criteria to assess the impacts for proposals relating to Part 6A of the Act are:

- Increases security for employees
- Increases contract efficiency for businesses
- Improves legal certainty
- Minimises costs to parties.

There is a trade-off between increasing protections to employees which may mean the costs to business can increase.

Collective bargaining proposals

The criteria to assess the likely impacts of the collective bargaining proposals are:

- Strengthens employers' bargaining position/efficiency

- Strengthens employees' bargaining position/efficiency
- Seeks to limit compliance costs
- Consistent with international obligations/best practice.

3.3 What other options have been ruled out of scope, or not considered, and why?

The scope of the options considered in this analysis is limited by the Government's 100 day commitments. Where there is one option for a proposal, the proposal has been considered against the status quo.

Section 4: Impact Analysis

Marginal impact: How does each of the options identified at section 3.1 compare with the counterfactual, under each of the criteria set out in section 3.2?

	Increases protections for employees	Mitigates risks to businesses	Improves legal certainty	Minimises costs to parties	Overall assessment
No action	**0**	**0**	**0**	**0**	**0**
Rest and meal breaks					
Reinstate prescribed rest and meal breaks	+ Employees receive minimum prescribed breaks, which means they can rest/refresh and return to work safely/productively. May mean more productive, safe workplaces.	- - Employers have less flexibility in how they provide breaks, which may impact on resource requirements for some businesses. Some businesses cannot provide breaks in some situations due to public need/public safety. These businesses run the risk of non-compliance.	++ Employees entitled to minimum standard of breaks, giving certainty as to when and how long breaks are entitled to be. Businesses have more certainty about requirements for breaks, instead of a 'reasonable' test.	- - Increase costs for businesses not currently providing minimum standard of breaks. Some may need to employ more staff to cover breaks at a cost to the business. Employees may be safer/more productive from having minimum breaks.	- Marginally better than the status quo. Improves minimum standards for employees where breaks are currently below those prescribed. Business flexibility may be impacted. This may increase costs to businesses that need to hire more employees to resource breaks. Some businesses may run the risk of non-compliance where they are unable (due to public safety/public need) to provide breaks.

	Increases protections for employees	Mitigates risks to businesses	Improves legal certainty	Minimises costs to parties	Overall assessment
Reinstate prescribed rest and meal breaks with an exception for businesses where continuity of work is critical to public need/safety, costs of substitution are high and where agreed between employer and employee.	**+** Employees receive minimum prescribed breaks, which means they can rest/refresh and return to work safely/productively. May mean more productive safe workplaces.	**0** Some Employers have less flexibility in how they provide breaks, which may impact on resource requirements for some businesses. Some businesses would be exempt where breaks cannot be provided because of public need/ public safety, giving flexibility where there is a genuine reason not to provide prescribed breaks.	**+** Employees entitled to minimum standard of breaks, giving certainty as to when and how long breaks are entitled to be. Businesses have more certainty about requirements for breaks, instead of a 'reasonable' test. Where businesses cannot provide breaks and fit within the exception, employees still have certainty because break arrangements must be agreed.	**+** Increase costs for businesses not currently providing minimum standard of breaks. Some may need to employ more staff to cover breaks at a cost to the business. Essential services that meet the exception requirements would not face additional cover staffing costs.	**+** Better than the status quo. Improves minimum standards for employees where breaks are currently below those prescribed. Business flexibility may be impacted. This may increase costs to businesses that need to hire more employees to resource breaks. Flexibility of breaks is provided where businesses meet the exception. **Preferred Option.**

	Increases security for employees	Increase contract efficiency for businesses	Improves legal certainty	Minimises costs to parties	Overall assessment
No action	**0**	**0**	**0**	**0**	**0**
PART 6A of the Employment Relations Act					
Remove SME exemption from Subpart 1 of Part 6A	++ All employees would have continuity of employment and their entitlements would accrue regardless of restructure.	- Harder for SMEs to compete (as they take on costs for transferring employees). Removes complexities around exemption process (having two processes depending on size of incoming employer). Simplifies processes for when employees can transfer.	++ Employees have certainty about when they can transfer. More straightforward that the Part applies to all businesses regardless of size.	- SMEs bear the costs associated with transferring employees. Levels playing field for businesses. Employees entitled to continued employment.	+ Better than the status quo. Provides key protections for employees while levelling the playing field for businesses, removes complex procedure around SME warranty. SMEs bear the costs associated with transferring employees and may be less able to absorb this than bigger employers.
Extend the timeframes employees have to elect to transfer from five working days to ten working days	++ Employees have more time to seek legal advice or union representation around whether or not they should elect to transfer.	- Increases timeframes within the restructure process. Businesses have to build in more time to be time compliant.	+ Employees have greater time to consider their options and understand the implications of transferring or bargaining for alternative arrangements with their current employer.	- Costs should not change substantially. Potentially costs around building in more time before the restructure takes place, unknown impact.	+ Better than the status quo. Provides employees more time to inform their decision on when to transfer. Businesses have to build more time into the restructuring process.

	Increases security for employees	Increase contract efficiency for businesses	Improves legal certainty	Minimises costs to parties	Overall assessment
Require employers to notify employees of their right to check personal information, including personal grievance disciplinary information, and ask to be corrected if any error	+ Employees have right to check personal information, however are unlikely to be aware of the type of information passed to the incoming employer. This could lead to unfair treatment if an employee is subsequently disadvantaged based on incorrect or misleading information. The additional notification requirements would promote greater awareness of protections by employees by giving them the opportunity to correct their information.	0 Increases notification requirements that businesses most follow, however must notify employees of other matters relating to transfer currently.	+ Employees are made aware of their legal right to check and correct information, specifically around personal grievance and disciplinary matters, held about them. Unlikely to be aware without being notified. Incoming employers may receive more accurate information about employees.	0 Employees already entitled to this right (so no procedural costs in checking/correcting information). Unlikely to be increased costs as notification requirements already exist for transfer.	+ Better than the status quo. Employees are more aware of rights and can access/correct information to be given to incoming employer. Information provided to incoming employer may be better as a result.

	Increases protections for employees	Mitigates risks to businesses	Improves legal certainty	Minimises costs to parties	Overall assessment
No action	**0**	**0**	**0**	**0**	**0**
Reinstatement as the Primary Remedy					
Reinstatement is the primary remedy of the Act	**+** Should increase the likelihood of Authority awarding reinstatement.	**-** Increases the likelihood of employees that the employer may no longer want to employ being reinstated into their position. This may cause issues where the trust and confidence in the relationship is gone.	**+** May improve legal certainty for employees in terms of getting reinstated. May lessen certainty for businesses who try to argue that it is not practicable or reasonable for the employee to be reinstated.	**-** In some cases reinstatement may be more likely to be awarded; this may put pressure on employers to settle matters at mediation. Minimises search costs for employees (of finding a new job) and may increase costs for employers (of working with an employee they may not want reinstated – may require more resourcing).	**0** May improve the likelihood of an employee being reinstated where the remedy is asked for. Employers who do not want reinstatement bear the costs of reinstated employees.

	Increases employer protections/ employer's bargaining efficiency	Increases union members' protections/union bargaining efficiency	Compliance costs	Consistent with international obligations/best practice	Overall assessment
No action	**0**	**0**	**0**	**0**	**0**
Collective bargaining proposals					
Improving access to union information	**0** Employers already have an obligation to provide information; the timing of the provision of the information is the only change that affects the employer.	**++** Employees have access to union information and the collective agreement before entering into an employment agreement with the employer. Increases employees awareness of unions and benefits of union membership so employees can make an informed choice about being on an individual or collective agreement.	**-** Small compliance costs for firms to provide information unions have provided. Small costs for unions to produce these.	**0** Consistent.	**+** Increases employees awareness of union's and benefits of union membership so employees can make an informed choice about being on an individual or collective agreement. Has little impact for employers.

	Increases employer protections/ employer's bargaining efficiency	Increases union members' protections/union bargaining efficiency	Compliance costs	Consistent with international obligations/best practice	Overall assessment
Reinstating the 30 day rule for new employees who are not union members and giving employees an active choice to join the union after the 30 days (unless the employee withholds consent)	**-** Impacts on what terms and conditions an employer can negotiate (cannot be inconsistent with the collective agreement). The active choice may mean more employees choose to be union members, decreasing the bargaining position of employers.	**++** Provides minimum standards for all workers and provides a good example to workers of what collective bargaining can achieve. The active choice may lead to higher union membership. Unions may have more information at their disposal regarding an employee's choice to join/not join union where the decision is provided to them. They could use this to target new members.	**0** Firm has to ensure all contracts meet the collective. However, this may actually reduce costs initially (as a standardised approach is implemented).	**+** Consistent. More aligned with international best practice.	**+** May lead to increased minimum standards and higher union membership.
Reinstate the ability for a union to initiate collective bargaining	**-** Employers must wait a certain period before being able to initiate bargaining.	**+** Unions are able to initiate bargaining first. Restores historical position.	**0** No impact.	**+** Consistent.	**0** Same as status quo. Unions are able to initiate bargaining first. Restores historical position. Employers cannot initiate bargaining unless the time period for unions to initiate passes.

	Increases employer protections/ employer's bargaining efficiency	Increases union members' protections/union bargaining efficiency	Compliance costs	Consistent with international obligations/best practice	Overall assessment
Reinstating the duty to conclude bargaining	**+** Bargain efficiency may increase as parties may stay around the bargaining table to try to genuinely conclude. May mean employers agree to less favourable terms.	**+** Bargain efficiency may increase as parties may stay around the bargaining table to try to genuinely conclude. Strengthens collective bargaining position.	**-** May lead to protracted and costly bargaining though risk is low.	**0** Consistent.	**+** Better than the status quo. Bargain efficiency may increase as parties may stay around the bargaining table to try to genuinely conclude
Remove the ability for employers to opt out of multi-employer bargaining when they receive notice of initiation for bargaining	**-** Less choice for employers on whether they are a party to multi-employer collective bargaining.	**+** Restores choice of multi-employer bargaining for employees/unions, without employers being able to opt out. Bargain efficiency may increase as parties may stay around the bargaining table to try to genuinely conclude.	**0** May lead to protracted and costly bargaining as unwilling parties would be required to bargain. Although it may be more cost effective for both sides to negotiate one collective (instead of multiple collective agreements).	**+** Consistent.	**+** Restores multi-employer bargaining for employees/unions, without employers being able to opt out. Better than the status quo. However, it may lead to protracted and costly bargaining where unwilling parties are required to bargain. May mean bargain efficiency increases as parties stay around the bargaining table to try to genuinely conclude.

	Increases employer protections/ employer's bargaining efficiency	Increases union members' protections/union bargaining efficiency	Compliance costs	Consistent with international obligations/best practice	Overall assessment
Require wages to be bargained for in collective bargaining, and included in collective agreements	**+** Requires employers to bargain wages as part of collective agreements. May mean employers agree to wage increases that they would not have otherwise. Conversely, the requirement may have a chilling effect on efforts to involve unions in wage reviews and other processes outside of the collective bargaining cycle (such as remuneration forums). This could negatively affect other initiatives to build ongoing cooperative relationships between employers and unions	**+** Requiring parties to bargain wages would strengthen the bargaining power of unions where wage rates are not currently covered by existing collective agreements. May lead to improved wage rates for employees covered by the collective.	**-** May mean bargaining is protracted, at a cost to the parties. Employers who do not currently bargain wages in collective bargaining would need to change processes and systems for how they review wages to align with bargaining rounds	**0** Consistent.	**+** Requiring parties to bargain wages may strengthen the bargaining power of unions where wage rates are not currently covered by existing collective agreements. May lead to improved wage rates for employees covered by the collective. May mean bargaining is protracted, at a cost to the parties.

	Increases employer protections/ employer's bargaining efficiency	Increases union members' protections/union bargaining efficiency	Compliance costs	Consistent with international obligations/best practice	Overall assessment
Increasing protections against employers discriminating against union members	**-** Litigation risk may increase. Employers who take discriminatory actions against union members may face penalties.	**++** Increases protections around an employee's choice to join a union or not. This may lead to increased union membership where undue influence was being used to induce an employee's choice. Union activity would be protected under discrimination provisions for longer	**-** Litigation costs may increase.	**0** Consistent.	**+** Better than status quo though the impact is unclear as we are not aware of the extent of discriminatory practice on the basis of union activity. Would increase protections around an employee's choice to join a union or not. This may lead to increased union membership where undue influence was being used to induce an employee's choice.
Allowing reasonable time for union delegates to perform their role in the workplace	**-** Employees may use their reasonable time off to discuss union matters with non-union employees, which may increase union membership.	**++** Gives employees reasonable time in the workplace to perform their workplace representative function. May improve workplace concerns as employees have time to address these. May lead to increased union membership as employee could use the time to recruit members.	**-** Employers pay for reasonable time off for employee to perform representative function, which is time away from employees' work duties.	**+** Consistent. More aligned with international best practice.	**+** Better than status quo. Gives employees reasonable time in the workplace to perform their workplace representative function. May improve workplace concerns as employees have time to address these. Employers bear the cost of providing this reasonable time off.

	Increases employer protections/ employer's bargaining efficiency	Increases union members' protections/union bargaining efficiency	Compliance costs	Consistent with international obligations/best practice	Overall assessment
Removing pay deductions as a response to partial strikes	**-** Removes a response for employers to deal with partial strikes. Only leaves suspension, lockouts (which may be disproportionate) or accepting the strike.	**+** May lead to more partial strikes which may strengthen the collective's bargaining position.	**+** Removes complexity around deducting pay and compliance costs associated with this.	**0** Consistent.	**+** Better than the status quo. It increases the bargaining power of unions to deliver better working conditions, but removes a response for employers who can only suspend/lockout or accept the impacts of the partial strike.

Key:

++ much better than doing nothing/the status quo

+ better than doing nothing/the status quo

0 about the same as doing nothing/the status quo

- worse than doing nothing/the status quo

- - much worse than doing nothing/the status quo

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Employment Standards

Rest and Meal breaks

Preferred option: Prescribe rest and meal breaks with an exception in limited circumstances

This option prescribes rest and meal breaks based on the number of hours an employee works (reverting back to the pre 2015 position), but carves out an exception in limited circumstances for some businesses. This option would deal with those businesses that, for some public need or public safety reason, may need flexibility in providing breaks to employees.

Reinstating prescribed rest and meal breaks would mean employees are at a minimum given a certain number of breaks and duration depending on the number of hours the employee works. For the majority of employees, this would provide minimum protections and ensure that the right to rest and meal breaks are not eroded or replaced with financial measures.

This proposal may impact on some businesses that do not fit within the exception, but where providing prescribed breaks would still impact on their continuity of business. The costs of providing breaks would be higher for businesses that need to shut in order to provide breaks or hire an additional resource.

This proposal responds to the concern of some stakeholders that for some businesses, shutting down or hiring an additional resource may be economically unviable or impracticable due to the nature of work by providing an exception in limited circumstances.

Part 6A

Preferred option: repeal the SME exemption from Subpart 1 of Part 6A

This option removes the SME exemption from Subpart 1 of Part 6A of the Act. This would mean that approximately 7,000 vulnerable employees would regain protections provided by Subpart 1 of Part 6A, which would allow them to choose to transfer to the incoming employer on the same terms and conditions (including transferring their entitlements).

This option is in line with the Review of Part 6A which recommended retaining these key protections for employees.

Repealing the SME exemption would mean that businesses with 19 or fewer employees would be required to take on those employees who elect to transfer to them and would be impacted by the costs associated with this.

Unions and some business groups were supportive of repealing the SME exemption. Some businesses groups thought that Subpart 1 of Part 6A should be repealed in its entirety.

Preferred option: employees are notified of their right to check and correct personal information held by the employer before it is transferred to the incoming employer

During consultation unions indicated that employers were passing on an employee's personnel records, including any disciplinary matters and personal grievances, without necessarily telling the employee they had the opportunity to check the accuracy of this information. This may mean that the information provided to the incoming employer may be incomplete, inaccurate or misleading, especially given that it may only provide the employer's view of disciplinary matters.

This option makes employees more aware of their rights under the Privacy Act 1993 to check and have the opportunity to request corrections of any personal information held about them, highlighting the nature of the information that would be provided to the incoming employer, including personal grievances and disciplinary matters. This option would have a minor impact on the process obligations of employers who would need to notify employees of their right in a timely fashion before the restructure takes effect.

Preferred option: extend timeframes for employees to elect to transfer to incoming employers from five working days to ten working days

This gives employees more time to consider their options, including bargaining with their current employer for any alternative arrangements. It allows employees more time to speak to their union representatives or lawyers and work out the best options for them (which may include bargaining with their current employer for an alternative arrangement).

Extending the timeframes would have a flow on impact to other timeframes within the Subpart, including when a Principal (the company who awards the contract) must inform the outgoing employer about the restructuring and when the outgoing employer must inform employees of their right to transfer. This may impact on some contract arrangements where a quick restructuring process is preferred. However, extending the timeframes is considered to be a balance between providing protections to employees and ensuring that businesses can still contract efficiently.

Reinstatement

Preferred option: Restore reinstatement as the primary remedy of the Act

Restoring reinstatement as the primary remedy would mean that reinstatement is ordered, wherever practicable and reasonable, when it is requested by an employee who has been unjustifiably dismissed.

The number of reinstatement orders has always been low, regardless of whether reinstatement was the primary remedy. Therefore the impact of this proposal is likely to be minor. In some circumstances it may mean employees are more likely to be reinstated where they opt for reinstatement as a remedy for being unjustifiably dismissed.

Collective bargaining provisions

Providing employees union information and the collective agreement

Preferred option: providing the collective agreement and other union information at the same time as any intended employment agreement

This would mean that when an employee receives their individual employment agreement they would also receive any applicable collective agreement, the union contact details and be notified of the right to join the union. This corrects the current timing asymmetries that exist between an employee receiving an individual employment agreement and the

collective agreement.

Many employees, especially those who are new to the workforce, are not aware of what a collective agreement is and how it may operate to benefit them. In addition to being provided the collective agreement and the union contact details, an employee could also receive information about what a unions role is in the workplace. This information could be provided by unions to the employer, who then passes this information on to the employee.

This would have little impact on the procedural costs to employers, whilst potentially having a positive impact on collectivisation and knowledge of rights and obligations.

The 30 day rule

Preferred option: restore the 30 day rule so that non-union employees are employed on terms and conditions not inconsistent with the applicable collective agreement

This would mean that if the work of a new employee is covered by a collective agreement and the employee is not a member of the relevant union, the employee would be employed on the terms and conditions in the collective agreement for their first 30 days of employment.

This would provide an initial period of protection for new employees (as employees are considered to be more vulnerable at the start of employment) and to prevent employers undermining existing collective agreements by offering lesser conditions of employment for the same type of work covered by those agreements. This may also encourage employees, if they wished to retain the conditions of the collective employment agreement, to join the union.

Preferred option: Making an active choice at the end of the 30-day period

An employee would be required to make an active choice after 30 days of employment about whether they wish to be employed on the collective agreement or the individual employment agreement. This choice would be communicated to the relevant union unless the employee withholds consent.

Requiring an active choice after the first 30 days of employment means that employees have more time to become informed about the collective agreement and its benefits. It also means they are more informed about the union, the role they play in the workplace and what benefits membership may provide before making both their decision over which contract to take up but also union membership more widely.

When bargaining may be initiated

Preferred option: Reinstate the ability for a union to initiate collective bargaining

This proposal would reflect the original position in the Act that where there is an applicable collective agreement in force, unions are able to initiate bargaining for a new collective agreement 60 days before the expiry of the current collective agreement. Employers are able to initiate bargaining 40 days before the expiry of the current collective agreement, provided the union has not already initiated. Where there is more than one collective agreement in force these dates are extended but the union is still able to initiate bargaining 20 days earlier than the employer.

We are not aware of any significant issues around this proposal. However, there may be a perception that the differential timeframes tilt the balance of power around initiation

towards unions.

Duty to conclude

Preferred option: restore the requirement that collective agreements be concluded unless there are genuine reasons based on reasonable grounds not to

This provision should encourage parties to stay at the bargaining table and reach agreement, where they may have walked away under the current framework. This proposal should also remove any incentives to 'surface bargain', where one party has no intention of concluding an agreement and does no more than go through the motions to avoid a good faith complaint.

Some employers may have to continue to bargain when agreement is unlikely because they do not meet or believe they do not meet the threshold to cease bargaining. Bargaining in these instances may become protracted and costly.

Multi-employer bargaining

Preferred option: remove the ability for employers to opt out of multi-employer bargaining when they receive notice of initiation for bargaining

The option represents a trade-off between the efficiency of negotiating collective agreements at a larger scale, with multiple employers and unions, and the flexibility for employers to choose whether they participate in such bargaining arrangements.

Employers participating in multi-employer bargaining may face additional negotiating costs to participate in the process, compared with single employer bargaining. It could also result in increased costs for smaller employers in particular, if larger employers party to the bargaining were better placed to accept higher wages or conditions.

Conversely, multi-employer bargaining could create efficiencies in the bargaining process by utilising the resources of multiple employers and unions.

Require wages to be included in collective bargaining and collective agreements

Preferred option: put into legislation the requirement for collective agreements and bargaining to include wages

This option would provide legal clarity by requiring that rates of pay be included in collective bargaining and that those rates of pay must be agreed during collective bargaining.

Requiring parties to bargain wages would strengthen the bargaining power of unions where wage rates are not currently covered by existing collective agreements. As a result, this option should improve wage rates for employees covered by the collective. Where wages are not currently bargained for, the cost of bargaining for employers and unions may increase as bargaining time may lengthen in order to settle wage rates. Employers would bear the cost of increased wage rates where these are agreed.

Discrimination

Preferred option: extend the discrimination provisions to include an employee's membership or non-membership of a union as ground for discrimination

This option would address situations where an employer may try to influence an

employee's choice to join a union by offering better terms and conditions, promotion or taking an action that dissuades an employee from making this choice freely.

Preferred option: extend the time limit applicable for an employee's involvement in union activities and an employer's resulting act of discrimination from 12 months to 18 months

This would ensure that an employee would be able to take a personal grievance against an employer who undertakes discriminatory action as a result of any union activity the employee may have engaged in (irrespective of when that activity was undertaken) up to two years after the activity. This would provide an effective deterrent to such discrimination and would ensure that people are not disincentivised from engaging in union activity.

Union stakeholders supported extending the time limit.

Union representatives are given reasonable time in workplace to perform role

Preferred option: require employers to give employees reasonable time in the workplace to perform representative role

This option would mean employee representatives have reasonable time to perform their role in the workplace during working hours. This may increase costs for employers who are paying for employee delegates to perform their workplace representative role. However, there may be benefits to the workplace where issues are raised with employees and dealt with without the need to escalate matters to dispute resolution services. Both employees and representatives are likely to benefit from clarification on this issue in legislation.

Partial strikes and pay deductions

Preferred option: remove the ability for employers to deduct pay for partial strikes

This option would mean employees would be able to partially strike without the fear of their wages being deducted. This proposal may lead to more partial strike action, increasing workers' bargaining position, but lower instances of full strikes.

This option would mean employers faced with a partial strike action only have three options available for response: suspension, lockout or accept partial/substitute performance. Some employers may not consider these responses effective or proportionate to the strike action.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties *(identify)*	**Comment**: *nature of cost or benefit (eg ongoing, one-off), evidence and assumptions (eg compliance rates), risks*	**Impact** *$m present value, for monetised impacts; high, medium or low for non-monetised impacts*	**Evidence certainty** *(High, medium or low)*

Prescribed rest and meal breaks with an exception

Regulated parties	Employers • Ongoing cost: Most employers must accommodate a minimum level of breaks, including ten minute paid breaks and unpaid lunch breaks. Where this is not currently being provided it would be an additional cost to business. This may require hiring an additional resource to cover breaks. • Ongoing benefit: May mean more productive, safe workplaces. May mean less safety incidents (at a benefit to the workplace as well as employees). Employees • Ongoing benefit: Employees receive minimum prescribed breaks, means they can rest/refresh and return to work safely/productively.	Non-monetised impacts: low We do not have cost estimates for the provision of breaks. For some businesses these changes would be easily absorbed, for smaller businesses they may need to hire an additional resource or close the business for the prescribed time where they do not meet the exception.	Low
Regulators	Minimal impacts.		Low
Wider government	ACC • Potential ongoing benefit: less health and safety incidents may mean less pressure on ACC.	Unclear	Low
Total Monetised Cost	Described in the impacts above	Unclear	
Non-monetised costs	Described in the impacts above.	Low	

Part 6A			
Regulated parties	Employers: • Ongoing costs: SMEs would bear the costs associated with transferring employees.	Non-monetised impacts: medium. We do not have	Low

	• Ongoing cost: Increases timeframes required within the restructure process. Businesses have to build in more time to be compliant. • Ongoing benefit: Levels playing field for businesses so that all businesses must take on transferring employees • Ongoing benefit: removes complexities around exemption process (having two processes depending on size of incoming employer) which simplifies processes for when employees can transfer • Ongoing benefit: The incoming employer may receive more accurate employee personnel and disciplinary information. Employees: • Ongoing benefit: more employees would have continuity of employment and be able to transfer their same terms and conditions of employment to the incoming employer • Ongoing benefit: Employees have certainty about being able to transfer. • Ongoing benefit: Employees have greater time to consider their options and understand the implications of transferring or bargaining for alternative arrangements with their current employer. • Ongoing benefit: Employees are made aware of their legal right to check and correct information held about them. Unlikely to be aware without being notified.	specific cost estimates for the transfer process and taking on transferring employees for SMEs. There was a cost benefit analysis undertaken in 2012 as part of the Part 6A review, however, this applies to all businesses and all employees prior to the exemption.	
Regulators	Minimal impacts.		
Wider government	Minimal impacts.		
Total	Described in the impacts above.	Unclear	

Monetised Cost			
Non-monetised costs	Described in the impacts above.	Medium	

Reinstatement as the primary remedy			
Regulated parties	Employers • Increases the likelihood of reinstatement of employees that the employer may no longer want to employ. This may cause issues where the trust and confidence in the relationship is gone. • May increase costs for employers of working with an employee they may not want reinstated i.e. may require more resourcing. Employees • In some cases reinstatement may be more likely to be awarded. This minimises search costs for employees (of finding a new job) and places employees in the same position prior to being dismissed. • May improve legal certainty for employees in terms of getting reinstated. May lessen certainty for businesses who try to argue that it is not practicable or reasonable for the employee to be reinstated.	Low – statistics show very few orders for reinstatement were issued both when reinstatement was the primary remedy and when it was just a remedy open to the Authority. Therefore the impacts of this proposal are likely to be minimal.	Medium
Regulators	Minimal impacts		
Wider government	Minimal impacts		
Total Monetised Benefit	Described in the impacts above.	Unclear	
Non-monetised benefits	Described in the impacts above	Low	

Collective bargaining proposals			
Regulated parties	*Overall* • The combined effect of the collective bargaining proposals is to strengthen	Low	

	collective bargaining and rights in relation to worker representation. It is difficult to put a dollar value on any of the collective bargaining proposals. *Employers* • Bargain efficiency may increase as parties may stay around the bargaining table to try to genuinely conclude • May mean bargaining is protracted at a cost to parties • Gives employees reasonable time in the workplace to perform their workplace representative function (at a cost to employers). • May improve workplace concerns as employee representatives have time to raise and address these. *Employees* • Increases employees' awareness of unions and benefits of union membership so employees can make an informed choice about being on an IEA or CEA. • May lead to increased employment standards and higher union membership. • Increased protections around an employee's choice to join a union or not • Gives employees reasonable time in the workplace to perform their workplace representative function. May improve resolution of workplace concerns as employee representatives have time to raise and address these.		
Regulators	Minimal impacts		
Wider government	The combined effect of the collective bargaining proposals is to strengthen collective bargaining and rights in relation to worker representation. The public sector has a high proportion of collective agreements. This may lead to better pay and conditions in the public sector, at a cost to government.		
Other			

parties			
Total Monetised Benefit	Described in the impacts above.	Unclear.	
Non-monetised benefits	Described in the impacts above.	Medium	

5.3 What other impacts is this approach likely to have?

Overall, the changes broadly revert the law to the pre-2014 position. Since the change in the law, there has been little discernible effect that can be attributed directly to the regulatory changes. We note that there has been limited research undertaken on the changes and what research has been done has shown little impact from the previous changes.

As such, the impacts of the proposed changes on the economy overall would be limited. As a total suite of interventions, the changes should strengthen the position of unions in bargaining and in turn limit some of the worst practices in the market. In doing so, this could limit firm flexibility, which could impact on innovation in and by firms. It could also have a detrimental impact on employment levels, particularly when if accompanied by a general economic slowdown.

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

No incompatibility has been identified.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

The legislative proposals need to be implemented through amendments to the Employment Relations Act 2000. MBIE is responsible for administering the Act and provides information for employers, unions and employees through its website, contact centre and other customer services on an ongoing basis. Information provision would be undertaken within MBIE's existing baseline funding.

6.2 What are the implementation risks?

Employers, unions and employees may face difficulties interpreting and applying the provisions

We will continue to engage with stakeholders to ensure parties understand the proposals. In certain areas such as providing union employee representatives appropriate time to perform their role, we will look at developing a code of employment practice to provide further guidance.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

Bargaining practices

Currently, information on how the bargaining process works in practice is limited. MBIE will undertake monitoring and evaluation of the proposals expected to have the most influence on how bargaining operates, including the duty to conclude.

Broadly, for all changes:

MBIE will undertake monitoring of the Act through media reports, research and use of mediation services and the Employment Relations Authority.

MBIE will include questions in its annual survey of employers to get information on uptake, awareness and barriers from changes.

7.2 When and how will the new arrangements be reviewed?

The proposals will be monitored and evaluated as part of MBIE's over-arching responsibility to monitor the Act.