Employment Relations Law Reform Bill

Government Bill

Explanatory note

General policy statement

Overview

This Bill furthers Government policy by amending the Employment Relations Act 2000 (the **Act**) to enable it to better meet its key objectives of promoting fair, productive, and effective employment relationships between employees, employers, and unions.

Fair and productive employment relationships are an essential ingredient in developing a more innovative economy while protecting the more vulnerable in society. They support innovation, productivity, and workforce skill development. Relationships that are trusting, inclusive, and fair also have a social benefit by enhancing people's ability to participate, their sense of satisfaction, and their general wellbeing. Employment relationships that function well and efficiently are based on mutual trust, confidence, and fair dealing. This requires a reasonable equality between the parties and effective means of relationship building and problem resolution.

To achieve this, the Act acknowledges the inherent inequality of power in employment relationships, and seeks to balance the interests of employers and employees through the promotion of unions and collective bargaining, the obligation to act in good faith, and the provision of a continuum of services and bodies designed to support and enhance ongoing employment relationships wherever possible. The operation of the Act since 2000 has, however, revealed a number of areas where it can be strengthened so that it can better achieve Government's employment relations policy objectives.

To address these areas, the Bill makes specific provision to ensure—

- the effective operation of the principle of good faith in all aspects of the individual and collective relationships between employees, employers, and unions. The Bill does this by codifying relevant case law, clarifying the nature of the duty, and providing for penalties for certain breaches of the duty:
- the effective promotion and encouragement of collective bargaining and settlement. The Bill seeks to reduce practical and behavioural barriers to collective bargaining through providing appropriate incentives for collective bargaining, as well as provisions to discourage and penalise the deliberate undermining and avoidance of collective bargaining:
- accessible and effective problem resolution mechanisms that encourage employees and employers to address problems themselves, but also to enable such matters to be dealt with effectively and in a relatively non-legalistic way when self-resolution is not possible. The Bill enhances the flexibility of mediation services, as well as ensuring that the novel investigative approach of the Employment Relations Authority can function as intended without legalistic intervention in its processes. At all stages of the problem resolution continuum, the focus is placed on the employment relationship problem that the parties have, rather than on how the various institutions have handled it:
- the protection of employees in restructuring situations, so that terms and conditions are not undermined and the new employer is encouraged to make the best use of existing talent. The Bill establishes a requirement that all employment agreements contain protective provisions describing what steps the employer will take in the event of any sale, transfer or initial contracting out of business to protect affected employees' interests. The details of such provisions are subject to negotiation. The Bill also identifies specific groups of employees who require special protection in restructuring situations, due to their particular vulnerability and lack of bargaining power. For such groups, the Bill provides the protection of a right to elect to transfer to the new employer on their current terms and conditions of employment. This protection also applies to situations where a new contractor replaces the existing one:
- the effective operation of the right to receive equal pay. The Bill repeals the Equal Pay Act 1972 and replaces it with new

provisions to ensure the right of all employees doing the same or substantially similar work to equal pay, and the effective enforcement of that right. The new Equal Pay Act will not, however, deal with the issue of equal pay for work of equal value (ie pay equity):

- more effective delivery of employment relations education in order to encourage greater knowledge of, and commitment to, productive employment relationships.

In doing so, the Bill complements other changes to legislation governing minimum employment standards – such as paid parental leave, health and safety in employment, and holidays legislation – all of which contribute to wider Government objectives for a more productive and equitable society and economy.

Summary of key elements

Promoting good faith

The principle and promotion of good faith as the basis of productive employment relationships underpins the Act. In practice, however, there has been some uncertainty over the nature of the obligation and when and how it applies. The lack of any penalty for breaching the requirement has also acted, on occasion, to undermine incentives for good faith behaviour.

To clarify and strengthen the duty and application of good faith, the Bill stipulates that good faith is a broader concept than just the common law obligations of mutual trust and confidence. It also recognises that the inherent inequality of power in employment relationships requires a broader focus than on bargaining power alone.

The Bill confirms the case law that supports the intent of the Act by specifying that the duty of good faith may require the disclosure to employees of specific information that may affect them; that in bargaining, the parties should bargain over all issues between them rather than allowing specific matters to impede further bargaining; and that the duty of good faith applies to individual, as well as to collective, bargaining and requires employers to consider and respond to issues raised by employees about proposed individual terms and conditions of employment.

The Bill also provides for penalties and remedies for serious and sustained breaches of the duty of good faith. In the context of collective bargaining, this includes the remedy of enabling the

Employment Relations Authority to fix specific terms and conditions of agreements where serious and sustained breaches of good faith have significantly undermined collective bargaining.

Promoting collective bargaining

The promotion and encouragement of collective bargaining is a key object of the Act. However, practical incentives for the parties to bargain and settle collective agreements can vary, whilst unions face administrative barriers in organising employees collectively, particularly in multi-party bargaining. Some behaviours also actively undermine collective bargaining and settlement, in particular the practice of employers trying to undermine collective bargaining by automatically passing on collectively bargained terms and conditions to other employees or unions ("free riding").

In order to encourage collective bargaining and settlement, the Bill amends the Act to make explicit the principle that the process of collective bargaining should result in a collective agreement unless there is a genuine reason not to. Other provisions to promote collective bargaining include making it a requirement of multi-party collective bargaining that the relevant unions and employers (or their representatives) meet at least once after bargaining has been initiated to work out the bargaining arrangements. Failure to do so will be a breach of good faith.

The Bill also allows subsequent union and employer parties to join existing collective agreements, where the parties to the original agreement have negotiated an enabling provision to allow this to occur. The Bill also confirms and clarifies that parties who are negotiating a collective employment agreement may agree to specific terms and conditions for those covered by the agreement that recognise the benefits of a collective relationship.

The Bill improves the ability of unions to bargain effectively by allowing them to seek prior authority from their members to sign a collective settlement without having to go back to the members when the settlement is actually reached. Employers are also required by the Bill to deduct union fees for all union members employed by them (not just union members covered by a collective agreement), subject to the union members' consent. The Bill also clarifies that workplace discussions between a union representative and a employee are not the same as formal paid union meetings under the Act, and that employees have a right to be paid in both events. This

responds to some employer behaviour that could be described as not being in the nature of good faith.

To overcome impasses in collective bargaining and facilitate settlement wherever possible, the Bill also enables the Employment Relations Authority to provide assistance to the parties in certain circumstances and make non-binding recommendations for the settlement of matters in dispute between them. Strikes and lockouts are, however, still permitted during the facilitation process so that the incentives to bargain and reach settlement during this period are preserved.

Discrimination against union members who participate lawfully in strikes is expressly forbidden by the Bill. In addition, to better balance the interests of those affected by industrial action, the Bill requires the Minister of Health to approve a code of employment practice that provides for matters relating to the health and safety of patients, staff, and the public during industrial action in the health sector.

To prevent the undermining of collective bargaining, the Bill makes it a breach of the duty of good faith for an employer to advise employees against collective bargaining or being covered by a collective agreement. The Bill also addresses what is known as "free-riding". It will be a breach of good faith to pass on to employees or other unions terms and conditions negotiated collectively, if the employer intends by doing so to undermine collective bargaining or a collective agreement and actually does so. This does not, however, prevent the employer and union(s) concerned from agreeing that those terms and conditions may be passed on to those not covered by the collective bargaining.

The Bill also strengthens the "30 day rule" in section 63 of the Act, which provides new, non-union employees with the terms and conditions of any collective agreement that covers their work. The Bill closes the potential loophole of avoiding this rule by defining coverage only by reference to the names or work of specific individuals. Instead, the Bill provides that such clauses are to be read for the purposes of applying the "30 day rule" as referring to the type of work performed by those individuals. The Bill also clarifies, for the purposes of invoking the 30 day rule, that where there is more than one collective agreement covering the new employee's work, the agreement covering the majority of employees doing that work applies.

Promoting more effective employment relationship problem resolution

The personal grievance provisions of the Act recognise the need for fairness and justifiability in cases where employees face situations such as dismissals or other actions by their employer. However, what constitutes unjustifiable actions or dismissals is not defined in the Act, and some court decisions seem to have interpreted the concept of justifiability inconsistently with the good faith intent of the Act, which seeks to balance issues of fairness to both employers and employees.

In particular, the judgment of the Court of Appeal in the *Oram* case has been taken by many as suggesting that what is considered justifiable may only be considered from the perspective of what the employer considered to be fair and reasonable, and that in any inquiry by the employment institutions they may not substitute their own judgement for that of the employer.

However, it is precisely the function of the employment institutions to examine whether a dismissal or other action was unjustifiable in the light of all of the facts. This inevitably involves some "substitution of judgement", but one based on an objective assessment of what a fair and reasonable employer would do in the circumstances. Deciding whether an action was justifiable solely on the basis of the subjective judgement of the employer who undertook the action would be neither fair nor reasonable.

In order to clarify matters, the Bill therefore specifies an objective test for justifiability that makes explicit reference to the requirement for an employer, in deciding on an action, to consider and balance the legitimate interests of both the employee and employer; and reference to the fact that the employer's action and how it was done must be fair and reasonable to both parties in all the circumstances.

The Bill also makes a number of amendments to strengthen the problem resolution processes and mechanisms of the Act, particularly relating to mediation. The Bill specifically recognises that employment relationship problems are more likely to be resolved quickly and successfully if the parties have first raised and discussed their problem directly between themselves. In addition, the Bill increases the flexibility and accessibility of problem resolution services by allowing such services to be offered to parties in work relationships that are not employment relationships (for example,

between contractors and their principals), but the statutory provisions will not apply, ie it will occur on a voluntary agreed basis.

A "fast track" mediation process is also provided for by the Bill so that specific types of problems can be resolved more quickly and effectively. The Bill also empowers mediators to set specific processes and procedures to govern the conduct of mediations and be more active in guiding the parties towards the resolution of their employment relationship problems.

The Bill reduces the incentives for representatives to inflate monetary claims in mediation, and enhances the authority of the applicant, by requiring any monetary settlements in mediation to be paid directly to the applicant rather than the representative, except in cases where legal aid has been granted. It is intended that a best practice guide to representation fees will be developed by the Department of Labour to better inform and educate the parties in this regard.

The Bill enhances certainty of process by clarifying that, in cases where an employee could make a complaint under the Act or the Human Rights Act 1993, once formal proceedings are commenced in one forum, then no aspects of the other procedure (such as mediation) are available.

Greater certainty of outcome in mediated settlements is also provided by the Bill. The Bill ensures that settlements that are agreed to be final and binding by the parties cannot later be cancelled by 1 party under the Contractual Remedies Act 1979, and provides for specific penalties for breaches of agreed settlements.

In addition, the Bill improves the ability of the Employment Relations Authority to deliver speedy, effective, and non-legalistic problem resolution services by restricting the ability of the Employment Court to intervene during Authority investigations. This will ensure that the focus remains on the immediate employment relationship problem itself, rather than on how the institutions deal with it. The Bill also reinforces the primacy of the Act's problem resolution mechanisms by requiring State sector employees to use those mechanisms to resolve employment relationship problems rather than judicial review.

Greater flexibility and responsiveness in Authority operations is provided through enabling the Authority to communicate directly with a party in the course of an investigation, but requiring the Authority to inform the other party of any material arising from any

such communication that is relevant to that party's case. Where the Authority finds detrimental workplace conduct or practices have been a significant factor in a personal grievance, the Authority will also be able to make recommendations to the employer about how to prevent similar problems arising in future. Flexibility is also enhanced by the Bill's provision that, at the conclusion of an investigation, the Authority may make an order for payment of any monetary remedies by instalment where this is justified by the employer's financial circumstances.

Equal pay

The right to equal pay is currently provided under the Equal Pay Act 1972. However, that Act is outdated and difficult to administer as it does not reflect changes made to the employment relations framework since it was passed. In addition, the right to equal pay for government employees is contained in separate legislation. The Bill therefore repeals and replaces the Equal Pay Act 1972 and the Government Service Equal Pay Act 1960 with new provisions that confirm that the right to equal pay applies to all employees, and establishes the means for the enforcement of that right.

Equal pay, for the purposes of the new Equal Pay Act, is defined as a rate of pay for the same or substantially similar work that does not involve discrimination on the basis of gender. The new provisions do not encompass the issue of equal pay for work of equal or comparable value (pay equity).

The new Equal Pay Act will provide that employees can ask their employer whether they are receiving equal pay in relation to other employees employed by their employer (or other employees bound by the same multi-employer collective agreement), and require that employers respond to any such query. Labour Inspectors will be empowered to investigate any issues and take enforcement action in the Employment Relations Authority. Remedies available to successful employees will include recovery of equal pay (ie back pay), compliance orders, and penalties for any proven breaches. Employees will be protected from dismissal or disadvantage as a result of making an equal pay query or complaint.

Protecting employees' interests in change of employer situations

The Bill provides a two-tiered framework of employment protection in restructuring situations where the legal ownership of the business

changes and the same or similar work to that of the affected employees is undertaken by a new employer.

This framework involves default protective provisions which will apply to most employees and employers for restructuring which is a sale or transfer of business or initial contracting out of business. There are also specific provisions that provide a higher level of guaranteed statutory protection to groups of employees that are considered particularly vulnerable to, and disadvantaged by, change of employer situations. This additional protection applies when a new contractor is chosen, as well as to the sale or transfer of business and the initial contracting out of business.

Employee protection provisions in employment agreements

The default provisions apply to all employees who are not in the defined group of vulnerable employees referred to below. Under the Bill, their employment agreements – individual and collective – are required to contain an employee protection provision dealing with possible restructuring situations.

These situations include the sale, transfer or contracting out of the employer's business, but not situations where the employer has been performing work contracted out by another business, and the contract for that work is ended and awarded to another provider.

The details of the employee protection provision are subject to negotiation between the employer and employees. However, it must include—

- the process that the employer will follow in negotiating with a new employer in any restructuring that affects the employees; and
- the matters relating to the affected employees' employment that the employer will negotiate about with the new employer – including whether they will transfer to the new employer on their existing terms and conditions of employment; and
- in the event that an employee does not transfer to the new employer, the process that will be followed at the time of restructuring to determine what entitlements, if any, are available.

Such provisions must be included in all employment agreements by the earliest of—

- 12 months after the Bill comes into force; or

- when the employment agreement is next amended; or
- if a restructuring situation arises or is proposed, before the restructuring actually occurs.

Once agreed, the provisions bind the employer in the event of any sale, transfer or contracting out of the employer's business. Should any such restructuring occur, the employer will then enter into negotiations with the prospective new owner/employer according to the agreed framework in the employee protection provisions.

Statutory protection for specified categories of employee

The Bill also contains provisions designed to provide a higher level of statutory protection to groups of employees that are considered particularly vulnerable to and disadvantaged by change of employer situations. The nature of this protection is the right, for affected employees, to elect to transfer to the new employer on their existing terms and conditions of employment. However, employers, employees and unions will be able to negotiate alternatives to transfer.

These protections will apply to groups of employees described in a schedule to the legislation. Changes to the schedule may follow assessment against specific criteria and may be made by Order in Council on the recommendation of the Minister of Labour. The criteria for changes to the schedule are—

- whether the employees concerned are employed in a sector in which the restructuring of an employer's business occurs frequently:
- whether the restructuring of businesses in the sector concerned has tended to undermine employees' terms and conditions of employment:
- whether the employees concerned—
  - are employed in a labour intensive sector in low paid work; and
  - have little bargaining power.

Elements of the service sector (cleaning, food, and laundry services) are prime examples of particularly vulnerable employees in terms of the above criteria and have therefore been included in a schedule of the Bill.

The right to transfer for these specified groups will be triggered in restructuring situations where the employees' employment is affected by a sale, transfer, or contracting out of their employer's business and the new employer undertakes the same or substantially similar work to that performed for the current employer by the affected employees.

This will also include succession to contract situations, where a contract or arrangement under which an employer carried out work on behalf of a client is terminated and awarded to another provider.

But restructuring situations where the current employer is involved in insolvency or liquidation proceedings will not trigger the protection.

Recognising that the right to transfer for these vulnerable employees may be undermined for employees who transfer to a new employer, but who then face redundancy after the transfer, the Bill also establishes a requirement that the issue of redundancy entitlements be addressed in such situations.

Where the employee's employment agreement already deals with the issue of redundancies caused by a restructuring situation, this will bind the parties after the transfer. However, if the employment agreement does not deal with this issue, the parties will be able to bargain over the matter. If the parties cannot reach agreement, the Employment Relations Authority can examine the matter and, ultimately, determine any redundancy entitlement, taking into account factors such as—

- any other redundancy entitlements already provided within the employment agreement:
- the length of service of the employee with the previous and new employer:
- the amount of notice given of the redundancy:
- the ability of the new employer to provide redundancy entitlements:
- the likelihood of future re-employment of the employee or employment with another employer:
- any other relevant matter.

Promoting more effective employment relations education

The provision of employment relations education leave (EREL) supports the Act's objective of promoting productive relationships through increasing employees' knowledge and capacity in employment relations. The Bill extends eligibility for EREL to all union members, rather than only those covered by collective agreements. The Bill also makes other minor changes to improve the operation of the EREL scheme.

Other matters

The Bill also makes a number of amendments designed to strengthen the effectiveness and clarify the administration of the Act, including the following:

Codes of practice

The Act currently enables the development of a Code of Good Faith bargaining, to set guidelines for the parties in collective bargaining. The Bill extends this concept by providing for the development of broader codes of practice in areas where such guidance would promote more productive employment relations (for example, the establishment of employment relationships).

Individual agreements

The Act requires that probation or trial periods must be in writing, but not the fact of, or reasons for, any fixed term. The Bill now provides that failure to put fixed terms and probation or trial periods in writing will mean that they are not enforceable if the employee chooses to contest them.

Time limits on penalty actions

Actions for penalties under the Act are generally limited to within 12 months after the cause of action has arisen, which means that a wrongdoer can escape liability by successfully concealing their breach for 12 months. To avoid this situation, the Bill provides for the 12 months to run from the earlier of when the cause of action becomes known, or should reasonably have become known, to the person who is bringing the action.

Service outside New Zealand

The Bill clarifies the current law by expressly providing that the Employment Relations Authority and the Employment Court have jurisdiction to authorise service of documents on parties who are outside New Zealand.

Challenges to determinations

The Act does not explicitly provide how cross-challenges or counterclaims to challenges to Employment Relations Authority determinations can be filed, and is silent on the status of determinations that are overturned by judgments of the Employment Court. The Bill clarifies this situation by providing that cross-challenges to Authority determinations can be made, and confirming that Authority decisions that are overturned by an Employment Court judgment are set aside and replaced by the Court's decision.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. The Bill comes into force on 4 October 2004.

Part 1
Employment Relations Act 2000

Clause 4 sets out the purpose of Part 1.

Clause 5 amends section 3 of the principal Act which sets out the object of the Act. The amendments relate to paragraph (a) which refers to building productive employment relations through the promotion of mutual trust and confidence. The amendments substitute reference to good faith and indicate that the duty of good faith in the principal Act is additional to the implied obligations of trust and confidence.

Clause 6 amends section 4 of the principal Act which sets out the general duty of good faith in employment relationships. The amendments—

- provide that the duty of good faith—
    - is wider in scope than the implied mutual obligations of trust and confidence:

- requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive, communicative, and supportive:
- requires an employer proposing to make a decision that is likely to have an adverse affect on the employment of its employees to provide them with access to relevant information (subject to maintaining the confidentiality of information where there is good reason to do so) and an opportunity to comment before the decision is made:

- include, in the non-exhaustive list of matters that the duty of good faith applies to, reference to bargaining for an individual employment agreement or variation of it, and to any matter arising under an individual employment agreement while it is in force:
- provide that it is a breach of the duty of good faith for an employer to advise an employee not to be involved in bargaining for a collective agreement or not to be covered by a collective agreement:
- make failure to comply with the duty of good faith subject to a penalty under the Act if the failure is serious and sustained, or was intended to undermine an employment agreement, or bargaining, or the employment relationship itself.

Clause 7 amends section 5 of the principal Act which is the interpretation provision.

The definition of **coverage clause** is extended to include, as a coverage clause, a provision in a collective agreement that refers to named employees, or to the work or type of work done by named employees, to whom the relevant collective agreement applies.

The definition of **dwellinghouse** is repealed and substituted to exclude, in relation to a homeworker working in a building that is not wholly occupied as a residence, any part of that building that is not occupied as the residence.

Clause 8 amends section 9 of the principal Act which prohibits a contract, agreement, or other arrangement from conferring certain preferences relating to employment because a person is or is not a member of a union. The amendment clarifies that the principal Act

does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits of a collective agreement or the benefits arising out of the relationship on which a collective agreement is based.

Clause 9 amends section 20 of the principal Act which entitles a union representative to enter a workplace for certain purposes. The amendments—

- provide that a discussion in a workplace between an employee and a union representative is not a union meeting for the purposes of section 26 of the principal Act:
- impose an obligation on an employer not to deduct from an employee's wages any amount in respect of the time an employee is engaged in discussion with a union representative.

Clause 10 amends section 31 of the principal Act which states the object of Part 5 of the principal Act which deals with collective bargaining. The amendment adds a new paragraph that refers to the amendment made by *clause 12*.

Clause 11 amends section 32 of the principal Act which specifies a non-exhaustive list of things that the duty of good faith requires parties to collective bargaining to do. The amendment requires the parties to continue to bargain on things on which they have not reached agreement even though they have come to a standstill or reached a deadlock on other things.

Clause 12 substitutes a *new section 33* in the principal Act. The *new section 33* provides that the duty of good faith requires the parties to bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason not to.

Clause 13 amends section 41 of the principal Act which specifies the rules about when bargaining for a collective agreement may be initiated. Subsection (4) contains rules in relation to more than 1 applicable collective agreement that binds more than 1 union or more than 1 employer. The amendment changes subsection (4) so that it applies to 1 or more unions or 1 or more employers.

Clause 14 inserts a *new section 48A* in the principal Act relating to the first meeting of multi-party bargaining for a collective agreement. The new section imposes an obligation on each party to the bargaining to attend, at least, the first meeting to the bargaining.

Clause 15 inserts in the principal Act *new sections 50A to 50I* (which relate to facilitating bargaining) and *new section 50J* (which provides a new remedy for breaches of the duty of good faith in collective bargaining).

New section 50A sets out the purpose of *new sections 50B to 50I* which is to enable any party who is having serious difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties. A party is not prevented from seeking assistance from another person, and in that case *new sections 50B to 50I* do not apply.

New section 50B provides for references to the Authority for facilitation. A reference may be made by any party to collective bargaining or 2 or more parties jointly, and must be made on 1 or more of the grounds in *new section 50C(1)*.

New section 50C sets out 4 separate grounds on which the Authority may accept a reference for facilitation—

- a party has failed to comply with the duty of good faith, and the failure was serious and sustained and has undermined the bargaining:
- the bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties:
- the bargaining has been interrupted by 1 or more protracted or acrimonious strikes or lockouts:
- during bargaining, a strike or lockout has been proposed which, if it were to occur, would be likely to affect the public interest substantially.

This new section defines the circumstances when a strike or lockout is likely to affect the public interest substantially, and when the Authority may act again as a facilitator in respect of bargaining it has already acted as facilitator for.

New section 50D provides that the same member of the Authority or different members of the Authority may accept a reference for facilitation and provide the facilitation.

New section 50E requires the process of facilitation to be conducted in private, and to be the process determined by the Authority. During facilitation, collective bargaining continues subject to the process determined by the Authority. During facilitation, the Authority is not acting as an investigative body, nor using its investigative powers. The provision of facilitation by the Authority cannot be called in

question on the ground that the nature and content of facilitation was inappropriate or the manner in which it was provided was inappropriate.

New section 50F makes any statement made by a party for the purposes of facilitation inadmissible in proceedings under the principal Act. A party may make a public statement about facilitation only if it is made in good faith and is limited to the process of facilitation or the progress being made.

New section 50G provides that, unless the parties otherwise agree, proposals made or positions reached by the parties during facilitation are not binding on them.

New section 50H provides for the Authority to make non-binding recommendations. The Authority has a discretion to give public notice of a recommendation.

New section 50I requires a party, during facilitation, to deal with the Authority in good faith.

New section 50J gives the Authority jurisdiction to make a determination fixing the provisions of a collective agreement being bargained for. The Authority can make such a determination only if 3 grounds are made out and only if satisfied that it is appropriate, in all the circumstances, to do so. The grounds are: that a breach of the duty of good faith has occurred in relation to collective bargaining and the breach was sufficiently serious and sustained as to undermine the collective bargaining; that all other reasonable alternatives for reaching agreement have been exhausted; and that making a determination is the only effective remedy.

Clause 16 amends section 51 of the principal Act which requires ratification of a collective agreement before a union signs it. The amendment permits a union to use the ratification procedure to obtain authorisation during collective bargaining to sign a collective agreement without having to go back to obtain ratification.

Clause 17 amends section 56 of the principal Act which sets out the application of a collective agreement to the relevant parties. A collective agreement that is in force binds and is enforceable by the union and the employer that are the parties to the agreement and the employer's employees who are or become members of the union and whose work comes within the coverage clause in the agreement. *New subsection 1A* provides an exception by authorising an employer to pay an employee, who holds an under-rate worker's permit, on the terms and conditions of the collective agreement

subject to the remuneration terms in the permit. The employer may take this course of action only if the union agrees. This amendment is related to the amendment in *clause 22(2)*.

Clause 18 inserts a *new section 56A* in the principal Act. The new section specifies when and how an employer or union who are not original parties to a collective agreement can become parties.

Clause 19 inserts *new sections 59A and 59B* in the principal Act. The new sections relate to undermining collective bargaining and collective agreements. *New section 59A* makes it a breach of the duty of good faith for an employer to pass on in an individual employment agreement terms and conditions agreed or reached in collective bargaining or a collective agreement if—

- the employer does so with the intention of undermining the collective bargaining or collective agreement; and
- passing on the terms and conditions has the effect of undermining the collective bargaining or collective agreement.

New section 59B is a parallel provision in relation to passing on in a collective agreement provisions agreed in other collective bargaining or another collective agreement.

Clause 20 amends section 60(c) of the principal Act. Section 60 sets out the objects of Part 6 of the principal Act which relates to individual employees' terms and conditions of employment. Paragraph (c) sets out how good faith behaviour, in relation to individual employees and their employers, is recognised.

New subparagraph (ia) requires good faith behaviour when entering into and varying individual employment agreements.

Subparagraph (ii) is amended to clarify that good faith behaviour is not limited to mutual trust and confidence. This amendment is related to the amendments to section 3 of the principal Act.

Clause 21 amends section 62 of the Act. Section 62 sets out an employer's responsibilities to inform a new employee, who is not a union member, about any relevant collective agreement and the application of the 30-day rule. The amendments—

- require the employer to inform the employee about the collective agreement that binds more of the employer's employees in relation to the work the employee will be performing than any other of the relevant collective agreements:
- add *new subsection (1A)* which requires a coverage clause that refers to named employees or the work done by named

employees to be treated, for the purposes of subsection (1), as covering the work or type of work done by the named employees (whether the work is in fact done by those employees or any other employees). This amendment relates to the amendment to the definition of **coverage clause** in *clause 7*.

Clause 22 amends section 63 of the principal Act. Section 63 sets out the terms and conditions of employment for the first 30 days for a new employee who is not a member of the union that is a party to the collective agreement that covers the work to be done by the new employee. The amendments—

- require that if the employee is covered by more than 1 collective agreement, the employee's terms and conditions are those of the collective agreement that binds more of the employer's employees in relation to the work the new employee will be performing, than any of the other collectively agreements:
- add *new subsection (6)* which authorises an employer to pay an employee who holds an under-rate worker's permit wages on the basis of the permit.

Clause 23 inserts a *new section 63A* in the principal Act. The section sets out the minimum good faith duties required by an employer, when bargaining in the situations set out in *new subsection (1)(a) to (h)*. These situations are intended to cover all individual bargaining situations. The minimum duties are—

- to provide an employee with a copy of the intended agreement under discussion:
- to advise the employee that he or she is entitled to seek independent advice about the intended agreement:
- to give the employee a reasonable opportunity to seek that advice:
- to consider any issues that the employee raises and respond to them.

An employer who fails to comply with the duties is liable to a penalty under the Act, but the validity of the agreement is not affected.

Clause 24 repeals section 64 of the principal Act. The requirements of this section have been subsumed in *new section 63A*.

Clause 25 amends section 65 of the principal Act which relates to the terms and conditions of employment for an employee whose

work is not covered by a collective agreement that binds the employee's employer.

New subsection (3) sets out how to determine if a coverage clause referring to named employees, or the work or type of work done by named employees, is relevant. The amendment relates to the amendment to the definition of **coverage clause** in *clause 7.*

Clause 26 inserts a *new section 65A* in the principal Act. The new section implies a provision into an individual employment agreement requiring an employer to deduct union fees in respect of an employee who is a member of a union. The new section parallels section 55 of the principal Act in relation to collective agreements.

Clause 27 amends section 66 of the principal Act which relates to fixed term employment arrangements. *New subsection (4)* requires a written term in the employment agreement—

- about the way in which the employment will end; and
- on the reasons for ending the employment in that way.

Failure to comply with the subsection does not affect the validity of the employment agreement. However, under *new subsection (6)*, if the employer does not comply, the employer may not rely on the fixed term to end the relationship if the employee elects to treat the term as ineffective.

Clause 28 amends section 67 of the principal Act which relates to periods of probationary or trial employment. The amendments have a similar effect to those in *clause 27.*

Clause 29 is a consequential amendment related to *clause 23.*

Clause 30 inserts *new Part 6A* in the principal Act dealing with continuity of employment if an employer's business is restructured. *Subpart 1* applies to employees specified in the *new Schedule 1A* inserted by *clause 70. Subpart 2* applies to all other employees.

New section 69A states the object of *subpart 1.* The object is to provide protection to specified categories of employees if their employer proposes to restructure its business so that their work is to be performed for a new employer. Employees are given a right—

- to elect to transfer to the new employer on the same terms and conditions; and
- to bargain for redundancy entitlements if made redundant by the new employer for reasons related to the restructuring of the previous employer's business; and

- if redundancy agreements cannot be agreed with the new employer, to have the redundancy entitlements determined by the Authority.

New section 69B contains definitions of **new employer**, **redundancy entitlements**, and **restructuring** for the purposes of *subpart 1*.

New section 69C provides that *subpart 1* applies to an employee if—

- *new Schedule 1A* applies to the employee; and
- the business of the employee's employer is being restructured; and
- as a result, the employee will no longer be required by his or her employer to work; and
- the type of work performed by the employee (or work that is substantially similar) is to be performed by employees of the new employer.

New section 69D requires an employer who proposes to restructure its business to provide the affected employees with—

- a reasonable opportunity to exercise the right to make an election about whether or not to transfer to the new employer; and
- the date by which the right to make the election must be exercised.

New section 69E clarifies that, before deciding whether to make an election to transfer, an employee can bargain with his or her employer for alternative arrangements. If an employee and employer agree on alternative arrangements, the employee may not subsequently elect to transfer to the new employer.

New section 69F provides that if an employee elects to transfer to the new employer, then to the extent that the employee is no longer required to perform work for his or her employer, the employee becomes the employee of the new employer on the same terms and conditions. An employee who transfers to the new employer is not entitled to any redundancy entitlements from his or her previous employer.

New section 69G applies if a transferring employee is a member of a union and bound by a collective agreement, and the new employer is not a party to the collective agreement that the union is a party to.

The new employer becomes a party to the collective agreement, but only in relation to and for the purposes of that employee.

New section 69H gives a transferring employee an entitlement to redundancy entitlements from his or her new employer if the new employer proposes to make the employee redundant for reasons relating to the restructuring.

New section 69I gives the Authority jurisdiction to investigate and determine redundancy entitlements if the employee and employer cannot agree on them under *new section 69H*.

New section 69J states the object of *subpart 2*. The object is to provide protection to all other categories of employees (ie, those not covered by *subpart 1*) if their employer proposes to restructure its business so that their work is to be performed for a new employer.

This subpart requires all employment agreements to contain employee protection provisions relating to negotiations between the employer and new employer about the transfer of affected employees to the new employer.

New section 69K contains definitions of **employee**, **employee protection provision**, **new employer**, and **restructuring** for the purposes of *subpart 2*. The new section also defines when an employee (an **affected employee**) is affected by the restructuring of his or her employer's business.

New section 69L requires new collective agreements and new individual employment agreements for employees covered by *subpart 2* to contain employment protection provisions.

New section 69M requires existing collective agreements and existing individual employment agreements for those employees to be varied to include employment protection provisions. This must be done within certain time limits.

New section 69N gives an affected employee whose employer has arranged for the employee to transfer to the new employer a right to choose to transfer or to choose not to transfer. If the affected employee chooses to transfer to the new employer, the employee's employment is to be treated as continuous, including for the purpose of service entitlements whether legislative or otherwise.

Clauses 31 to 33 relate to employment relations education leave. *Clause 31* amends section 71 of the principal Act, the interpretation section for Part 7, which relates to employment relations education

leave. The amendment repeals and substitutes the definition of **eligible employee**. The new definition removes the former requirement that the employee be a member of a union that is a party to a collective agreement, or bargaining to be a party to a collective agreement, to which the employer is a party, or bargaining to be a party.

Clause 32 amends section 72 of the principal Act by removing the requirement that the Minister's approval of courses of employment relations education be notified in the *Gazette*.

Clause 33 amends section 74 of the principal Act which sets out how a union is to calculate the maximum number of days of employment relations education leave it is entitled to allocate to eligible employees. The date of allocation is amended from "the specified date" to "the 30th day before the specified date". The heading to the first column in the table to section 74 is amended in the same manner.

Clause 34 amends section 78 of the principal Act to clarify that a representative of an eligible employee may, on the employee's behalf, tell the relevant employer of the details of the employee's proposed leave.

Clause 35 inserts into the principal Act a *new Part 8A* (*new sections 100A to 100C*) relating to codes of employment practice. This *new Part* is modelled on the codes of good faith in sections 35 to 39 of the principal Act.

New section 100A authorises the Minister to approve, by notice in the *Gazette*, a code of employment practice for the purposes of providing guidance on the application of the Act. The notice may either set out the details of the code or provide sufficient information on its nature, commencement, and availability. The Minister is required to consult or be satisfied that there has been consultation with such persons and organisations as he or she sees fit, including relevant employer and employee interests.

New section 100B provides that a code of practice may be amended or revoked in the same manner as the code is approved.

New section 100C provides that the Authority or the Court, when determining a matter before it, may have regard to a code of employment practice that—

- was in force at the relevant time; and
- in the form in which it was then in force, related to the circumstances before the Authority or the Court.

New section 100D requires the Minister of Health to approve a code of employment practice that provides for matters relating to the health and safety of patients, employees, and the public during strikes and lockouts in the health sector.

Clause 36 amends section 101 of the principal Act, which sets out the objects of Part 9 which relates to personal grievances, disputes, and enforcement. The amendment inserts a new object: to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship.

Clause 37 inserts into the principal Act a *new section 103A*. *New subsection (1)* sets out the test to be applied when considering, for the purposes of section 103(1)(a) and (b), whether a dismissal or an action of an employer was justifiable. The test requires the objective consideration of whether an employer's actions and how the employer acted was fair and reasonable to both the employer and the employee in all the circumstances judged at the time the dismissal or action occurred. For this purpose, *new subsection (2)* requires the employer to have considered and balanced the legitimate interests of the employee and of the employer.

This section is intended to resolve uncertainties arising from the decision of the Court of Appeal in *W&H Newspapers Ltd v Oram* [2001] 3 NZLR 29.

Clause 38 amends section 107 of the principal Act. Section 107 defines, for the purposes of section 104, the expression "involvement in the activities of a union". *New paragraph (ba)* inserts the activity of having participated in a strike lawfully.

Clause 39 amends section 112 of the principal Act by adding *new subsections (3) and (4)*. Section 112 requires an employee, in circumstances giving rise to a personal grievance and an entitlement to make a complaint under the Human Rights Act 1933 (**HRA**), to elect either to apply for resolution of the grievance or to make a complaint under the HRA. *New subsection (3)* stops an employee who elects to apply to the Authority for a resolution of the grievance from exercising or continuing to exercise, in relation to the subject matter of the grievance, any rights that he or she may have under the HRA. *New subsection (4)* stops an employee who elects to make a complaint under the HRA from exercising or continuing to exercise, in relation to the subject matter of the complaint, any rights that he or she may have under the principal Act.

Clause 40 inserts into section 123 of the principal Act a further remedy which the Authority or the Court may provide in settling a personal grievance. *New subsection (1)(ca)* authorises the Authority or the Court to make recommendations to an employer on the actions the employer should take to prevent similar employment relationship problems occurring, in circumstances where the Authority or the Court has found that workplace conduct or practices were a significant factor in the personal grievance.

In addition, *new subsection (2)* authorises the Authority or the Court to order payment by the employer to the employee of wages or other money lost under subsection (1)(b), or compensation under subsection (1)(c) by instalments, but only if the financial position of the employer requires it. This amendment is related to the amendments in *clauses 41 and 43*.

Clause 41 amends section 131 of the principal Act which relates to the payment by the employer to the employee of arrears in wages or other money payable. *New subsection (1A)* authorises the Authority to order payment of the wages or other money to the employee by instalments, but only if the financial position of the employer requires it. This amendment is related to the amendments in *clauses 40 and 42*.

Clause 42 amends section 135 of the principal Act which relates to the recovery of penalties. *New subsection (5)* amends the limitation period for bringing an action to a subjective test. Currently an action must be commenced within 12 months after the cause of action has arisen. *New subsection (5)* requires an action to be commenced within 12 months after the earlier of—

- the date when the cause of action first became known to the person bringing the action; or
- the date when the cause of action should reasonably have become known to the person bringing the action.

Clause 43 amends a cross-reference error in section 137(1)(a)(xi) of the principal Act.

Clause 44 amends section 138 of the principal Act which relates to compliance orders. The amendment adds *new subsection (4A)* which authorises the Authority to order payment of any money to an employee as part of a compliance order by instalments, but only if the financial position of the employer requires it. This amendment is related to the amendments in *clauses 40 and 41*.

Clause 45 amends section 143 of the principal Act which sets out the object of Part 10 (which relates to institutions). The amendments—

- insert *new paragraph (da)* which recognises that the person who provides mediation services is able to manage any mediation process actively:
- insert *new paragraph (fa)* which ensures that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations.

Clause 46 inserts a *new section 144A* into the principal Act. The section authorises the chief executive to provide dispute resolution services to parties in work-related relationships that are not employment relationships (for example, contractors). Services provided in accordance with this section proceed on the basis specified in writing by the chief executive.

Clause 47 amends section 145 of the principal Act which authorises the chief executive to decide how mediation services are to be provided. The amendment includes authorising the chief executive to treat matters presented for mediation in different ways, in order to promote fast and effective resolutions.

Clause 48 amends section 147 of the principal Act which authorises the person who provides mediation services in any particular case to decide what services are appropriate in the particular case. The amendments—

- further authorise the person who provides the services, with the consent of the parties prior to the commencement of the mediation, to offer mediation services limited to a specified time. If the problem is not resolved in the specified time, a decision is made for the parties (in accordance with section 150):
- clarify that the person who provides the services may—
    - address any party to the matter without any representative of that party being present:
    - express to any party his or her views on the substance of 1 or more of the issues between the parties:
    - express to any party his or her views on the process the party is following or the position the party has adopted about the employment relationship problem (with or without any representative of the party being present or

with or without any other party or parties to the matter being present).

Clause 49 amends section 149 of the principal Act which relates to the signing of an agreed terms of settlement. The amendments—

- state that the agreed terms may not be cancelled under section 7 of the Contractual Remedies Act 1979:
- introduce a penalty, imposed by the Authority, for persons who breach a term of a settlement.

Clause 50 amends section 150 of the principal Act which authorises a person providing mediation services to make a final, binding, and enforceable decision for the parties with the prior written consent of the parties. The amendment introduces a penalty, imposed by the Authority, for persons who breach a term of a settlement. This amendment is related to the amendment in *clause 49(2)*.

Clause 51 inserts a *new section 150A* into the principal Act. This section requires any payment under section 149(3) or section 150(3), by 1 party to another, to be paid directly to the other party and not to a representative of that party. For the purposes of the principal Act, a payment that is not made in the required manner is to be treated as if the payment has not been made. This section does not apply if the party to whom the payment is required is receiving or has received legal aid for the mediation services.

Clause 52 amends section 160 of the principal Act which sets out the powers of the Authority. The amendment extends the power of the Authority to interview any of the parties or any person at any time before an investigation meeting, to any time during or after an investigation meeting.

Clause 53 amends section 161 of the principal Act which specifies the Authority's jurisdiction. The amendments add references to *new sections 50A to 50J, and 69I* (as inserted by *clauses 15 and 30* respectively).

Clause 54 amends section 173 of the principal Act which sets out the procedure the Authority must follow in exercising its powers and functions. The amendment authorises the Authority to exercise its functions in the absence of 1 or more of the parties. However, if the Authority does so, it must provide to an absent party any material it receives that is relevant to the case of the absent party, and give the party an opportunity to comment on the material before the Authority takes it into account. The amendment does not affect the Authority's powers to make ex parte orders.

Clause 55 amends section 177 of the principal Act. Section 177 empowers the Authority to refer a question of law that arises during an investigation to the Court for its opinion. The amendment restricts the power to refer a question by excluding questions about the procedure that the Authority has followed, is following, or is intending to follow, including a question about whether the Authority may follow or adopt a particular procedure. This amendment is related to the amendments to sections 178, 179, and 184 in *clauses 56, 57, and 60.*

Clause 56 amends section 178 of the principal Act. Section 178 authorises applications by any party to a matter to be removed to the Court for it to hear and determine without the Authority investigating the matter. The amendment excludes procedural matters from removal in the same manner as the amendment to section 177 in *clause 55.*

Clause 57 amends section 179 of the principal Act which authorises a party to a matter to challenge the determination of the Authority by electing to have the matter heard by the Court. The amendment prohibits an election on any procedural determination in the same manner as the amendments to sections 177 and 178 in *clauses 55 and 56* respectively.

Clause 58 inserts *new sections 179A and 179B* into the principal Act. *New section 179A* authorises a party to a matter before the Authority that is subject to an election under section 179 to make a cross-challenge to the relevant determination. The cross-challenge may continue even if the election is withdrawn or abandoned. For the purposes of the principal Act, a cross-challenge must itself be treated as an election under section 179. *New section 179B* limits the scope of challenges from determinations of the Authority in relation to facilitating bargaining under *new sections 50A to 50I* or determining the provisions of a collective agreement under *new section 50J* (as inserted by *clause 15*). Challenges to those determinations are limited to whether the grounds in *new section 50C(1)* or *new section 50J(3)* have been made out.

Clause 59 amends section 183 of the principal Act which states that where a party to a matter has elected under section 179 to have the matter heard by the Court, the Court must make its own decision. The amendment clarifies that once the Court has made a decision, the Authority's determination on the matter is set aside and the

Court's decision stands in its place. The amendment does not interfere with a party's review rights (except as those are limited by the amendments to sections 184 and 194 in *clauses 60 and 62*).

Clause 60 amends section 184 of the principal Act. Section 184 restricts judicial review of determinations, orders, or proceedings of the Authority to lack of jurisdiction (within a restricted definition) or as provided in section 179. The amendment further restricts the right to take review proceedings in relation to any matter before the Authority unless—

- the Authority has issued final determinations on all matters relating to the subject of the review application between the parties to the matter; and
- the party initiating the review proceedings has challenged the determination under section 179; and
- the Court has made a decision on the challenge under section 183.

Clause 61 amends section 188 of the principal Act which sets out the general role of the Court. The amendment clarifies that it is not a function of the Court to advise or direct the Authority in relation to the exercise of its investigative role, powers, and jurisdiction or its procedure.

Clause 62 amends section 194 of the principal Act which sets out the Court's review jurisdiction. This amendment is related to the amendment to section 184 in *clause 60* and *new section 194A* inserted by *clause 63*.

Clause 63 inserts a *new section 194A* into the principal Act. This section prohibits a state sector employee from using judicial review proceedings in the Court or High Court to review the exercise, refusal to exercise, or proposed or purported exercise of a statutory power of decision if it is, or gives rise to, an employment relationship problem. Instead, the employee must use the employment relationship problem-solving provisions in the principal Act.

Clause 64 amends section 229 of the principal Act which relates to the powers of Labour Inspectors under the Acts specified in section 223(1). The amendment clarifies that a Labour Inspector is the person who brings an action under subsection (3).

Clause 65 amends section 232 of the principal Act which relates to the powers of a Labour Inspector to require an employer to compile a wages and time record. The amendment clarifies that a Labour

Inspector is the person who brings an action for failure to comply with the compilation request.

Clause 66 inserts a *new section 237A* in the principal Act. The new section authorises the Governor-General by Order in Council to add to, omit from, or vary the categories of employees in *new Schedule 1A* (as inserted by *clause 67*) which specifies the categories of employees that *subpart 1 of new Part 6A* (as inserted by *clause 30*) applies to.

Clause 67 inserts a *new Schedule 1A* in the principal Act. The new schedule specifies the categories of employees that *subpart 1 of new Part 6A* applies to.

Clause 68 amends Schedule 2 of the principal Act which relates substantially to procedural matters of the Authority. The amendment inserts a *new clause 4A* which authorises the serving out of New Zealand of any document relating to a matter before the Authority provided—

- the Authority has granted leave; and
- the service is in accordance with regulations made under the Act.

Clause 69 amends Schedule 3 of the principal Act which relates (substantially) to procedural matters of the Court. The amendment inserts a *new clause 5A* to the same effect as the amendment in *clause 68*.

Clause 70 provides for consequential amendments to other Acts.

Clause 71 contains transitional provisions.

Part 2
Equal pay

Clause 72 states the purpose of this Part, which is to address gender-based discrimination in pay by—

- requiring an employer to provide equal pay to each of his or her employees who performs the same or substantially similar work (including for an employer who is a party to a multi-employer collective agreement, when compared to other employees who are bound by that agreement and who perform the same or substantially similar work); and
- providing processes for the resolution of equal pay queries and for equal pay investigations.

Clause 73 provides that when dealing with each other under this Part, an employer and employee must deal with each other in good faith.

Clause 74 defines certain terms used in this Part. The terms **Authority**, **employee, employer**, **employment agreement**, and **Labour Inspector** have the same meaning as in section 5 of the Employment Relations Act 2000.

Clause 75 applies this Part to all employers and employees, including the Crown and its employees.

Clause 76 states the duty of an employer to provide equal pay to each of his or her employees who performs the same or substantially similar work. *Subclause (2)* provides that if an employer is a party to a multi-employer collective agreement, the employer must provide equal pay to his or her employees when compared to other employees who are bound by that agreement and who perform the same or substantially similar work. *Subclause (4)* clarifies that the general duty to provide equal pay does not prevent an employee from paying an employee a special rate of pay if the circumstances of the employee justify it.

Clause 77 provides that an employee may ask his or her employer whether or not he or she is receiving equal pay (an **equal pay query**). *Subclause (2)* provides that in considering the query, the employer must compare the pay received by the employee making the query with that paid to a comparable employee identified by the employer.

Clause 78 provides that an employer must confirm in writing, to the employee who made the query, within 20 working days, whether or not that employee is receiving equal pay. The employer's response must not disclose the identity of the comparable employee used by the employer as the basis for assessing the pay received by the employee making the query. However, if the response contains any information that may indirectly identify the comparable employee or any other personal information about that employee, the disclosure of that information is authorised by this Part.

Clause 79 deals with the process for considering an equal pay query where an employer who is a party to a multi-employer collective agreement considers that he or she does not employ an appropriate comparable employee. In these circumstances, the equal pay query must be referred to a Labour Inspector.

Clause 80 provides that if the employer's response under *clause 78* confirms that the employee has not been receiving equal pay, the employer must, as soon as possible (but not later than 1 month after the employer's response),—

- comply with the duty to pay the employee equal pay; and
- pay to the employee the arrears of pay for the period during which the employee was not receiving equal pay.

Clause 81 deals with the circumstances in which a Labour Inspector may conduct an equal pay investigation. The circumstances are where—

- an employee who is not satisfied with the employer's response to his or her equal pay query under *clause 78* requests that an investigation be conducted:
- an employer has referred an equal pay query to the Labour Inspector under *clause 79*:
- the Labour Inspector thinks fit.

Clause 82 lists the information that a Labour Inspector may access for the purposes of conducting an equal pay investigation.

Clause 83 states that a Labour Inspector must provide a written report of his or her findings relating to an equal pay investigation to the employee who is the subject of the investigation and to the employee's employer. If the Labour Inspector's report confirms that the employee has not been receiving equal pay, the employer must, as soon as possible (but not later than 1 month after the Labour Inspector's report),—

- comply with the duty to pay the employee equal pay; and
- pay to the employee the arrears of pay for the period during which the employee was not receiving equal pay.

Clause 84 provides that a Labour Inspector may make recommendations to an employer about the duty to provide equal pay generally or in relation to a specific employee.

Clause 85 relates to the confidentiality of information received by a Labour Inspector, an employer, and an employee under this Part.

Clause 86 clarifies that if an employee may take enforcement action (through a Labour Inspector) under this Part or may make a complaint under the Human Rights Act 1993 or may pursue a personal grievance under the Employment Relations Act 2000, the employee may only take 1 of those steps.

Clause 87 declares that a Labour Inspector is the only person who make take enforcement action under this Part.

Clause 88 enables a Labour Inspector to bring proceedings on behalf of an employee to recover arrears of equal pay.

Clause 89 provides for the imposition of penalties on employers who do not comply with this Part. The maximum penalty is $5,000 in the case of an employer who is an individual, and $10,000 in the case of an employer who is a company or other body corporate.

Clause 90 provides that an enforcement action initiated or taken under this Part by a Labour Inspector may be completed by another Labour Inspector.

Clause 91 clarifies that, for the purposes of this Part, a Labour Inspector has all the powers that a Labour Inspector has under the Employment Relations Act 2000.

Clause 92 provides that in exercising his or her functions or powers under this Part, a Labour Inspector must comply with the principles of natural justice.

Clause 93 relates to the confidentiality of information received by the Authority in the course of proceedings for an enforcement action taken under this Part.

Clause 94 repeals the Equal Pay Act 1972 and the Government Service Equal Pay Act 1960.

Clause 95 consequentially amends the Employment Relations Act 2000 in the manner indicated in *Schedule 3*.

Part 3
Health and Safety in Employment Act 1992

Clause 97 amends section 19G of the principal Act which sets out how the Minister may approve occupational health and safety training courses. The amendment removes the requirement that the Minister must approve such courses by notice in the *Gazette*. This amendment is related to the amendment in *clause 32*.

Part 4
Human Rights Act 1993

Clause 99 repeals section 64 of the principal Act. This section, relating to employees electing whether to take a complaint under the

principal Act or a personal grievance under the Employment Relations Act 2000, has been subsumed in the amendment in *clause 100*.

Clause 100 inserts a *new section 79A* in the principal Act. The section requires a person to make an election between procedures if the circumstances giving rise to a complaint under Part 2 of the principal Act are such that the person, as an employee, would also be entitled to pursue a personal grievance under the Employment Relations Act 2000. Once an election is made, the person may not exercise or continue to exercise any rights relating to the subject matter of the complaint or grievance (as the case may be) in the other system. This new section applies to all complaints made under Part 2, including complaints of sexual harassment or racial harassment. Consequently section 64 of the principal Act is no longer required.

Clause 101 inserts a *new section 92BA* in the principal Act. The new section clarifies that proceedings before the Tribunal are commenced by the lodging of an application in the prescribed form. The new section is related to the amendments in *clauses 39 and 100* in that it provides certainty to the meaning of sections 112(1)(b) and 112(2) of the principal Act, and to *new section 79A* of the HRA.

Regulatory impact and business compliance cost statement

Statement of problem and need for action

The Employment Relations Act 2000 (the **Act**) implemented Government policy to promote collective bargaining, recognise unions, ensure voluntary union membership, and promote consistency with specific International Labour Organisation conventions.

The operation of the Act has been closely monitored since its enactment in order to identify whether the statutory objectives of promoting productive employment relationships, good faith, collective bargaining, and the effective resolution of employment problems are being given full effect in practice, and what, if any, barriers exist to the realisation of those objectives. Case law, the experiences of practitioners, and the findings of the Employment Relations Act 2000 evaluation have identified a variety of behavioural, administrative, and regulatory issues affecting the functioning of the Act. Specific issues have also been identified in submissions made to Government on the review of the Act.

The absolute magnitude of these issues is not readily quantifiable, but examples of the kind of behavioural, administrative, and regulatory issues affecting the functioning of the Act are as follows.

Clarification of statutory intent

A recent decision of the Court of Appeal has applied a test for "justification" for dismissals that differs from the intent of the Act by not providing adequate balance between the interests of employers and employees. The Employment Court and Employment Relations Authority are required to follow this precedent when deciding all cases.

The Act's good faith provisions have been interpreted by the courts in a limited manner which has not seen the level of progression and change in attitude envisaged.

The lack of a requirement in the Act to have the term of any fixed term employment specified in an employment agreement has led to employment relationship problems when the term of the agreement is not understood by both parties.

Changing behaviours relating to collective bargaining

An objective of the Act is the promotion, rather than simple permission, of collective bargaining. This is currently undermined through the practice of employers automatically passing on collectively bargained terms and conditions to other employees or unions either during or after the bargaining process.

Currently, there is limited scope under the Act for the employment institutions to grant effective remedies for serious breaches of good faith that undermine collective bargaining.

The expectation under the Act that parties will reach a settlement in collective agreement negotiations, unless there is a genuine reason they are unable to, is not always borne out in practice – the evaluation and court cases include examples of unduly protracted and costly bargaining and resultant bargaining disputes.

There has been uncertainty in the operation of the Act relating to multi-employer and multi-union collective bargaining. Union and employer parties have experienced difficulties organising effective and efficient bargaining units, sometimes as a result of intentional bargaining tactics or disagreements about the scope of bargaining.

Changing behaviours relating to the objectives of the Act

Currently, demand pressures on mediation services are growing, with the potential to jeopardise the delivery of speedy interventions

and, in turn, the likelihood of those interventions successfully resolving problems at the earliest possible phase.

The operation of the Act has also shown a lack of clarity or definition in the statutory provisions regarding the obligations of the parties and the role of the mediator in facilitating the resolution of a problem. This has led to situations where problem resolution has been compromised, either because of mediator uncertainty or where guidance has been lacking for parties as to the best means of resolving the issues between them.

The ability to apply for judicial review in Employment Relations Authority cases before a determination is issued or challenged has the potential to undermine the role of the Authority as a problem solving institution and increase the incidence of judicial intervention.

Access to employment relations education leave (**EREL**) is restricted only to employees on a collective agreement. This limits the effect of such leave in increasing employees' knowledge about employment relations for the purpose of building productive employment relationships, as non-collectivised union employees do not have access to it.

Protecting employee interests in change of employer situations

Currently, when the legal ownership of a business changes - through a sale, transfer, or "contracting out" situation - the employment relationship ceases. This allows the new employer to choose which employees to hire and, if it wishes, to offer terms and conditions for that work on a take-it-or-leave-it basis. The terms and conditions and employment security of often vulnerable groups of employees is consequently undermined, even though the new employer may be undertaking the same type of work as the old.

Equal Pay Act 1972

The Equal Pay Act 1972 and the Government Service Equal Pay Act 1960 are difficult to apply in practice and need updating to fit within the Employment Relations Act 2000 framework. There is a need to clarify the statutory obligation, reduce legislative overlap, and provide for an effective enforcement mechanism consistent with those in the Employment Relations Act 2000.

Statement of the public policy objective

The objective is to ensure that the Act can more effectively meet its statutory objectives of promoting productive employment relationships through the provisions for good faith, collective bargaining, and the effective resolution of employment problems. This was made clear in the 2002 Labour Party policy, and reiterated in the Speech from the Throne.

Statement of feasible options to achieve desired objective and net benefits of proposal

Other options considered

Non-regulatory options such as provision of information or best practice guidelines in these areas are already in use and would continue as additional means of supporting the legislative proposals required to directly address the issues or practices that have developed contrary to the objectives of the Act.

Preferred option

The preferred option is a range of legislative amendments designed to address the four broad areas identified above. These measures include:

Clarification of the law through—

- clarifying and strengthening the Act's good faith provisions – the Bill stipulates that good faith is a broader concept than just the common law obligations of mutual trust and confidence. It also specifies that the duty of good faith may require the disclosure to employees of specific information that may affect them; that in bargaining, the parties should bargain over all issues between them rather than allowing specific matters to impede further bargaining; and that the duty of good faith applies to individual, as well as to collective, bargaining. Provision is also made for penalties and remedies for serious and sustained breaches of the duty:
- codifying a test for justifiability in personal grievances (for example, in relation to whether a dismissal was justifiable), to reinforce the policy intent of the Act of maintaining a balance in employment relationships. The Bill specifies an objective test for justifiability that makes explicit reference to the requirement for an employer, in deciding on an action, to

consider and balance the legitimate interests of both the employee and employer; and to the fact that the employer's action and how it was done must be fair and reasonable to both parties in all the circumstances:

- requiring the term of any fixed term employment to be specified in an employment agreement.

Clarification of the law ensures that the interpretation given to parts of the Act by employers, employees, and the judiciary is in line with the principles of the Act. This, in turn, will give greater legislative direction to employers and employees on how to conduct their affairs in a good faith manner, further increasing productive employment relationships.

The reaction of employers to the perceived and intended effects of the new test for justifiability will be reflected in their perceptions of the procedural requirements it sets around their ability to terminate employees' employment. To the extent that the change is seen to add to these requirements, it is likely to be viewed negatively, although how such attitudes will translate into actual behaviour and affect employment practices cannot be quantified.

Changing behaviours relating to collective bargaining through—

- preventing or proscribing behaviours designed to undermine collective bargaining, including "free riding" behaviour where the terms and conditions of a collective agreement are passed on to other employees or unions without meaningful bargaining:
- promoting the settlement of collective agreements, including provisions—
    - reinforcing that good faith requires bargaining parties to conclude a collective agreement, unless there is a genuine reason not to:
    - enabling third party facilitation of collective bargaining and settlement in specified situations where bargaining impasses are reached. This may involve the facilitator making non-binding recommendations for settlement to the parties:
    - providing for more effective remedies (such as the Employment Relations Authority being able to fix terms and conditions of collective agreements) for very

serious breaches of good faith that significantly undermine collective bargaining:

- allowing the parties to collective agreements to negotiate "joinder clauses" into their agreements which allow third parties not involved in the original bargaining to become party to the agreements after settlement:
- requiring the parties to multi-employer/union bargaining to meet to determine the bargaining arrangements for the negotiations.

The encouragement of collective organisation and improved access to settlement procedures is intended to further assist a culture change towards increased co-operation in the workplace and an emphasis on employment as a relationship. This is expected to underpin the objective of the Act of promoting collective bargaining and, in turn, assist in enabling New Zealand to compete domestically and internationally through enhancing our ability to attract and retain labour and to promote quality investment in human capital rather than via a simple lowest cost approach.

The prevention of "free riding" behaviour through the requirement to bargain with all employees will have costs associated with the employer engaging in this bargaining. However, there will also be benefits associated with the employer being able to negotiate terms and conditions with the individual employee that recognise the individual skills and abilities that that employee brings to their business.

Enhancing the ability of the employment institutions to provide effective remedies for very serious breaches of good faith will provide incentives for bargaining parties to behave in good faith and will, therefore, reduce the risk of the bargaining process breaking down.

Changing behaviours relating to the objectives of the Act

Promoting more effective resolution of employment problems by—

- clarifying the roles and responsibilities of the parties and mediators in resolving problems. The Bill empowers mediators to set specific processes and procedures to govern the conduct of mediations and be more active in guiding the parties, thus assisting the successful resolution of employment relationship problems:

- clarifying that those offering mediation services may decide what specific services are appropriate to a particular situation and offer services on that basis:
- providing that the Court may not intervene in Employment Relations Authority investigations on procedural grounds until the Authority has concluded its investigation and issued a determination:
- promoting good faith and more productive employment relationships between unions, employers, and employees through extending the eligibility for EREL to all union members (rather than only those covered by collective agreements).

The preferred option is intended to enhance the operation of the Act by achieving greater clarity and more balanced and productive employment relationships. Productive employment relationships should lead to increased employee involvement and commitment at the workplace level which, in turn, should result in increased productivity and investment in human resources and should lead ultimately to improved employment growth and distribution of earnings.

The estimated additional aggregate direct cost to employers of extending EREL eligibility to all union members is $215,000 per annum at 2002 levels of use of EREL (about 40% of the available days). If the proportion of EREL days used increased to 50%, then the aggregate additional cost to employers would be approximately $560,000 per annum.

Restricting the ability of the Court to intervene in the Employment Relations Authority's processes will reduce unnecessary legalism and ensure that the focus remains on resolving the immediate employment relationship problem itself, rather than on how the institutions have dealt with it.

Protecting employee interests in change of employer situations

This provides two different types of protection to employees depending on their vulnerability and susceptibility to change of employer situations and their bargaining power.

The legislation provides the most vulnerable employees (as defined in a proposed schedule) with a right to transfer to the new employee on their existing terms and conditions if the employer has the same or substantially similar work for the employees to perform. This will

provide effective protections for the employees who are most affected by change of employer situations by ensuring that their terms and conditions of employment cannot be automatically undermined by a change of employer situation. This, in turn, will encourage employers to make the best use of existing talent, and facilitate more productive employment relations and the promotion of good faith behaviour.

Compliance costs to businesses that employ the most vulnerable employees are likely to be relatively insignificant, due to the fact that a restructuring situation is a costly endeavour and interaction with employees to consult with them and determine their future is already required by employment law. Essentially the question dealt with by the Bill is where the costs should actually lie. Currently, these costs are often carried by the employee.

For all other employees, protection in change of employer situations will be provided through a requirement that employment agreements contain a clause that deals with how the employer will negotiate with a potential new employer in a change of employer situation. At a minimum, the proposal provides that the employer and potential new employer must negotiate about whether the employees will be able to transfer to the new employer on their same terms and conditions and about a process for dealing with entitlements, if any, should employees not be able to transfer.

Compliance costs to businesses that employ these types of employees will be in terms of bargaining with their employees for the inclusion of a clause in the employment agreement covering how negotiation with the new employer in change of employer situations will take place. There may also be compliance costs associated with undertaking the negotiation with the potential new employer consistent with the clause in the agreement. As mentioned above, however, these costs will be relatively insignificant as the employer will already be undertaking negotiations with the new employer.

Changing Equal Pay Act 1972

Repeal and replacement of the Equal Pay Act 1972, and repeal of the Government Service Equal Pay Act 1960, to update its operation within the Employment Relations Act 2000 framework.

This will ensure that the Equal Pay Act, is complementary to the employment relations framework, is easily accessible to employees who are affected by it, and is easy to understand and comply with for

employers who may have issues around whether they are providing equal pay for their employees.

Quantification of costs associated with preferred option

Quantification of the direct costs and benefits of the other proposals to the same extent as those for EREL is not possible as it depends on the use that businesses make of the changes and as such cannot be accurately projected into a dollar figure.

It is acknowledged that ultimately the extent to which the legislation results in the outcomes sought depends crucially on whether it leads to the desired behaviour changes (as identified above) on the part of employers and employees. This, in turn, depends on how the signals sent by the legislation are perceived.

Consultation

The Treasury, Ministry of Justice, State Services Commission, Ministry of Women's Affairs, Te Puni Kokiri, Ministry of Pacific Island Affairs, Ministry of Youth Development, Department of Prime Minister and Cabinet, Ministry of Economic Development, Ministry of Education, Ministry of Health, and the Office of Ethnic Affairs have been consulted over the proposed amendments.

Business New Zealand and the NZCTU provided submissions that informed the policy development process in the review. A number of suggestions that fell within the scope of the review and Government policy on employment relations were considered for inclusion.

Business compliance cost statement

Source of compliance costs

There will be some transitional compliance costs associated with becoming familiar with the new legislative provisions.

The proposals will also potentially give rise to the following compliance costs:

- costs in terms of time and resources associated with amending payment systems in the case of making union fee deductions for all union members (not just those covered by collective agreements) mandatory for employers:

- costs in terms of time and resources associated with anti-free-riding provisions and the requirement for meaningful bargaining with other employees rather than a simple passing on of collectively bargained terms and conditions:
- costs associated with determining eligibility and payment for the new group of employees who will be able to access EREL:
- costs in terms of providing information on employment arrangements to ensure they are consistent with the requirement to pay equal pay:
- costs in terms of time and resources associated with the requirement for all parties in multi-union and/or multi-employer collective bargaining, or their representatives, to meet at least once after bargaining has been initiated:
- cost savings from the general requirement for employers and employees to discuss any employment relationship problems between themselves in the first instance without involving the use of external mediation.

Most employers are likely to be affected by the changes to some extent.

The costs of the proposals that affect collective bargaining and collective agreements will impact most heavily on the manufacturing, health, and education sectors as these sectors have the highest proportion of collective agreements. The manufacturing sector has 769 (35% of) collective agreements covering 52,357 employees, the health sector 381 (17% of) collective agreements covering 58,873 employees, and the education sector 110 (5% of) collective agreements covering 66,216 employees.

Quantitative or qualitative estimates of compliance costs

Compliance costs cannot be readily quantified. The specific costs and their impact depend upon—

- the size of the employer:
- the human resource capacity of the employer:
- the structure of agreements (collective and individual) in existence in the workplace:
- the extent of unionisation amongst the workforce and the number of unions on site.

The requirement to bargain meaningfully with all employees rather than allow freeloading may add to the cost and complexity of bargaining for employers who currently pass on collective terms and conditions of employment to individuals. Clear legislative drafting and information as to the effect of the changes will reduce uncertainty, whilst practical advice and assistance via departmental mechanisms will also assist employers with dealing with any such costs.

However, a number of the compliance costs identified are expected to be relatively minor in themselves, as they will primarily involve either—

- a minor updating of payment or records systems; or
- recording an additional term in the employment agreement.

Longer term implications of compliance costs for business

It is expected that the compliance costs to business will reduce over time, as they become familiar with the new legislation. Compliance savings can also be expected over time in several areas. For example, the proposed incentives for employers and employees to discuss their employment relationship problem before seeking mediation is expected to reduce the costs associated with attending and presenting their side of the issue at a mediated hearing.

Any overlapping compliance requirements with other agencies

None have been identified.

Steps that were taken to ensure that compliance costs were minimised

A comprehensive information campaign through publications, media statements, web sites, and the Employment Relations Service Infoline will be undertaken. Labour Inspectors will also be able to assist parties in determining any issues under the Equal Pay Act 1972.

Hon Margaret Wilson

Employment Relations Law Reform Bill

Government Bill

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Amendments to Employment Relations Act 2000

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Employment Relations Law Reform Act **2003**.

2 Commencement

This Act comes into force on **4 October 2004**.

Part 1
Employment Relations Act 2000

3 Employment Relations Act 2000 called principal Act in this Part

In this Part, the Employment Relations Act 2000[1] is called "the principal Act".

[1] 2000 No 24

4 Purpose

(1) This Part—

(a) amends the provisions of the principal Act, particularly in relation to—

(i) the duty of good faith; and

(ii) collective bargaining; and

(iii) the processes for resolution of employment relationship problems; and

(b) provides, in the principal Act, protection to employees in situations where business undertakings are sold, transferred, or contracted out.

(2) The purpose of the amendments referred to in **subsection (1)** is to promote and encourage behaviour that meets the object of the principal Act, of building productive employment relationships.

5 Object of this Act

(1) Section 3(a) of the principal Act is amended by omitting the words "mutual trust and confidence", and substituting the words "good faith".

(2) Section 3(a) of the principal Act is amended by repealing subparagraph (i), and substituting the following subparagraph:

"(i) 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".

(3) Section 3(a)(ii) of the principal Act is amended by omitting the word "bargaining".

6 Parties to employment relationship to deal with each other in good faith

(1) Section 4 of the principal Act is amended by inserting, after subsection (1), the following subsections:

"(1A) The duty of good faith in subsection (1)—

"(a) is wider in scope than the implied mutual obligations of trust and confidence; and

"(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive, communicative, and supportive; and

"(c) without limiting **paragraph (b)**, requires an employer who is proposing to make a decision that will, or is likely to, have an adverse affect on the employment of his or her employees to provide to the employees affected—

"(i) access to relevant information about the decision; and

"(ii) an opportunity to comment on the information to their employer before the decision is made.

"(1B) **Subsection (1A)(c)** does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information."

(2) Section 4(4) of the principal Act is amended by inserting, after paragraph (b), the following paragraphs:

"(ba) bargaining for an individual employment agreement or for a variation of an individual employment agreement:

"(bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:".

(3) Section 4 of the principal Act is amended by adding the following subsections:

"(6) It is a breach of subsection (1) for an employer to advise an employee—

"(a) not to be involved in bargaining for a collective agreement; or

"(b) not to be covered by a collective agreement.

"(7) A party to an employment relationship who fails to comply with the duty of good faith in subsection (1) is liable to a penalty under this Act if—

"(a) the failure is serious and sustained; or

"(b) the failure was intended to undermine—

"(i) bargaining for an individual employment agreement or a collective agreement; or

"(ii) an individual employment agreement or a collective agreement; or

"(iii) an employment relationship."

7 Interpretation

(1) Section 5 of the principal Act is amended by repealing paragraph (a) of the definition of **coverage clause**, and substituting the following paragraph:

"(a) in relation to a collective agreement,—

"(i) means a provision in the agreement that specifies the work that the agreement covers, whether by reference to the work or type of work or employees or types of employees; and

"(ii) includes a provision in the agreement that refers to named employees, or to the work or type of work done by named employees, to whom the collective agreement applies."

(2) Section 5 of the principal Act is amended by repealing the definition of **dwellinghouse**, and substituting the following definition:

"**dwellinghouse**—

"(a) means any building or any part of a building to the extent that it is occupied as a residence; and

"(b) in relation to a homeworker who works in a building that is not wholly occupied as a residence, excludes any part of the building not occupied as a residence".

8 Prohibition on preference

Section 9 of the principal Act is amended by adding the following subsection:

"(3) To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits—

"(a) of a collective agreement:

"(b) arising out of the relationship on which a collective agreement is based."

9 Access to workplaces

Section 20 of the principal Act is amended by adding the following subsections:

"(4) A discussion in a workplace between an employee and a representative of a union, who is entitled under this section and section 21 to enter the workplace for the purpose of the discussion, is not to be treated as a union meeting for the purposes of section 26.

"(5) An employer must not deduct from an employee's wages any amount in respect of the time the employee is engaged in a discussion referred to in **subsection (4)**".

10 Object of this Part

Section 31 of the principal Act is amended by inserting, after paragraph (a), the following paragraph:

"(aa) to provide that the duty of good faith in section 4 requires parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason not to; and".

11 Good faith in bargaining for collective agreement

Section 32(1) of the principal Act is amended by inserting, after paragraph (c), the following paragraph:

"(ca) even though the union and the employer have come to a standstill or reached a deadlock about a matter, they must continue to bargain (including doing the things specified in paragraphs (b) and (c)) about any other matters on which they have not reached agreement; and".

12 New section 33 substituted

The principal Act is amended by repealing section 33, and substituting the following section:

"33 **Duty of good faith requires parties to conclude collective agreement unless genuine reason not to**

The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason not to."

13 When bargaining may be initiated

Section 41(4) of the principal Act is amended by omitting the words "more than 1 union or more than 1 employer", and substituting the words "1 or more unions or 1 or more employers".

14 New section 48A inserted

The principal Act is amended by inserting, after section 48, the following section:

"48A **First meeting of multi-party bargaining for a collective agreement**

"(1) This section applies to bargaining for a collective agreement—

"(a) initiated by a notice given under section 45(5); or

"(b) in respect of which bargaining may continue under section 47(6).

"(2) Each union and each employer must attend, at least, the first meeting of the parties to the bargaining for a collective agreement.

"(3) A union or employer complies with **subsection (2)** if a representative of the union or employer attends the meeting.

"(4) The purpose of the meeting referred to in **subsection (2)** is—

"(a) for the parties to enter into an arrangement contemplated by section 32(1)(a); and

"(b) to discuss such matters as the proposed coverage of the bargaining and arrangements for the representation of parties at subsequent meetings.

"(5) **Subsection (4)** does not limit the matters that may be addressed at the meeting referred to in **subsection (2)**.

"(6) It is a breach of the duty of good faith in section 4 for an employer or a union to fail, without reasonable excuse, to comply with **subsection (2)**".

15 New heading and sections 50A to 50J inserted

The principal Act is amended by inserting, after section 50, the following heading and sections:

"*Facilitating bargaining*

"50A **Purpose of facilitating collective bargaining**

"(1) The purpose of **sections 50B to 50I** is to provide a process that enables 1 or more parties to collective bargaining who are having serious difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties.

"(2) **Sections 50B to 50I** do not—

"(a) prevent the parties from seeking assistance from another person in resolving the difficulties; or

"(b) apply to any agreement or arrangement with the other person providing such assistance.

"50B **Reference to Authority**

"(1) One or more matters relating to bargaining for a collective agreement may be referred to the Authority for facilitation to assist in resolving difficulties in concluding the collective agreement.

"(2) A reference for facilitation—

"(a) may be made by any party to the bargaining or 2 or more parties jointly; and

"(b) must be made on 1 or more of the grounds specified in **section 50C(1)**.

"50C **Grounds on which Authority may accept reference**

"(1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:

"(a) that—

"(i) in the course of the bargaining, a party has failed to comply with the duty of good faith in section 4; and

"(ii) the failure—

"(A) was serious and sustained; and

"(B) has undermined the bargaining:

"(b) that—

"(i) the bargaining has been unduly protracted; and

"(ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement:

"(c) that—

"(i) the bargaining has been interrupted by 1 or more strikes or lockouts; and

"(ii) the strikes or lockouts have been protracted or acrimonious:

"(d) that—

"(i) in the course of bargaining, a party has proposed a strike or lockout; and

"(ii) the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

"(2) For the purposes of **subsection (1)(d)(ii)**, a strike or lockout is likely to affect the public interest substantially if—

"(a) the strike or lockout is likely to endanger the life, safety, or health of persons; or

"(b) the strike or lockout is likely to disrupt social, environmental, or economic interests and the effects of the disruption are likely to be widespread, long-term, or irreversible.

"(3) The Authority must not accept a reference in relation to bargaining for which the Authority has already acted as a facilitator unless—

"(a) circumstances relating to the bargaining have changed; or

"(b) the bargaining since the previous facilitation has been protracted.

"50D **Different members of Authority may accept reference and provide facilitation**

A member of the Authority who facilitates collective bargaining may be the same member of the Authority who accepted the reference for facilitation or a different member of the Authority.

"50E **Process of facilitation**

"(1) The process to be followed during facilitation—

"(a) must be conducted in private; and

"(b) is the process determined by the Authority.

"(2) During facilitation, the collective bargaining that the facilitation relates to continues subject to the process determined by the Authority.

"(3) During facilitation, the Authority—

"(a) is not acting as an investigative body; and

"(b) may not exercise the powers it has for investigating matters.

"(4) The provision of facilitation by the Authority may not be challenged or called in question in any proceedings on the ground—

"(a) that the nature and content of the facilitation was inappropriate; or

"(b) that the manner in which the facilitation was provided was inappropriate.

"50F **Statements made by parties during facilitation**

"(1) A statement made by a party for the purposes of facilitation is not admissible against the party in proceedings under this Act.

"(2) A party may make a public statement about facilitation only if—

"(a) it is made in good faith; and

"(b) it is limited to the process of facilitation or the progress being made.

"50G **Proposals made or positions reached during facilitation**

"(1) A proposal made by a party or a position reached by parties to collective bargaining during facilitation is not binding on a party after facilitation has come to an end.

"(2) This section—

"(a) applies to avoid doubt; and

"(b) is subject to any agreement of the parties.

"50H **Recommendation by Authority**

"(1) While assisting parties to bargaining for a collective agreement, the Authority may make 1 or more recommendations about—

"(a) the process the parties should follow to reach agreement; or

"(b) the provisions of the collective agreement the parties should conclude; or

"(c) both.

"(2) The Authority may give public notice of a recommendation in such manner as the Authority determines.

"(3) A recommendation made by the Authority is not binding on a party, but a party must consider a recommendation before deciding whether to accept the recommendation.

"50I **Party must deal with Authority in good faith**

During facilitation, a party to bargaining for a collective agreement must deal with the Authority in good faith.

"Determining collective agreement if breach of duty of good faith

"50J **Remedy for serious and sustained breach of duty of good faith in section 4 in relation to collective bargaining**

"(1) A party to bargaining for a collective agreement may apply, on the grounds specified in **subsection (3)**, to the Authority for a determination fixing the provisions of the collective agreement being bargained for.

"(2) The Authority may fix the provisions of the collective agreement being bargained for if it is satisfied that—

"(a) the grounds in **subsection (3)** have been made out; and

"(b) it is appropriate, in all the circumstances, to do so.

"(3) The grounds are that—

"(a) a breach of the duty of good faith in section 4—

"(i) has occurred in relation to the bargaining; and

"(ii) was sufficiently serious and sustained as to significantly undermine the bargaining; and

"(b) all other reasonable alternatives for reaching agreement have been exhausted; and

"(c) fixing the provisions of the collective agreement is the only effective remedy for the party or parties affected by the breach of the duty of good faith.

"(4) The Authority may make a determination under this section whether or not any penalty for a breach of good faith has been awarded under **section 4(7)** in relation to the same bargaining and whether or not the breach is the same breach.

"(5) The effect of a determination of the Authority fixing the provisions of a collective agreement is to make the collective agreement binding and enforceable as if it had been—

"(a) ratified as required by section 51; and

"(b) signed by the parties under section 54(1)(b).

"(6) Section 59 applies to the determination as if it were a collective agreement.

"(7) If the bargaining for the collective agreement was subject to facilitation under **sections 50A to 50I**, the member of the Authority who conducted the facilitation may also be the member of the Authority who makes a determination under this section."

16 Ratification of collective agreement

(1) Section 51(1) of the principal Act is amended by omitting the words "has been ratified in accordance with the ratification procedure notified under subsection (2)", and substituting the following paragraphs:

"(a) has been ratified in accordance with the ratification procedure notified under subsection (2); or

"(b) is signed by the union in accordance with an authorisation given under **subsection (3)**".

(2) Section 51 of the principal Act is amended by adding the following subsection:

"(3) Before bargaining for a collective agreement or a variation of it is concluded, a union may, in accordance with the ratification procedure previously notified under subsection (2), seek the authorisation of the employees who will be bound by the

collective agreement to sign the collective agreement or variation of it without having to comply with the ratification procedure."

17 Application of collective agreement

Section 56 of the principal Act is amended by inserting, after subsection (1), the following subsection:

"(1A) However, an employee who is bound by a collective agreement and who holds an under-rate worker's permit under section 8 of the Minimum Wage Act 1983 may be paid wages at the rate specified in the permit,—

"(a) while the permit is in force; and

"(b) if the union that is a party to the collective agreement agrees."

18 New section 56A inserted

The principal Act is amended by inserting, after section 56, the following section:

"56A **Application of collective agreement to subsequent parties**

"(1) An employer who is not a party to a collective agreement may become a party to the collective agreement if—

"(a) the agreement provides for an employer to become a party to the agreement after it has been signed by the original parties to the agreement; and

"(b) the work of some or all of the employer's employees comes within the coverage clause in the agreement; and

"(c) the employees referred to in **paragraph (b)** are not bound by another collective agreement in respect of their work for the employer; and

"(d) the employer notifies all the parties to the agreement in accordance with **subsection (5)** that the employer proposes to become a party to the agreement.

"(2) On the day after the day on which all parties to the collective agreement have been notified in accordance with **subsection (5)**,—

"(a) the employer becomes a party to the collective agreement; and

"(b) the collective agreement also binds and is enforceable by—

"(i) the employer:

"(ii) employees—

"(A) who are employed by the employer; and

"(B) who are or become members of a union that is a party to the agreement; and

"(C) whose work comes within the coverage clause in the agreement.

"(3) A union that is not a party to a collective agreement may become a party to the collective agreement if—

"(a) the agreement provides for a union to become a party to the agreement after it has been signed by the original parties to the agreement; and

"(b) the union has members doing work that comes within the coverage clause of the collective agreement; and

"(c) as a result of a secret ballot of those members, a majority of them who are entitled to vote and do vote are in favour of the union becoming a party to the collective agreement; and

"(d) the union notifies all the parties to the collective agreement in accordance with **subsection(5)** that the union proposes to become a party to the agreement.

"(4) On the day after the day on which all parties to the collective agreement have been notified in accordance with **subsection (5)**,—

"(a) the union becomes a party to the collective agreement; and

"(b) the collective agreement also binds and is enforceable by—

"(i) the union:

"(ii) employees—

"(A) who are employed by an employer that is a party to the agreement; and

"(B) who are or become members of the union; and

"(C) whose work comes within the coverage clause in the agreement.

"(5) For the purposes of this section, a party to a collective agreement is notified—

"(a) when the notice is given to the party; or

"(b) if the notice is posted to the party, on the seventh day after the day on which the notice is posted.

"(6) For the purposes of **subsection (1)(b) and (1)(c)**, **employees** includes persons whom the employer might employ in the future."

19 New heading and sections 59A and 59B inserted

The principal Act is amended by inserting, after section 59, the following heading and sections:

"*Undermining collective bargaining or collective agreement*

"59A **Breach of duty of good faith to pass on in individual employment agreement terms and conditions agreed in collective bargaining or in collective agreement**

"(1) It is a breach of the duty of good faith in section 4 for an employer to agree that a term or condition of employment of an employee who is not bound by a collective agreement should be the same or substantially the same as a term or condition in a collective agreement that binds the employer if—

"(a) the employer does so with the intention of undermining the collective agreement; and

"(b) the effect of the employer doing so is to undermine the collective agreement.

"(2) It is a breach of the duty of good faith in section 4 for an employer to agree that a term or condition of employment of an employee should be the same or substantially the same as a term or condition reached in bargaining for a collective agreement if—

"(a) the employer does so with the intention of undermining the collective bargaining; and

"(b) the effect of the employer doing so is to undermine the collective bargaining.

"(3) It is not a breach of the duty of good faith in section 4 if anything referred to in **subsection (1) or subsection (2)** is done with the agreement of the union concerned.

"(4) In determining whether **subsection (1)(a) and (b)** or **subsection (2)(a) and (b)** applies, the following matters must be taken into account:

"(a) whether the employer bargained with the employee before they agreed on the term or condition of employment:

"(b) whether the employer consulted the union in good faith before agreeing to the term or condition of employment:

"(c) the number of the employer's employees bound by the collective agreement or covered by the collective bargaining compared to the number of the employer's employees not bound by the collective agreement or not covered by the collective bargaining:

"(d) how long the collective agreement has been in force:

"(e) the application of section 63.

"(5) **Subsection (4)** does not limit the matters that may be taken into account for the purposes of **subsection (1)(a) and (b)** or **subsection (2)(a) and (b)**.

"(6) Every employer who commits a breach of the duty of good faith under this section is liable to a penalty under this Act.

"59B **Breach of duty of good faith to pass on in collective agreement provisions agreed in other collective bargaining or another collective agreement**

"(1) It is a breach of the duty of good faith in section 4 for an employer to conclude a collective agreement that contains 1 or more provisions that are the same or substantially the same as provisions in another collective agreement to which the employer is a party if—

"(a) the intention of the employer is to undermine the other collective agreement; and

"(b) the effect of the employer doing so is to undermine the other collective agreement.

"(2) It is a breach of the duty of good faith in section 4 for an employer to conclude a collective agreement that contains 1 or more provisions that are the same or substantially the same as provisions reached in bargaining for another collective agreement if—

"(a) the employer does so with the intention of undermining the other collective bargaining; and

"(b) the effect of the employer doing so is to undermine the other collective bargaining.

"(3) It is not a breach of the duty of good faith in section 4 if anything referred to in **subsection (1) or subsection (2)** is done with the agreement of the parties to the other collective agreement or collective bargaining.

"(4) In determining whether **subsection (1)(a) and (b) or subsection (2)(a) or (b)** applies, the following matters must be taken into account:

"(a) whether the employer and union bargained before agreeing on the provision:

"(b) whether the employer and union consulted, in good faith, the parties to the other collective agreement or collective bargaining:

"(c) the number of the employer's employees bound by the collective agreement or covered by the collective bargaining compared to the number of the employer's employees bound by the other collective agreement or covered by the other collective bargaining:

"(d) how long the other collective agreement has been in force.

"(5) **Subsection (4)** does not limit the matters that may be taken into account for the purposes of **subsection (1)(a) and (b) or subsection (2)(a) or (b).**

"(6) Every employer who commits a breach of the duty of good faith under this section is liable to a penalty under this Act."

20 Object of this Part

(1) Section 60(c) of the principal Act is amended by inserting, after subparagraph (i), the following subparagraph:

"(ia) required when entering into and varying individual employment agreements; and".

(2) Section 60(c)(ii) of the principal Act is amended by inserting, after the words "consistent with", the words ", but not limited to,".

21 Employer's obligations in respect of new employee who is not member of union

(1) Section 62(1) of the principal Act is amended by repealing paragraph (a) and substituting the following paragraph:

"(a) applies to a new employee who—

"(i) is not a member of a union that is a party to a collective agreement that covers the work to be done by the employee; and

"(ii) enters into an individual employment agreement with an employer that is a party to a collective

agreement that covers the work to be done by the employee; but".

(2) Section 62 of the principal Act is amended by inserting, after subsection (1), the following subsection:

"(1A) For the purposes of subsection (1), a collective agreement that includes a coverage clause referring to named employees, or the work done by named employees, to whom the collective agreement applies, must be treated as covering the work or type of work done by the named employees (whether done by those employees or any other employees)."

(3) Section 62(3)(a) of the principal Act is amended by inserting, after the words "that binds more of the employer's employees", the words " in relation to the work the new employee will be performing".

22 Terms and conditions of employment of new employee who is not member of union

(1) Section 63(3) of the principal Act is amended by inserting after the words "employer's employees", the words "in relation to the work the employee will be performing".

(2) Section 63 of the principal Act is amended by adding the following subsection:

"(6) For an employee who holds an under-rate worker's permit under section 8 of the Minimum Wage Act 1983, the terms and conditions under subsection (2) are subject to the terms of the permit relating to the wages to be paid."

23 New section 63A inserted

The principal Act is amended by inserting, after section 63, the following section:

"63A **Bargaining for individual employment agreement or individual terms and conditions in employment agreement**

"(1) This section applies when bargaining for terms and conditions of employment in the following situations:

"(a) under section 61(1), in relation to additional terms and conditions to the applicable collective agreement:

"(b) under section 61(2), in relation to—

"(i) additional terms and conditions to the collective agreement on which the individual employment agreement is based; and

"(ii) variations to the individual employment agreement in **subparagraph (i)**:

"(c) under section 63(2), in relation to additional terms and conditions for the first 30 days of an individual employment agreement:

"(d) under section 63(5), in relation to variations to terms and conditions of an individual employment agreement after the 30-day period:

"(e) in relation to terms and conditions of an individual employment agreement for an employee if no collective agreement covers the work done, or to be done, by the employee:

"(f) where a fixed term of employment, or probationary or trial period of employment, is proposed:

"(g) under **section 69L or section 69M** in relation to employee protection provisions in individual employment agreements:

"(h) under **section 69H** in relation to redundancy entitlements with a new employer.

"(2) The employer must do at least the following things:

"(a) provide to the employee a copy of the intended agreement, or the part of the intended agreement, under discussion; and

"(b) advise the employee that he or she is entitled to seek independent advice about the intended agreement, or any part of the intended agreement; and

"(c) give the employee a reasonable opportunity to seek that advice; and

"(d) consider any issues that the employee raises and respond to them.

"(3) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

"(4) Failure to comply with this section does not affect the validity of the employment agreement between the employee and the employer.

"(5) The requirements imposed by this section are in addition to any requirements that may be imposed under any provision in this Act.

"(6) For the purposes of **subsection (1)(e)**, a collective agreement that includes a coverage clause referring to named employees, or the work done by named employees, to whom the collective agreement applies, must be treated as covering the work or type of work done by the named employees (whether done by those employees or any other employees).

"(7) In this section **employee** includes a prospective employee."

24 Section 64 repealed

Section 64 of the principal Act is repealed.

25 Terms and conditions of employment where no collective agreement applies

Section 65 of the principal Act is amended by adding the following subsection:

"(3) To determine for the purposes of subsection (1) whether the work of an employee is covered by a collective agreement that binds the employer, a collective agreement that includes a coverage clause referring to named employees, or the work or type of work done by named employees, to whom the collective agreement applies, must be treated as covering the work or type of work done by the named employees (whether done by those employees or any other employees)."

26 New section 65A inserted

The principal Act is amended by inserting, after section 65, the following section:

"65A **Deduction of union fees**

"(1) An individual employment agreement is to be treated as if it contains a provision that requires an employer to deduct, with the consent of an employee who is a member of a union, the employee's union fee from the employee's salary or wages on a regular basis during the year.

"(2) An individual employment agreement may exclude or vary the effect of **subsection (1)**.

"(3) Union fees deducted from an employee's salary or wages must be paid to the union concerned in accordance with any arrangement agreed with the union."

27 Fixed term employment

Section 66 of the principal Act is amended by adding the following subsections:

"(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—

"(a) the way in which the employment will end; and

"(b) the reasons for ending the employment in that way.

"(5) Failure to comply with **subsection (4)**, including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.

"(6) However, if the employer does not comply with **subsection (4)**, the employer may not rely on any term agreed under subsection (1)—

"(a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or

"(b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective."

28 Probationary arrangements

Section 67 of the principal Act is amended by adding as subsections (2) and (3) the following subsections:

"(2) Failure to comply with subsection (1)(a) does not affect the validity of the employment agreement between the parties.

"(3) However, if the employer does not comply with subsection (1)(a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation or trial if the employee elects, at any time, to treat that term as ineffective."

29 Unfair bargaining for individual employment agreements

Section 68(2)(d) of the principal Act is amended by omitting the expression "64", and substituting the expression "**63A**".

30 New Part 6A inserted

(1) The principal Act is amended by inserting, after Part 6, the following Part:

"Part 6A
"Continuity of employment if employer's business restructured

"Subpart 1—Specified categories of employees

"69A **Object of this subpart**

The object of this subpart is to provide protection to specified categories of employees if their employer proposes to restructure its business so that their work is to be performed for a new employer and, to this end, to give employees a right—

"(a) to elect to transfer to the new employer on the same terms and conditions of employment; and

"(b) subject to their employment agreements, to bargain for redundancy entitlements from the new employer if made redundant by the new employer for reasons related to the restructuring of the previous employer's business; and

"(c) if redundancy entitlements cannot be agreed with the new employer, to have the redundancy entitlements determined by the Authority.

"69B **Interpretation**

In this subpart, unless the context otherwise requires,—

"**new employer**, in relation to the restructuring of an employer's business, means—

"(a) the person who undertakes, or proposes to undertake, the employer's business (or part of it) for the employer; or

"(b) the person to whom the employer's business (or part of it) is, or is to be, sold or transferred; or

"(c) the new person (referred to in **paragraph (a)(iii)** of the definition of **restructuring**) who is to carry out work on behalf of the other person

"**redundancy entitlements** includes redundancy compensation

"**restructuring**, in relation to an employer's business,—

"(a) means—

"(i) entering into a contract or arrangement under which the employer's business (or part of it) is undertaken for the employer by another person; or

"(ii) selling or transferring the employer's business (or part of it) to another person; or

"(iii) the termination of a contract or arrangement under which the employer carried out work on behalf of another person if the work is to be carried out on behalf of the other person by a new person; but

"(b) to avoid doubt, does not include—

"(i) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or

"(ii) any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

"69C **Application of this subpart**

This subpart applies to an employee if—

"(a) **Schedule 1A** applies to the employee; and

"(b) the business of the employee's employer is being, or is proposed to be, restructured; and

"(c) as a result, the employee is, or will be, no longer required by his or her employer to perform the work, or part of the work, specified in his or her employment agreement; and

"(d) the type of work performed by the employee (or work that is substantially similar) is, or is to be, performed by employees of the new employer.

"69D **Notice of right to make election**

"(1) Before an employer's business is restructured, the employer must, in complying with **section 4(1A)(c)**, provide the employees affected with—

"(a) a reasonable opportunity to exercise the right to make an election under **section 69F(1)**; and

"(b) the date by which the right to make the election must be exercised.

"(2) If an employer's business is restructured within the meaning of **paragraph (a)(iii) of restructuring in section 69B**, then the person who terminates the contract or arrangement must give the employer sufficient notice of the restructuring to enable the employer to comply with **subsection (1)**.

"69E **Employee bargaining for alternative arrangements**

"(1) To avoid doubt, an employee may, after his or her employer has complied with **section 69D** and before deciding whether to elect to transfer to the new employer, bargain with his or her employer for alternative arrangements.

"(2) If the employee and employer agree on alternative arrangements, the employee may not subsequently elect to transfer to the new employer.

"69F **Employee may elect to transfer to new employer**

"(1) An employee to whom this subpart applies may, before the date provided to the employee under **section 69D(b)**, elect to transfer to the new employer.

"(2) If an employee elects to transfer to the new employer, then to the extent that the employee is no longer required to perform work for his or her employer, the employee—

"(a) becomes an employee of the new employer on and from the specified date; and

"(b) is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date, including terms and conditions relating to whether the employee is employed full-time or part-time; and

"(c) is not entitled to any redundancy entitlements under those terms and conditions of employment from his or her previous employer because of the transfer.

"(3) The employment of an employee who elects to transfer to the new employer is to be treated as continuous, including for the purpose of service-related entitlements whether legislative or otherwise.

"(4) To avoid doubt, this section does not affect the employment agreement of an employee who elects not to transfer to the new employer.

"(5) In this section, **specified date** means—

"(a) a date agreed by the employee and his or her previous employer; but

"(b) if no date is agreed, the date on which the restructuring of the previous employer's business takes effect.

"69G **New employer becomes party to collective agreement that binds employee electing to transfer**

"(1) This section applies if—

"(a) an employee who elects to transfer to a new employer is a member of a union and bound by a collective agreement; and

"(b) the new employer is not a party to the collective agreement that the union is a party to.

"(2) On and from the date on which the employee becomes an employee of the new employer, the new employer becomes a party to the collective agreement, but only in relation to, and for the purposes of, that employee.

"69H **Employee who transfers may bargain for redundancy entitlements with new employer**

"(1) This section applies to an employee if—

"(a) the employee elects, under **section 69F(1)**, to transfer to a new employer; and

"(b) the new employer proposes to make the employee redundant for reasons relating to the restructuring; and

"(c) the employee's employment agreement—

"(i) does not provide for redundancy entitlements in that circumstance; or

"(ii) does not expressly exclude redundancy entitlements in that circumstance.

"(2) The employee is entitled to redundancy entitlements from his or her new employer.

"(3) If an employee seeks redundancy entitlements from his or her new employer, the employee and new employer must bargain with a view to reaching agreement on appropriate redundancy entitlements.

"69I **Authority may investigate bargaining and determine redundancy entitlements**

"(1) If an employee and his or her new employer fail to agree on redundancy entitlements under **section 69H(3)**, the employee or new employer may apply to the Authority to investigate the bargaining relating to the matter.

"(2) After concluding the investigation, the Authority must determine—

"(a) if, in the Authority's view, it is possible for the bargaining to continue, how further bargaining should occur; or

"(b) if, in the Authority's view, further bargaining is not warranted, the redundancy entitlements due to an employee.

"(3) In determining the redundancy entitlements under **subsection (2)(b)**, the Authority may take into account 1 or more of the following matters:

"(a) the redundancy entitlements (if any) provided in the employee's employment agreement for redundancy in circumstances other than restructuring:

"(b) the employee's length of service with his or her previous employer and new employer:

"(c) how much notice of the redundancy the employee has received:

"(d) the ability of the new employer to provide redundancy entitlements:

"(e) the likelihood of the employee being re-employed or obtaining employment with another employer:

"(f) any other relevant matter that the Authority thinks fit.

"Subpart 2—Other employees

"69J **Object of this subpart**

The object of this subpart is to provide protection to employees to whom **subpart 1** does not apply if their employer restructures its business so that their work is to be performed for a new employer and, to this end, to require their employment agreements to contain employee protection provisions relating to negotiations between the employer and new employer about the transfer of affected employees to the new employer.

"69K **Interpretation**

"(1) In this subpart, unless the context otherwise requires,—

"**employee** means an employee to whom **Schedule 1A** does not apply

"**employee protection provision** means a provision—

"(a) the purpose of which is to provide protection for the employment of affected employees if their employer's business is restructured; and

"(b) that includes—

"(i) a process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and

"(ii) the matters relating to the affected employees' employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and

"(iii) the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer

"**new employer**, in relation to the restructuring of an employer's business, means the person—

"(a) who undertakes, or proposes to undertake, the employer's business (or part of it) for the employer; or

"(b) to whom the employer's business (or part of it) is, or is to be, sold or transferred

"**restructuring**, in relation to an employer's business,—

"(a) means—

"(i) entering into a contract or arrangement under which the employer's business (or part of it) is undertaken for the employer by another person; or

"(ii) selling or transferring the employer's business (or part of it) to another person; but

"(b) to avoid doubt, does not include—

"(i) the termination of a contract or arrangement under which the employer carried out work on behalf of another person; or

"(ii) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or

"(iii) any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

"(2) For the purposes of this subpart, an employee is an **affected employee** if—

"(a) the business of the employee's employer is being, or is proposed to be, restructured; and

"(b) as a result, the employee is, or will be, no longer required by his or her employer to perform the work specified in his or her employment agreement; and

"(c) the type of work performed by the employee (or work that is substantially similar) is, or is to be, performed by employees of the new employer.

"69L **New collective agreements and new individual employment agreements must contain employee protection provision**

Every collective agreement and every individual employment agreement entered into on or after the commencement of this section must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.

"69M **When existing collective agreement or individual employment agreement must contain employee protection provision**

"(1) Every collective agreement and every individual employment agreement in force immediately before the commencement of this section must be varied to include an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.

"(2) **Subsection (1)** must be complied with by the earliest of the following:

"(a) 12 months after the commencement of this section; or

"(b) when the collective agreement or individual employment agreement is next amended; or

"(c) if an employer's business is restructured, before the restructuring occurs.

"69N **Affected employee may choose whether to transfer to new employer**

If an employer, in relation to the restructuring of the employer's business, arranges for an affected employee to transfer to the new employer, the affected employee may—

"(a) choose to transfer to the new employer; or

"(b) choose not to transfer to the new employer."

(2) Section 54(3)(a)(ii) of the principal Act is repealed.

31 Interpretation

Section 71 of the principal Act is amended by repealing the definition of **eligible employee**, and substituting the following definition:

"**eligible employee**, in relation to a union or an employer, means an employee who is a member of a union".

32 Minister to approve employment relations education

Section 72(1) of the principal Act is amended by omitting the words "by notice in the *Gazette*,".

33 Calculation of maximum number of days of employment relations education leave

(1) Section 74(1) of the principal Act is amended by inserting, after the words "by the employer as at", the words "the 30th day before".

(2) The heading to the first column to the table in section 74(1) of the principal Act is amended by inserting, after the words "**as at**", the words "**the 30th day before**".

34 Eligible employee proposing to take employment relations education leave

Section 78 of the principal Act is amended by inserting, after subsection (3), the following subsection:

"(3A) To avoid doubt, a representative of an eligible employee may comply with **subsection (1)** on behalf of the eligible employee."

35 New Part 8A inserted

The principal Act is amended by inserting, after section 100, the following Part:

"Part 8A
"Codes of employment practice

"100A **Codes of employment practice**

"(1) The Minister may, by notice in the *Gazette*, approve 1 or more codes of employment practice.

"(2) The notice in the *Gazette* may, instead of setting out the code of employment practice being approved,—

"(a) provide sufficient information to identify the code; and

"(b) specify the date on which the code comes into force; and

"(c) state where copies of the code may be obtained.

"(3) Before the Minister approves a code of employment practice, the Minister must consult, or be satisfied that there has been consultation, with such persons and organisations as the Minister thinks appropriate, including relevant employer and employee interests.

"(4) The purpose of a code of employment practice is to provide guidance on the application of this Act—

"(a) generally; or

"(b) in relation to particular types of situations; or

"(c) in relation to particular parts or areas of the employment environment.

"100B **Amendment and revocation of code of practice**

A code of practice may be amended or revoked in the same manner as the code is approved.

"100C **Authority or Court may have regard to code of practice**

The Authority or the Court may, in determining any matter within its jurisdiction, have regard to a code of employment practice that—

"(a) was in force at the relevant time; and

"(b) in the form in which it was then in force, related to the circumstances before the Authority or the Court.

"100D **Codes of employment practice relating to the health sector**

"(1) The Minister of Health must, by notice in the *Gazette*, approve a code of employment practice that provides for matters relating to the health and safety of patients, employees, and the public during strikes and lockouts in the health sector.

"(2) **Sections 100A(2) to (4), 100B, and 100C** apply, with all necessary modifications, to a code approved under this section as if the code were approved under **section 100A**.

"(3) A person breaches the duty of good faith in section 4 if—

"(a) the code applies to the person; and

"(b) the person does not comply with the code."

36 Object of this Part

Section 101 of the principal Act is amended by inserting after paragraph (a), the following paragraph:

"(ab) to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship; and".

37 New section 103A inserted

The principal Act is amended by inserting, after section 103, the following section:

"103A **Test of justification**

"(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, was fair and reasonable to both parties in all the circumstances at the time the dismissal or action occurred.

"(2) For the purposes of **subsection (1)**, the employer must have considered and balanced the legitimate interests of the employee and the employer."

38 Definition of involvement in activities of union for purposes of section 104

Section 107 of the principal Act is amended by inserting, after paragraph (b), the following paragraph:

"(ba) had participated in a strike lawfully; or".

39 Choice of procedures

Section 112 of the principal Act is amended by adding the following subsections:

"(3) If an employee applies to the Authority for a resolution of the grievance under subsection (1)(a), the employee may not exercise or continue to exercise any rights in relation to the subject matter of the grievance that the employee may have under the Human Rights Act 1993.

"(4) If an employee makes a complaint under subsection (1)(b), the employee may not exercise or continue to exercise any rights in relation to the subject matter of the complaint that the employee may have under this Act."

40 Remedies

(1) Section 123 of the principal Act is amended by inserting, after paragraph (c), the following paragraph:

"(ca) if the Authority or the Court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:".

(2) Section 123 of the principal Act is amended by adding, as subsection (2), the following subsection:

"(2) When making an order under subsection (1)(b) or (c), the Authority or the Court may order payment to the employee by instalments, but only if the financial position of the employer requires it."

41 Arrears

Section 131 of the principal Act is amended by inserting, after subsection (1), the following subsection:

"(1A) The Authority may order payment of the wages or other money to the employee by instalments, but only if the financial position of the employer requires it."

42 Recovery of penalties

(1) Section 135 of the principal Act is amended by inserting, after subsection (4), the following subsection:

"(4A) The Authority or the Court may order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it."

(2) Section 135 of the principal Act is amended by repealing subsection (5), and substituting the following subsection:

"(5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of—

"(a) the date when the cause of action first became known to the person bringing the action; or

"(b) the date when the cause of action should reasonably have become known to the person bringing the action."

43 Power of Authority to order compliance

Section 137(1)(a)(xi) is amended by omitting the expression "19K", and substituting the expression "19G".

44 Further provisions relating to compliance order by Authority

Section 138 of the principal Act is amended by inserting, after subsection (4), the following subsection:

"(4A) If the compliance order relates in whole or in part to the payment to an employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it."

45 Object of this Part

(1) Section 143 of the principal Act is amended by inserting, after paragraph (d), the following paragraph:

"(da) recognise that the person who provides mediation services can manage any mediation process actively; and".

(2) Section 143 of the principal Act is amended by inserting, after paragraph (f), the following paragraph:

"(fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations; and".

46 New section 144A inserted

The principal Act is amended by inserting, after section 144, the following section:

"144A **Dispute resolution services**

"(1) Nothing in this Act prevents the chief executive from providing dispute resolution services to parties in work-related relationships that are not employment relationships.

"(2) Services provided in accordance with this section proceed on the basis specified in writing by the chief executive."

47 Provision of mediation services

Section 145 of the principal Act is amended by repealing subsection (1), and substituting the following subsection:

"(1) The chief executive, by way of general instructions under section 153(2) and (3),—

"(a) may decide how the mediation services required by section 144 are to be provided; and

"(b) may, in order to promote fast and effective resolutions, treat matters presented for mediation in different ways."

48 Procedure in relation to mediation services

(1) Section 147(2) of the principal Act is amended by inserting, after paragraph (a), the following paragraph:

"(ab) may offer mediation services on the basis that, prior to the commencement of a mediation, the parties have agreed—

"(i) that the services will be limited to a specified time; and

"(ii) if the problem is not resolved within the specified time, the parties will resolve the problem by using the process in section 150 (with any necessary modifications); and".

(2) Section 147 of the principal Act is amended by adding the following subsection:

"(3) To avoid doubt, the person who provides the services also decides the procedures that will be followed, which may include—

"(a) addressing any party to the matter without any representative of that party being present:

"(b) expressing to any party his or her views on the substance of 1 or more of the issues between the parties—

"(i) with or without any representative of the party being present:

"(ii) with or without any other party or parties to the matter being present:

"(c) expressing to any party his or her views on the process the party is following or the position the party has adopted about the employment relationship problem—

"(i) with or without any representative of the party being present:

"(ii) with or without any other party or parties to the matter being present."

49 Settlements

(1) Section 149(3) of the principal Act is amended by inserting, after paragraph (a), the following paragraph:

"(ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and".

(2) Section 149 of the principal Act is amended by adding the following subsection:

"(4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority."

50 Decision by authority of parties

Section 150 of the principal Act is amended by adding the following subsection:

"(4) A person who breaches a term of a decision to which subsection (3) applies is liable to a penalty imposed by the Authority."

51 New section 150A inserted

The principal Act is amended by inserting, after section 150, the following section:

"150A **Payment on resolution of problem**

"(1) Any payment by 1 party to another, required by any agreed terms of settlement under section 149(3) or decision under section 150(3), must be paid directly to the other party and not to a representative of that party, and the party receiving the payment may not receive, or agree to receive, payment in any other manner.

"(2) For the purposes of this Act, a payment that does not comply with **subsection (1)** is to be treated as if the payment has not been made.

"(3) **Subsection (1)** does not apply if the party to whom the payment is required is receiving or has received legal aid for the mediation services under the Legal Services Act 2000."

52 Powers of Authority

Section 160(1)(c) of the principal Act is amended by inserting, after the words "any time before", the words ", during, or after".

53 Jurisdiction

(1) Section 161(1) of the principal Act is amended by inserting, after paragraph (c), the following paragraphs:

"(ca) facilitating bargaining under **sections 50A to 50I**:

"(cb) fixing the provisions of a collective agreement under **section 50J**:".

(2) Section 161(1) of the principal Act is amended by inserting, after paragraph (d), the following paragraph:

"(da) investigating bargaining under **section 69I** and, if necessary, determining redundancy entitlements under that section:."

(3) Section 161(2) of the principal Act is amended by omitting the words "subsection (1)(d) or subsection (1)(f)", and substituting the words "subsection **(1)(ca)**, **(cb)**, (d), **(da)**, and (f)".

54 Procedure

Section 173 of the principal Act is amended by inserting, after subsection (2), the following subsections:

"(2A) The Authority may exercise its powers under section 160(1) in the absence of 1 or more of the parties.

"(2B) However, if the Authority acts under **subsection (2A)**, the Authority must provide to an absent party—

"(a) any material it receives that is relevant to the case of the absent party; and

"(b) an opportunity to comment on the material before the Authority takes it into account.

"(2C) To avoid doubt, **subsections (2A) and (2B)** do not limit the powers of the Authority to make ex parte orders."

55 Referral of question of law

Section 177 of the principal Act is amended by adding the following subsection:

"(4) Subsection (1) does not apply—

"(a) to a question about the procedure that the Authority has followed, is following, or is intending to follow; and

"(b) without limiting **paragraph (a)**, to a question about whether the Authority may follow or adopt a particular procedure."

56 Removal to Court

Section 178 of the principal Act is amended by adding, the following subsection:

"(6) This section does not apply—

"(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and

"(b) without limiting **paragraph (a)**, to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure."

57 Challenges to determinations of Authority

Section 179 of the principal Act is amended by adding the following subsection:

"(5) Subsection (1) does not apply—

"(a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and

"(b) without limiting **paragraph (a)**, to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure."

58 New sections 179A and 179B inserted

The principal Act is amended by inserting, after section 179, the following sections:

"179A **Cross-challenges to determinations of Authority**

"(1) A party to a matter before the Authority that is subject to an election under section 179 may make a cross-challenge to the relevant determination—

"(a) in the prescribed manner; and

"(b) within the prescribed time.

"(2) If the election is withdrawn or abandoned, the cross-challenge may continue to proceed before the Court.

"(3) For the purposes of this Act, a cross-challenge under **subsection (1)** must itself be treated as an election under section 179.

"179B **Limitation on challenges to certain determinations of Authority**

"(1) This section applies to a determination of the Authority made—

"(a) for the purposes of **sections 50A to 50I**; or

"(b) under **section 50J**.

"(2) A party may not elect, under section 179(1), to have the matter heard by the Court unless the matter is whether 1 or more of the grounds in **section 50C(1)** or **section 50J(3)** exist."

59 Decision

Section 183 of the principal Act is amended, by adding, as subsections (2) and (3), the following subsections:

"(2) Once the Court has made a decision, the determination of the Authority on the matter is set aside and the decision of the Court on the matter stands in its place.

"(3) Despite **subsection (2)**, a person may apply for review of the determination of the Authority under section 194."

60 Restriction on review

Section 184 of the principal Act is amended by inserting, after subsection (1), the following subsection:

"(1A) No review proceedings under section 194 may be initiated in relation to any matter before the Authority unless—

"(a) the Authority has issued final determinations on all matters relating to the subject of the review application between the parties to the matter; and

"(b) (if applicable) the party initiating the review proceedings has challenged the determination under section 179; and

"(c) the Court has made a decision on the challenge under section 183."

61 Role in relation to jurisdiction

Section 188(4) of the principal Act is amended by repealing subsection (4), and substituting the following subsection:

"(4) It is not a function of the Court to advise or direct the Authority in relation to—

"(a) the exercise of its investigative role, powers, and jurisdiction; or

"(b) the procedure—

"(i) that it has followed, is following, or is intending to follow; or

"(ii) without limiting **subparagraph (i)**, that it may follow or adopt."

62 Application for review

Section 194(2) of the principal Act is amended by inserting, after the words "rule of law,", the words "but subject to **section 184(1A)**,".

63 New section 194A inserted

The principal Act is amended by inserting, after section 194, the following section:

"194A **Application for review by State services employees**

"(1) This section applies to any exercise, refusal to exercise, or proposed or purported exercise of a statutory power or statutory power of decision by an employer in the State services under any of the provisions of Parts V, VI, VII, or VIIA of the State Sector Act 1988 if that exercise, refusal to exercise, or proposed or purported exercise of the statutory power or statutory power of decision is or gives rise to an employment relationship problem.

"(2) When **subsection (1)** applies, the State services employee or former State services employee concerned—

"(a) must use the employment relationship problem-solving provisions in this Act to deal with the problem; and

"(b) may not bring an application for review in relation to the problem in the Court or the High Court."

64 Powers of Labour Inspectors

Section 229(3) of the principal Act is amended by inserting, after the words "is liable", the words ", in an action brought by a Labour Inspector,".

65 Compilation of wages and time record

Section 232(4) of the principal Act is amended by inserting, after the words "is liable", the words ", in an action brought by a Labour Inspector,".

66 New section 237A inserted

The principal Act is amended by inserting, after section 237, the following section:

"237A **Amendments to Schedule 1A**

"(1) The Governor-General may, by Order in Council, amend **Schedule 1A** to add to, omit from, or vary the categories of employees.

"(2) An Order in Council must not be made under **subsection (1)** unless—

"(a) made on the recommendation of the Minister; and

"(b) the Minister—

"(i) has consulted such employers, employees, and the representatives of such employers and employees, as the Minister considers appropriate; and

"(ii) is satisfied that the criteria in **subsection (3)** are met.

"(3) The criteria are—

"(a) whether the employees concerned are employed in a sector in which the restructuring of an employer's business occurs frequently:

"(b) whether the restructuring of employers' businesses in the sector concerned has tended to undermine the employees' terms and conditions of employment:

"(c) whether the employees concerned—

"(i) are employed in a labour intensive sector in low paid work; and

"(ii) have little bargaining power.

"(4) In this section, **restructuring** has the same meaning as in **subpart 1 of Part 6A**."

67 New Schedule 1A inserted

The principal Act is amended by inserting, after Schedule 1, the **Schedule 1A** set out in **Schedule 1**.

68 Schedule 2 amended

Schedule 2 of the principal Act is amended by inserting, after clause 4, the following clause:

"4A **Service outside New Zealand**

Any document relating to a matter before the Authority may be served out of New Zealand—

"(a) by leave of the Authority; and

"(b) in accordance with regulations made under this Act."

69 Schedule 3 amended

Schedule 3 of the principal Act is amended by inserting, after clause 5, the following clause:

"5A **Service outside New Zealand**

Any document relating to a matter before the Court may be served out of New Zealand—

"(a) by leave of the Court; and

"(b) in accordance with regulations made under this Act."

70 Consequential amendments

The enactments specified in **Schedule 2** are amended in the manner indicated in that schedule.

71 Transitional provisions

(1) The amendments made by this Act do not apply to anything done or any matter arising before the commencement of this Act.

(2) However, **subsection (1)** applies subject to **subsections (3) to (22)**.

(3) The definition of **coverage clause** in **section 5** of the principal Act (as substituted by **section 7(1)** of this Act) applies to a collective agreement whether it comes into force before or after the commencement of this Act.

(4) **Section 9(3)** of the principal Act (as added by **section 8** of this Act) applies to a collective agreement whether it comes into force before or after the commencement of this Act.

(5) **Section 20(5)** of the principal Act (as added by **section 9** of this Act) applies whether the discussion took place before or after the commencement of this Act.

(6) **Section 32(1)(ca)** (as inserted by **section 11** of this Act) applies whether the bargaining started before or after the commencement of this Act.

(7) **Section 33** of the principal Act (as substituted by **section 12** of this Act) applies whether the bargaining started before or after the commencement of this Act.

(8) **Sections 50A to 50J** of the principal Act (as inserted by **section 15** of this Act)—

(a) apply whether the bargaining started before or after the commencement of this Act; but

(b) do not apply in relation to grounds that exist before the commencement of this Act.

(9) **Section 56(1A)** of the principal Act (as inserted by **section 17** of this Act) applies whether an employee's employment started before or after the commencement of this Act.

(10) **Section 56A** of the principal Act (as inserted by **section 18** of this Act) applies whether the collective agreement came into force before or after the commencement of this Act.

(11) **Section 59A(1)** of the principal Act (as inserted by **section 19** of this Act) applies whether the collective agreement came into force before or after the commencement of this Act.

(12) **Section 59A(2)** of the principal Act (as inserted by **section 19** of this Act) applies whether the bargaining started before or after the commencement of this Act.

(13) **Section 59B(1)** of the principal Act (as inserted by **section 19** of this Act) applies whether the collective agreement came into force before or after the commencement of this Act.

(14) **Section 59B(2)** of the principal Act (as inserted by **section 19** of this Act) applies whether the bargaining started before or after the commencement of this Act.

(15) **Section 65A** of the principal Act (as inserted by **section 26** of this Act) applies whether the individual employment agreement started before or after the commencement of this Act.

(16) **Section 78(3A)** of the principal Act (as inserted by **section 34** of this Act) applies whether the employer was told of the proposal to take employment leave before or after the commencement of this Act.

(17) **Section 149(3)(ab)** of the principal Act (as substituted by **section 49** of this Act) applies to the agreed terms of settlement whether the agreed terms of settlement are signed before or after the commencement of this Act.

(18) **Section 149(4)** of the principal Act (as inserted by **section 49** of this Act) applies whether the agreed terms of settlement are signed before or after the commencement of this Act.

(19) **Section 150(4)** of the principal Act (as inserted by **section 50** of this Act) applies whether the decision was signed before or after the commencement of this Act.

(20) **Section 194A** of the principal Act (as inserted by **section 63** of this Act),—

(a) applies whether the exercise, refusal to exercise, or proposed or purported exercise of the statutory power of decision was made before or after the commencement of this Act; but

(b) does not apply if an application or proceedings of the type referred to in section 194(1) have been started.

Part 2
Equal pay

Subpart 1—Preliminary provisions

72 Purpose

The purpose of this Part is to address gender-based discrimination in pay by—

(a) requiring, in relation to the same or substantially similar work, an employer to provide equal pay—

(i) to each of his or her employees who performs the work:

(ii) in the case of an employer who is a party to a multi-employer collective agreement, to each of his or her employees when compared to other employees who are bound by that agreement and who perform the work for another employer; and

(b) providing processes for the resolution of equal pay queries that focus on resolution by the parties themselves in the first instance:

(c) providing for Labour Inspectors to conduct equal pay investigations.

73 Employer and employee obligations under this Part

When dealing with each other under this Part, an employer and each employee employed by the employer must deal with each other in good faith.

74 Interpretation

(1) In this Part, unless the context otherwise requires,—

comparable employee, in relation to a relevant employee, means a person who—

(a) is not of the same sex as the relevant employee; and

(b) performs work that is the same as, or substantially similar to, the work performed by the relevant employee; and

(c) does not receive a special rate of pay; and

(d) is either—

(i) employed by the same employer as the relevant employee; or

(ii) employed by another employer, if the employee and the relevant employee are bound by the same multi-employer collective agreement

enforcement action means proceedings taken by a Labour Inspector on behalf of an employee—

(a) to recover arrears of equal pay under **section 88**; or

(b) to recover a penalty under **section 89**; or

(c) for a compliance order under section 137 of the Employment Relations Act 2000

equal pay means a rate of pay—

(a) for work that is the same or substantially similar; and

(b) in which there is no element of differentiation between male employees and female employees based on the sex of the employees

multi-employer collective agreement means a collective agreement that is binding on—

(a) 1 or more unions; and

(b) 2 or more employers; and

(c) 2 or more employees

pay, in relation to an employee,—

(a) means salary or wages actually and legally payable to the employee; and

(b) includes—

(i) productivity and incentive-based payments:

(ii) overtime, bonuses, or other special payments:
(iii) allowances, fees, commission, and every other emolument or benefit whether in 1 sum or several sums and whether paid in money or not

personal information has the same meaning as in section 2(1) of the Privacy Act 1993

relevant employee means an employee who—
(a) makes an equal pay query; or
(b) is the subject of an equal pay investigation

special rate of pay means a rate of pay that—
(a) is special to an employee because of the employee's particular skills, knowledge, experience, or other attributes; and
(b) does not involve discrimination in relation to the employee or any other employee based on the sex of the employee.

(2) In this Part,—
(a) the terms **Authority**, **employee**, **employer**, **employment agreement**, and **Labour Inspector** have the same meaning as in section 5 of the Employment Relations Act 2000; and
(b) any other term or expression that is used but not defined in this Part, but that is defined in the Employment Relations Act 2000, has the same meaning as in that Act.

75 Application
This Part applies to all employers and employees, including the Crown and its employees.

Subpart 2—Duty to provide equal pay

76 Employer must provide equal pay
(1) An employer must provide equal pay to each of his or her employees who performs the same or substantially similar work.
(2) For the purposes of **subsection (1)**, if the employer is a party to a multi-employer collective agreement, the employer must provide equal pay to his or her employees when compared to other employees who are bound by that agreement and who perform the same or substantially similar work.

(3) In determining whether employees carry out the same or substantially similar work, regard must be had to, among other things, the extent to which—

(a) the work or class of work requires the same, or a substantially similar, degree of skill, knowledge, effort, and responsibility; and

(b) the conditions under which the work is performed are the same or substantially similar.

(4) **Subsection (1)** does not prevent an employer from paying an employee a special rate of pay if the circumstances of the employee justify it.

Compare: 1972 No 118 s 3(1)(a)

Equal pay queries

77 Employee may make equal pay query

(1) An employee may ask his or her employer whether he or she is receiving equal pay (an **equal pay query**).

(2) In considering an equal pay query under **subsection (1)**, the employer must compare the pay received by the relevant employee with that paid to a comparable employee identified by the employer.

78 Employer's response to equal pay query

(1) An employer must provide a written response to the relevant employee about his or her equal pay query within 20 working days after the query is made.

(2) The response must confirm whether or not the relevant employee, to the best of the employer's knowledge, is receiving equal pay.

(3) The response must not disclose the identity of the comparable employee used by the employer as the basis for assessing the pay received by the relevant employee.

(4) However, if the response contains any information that may indirectly disclose the identity of the comparable employee or other personal information about that employee, the disclosure of that information is authorised by this Part.

(5) This section does not apply if the equal pay query is referred to a Labour Inspector under **section 79**.

79 Process for considering equal pay query if employer does not employ a comparable employee

(1) This section applies to an employer who—

(a) is a party to a multi-employer collective agreement; and

(b) considers, in relation to an equal pay query made under **section 77**, that he or she does not employ an appropriate comparable employee.

(2) The employer must refer the employee's equal pay query to a Labour Inspector for consideration and response.

(3) **Sections 81 to 83** apply to a query referred to a Labour Inspector under this section as if it were an equal pay investigation.

80 Employer must ensure employee receives equal pay

(1) This section applies if the employer's response under **section 78** confirms that the employee has not been receiving equal pay.

(2) The employer must, as soon as possible (but not later than 1 month after the response),—

(a) comply with the duty to pay the employee equal pay; and

(b) pay to the employee the arrears of pay for the period during which the employee was not receiving equal pay.

Equal pay investigations

81 Labour Inspector may conduct equal pay investigation

(1) A Labour Inspector may conduct an equal pay investigation if—

(a) an employee who is not satisfied with the employer's response under **section 78** to his or her equal pay query requests it; or

(b) an employer has referred an equal pay query to the Labour Inspector under **section 79**; or

(c) the Labour Inspector thinks fit.

(2) In conducting the investigation, the Labour Inspector must compare the pay received by the relevant employee with that paid to a comparable employee identified by the Labour Inspector.

82 Labour Inspector may require information

(1) For the purposes of conducting an equal pay investigation, an employer must, if required by a Labour Inspector, provide the Labour Inspector with access to—

(a) a copy of the relevant employee's—

(i) employment agreement:

(ii) job description:

(b) any information about the classification of the relevant employee's work:

(c) a copy of the employer's wages and time records kept under section 130 of the Employment Relations Act 2000 or any other enactment:

(d) any rules or policies relating to pay scales, progression in the workplace, or job structure or any other information (not being personal information) that the Labour Inspector considers to be relevant in assessing the pay received by the relevant employee.

(2) A Labour Inspector may also require the employer of a comparable employee to provide access to any of the information referred to in **subsection (1)** in relation to the comparable employee.

(3) If an employer is required to provide access to information under **subsection (1) or subsection (2)**, the employer must comply with that requirement within the time specified by the Labour Inspector.

(4) A Labour Inspector may also discuss with any other employee the nature of the work done by that employee, if the employee—

(a) is employed by the same employer as the relevant employee; or

(b) is bound by the same multi-employer collective agreement as the relevant employee.

83 Labour Inspector must report findings to employer and employee

(1) A Labour Inspector must provide a written report of his or her findings, as a result of the investigation, to—

(a) the relevant employee; and

(b) the relevant employee's employer.

(2) The Labour Inspector's report to the relevant employee must inform the relevant employee whether or not he or she is receiving equal pay.

(3) The Labour Inspector's report to the employer must inform the employer—

(a) whether or not the relevant employee is receiving equal pay; and

(b) if the relevant employee is not receiving equal pay,—

(i) of the reasons for the Labour Inspector's finding that the employer is not providing equal pay (which may include information about a comparable employee that the Labour Inspector received under **section 82**); and

(ii) how the employer must comply with the duty to provide equal pay.

(4) If the Labour Inspector's report confirms that the relevant employee has not been receiving equal pay, the employee's employer must, as soon as possible (but not later than 1 month after the Labour Inspector's report),—

(a) comply with the duty to pay the employee equal pay; and

(b) pay to the employee the arrears of pay for the period during which the employee was not receiving equal pay.

(5) The Labour Inspector's report under **subsection (2) or subsection (3)** must not disclose the identity of the comparable employee used by the Labour Inspector as the basis for assessing the pay received by the relevant employee.

(6) However, if the report contains any information that may indirectly disclose the identity of the comparable employee or other personal information about that employee, the disclosure of that information is authorised by this Part.

Other matters

84 Labour Inspector may make recommendations

A Labour Inspector may make recommendations to an employer about—

(a) the duty to provide equal pay generally; or

(b) the duty to provide equal pay in relation to any of the employer's employees.

85 Confidentiality of information

To avoid doubt,—

(a) a Labour Inspector must not disclose any personal information that the Labour Inspector has received under this Part except as authorised by this Part or in accordance with the Privacy Act 1993:

(b) an employer or employee must not disclose any personal information he or she receives under this Part except in accordance with the Privacy Act 1993.

Subpart 3—Enforcement and other matters

Enforcement

86 Choice of procedures

(1) If the circumstances giving rise to an enforcement action under this Part are such that an employee would also be entitled to make a complaint under the Human Rights Act 1993 or pursue a personal grievance under the Employment Relations Act 2000, the employee may take only 1 of the following steps:

(a) if the matter is not otherwise resolved, the employee may take enforcement action under this Part; or

(b) the employee may make, in relation to the matter, a complaint under the Human Rights Act 1993; or

(c) the employee may, if the grievance is not otherwise resolved, apply to the Authority for the resolution of the grievance under the Employment Relations Act 2000.

(2) For the purposes of **subsection (1)**,—

(a) an employee takes enforcement action under this Part when proceedings in relation to the matter are commenced by a Labour Inspector with the knowledge or consent of the employee:

(b) an employee makes a complaint under the Human Rights Act 1993 when proceedings about that complaint are commenced by the complainant or the Commission.

(3) If an employee takes enforcement action under this Part, the employee may not exercise or continue to exercise any rights in relation to the subject matter of the enforcement action that the employee may have under the Human Rights Act 1993 or the Employment Relations Act 2000.

(4) If the employee makes a complaint under the Human Rights Act 1993, the employee may not exercise or continue to exercise any rights in relation to the subject matter of the complaint that the employee may have under this Part or the Employment Relations Act 2000.

(5) If the employee applies to the Authority for the resolution of the grievance under the Employment Relations Act 2000, the employee may not exercise or continue to exercise any rights in relation to the subject matter of the grievance the employee may have under this Part or the Human Rights Act 1993.

87 Enforcement action may only be taken by Labour Inspector

A Labour Inspector is the only person who may take enforcement action under this Part.

88 Proceedings to recover arrears of equal pay

(1) A Labour Inspector may take proceedings on behalf of an employee to recover arrears of equal pay that the employee is entitled to under this Part.

(2) Section 131 of the Employment Relations Act 2000 applies, with any necessary modifications, to proceedings taken under **subsection (1)**.

89 Penalty for non-compliance

(1) An employer who fails to comply with this Part is liable—

(a) if the employer is an individual, to a penalty not exceeding $5,000:

(b) if the employer is a company or other body corporate, to a penalty not exceeding $10,000.

(2) Section 135 of the Employment Relations Act 2000 applies, with any necessary modifications, to actions for the recovery of a penalty under **subsection (1)**.

90 Action may be completed by other Labour Inspector

An enforcement action initiated or taken under this Part by a Labour Inspector may be completed by another Labour Inspector.

Other matters

91 Powers of Labour Inspector

For the purposes of this Part, every Labour Inspector has, in addition to any powers conferred by this Part, all the powers that a Labour Inspector has under the Employment Relations Act 2000.

92 Labour Inspector must comply with principles of natural justice

A Labour Inspector, in exercising his or her functions or powers under this Part, must comply with the principles of natural justice.

93 Authority must protect confidentiality of information

The Authority must not, to the extent that is practicable, disclose any personal information—

(a) received by it in the course of proceedings for an enforcement action taken under this Part; or

(b) in issuing a determination in relation to any enforcement action taken under this Part.

94 Repeals

The following Acts are repealed:

(a) Equal Pay Act 1972 (1972 No 118):

(b) Government Service Equal Pay Act 1960 (1960 No 117).

95 Employment Relations Act 2000 amended

The Employment Relations Act 2000 is consequentially amended in the manner indicated in **Schedule 3**.

Part 3
Health and Safety in Employment Act 1992

96 Health and Safety in Employment Act 1992 called principal Act in this Part

In this Part, the Health and Safety in Employment Act 1992[2] is called "the principal Act".

[2] 1992 No 96

97 Minister may approve occupational health and safety training

Section 19G(1) of the principal Act is amended by omitting the words ", by notice in the *Gazette*,".

Part 4
Human Rights Act 1993

98 Human Rights Act 1993 called principal Act in this Part

In this Part, the Human Rights Act 1993[3] is called "the principal Act".

[3] 1993 No 82

99 Section 64 repealed

Section 64 of the principal Act is repealed.

100 New section 79A inserted

The principal Act is amended by inserted after section 79, the following section:

"79A **Choice of procedures**

"(1) If the circumstances giving rise to a complaint under Part 2 are such that an employee would also be entitled to pursue a personal grievance under the Employment Relations Act 2002, the employee may take 1, but not both, of the following steps:

"(a) the employee may make in relation to those circumstances a complaint under this Act:

"(b) the employee may, if the grievance is not otherwise resolved, apply to the Employment Relations Authority for the resolution of the grievance under the Employment Relations Act 2000.

"(2) To avoid doubt, a complaint referred to in **subsection (1)** includes, but is not limited to, a complaint about sexual harassment or racial harassment.

"(3) For the purposes of **subsection (1)(a)**, an employee makes a complaint when proceedings about that complaint are commenced by the complainant or the Commission.

"(4) If an employee makes a complaint under **subsection (1)(a)**, the employee may not exercise or continue to exercise any rights relating to the subject matter of the complaint that the

employee may have under the Employment Relations Act 2000.

"(5) If an employee applies to the Employment Relations Authority for a resolution of the grievance under **subsection (1)(b)**, the employee may not exercise or continue to exercise any rights relating to the subject matter of the grievance that the employee may have under this Act."

101 New section 92BA inserted

The principal Act is amended by inserting, after section 92B, the following section:

"92BA **Lodging of applications**

Proceedings before the Tribunal are to be commenced by the lodging of an application in the prescribed form."

s 67

Schedule 1
New Schedule 1A inserted in principal Act

ss 69C, 237A

Schedule 1A
Employees to whom subpart 1 of Part 6A applies

Employees who provide the following services in the specified sectors, facilities, or places of work:

(a) cleaning services, food services, caretaking, or laundry services for the education sector (being the public and private pre-school, primary, secondary, and tertiary educational institutions):

(b) cleaning services, food services, orderly services, or laundry services for the health sector (being any hospital, as defined by the Hospitals Act 1957 and any hospital within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992):

(c) cleaning services, food services, orderly services, or laundry services in the age-related residential care sector:

(d) cleaning services or food services in the public service (as defined in Schedule 1 of the State Sector Act 1988) or local government sector:

(e) cleaning services or food services in relation to any airport facility or for the aviation sector:

(f) cleaning services or food services in relation to any other place of work (within the meaning of the Health and Safety in Employment Act 1992).

Schedule 2
s 70

Enactments amended

Arts Council of New Zealand Toi Aotearoa 1994 (1994 No 19)
Repeal clause 13 of the First Schedule.

Commerce Act 1986 (RS Vol 31 p 71)
Repeal section 18C.

Government Superannuation Fund Act 1956 (RS Vol 21 p 209)
Repeal clause 50 of Schedule 4.

Judicature Amendment Act 1972 (RS Vol 40 p 870)
Insert in section 3A, after the words "Employment Court", the words "and High Court".

Museum of New Zealand Te Papa Tongarewa Act 1992 (1992 No 19)
Repeal clause 6 of the First Schedule.

New Zealand Superannuation Act 2001 (2001 No 84)
Repeal clause 50 of Schedule 3.

Social Welfare (Transitional Provisions) Act 1990 (RS Vol 32 p 883)
Repeal clause 15 of the Third Schedule.

State Sector Act 1988 (RS Vol 33 p 715)
Add to section 30E the following subsection:

"(3) This section overrides **Part 6A** of the Employment Relations Act 2000."

s 95

Schedule 3
Amendments to Employment Relations Act 2000

Section 104(1)

Insert, after the words "section 107," the words "or by reason directly or indirectly of that employee exercising his or her rights under **Part 2 of the Employment Relations Law Reform Act 2003** in terms of **section 107A**,".

New section 107A

Insert, after section 107:

"107A **Definition of exercising rights under Equal Pay Act 2003 for purposes of section 104**

For the purposes of section 104, an employee exercises his or her rights under **Part 2 of the Employment Relations Law Reform Act 2003** if—

"(a) the employee makes an equal pay query under **section 77** of the Act; or

"(b) the employee requests that a Labour Inspector conduct an equal pay investigation under **section 81(1)(a)** of the Act; or

"(c) a Labour Inspector takes enforcement action on behalf of the employee under that Act."

Section 137

Add to subsection (1)(a):

"(xii) **section 76, 78, 80, 82, or 83(4),** of the **Employment Relations Law Reform Act 2003**; or".

Add to subsection (4):

"(c) a Labour Inspector designated under this Act who alleges that there has been non-observance or non-compliance of the kind described in **subsection (1)(a)(xii)**."

Section 161(1)(m)

Add:

"(vi) under **section 89** of the **Employment Relations Law Reform Act 2003**:".

Section 223(1)(b)

Omit the words "Equal Pay Act 1972" and substitute the words "**Part 2 of the Employment Relations Law Reform Act 2003**".

Section 234

Omit from subsection (1) the words "or holiday pay", and substitute the words ", holiday pay, or equal pay".

Section 234—continued

Omit from subsection (2) the words "minimum wages or holiday pay or both", and substitute the words "1 or more of the minimum wages, holiday pay, or equal pay".

Omit from subsection (3) the words "minimum wages or holiday pay or both", and substitute the words "1 or more of the minimum wages, holiday pay, or equal pay".

Insert in subsection (4), after the item relating to the term "**company**", the following item:

"**equal pay** means equal pay payable under **Part 2 of the Employment Relations Law Reform Act 2003**".

Section 236

Omit from subsection (4)(c) the words "Equal Pay Act 1972" and substitute the words "**Part 2 of the Employment Relations Law Reform Act 2003**".

Add:

"(5) Despite anything in this Act or any other enactment, actions in relation to the **Part 2 of the Employment Relations Law Reform Act 2003** may be taken only by a Labour Inspector."

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