



# BRIEFING

## Proposed Changes to Employment Legislation

<b>Date:</b>	31 October 2017	<b>Priority:</b>	High
<b>Security classification:</b>	<b>In Confidence</b>	<b>Tracking number:</b>	0751 17-18

Action sought		
	Action sought	Deadline
Hon Iain Lees-Galloway <b>Minister for Workplace Relations and Safety</b>	<b>Agree</b> to our proposed approach to supporting you to implement your first 100 days manifesto commitments.	2 November 2017

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Ruth Isaac	General Manager, Labour and Immigration Policy	04 901 3883	██████████	✓
Gerard Clark	Policy Manager, Employment Standards	04 901 8590	██████████	
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The following departments/agencies have been consulted					
X Treasury	<input type="checkbox"/> MoJ	<input type="checkbox"/> NZTE	<input type="checkbox"/> MSD	<input type="checkbox"/> TEC	<input type="checkbox"/> MoE
<input type="checkbox"/> MFAT	<input type="checkbox"/> MPI	<input type="checkbox"/> MfE	<input type="checkbox"/> DIA	<input type="checkbox"/> TPK	<input type="checkbox"/> MoH
		X Other:	SSC		

**Minister's office to complete:**

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

**Comments:**



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### Purpose

To seek your agreement to our proposed approach for supporting you to implement the workplace relations commitments from your manifesto and coalition agreements.

### Executive summary

Your manifesto and coalition agreements include proposals for changes to the existing workplace relations system. This briefing seeks your agreement to our proposed approach to supporting you to implement your '100 days plan'. We understand that there are three key workplace relations commitments in your '100 days plan' as follows:

- increase the minimum wage to \$16.50 per hour, to take effect from 1 April 2018, as part of a series of progressive increases to \$20 per hour by 2020 with the final increase taking effect in April 2021
- increase Paid Parental Leave from 18 to 22 weeks from 1 July 2018 rising to 26 weeks from 2020
- introduce legislation to improve fairness in the workplace.

#### *Increasing the Minimum Wage*

The coalition agreement to increase the minimum wage to \$16.50 per hour from 1 April 2018 can be implemented by an Order in Council and would not require any changes to primary legislation. We intend to provide you with a briefing by 24 November 2017 on the proposed increase in the minimum wage. This will cover the impact of the proposed increase as well as the process for implementing any changes to the minimum wage, and will also seek your decisions on the rates for the starting out and training wages.

#### *Changes to Parental Leave*

The changes to amend the parental leave legislation are straightforward and we understand they are to be implemented through a standalone Parental Leave and Employment Protection Amendment Bill to be ready for introduction in the week beginning 6 November 2017. The policy increases the duration of parental leave payments over three years, from the current 18 weeks to 26 weeks from 2020.

#### *Legislation to improve fairness in the workplace*

An Employment Relations Amendment Bill (the ER Bill) to improve fairness in the workplace could be introduced to Parliament in December 2017. Many of the policies require relatively straightforward amendments. Some are more complex (including, for example, the proposals relating to trial periods and passing on). We would like to discuss these more complex issues with you.

#### *Progressing the remaining commitments from your workplace relations manifesto*

We would like to discuss and confirm that we have correctly identified all of the commitments in your '100 days plan'. We would also like to discuss your priorities for implementation of remaining manifesto commitments so we can ensure that our policy resources are focused on the initiatives that are most important to you.

## Recommended action

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The Ministry of Business, Innovation and Employment (MBIE) recommends that you:

1. **Note** that increasing the minimum wage to \$16.50 per hour from 1 April 2018 can be implemented by an Order in Council and will not require any changes to primary legislation  
*Noted*
2. **Note** that your manifesto commitments for the Workplace Relations and Safety portfolio for the first 100 days will require changes to the *Parental Leave and Employment Protection Act 1987* and the *Employment Relations Act 2000*  
*Noted*
3. **Agree** that the proposal to increase the duration of parental leave payments from the current 18 weeks to 22 weeks in 2018 rising to 26 weeks in 2020 should be implemented through a Parental Leave and Employment Protection Amendment Bill  
*Agree / Disagree*
4. **Direct** MBIE to draft a Cabinet paper seeking policy agreement to the following amendments to the *Employment Relations Act 2000*:
  - a. Restore prescription to the right to rest and meal breaks for employees  
*Agree / Disagree*
  - b. Restore reinstatement as the Act's primary remedy in cases where a worker has been unjustifiably dismissed  
*Agree / Disagree*
  - c. Restore protections for vulnerable workers in sale or transfer of business  
*Agree / Disagree*
  - d. Restore the duty on parties to reach an agreement when collective bargaining has been initiated  
*Agree / Disagree*
  - e. Restore unions' ability to initiate collective bargaining in advance of employers  
*Agree / Disagree*
  - f. Restore the right for new workers to be employed on the same terms and conditions as an existing collective agreement  
*Agree / Disagree*
  - g. Restore the right for employees to be visited by union representatives at their workplaces  
*Agree / Disagree*
  - h. Remove the ability for employers to deduct pay from employees taking part in partial strikes  
*Agree / Disagree*
  - i. Increase protections against discrimination based on union membership  
*Agree / Disagree*
5. **Agree** to discuss with officials the more complex amendments to the *Employment Relations Act 2000* that are outlined in this briefing  
*Agree / Disagree*

6. **Agree** that the proposed changes to the *Employment Relations Act 2000* should be implemented through an Employment Relations Amendment Bill

*Agree / Disagree*

7. **Note** that subject to your policy decisions above, MBIE will progress work on an Employment Relations Amendment Bill on the following timeframe:

<i>Stage of Bill</i>	<i>Expected date</i>
Draft Cabinet paper seeking initial policy decisions provided for your feedback	06 November 2017
Submission of Cabinet paper to Cabinet committee	09 November 2017
Cabinet committee considers Cabinet paper	15 November 2017
Cabinet considers Cabinet paper	20 November 2017
Draft legislation provided for your feedback	04 December 2017
Submission of draft legislation and any outstanding policy decisions to Cabinet committee	07 December 2017
Cabinet committee considers draft legislation	13 December 2017
Cabinet considers draft legislation	18 December 2017
Bill introduced into the House	19 December 2017

*Noted*

8. **Note** that we would like to discuss your priorities for implementation of your remaining manifesto commitments so we can ensure our policy resources are focused on the initiatives that are most important to you

*Noted*

9. **Note** that MBIE will provide you with the following briefings which mainly relate to your manifesto commitments but also include a briefing on issues related to the *Holidays Act 2003*:

- |   |                  |
|---|------------------|
| • Pay equity and gender pay gap   | 3 November 2017  |
| • <i>Holidays Act 2003</i> and payroll compliance issues                              | 10 November 2017 |
| • Ensuring NZ employment law applies to foreign workers working for foreign companies | 10 November 2017 |
| • Increasing the minimum wage to \$16.50 from 1 April 2018                            | 24 November 2017 |

*Noted*

10. **Note** that MBIE will provide you with briefings on your other manifesto commitments on a longer timeframe, including Fair Pay Agreements, vulnerable worker protections, dependent contractors and redundancy entitlements.

*Noted*

Ruth Isaac

**General Manager, Labour and Immigration policy,** Labour, Science and Enterprise, MBIE

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Hon Iain Lees-Galloway

**Minister for Workplace Relations and Safety**

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## Background

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1. Your manifesto and coalition agreements include a range of proposals for changes to the workplace relations system with some proposals to be implemented in the first 100 days and others to be implemented on a longer timeframe. This briefing focuses on how we can support you to implement your priorities for the first 100 days.

## We are ready to support you to implement your priorities

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2. We would like to work with you to understand your priorities for implementing your commitments. We understand that there are three key workplace relations commitments in your '100 days plan' as follows:
  - increase the minimum wage to \$16.50 per hour, to take effect from 1 April 2018, as part of a series of progressive increases to \$20 per hour by 2020 with the final increase taking effect in April 2021
  - increase Paid Parental Leave from 18 to 22 weeks from 1 July 2018 rising to 26 weeks from 2020
  - introduce legislation to improve fairness in the workplace.
3. We would like to confirm that the proposals outlined above are your priority to achieve in your first 100 days. This report sets out our initial advice to deliver these commitments. This is outlined in the following sections on the minimum wage, Paid Parental Leave and legislation to improve fairness in the workplace.

## Other proposals will require more complex policy choices and/or consultation with key stakeholders

4. Some of the proposals in your manifesto will require further policy work and choices between various design options. We would like to discuss your priorities for the proposals that fall into this category so we can target our policy work on those proposals that you would like implemented first.
5. You have indicated in your manifesto that you would like to consult on a number of proposals. We would like to discuss your plans for consultation so we can support you and prepare the relevant processes and documents for this consultation.
6. We have identified a further 7 manifesto commitments for the Workplace Relations and Safety portfolio that may fall into either of these categories. We would like to confirm that while these issues will be progressed as a priority, they are not part of the 100 day plan.

## Proposed approach to remaining manifesto commitments

Commitment	Comment and next steps
Ensure NZ employment law applies to foreign workers working for foreign companies.	<b>MBIE led.</b> We will seek your agreement to our proposed approach to this issue in your capacity as Minister of Immigration in a separate briefing in November.
Implement changes to <i>Equal Pay Act</i> as set out in the report from the Joint Working Group on Pay Equity Principles to give all women in female-dominated workforces access to collective bargaining and court processes to settle their claims.	<b>MBIE led.</b> We will brief you on our proposed approach to this work as part of a briefing on reducing the gender pay gap and progressing pay equity.
Commence the establishment of appropriate governmental	<b>MBIE led.</b> We will provide you with a

assistance to provide support to employers and unions that wish to work together to implement high performance engagement systems designed to lift productivity through worker participation in decision-making.	briefing in the coming months seeking decisions on how you would like this work to progress.
Begin expanding and enhancing skill development and industry training programs to support the growth of high performance workplaces, higher wages and a Just Transition for workers who need new skills to adapt to the changing nature of work.	<b>MBIE led.</b> We will provide you with a briefing in the coming months seeking decisions on how you would like this work to progress.
Ensure all workers in the core public service are paid at least the Living Wage and begin work with organisations that have regular and ongoing service contracts with the core public service to ensure they are Living Wage employers. We envisage the lowest-paid workers such as cleaners, catering staff and security guards will make significant moves towards the Living Wage during the first term of Government.	<b>Not MBIE led.</b> We will work with other agencies and report back to you on progress in the coming weeks.
Require all state agencies to only contract with organisations that comply with good employer practices, have a history of adhering to employment legislation, and respect the right of their workers to join a union and bargain collectively.	<b>Not MBIE led.</b> We will work with other agencies and report back to you on progress in the coming weeks.
Reform the current Productivity Commission so that it has a focus on wage growth and addresses explicitly the development of appropriate high engagement-high performance measures and behaviours in New Zealand workplaces and industries.	<b>Not MBIE led.</b> We will work with other agencies and report back to you on progress in the coming weeks.

## Increasing the minimum wage

7. The coalition agreement includes a commitment to increase the minimum wage to \$16.50 as of 1 April 2018. This can be achieved through an Order in Council.
8. We intend to provide you with a briefing by the end of November providing information about the impact of raising the minimum wage to \$16.50 on 1 April 2018, and seeking your decisions on the rates for the starting-out and training minimum wages (these can also be altered or removed by Order in Council). Considering this briefing is one way to fulfil the statutory requirement to review the minimum wage by the end of the year.
9. Once we receive your decisions on changes to the adult minimum wage, the starting out minimum wage, and the training minimum wage, we intend to provide you with a draft Cabinet paper to implement those decisions. This should allow decisions to be confirmed and publicised in December.
10. The coalition agreement also provides for an increase of the adult minimum wage to \$20 an hour by 1 April 2021, and there are manifesto policies to abolish youth minimum wage rates, and to move towards the adult minimum wage being two thirds of the average wage. We would like to confirm when you would like further advice on these proposals.

## Changes to Paid Parental Leave

11. Part of the Government's 100 day priorities include amending the Parental Leave and Employment Protection Act 1987 (the Act) to increase the duration of parental leave payments. The increase is to be phased in over three years, increasing payments from the current 18 weeks to 22 weeks as of 1 July 2018, and from 22 weeks to 26 weeks as of 1 July 2020.

12. The changes to the Act are straightforward and we understand they are to be implemented through a standalone Parental Leave and Employment Protection Amendment Bill (the Parental Leave Bill) to be ready for introduction possibly in the week beginning 6 November 2017.
13. Indicative costings (to be confirmed with Treasury) are estimated to be an additional \$66m in the 2018/19 year, \$68.7m in the 2019/20 financial year, and an additional \$142.7m in the 2020/21 year once the scheme is fully implemented. The additional 3-year cost over the current forecast period is estimated at \$293.2m. The additional net cost over the forecast period, once PAYE tax revenue is taken into account, is \$253.6m.
14. A budget bid will be required to receive funding for this increase, and will be carried out as part of the process. We will provide a briefing with further details, and provide additional support as required for any Budget or legislative changes. We are working with officials leading other parts of the Best Start package to ensure alignment.
15. As part of the cross-agency work on the Families Package, you will be receiving a joint briefing today, outlining the 100 day package, seeking decisions on Ministerial decision-making processes and timing issues across the package, and other decisions necessary to progress the package in the timeframe required.

## Legislation to improve fairness in the workplace

16. The proposed changes to the *Employment Relations Act 2000* can be implemented relatively quickly through an Employment Relations Amendment Bill (the ER Bill).
17. Part 1 sets out the straightforward amendments that could be included in the ER Bill together with the impacts associated with each of these proposals. We can provide further detail on any or all of these policies if required.
18. Part 2 covers the more complex changes that require further deliberation on the policy design detail. We would like to discuss these with you to develop an agreed approach for implementation. Subject to your decisions, many, if not all, of these proposals could also be included in the proposed ER Bill.
19. We note that some of the proposals may have implementation and ongoing administration costs. We have not yet been able to quantify these costs, but have attempted to note where they may be likely to arise. We also note that all proposals will likely require a Regulatory Impact Assessment to be undertaken.

### Part 1: Straightforward amendments

20. The table below presents the straightforward amendments that could be included in the ER Bill. The table indicates our understanding of the policy, our proposed amendments to the Act (unless otherwise stated) and comments on the impacts of the proposed changes.

Policy	Description	Amendments	Impact / risks / trade-offs
<b>Rest and meal breaks</b>	Restoring the prescribed right to rest and meal breaks for employees	Restore the prescription to the pre-2015 provisions where break length was based on length of time worked.	Uncertain impact. Prescription was removed due to concerns of the impact on sectors such as air traffic control at small airports, where prescription may cause a temporary closure of the airport. <b>You may wish to consider exploring an exemption in a limited form.</b>
<b>Reinstatement as primary remedy in unjustifiable dismissals</b>	Restore reinstatement as the ERA's preferred remedy in cases where a worker has been	Amend s125 to restore reinstatement as the primary remedy	Minor impact. We understand that employees often do not wish to be reinstated. However, employees who have been unjustifiably

	unjustifiably dismissed		dismissed can opt to be reinstated. May mean businesses are more cautious when dismissing employees.
<b>Protections for workers in sale or transfer of business</b>	Restore protections for workers when the sale or transfer of business is contemplated, or job outsourcing is proposed (i.e. Removing the exemption for SMEs to take on workers in restructurings in specified industries)	Amendments to, or repeals of sections in Part 6A	Moderate impact. SMEs will bear the cost of taking on transferring employees. May have an effect on contracting practices as SMEs become less attractive to contract with compared to larger firms (who may be able to offer lower prices as a result of economies of scale). Protects the security of vulnerable employees who can transfer on the same terms and conditions to the incoming employer.
<b>Duty on parties to reach an agreement when collective bargaining has been initiated</b>	Restore a duty on parties to reach an agreement, unless there is a genuine reason not to	Amendments to reverse changes made by <i>Employment Relations Amendment Act 2014</i> : - reinstate s32(1)(ca) - revert to former s32 - repeal ss50K and 50KA	Minor impact. May lengthen negotiations which could create disruption, but may also mean that settlement is reached. Strengthens collective bargaining power.
<b>Unions' right to initiate bargaining in advance of employers</b>	Restore unions' ability to initiate collective bargaining	Amendments to ss41(3) and (4)	Minor impact. May strengthen union bargaining position.
<b>Workers employed on collective agreement's terms and conditions</b>	Restore the default for new workers to be employed on terms and conditions that are not inconsistent with the existing collective agreement covering their workplace	Restore ss62(2)(a)(v), 63, 63A(1)(c)&(d)	Minor impact. Many provisions of employment agreements and collective agreements align. This will ensure that workers with low bargaining power do not get terms and conditions that are less than those negotiated in the collective. May increase the risk that employers simply pass on the terms and conditions from collective.
<b>Union access to workplaces</b>	Restore the right for employees to be visited by union representatives at their workplaces	Restore s20 to the pre-2011 provisions where unions do not need consent to enter the workplace	Minor impact. Employers will have no notice of when union representatives turn up at workplaces. Union representatives will no longer need consent; and may mean employees have greater access to their representatives.
<b>Ability to deduct pay for low-level protest action</b>	Remove the ability for employers to deduct pay from workers taking part in a partial strike	Repeal ss95A-95H	Minor impact. Potential for more partial strikes. Removes employer's options for dealing with partial strikes. This may increase the incidence of partial strikes (which historically were more prevalent in the public sector). Decreases transaction



			costs. May strengthen union bargaining power.
<b>Protections against discrimination based on union membership</b>	Increase protections against discrimination based on union membership	Amend ss104 and 107 to expand the current grounds of discrimination to include union membership.	Uncertain impact. We are unaware of this being an issue. May be difficult to prove link between discrimination and union membership.

## **Part 2: Amendments we would like to discuss with you**

21. This part provides an overview of the more complex proposals we would like to discuss with you. While many, or all, of them can be implemented through the ER Bill, there are a number of questions relating to the design or impacts that need addressing prior to inclusion in the ER Bill.

### **Film and Televisions workers' rights**

22. You have proposed removing the prohibition that prevents film and television workers from bargaining collectively.

#### *Background*

23. In 2010 the government amended the Act so that workers in film production would be independent contractors unless they signed up to an employment agreement that said they were employees. This was in response to high level disputes around employment status (including the Supreme Court decision in *Bryson v Three Foot Six*) at the time that 'The Hobbit' films were being produced. The changes attracted significant negative publicity at the time.

24. The film industry was concerned that contractors could challenge their agreements which could give rise to a lengthy and costly legal dispute. If a contractor was found to be an employee the film production company would then be liable for failing to provide employment law rights and could be required to participate in collective bargaining under the *Employment Relations Act 2000*.

#### *Meeting your commitment*

25. One option is to remove the change inserted in 2010 and restore the common law test of an employee relationship to workers in the film industry. Thus, where, under the common law tests of employment, the nature of relationship is deemed that of an employer/employee, the relevant workers would be afforded all the rights and protections as other employees in New Zealand, including access to collective bargaining.

26. We note that another option may be to explore expanding the right to collective bargaining to a these workers. We are not confident we could design this type of option, however, in time for the Bill. We also note that you have indicated in your manifesto that you would like to explore this option more broadly in your first 12 months in government.

#### *Challenge*

27. The option to restore the common law tests of employment may lead to increased unionisation and collective bargaining. That in turn may improve terms and conditions across the industry. The trade-off for improved conditions is greater cost to the industry, which is price sensitive to production costs and reasonably mobile.

28. The attractiveness of New Zealand as a destination for film production work does not depend entirely on our labour costs or industrial relations settings (and will include consideration of the relevant exchange rates, skills and technological base and the availability of support such as the Screen Production Grant). We also note in comparison, New Zealand's labour laws are generally more flexible than many other advanced economies we compete with such as Australia.

29. There is added uncertainty in that the exact cost is unclear because the employment status of affected workers would come down to a legal determination based on the facts of substance of each working relationship (common law tests).
30. Given the uncertainty about the potential impact, we would like to explore whether you would like to consult with the film production industry alongside the development of the proposal for legislative change.

### **90 day trial period**

31. You have proposed restoring fairness for employees by amending the 90 day 'fire at will' law to add a fast, fair and simple referee system that restores the ability for employees to bring a personal grievance claim for unjustified dismissal during a trial period.

#### *Background*

32. Currently, trial periods are valid where an employer includes a trial provision in the employment agreement, which is agreed to by the employee. If an employer dismisses the employee for any reason during the trial period the employee cannot bring a personal grievance claim.
33. These differ from probationary periods. Probationary periods provide employers a means to dismiss for performance only, generally requiring the process and documentation to prove performance concerns. In practice, the evidence burden and process requirements have operated as a significant barrier to using such concerns as a means of dismissal.
34. The trial period policy sought to provide employers with the confidence to hire new employees by reducing the risks and costs of taking on new workers through giving employers an easy means to dismiss permanent employees. The goal was to increase employment opportunities, particularly for those who are marginal workers in the labour market. The trade-off is that it increases uncertainty and costs for employees.
35. The best data we have is from The National Employer's Survey in 2014/15 which shows 66% of firms have employed on these terms with 24% having dismissed at least one staff member using the trial period.
36. The Ministry has limited evidence as to the impact of the trial period policy on increasing employment or the frequency of dismissals. MOTU researched the effect on employment and found no evidence that the policy affected the number of hires by firms on average, either overall or into employment that lasted beyond the trial period. They also did not find an effect on hiring of disadvantaged jobseekers. They found the main benefit of trial periods was a decrease in dismissal costs for firms, while employees faced increased uncertainty about job security.
37. Anecdotal evidence from that report also suggests divergent views between employees and employers. Employers take the view that the trial periods are very important as they assert it allows them to take more risks in employment decisions. Employees, on the other hand, prefer not to be on trial periods because of the insecurity it creates.

#### *Your proposal*

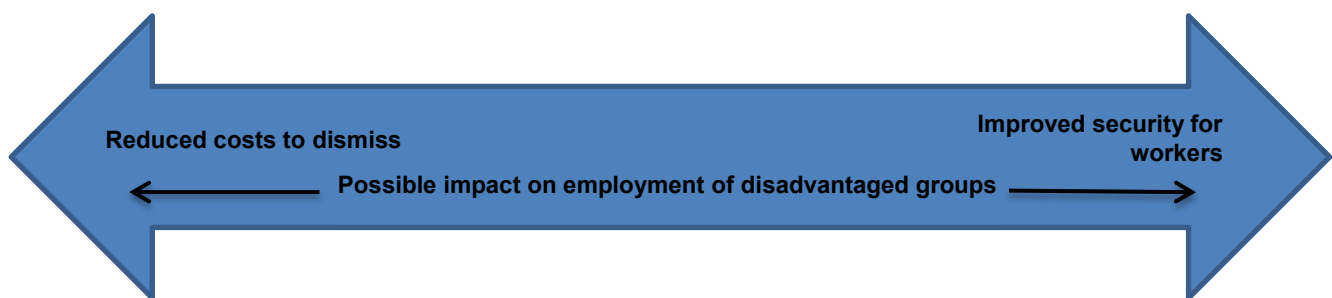
38. You proposed continuing the 90 day trial period but restoring the right for all employees to take a personal grievance for unjustified dismissal from the outset of employment. Such personal grievances would be heard by a new referee service with the following objectives.
  - Free to use
  - Quick
  - Fair
39. You proposed that under the new trial periods policy employees will be given reasons for dismissal and disputes will be heard within 3 weeks of being lodged by a referee which will be free at the point of use. Both parties will be allowed representation but no lawyers will be allowed. A referee will seek agreement between the parties but where this is not possible,

they will make a final and binding decision that cannot be appealed. There will be a cap on the value of penalties awarded. You proposed a budget of \$4 million for the new process.

*Remaining issues to determine*

40. We would like to discuss two further issues of design with you:
  - a. Who should be a referee
  - b. The scope of the referee's powers.
    - a) Who should be the referee?
41. Currently, the regulatory system provides two mechanisms to facilitate the resolution of disputes relating to a dismissal:
  - a. Mediators facilitate discussion between the parties with the aim of helping the parties to try to resolve their issues between themselves; and
  - b. the Employment Relations Authority, whose current role includes adjudicating matters for parties and making final decisions.
42. The proposed referee service could be introduced by amending these existing mechanisms or through a new tailored service.
43. If the referee service is intended to provide arbitral decisions, it is more aligned with the arbitral role of the ERA. Mediators, on the other hand, have better expertise in facilitating self-resolution of disputes. A new tailored service would incur significant establishment and ongoing administrative costs.
  - b) Scope of powers
44. It is also important to consider the basis on which the referee may make its decisions. Under the current law, employers do not need to adhere to any investigatory processes or give reasons for a dismissal under a trial period. In all such cases, employees are effectively barred from bringing a personal grievance.
45. As context, there appear to be two legitimate over-arching possible reasons why a firm may dismiss an employee:
  - The employee is unfit – performance related concerns or misconduct
  - The firm determines they can no longer justify employing an extra member of staff – redundancy type concerns, around the cost and benefits of the role to the firm.
46. In the table below we set out initial options we have formulated for the referee service. Each differs in the scope of the powers of the referee in terms of process and substance.

Status quo	Option 1	Option 2	Option 3
<p>Firm can dismiss for any reason without following any established process if done under a valid trial period</p>	<p>Firm can dismiss within the 90 day period if the dismissal is related to performance or a legitimate business need to restructure.</p> <p>The referee would assess whether the substantive decision is fair (without having regard to the process undertaken by the employer in dismissing).</p>	<p>Firm can dismiss within the 90 day period if the dismissal is related to performance (including misconduct).</p> <p>The referee would only assess whether the substantive decision is fair (without having regard to the process undertaken by the employer in dismissing).</p> <p>A dismissal for redundancy will be subject to the full protections of unjustified dismissal laws (within or beyond the 90 day timeframe).</p>	<p>Firms must adhere to all procedural and substantive grounds for dismissing staff.</p> <p>Referee would assess both substance and process.</p> <p>This would be equivalent to removing the 90 day trial provisions and allowing an unjustified dismissal claim to be heard by a referee in an expeditious manner.</p>



47. In any form the referee service provides a means for firms and employees to resolve disputes with greater administrative efficiency. A referee would find it more difficult to determine whether redundancy grounds are legitimate (since they derive from a business judgement of risk/return) than a case brought on an employee's performance. The broader the scope of the referee's powers, the more costly the system will likely be.
48. We would like to discuss the policy design of this proposal with you further. We also note that we do not have any data on the likely demand for a free to use service. As such, it will be difficult to estimate the cost and uptake of such a system with any accuracy. We note that underfunding such a service will likely mean that the timeliness of the service would be compromised.

**Passing on terms and conditions to non-union workers**

49. You have proposed strengthening the integrity of collective bargaining by tightening the rules on employers automatically passing on terms and conditions to non-union workers.

*Background*

50. In most circumstances employers can pass on terms and conditions without breaching good faith. Currently employers only breach good faith where passing on collectively agreed terms and conditions to non-unionised employees has the:
  - a. intent to undermine the collective agreement; and
  - b. effect of undermining the collective agreement.

51. The threshold is lower during collective bargaining, where either intent *or* undermining collective bargaining will suffice. However, in the majority of cases passing on occurs after the terms and conditions are agreed.
52. The provisions have been interpreted strictly in leading case law. As a result of both the cumulative nature of the threshold and the narrow interpretation of the passing on provisions taken by the Court, the threshold for breaching passing on provisions is very high.

#### *Considerations*

56. We would like to discuss with you how best to achieve the intended outcome.

#### **Reasonable time for union workplace representatives at workplaces**

57. You have proposed to ensure union workplace representatives are given reasonable time within the workplace or work unit to carry out their representative role.

#### *Background*

58. The Act does not currently impose limits on how long a union representative can access a workplace to perform their role. The exception to this is that discussions between union representatives and employees are limited to a reasonable duration.

#### *Considerations*

59. We would like to discuss any concerns that you have regarding unions having enough time within the workplace to undertake their representative role and what you would like to replace the current provisions with to strengthen this. One option may be to explore further information and education around the current requirements.

#### **Information about unions**

60. You have proposed to ensure new workers have all necessary information and access to unions at the commencement of their employment.

#### *Background*

61. Currently, the Act requires an employer to inform new employees if a collective agreement applies to them and that they can join the union if they would like to. An employer is required to provide the union's contact details and a copy of the collective agreement.

### *Meeting your commitment*

62. Employees may not be aware of what a union is or what role they have in workplaces. Providing this information may increase employees' awareness of the benefits of collectivisation and their employment rights and obligations before signing their employment agreement. This may have the impact of increasing collectivisation.
63. You could require that an employer provides information about the role of unions in workplaces. This could be done by either:
  - a. Directing the employee to information about unions on MBIE's website; or
  - b. Requiring employers to provide employees with specific union information.
64. Directing an employee to MBIE's website would provide general information about what unions are and what they do for employees. Union specific information is more likely to be tailored to the nature of the employee's work and workplace. This information could be provided by the relevant union and address what the benefits and costs of joining the union are and could increase awareness of worker rights and obligations prior to signing the employment agreement. 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.

### *Considerations*

65. We would like to discuss with you what level and type of union information employees should receive at the outset of employment.

### **Indicative timeline for Employment Relations Act Amendment Bill**

66. The timeline below provides an initial indication of the process for an amendment Bill, and the approximate timing of each stage of the process, on the assumption that you wish to have the Bill introduced to the House before Christmas. These dates will need to be confirmed once Cabinet schedules are available.
67. This timeline will be tight to meet if significant further work on some of the options above is required.

<b>Stage of Bill</b>	<b>Approximate date</b>
Draft Cabinet paper provided for your feedback	06 November 2017
Submission of Cabinet paper to Cabinet committee	09 November 2017
Cabinet committee considers Cabinet paper	15 November 2017
Cabinet considers Cabinet paper	20 November 2017
Draft legislation provided for your feedback	04 December 2017
Submission of draft legislation to Cabinet committee	07 December 2017
Cabinet committee considers draft legislation	13 December 2017
Cabinet considers draft legislation	18 December 2017
Bill introduced into the House	19 December 2017

## Annex One: Your Workplace Relations and Safety priorities for the next 12 Months

Manifesto Commitment	Notes
<b>Strengthening Workers' Rights</b>	
Begin consultation on improving minimum redundancy protection for workers affected by restructure	We will seek direction from you to guide this consultation process.
Introduce statutory support and legal rights for 'dependent contractors'	This will require significant policy decisions and consideration of issues including: <ul style="list-style-type: none"> <li>— the distinction between 'dependent contractors' and employees</li> <li>— identifying the supports/rights that should apply</li> <li>— identifying the implementation and enforcement options.</li> </ul>
Investigate options for ensuring that people who work over 40 hours a week receive adequate remuneration	Ready to initiate this process, including policy analysis and consultation.
Increase the number of, and resourcing for, Labour Inspectors, and double the number within first term	
Extend the right for workers to elect a health and safety representative from amongst their own to all workplaces	
Abolish youth rates	

Manifesto Commitment	Notes
<b>Improving Workers' Bargaining Position</b>	
<p>In conjunction with all relevant stakeholders, develop and introduce a legislative system of industry and sector collective bargaining that allows unions and employers, with the assistance of the Employment Relations Authority, to create Fair Pay Agreements that set minimum conditions, such as wages, allowances, weekend and night rates, hours of work and leave arrangements for workers across an industry based on the employment standards that apply in that industry</p>	<p>We will provide you with a separate briefing on this issue and will seek a meeting with you to discuss the plan for progressing this work, including the consultation and design process and the key design features of the Fair Pay Agreements regime.</p>
<p>Extend the right to organise and bargain collectively to contractors who primarily sell their labour</p>	<p>We would like to discuss this proposal with you along with other proposals related to improving protections for vulnerable workers.</p>
<p>Investigate measures that improve job security for people in precarious forms of employment (for example, labour hire, casual, seasonal, contracted or sub-contracted workers)</p>	<p>We would like to discuss this proposal with you along with other proposals related to improving protections for vulnerable workers.</p>
<p>Review bargaining fee arrangements to ensure they are fair to workers, the union, and employers for the extension of collective bargaining outcomes to non-unionised workers</p>	<p>We will seek further direction from you on the objectives of this review.</p>
<p>Review multi-employer and multi-union collective bargaining arrangements to encourage their use and to support the development of Fair Pay Agreements</p>	<p>We propose to progress this initiative as part of the work on Fair Pay Agreements.</p>
<b>Government Setting the Example as an Employer</b>	
<p>Address pay equity claims through the process established by the Joint Working Group on Pay Equity Principles</p>	<p>To date the process for resolving pay equity claims in state sector workforces has been led by the relevant departments with oversight from the State Services Commission. We can provide you with a separate briefing on this.</p>