

19 January 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Employment Relations Amendment Bill

Purpose

1. We have considered whether the Employment Relations Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 20778/10.5). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with section 14 (freedom of expression), section 17 (freedom of association), and section 27(1) (right to justice). Our analysis is set out below.

The Bill

4. The Bill amends the Employment Relations Act 2000 (ERA) and the Wages Protection Act 1983 (WPA). It implements the Government's post-election commitments regarding workplace relations. This includes a series of changes to promote and strengthen collective bargaining and union rights in the workplace, including reinstating provisions of the ERA that have previously been removed. The changes are intended to introduce greater fairness in the workplace between employees and employers, in order to promote productive employment relationships.
5. Key provisions of the Bill:
 - a. reinstate the principle that the duty of good faith in s 4 of the ERA requires parties to conclude collective agreement bargaining, and repeals the provisions that enable the Employment Relations Authority (the Authority) to determine that bargaining has concluded
 - b. repeal sections 44A to 44C of the ERA, which allow employers to opt out of multi-employer collective bargaining once bargaining has been initiated
 - c. require employers to provide the applicable collective agreement, union contact details and the option to join the union at the same time they provide an intended individual employment agreement to an employee, and to provide certain specified information about the role and function of the union to new employees

- d. introduce an ‘adverse treatment’ personal grievance based on an employee’s union membership, and extend the grounds for discrimination to include an employee’s union membership
- e. restrict the use of 90-day trial periods to small to medium-sized employers (SMEs) (employers with fewer than 20 employees), and
- f. remove the exemption for SMEs from ERA provisions allowing specified vulnerable employees to elect to transfer to an incoming employer, in the event of a sale or transfer of the business.

Consistency of the Bill with the Bill of Rights Act

- 6. Several provisions in the Bill *prima facie* engage the rights and freedoms contained in the Bill of Rights Act. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:¹
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?

Section 14 – Freedom of expression

- 7. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.²

Duty of good faith in collective bargaining

- 8. The Bill makes several amendments to Part 5 of the ERA, which relates to collective bargaining. These changes reinstate former provisions relating to the duty to bargain in good faith and to conclude bargaining, and make additional changes to what constitutes “genuine reasons” for non-compliance with these duties.
- 9. Clause 9 requires parties bargaining for a collective agreement to conclude the agreement unless there are genuine and reasonable grounds not to do so.

¹ *Hansen v R* [2007] NZSC 7 at [123].

² *RJR-MacDonald Inc. v Canada (Attorney General)* 1995 3 SCR 199.

10. Clause 10 extends the duty of good faith in s 32 of the ERA to include a requirement that, when a deadlock is reached on certain matters during bargaining, bargaining on other matters must continue.
11. Clause 11 provides that the following reasons are not genuine reasons for non-compliance:
 - a. opposition to being a party to a collective agreement, or
 - b. disagreement about the inclusion of a bargaining fee under Part 6B or the inclusion of rates of pay in the collective agreement.
12. Requiring parties bargaining for a collective agreement to continue bargaining where deadlock might be reached, and to conclude an agreement (including requiring wages to be bargained for in collective bargaining) despite objections on the basis of the reasons in paragraph 11 above, clauses 9 – 11 of the Bill arguably constitute a *prima facie* limit on the freedom of expression under the Bill of Rights Act.
13. The objectives of these provisions are to address the power imbalances in the employment relationship and ensure parties continue to bargain and work through issues in good faith, thereby supporting effective functioning of workplace relations. To the extent that clauses 9 – 11 limit the right to freedom of expression on the part of employers and unions, we consider that limit is rationally connected and proportionate to those objectives. This conclusion is consistent with our previous advice regarding the duty to continue bargaining.

Duties to provide information

14. Several clauses of the Bill affect how employers and unions seek, receive or impart certain information in relation to union representation and applicable collective agreements. For example, clause 18 introduces a provision that requires employers to give a prospective employee information about the existence of a collective agreement and contact information for the union during bargaining processes. Clause 18 also introduces a provision which states an employer must share new employee information with the union unless the employee objects.
15. To the extent these provisions engage section 14, we consider they are rationally connected and proportionate to the Bill's objective of promoting the proper functioning of the employment relations framework.

Conclusion on consistency with s 14

16. We consider that any limits the Bill places on freedom of expression appear to be justified under s 5 of the Bill of Rights Act.

Section 17 – Freedom of association

17. Section 17 provides that everyone has the right to freedom of association. This provision recognises that persons should be free to enter into consensual arrangements with others and to promote the common interests and objectives of the associating group. By protecting the right of individuals to decide freely whether they wish to associate with others, it also includes the right not to associate.
18. Several of the provisions in this Bill engage the right to freedom of association.

New employees to be employed on same terms and conditions as an existing collective agreement

19. Clause 18 reinstates the “30-day rule”, providing that new employees whose work is covered by a collective agreement are subject to the terms and conditions of that collective agreement as if they were a member of the union for the first 30 days of their employment. Any other terms and conditions the employee and employer may have negotiated cannot be inconsistent with the terms and conditions of the collective agreement, although they may enter into negotiations for such inconsistent terms and conditions after the first 30 days of employment
20. As a new employee is not compelled to belong to the union that negotiated the agreement, any limit on the freedom of association is confined to the terms and conditions of the agreement, for the first 30 days of their employment. An employee may opt to join another union or to negotiate an individual employment agreement if they wish at the end of the first 30 days of employment.
21. The purposes of the provision are to protect employees from agreeing to unfavourable terms and conditions at the outset of the employment relationship and to provide, at a minimum, the same terms and conditions as the applicable collective agreement. The provision also intends to provide employees more time to become informed about the union and its role in the workplace, before making a decision as to their preferred type of employment agreement and whether they wish to join the union.
22. To the extent that clause 18 constitutes a *prima facie* limit on the freedom of association by requiring new employees to be employed on the same terms and conditions as if they were a member of a union, we consider that the limitation is justified. This is consistent with our advice regarding the original provision when it was included in the ERA in 2000.

Multi-employer collective bargaining

23. A multi-employer collective agreement (‘MECA’) is a type of collective employment agreement that has more than one employer party. Sections 44A to 44C of the current Act provide that where a union or employer initiates multi-employer bargaining, an employer that is an intended party to bargaining to a MECA and has received notice initiating bargaining for the MECA, may opt out where:
 - a. a new MECA is proposed;
 - b. a current MECA is being renegotiated; or
 - c. where employers are cited to join an existing MECA.
24. If an employer does not opt out within 10 days of receiving notification of the initiation of bargaining, then the employer is required to participate in the multi-employer bargaining.
25. The Bill proposes to repeal sections 44A to 44C. By removing the ability for an employer to opt out of collective bargaining for a MECA, the right to freedom of association is arguably engaged because an employer is required to participate in collective bargaining alongside other employers based on their association with the industry or occupation.
26. The Court of Appeal has previously said that while the right to collective bargaining arises out of the right to freedom of association, it is generally not regarded as an element of

freedom of association.³ However, the Canadian Supreme Court has held that freedom of association does include a procedural right to collective bargaining.⁴ Further, New Zealand has a commitment to promoting freedom of association and collective bargaining through its ratification of ILO 98 (Right to Organise and Collective Bargaining Convention).

27. We understand the objectives of repealing sections 44A to 44C are to:
 - a. address the power asymmetries in the employment relationship by promoting and strengthening collective bargaining where more than one employer is an intended party to the bargaining, and
 - b. reduce the need for a union to spread its resources to cover multiple employers, thereby enhancing the effectiveness of a union to adequately represent the interests of its members (and strengthening the position of an employee).
28. We consider these are sufficiently important objectives to justify some limitation on an employer's rights, and there is a rational connection between those objectives and removing the employer's ability to opt out of bargaining for a MECA.
29. The repeal of the opt-out provisions does not require an employer to enter into a MECA that it does not want to be part of, and moreover, an employer is not obliged to agree to the outcome of collective bargaining. In our view, this means that the limitation on the right not to associate is not impaired more than is reasonably necessary in order to achieve the objectives of addressing power imbalances and strengthening collective bargaining processes.
30. More generally, we consider the limitation on an employer's right to freedom of association does not appear to outweigh the advantage to employees and unions in requiring an employer to participate in multi-employer collective bargaining. Collective bargaining is itself a significant right that arises out of, and in other jurisdictions has been recognised as forming part of, freedom of association. We acknowledge that this appears to be a finely balanced issue; however, to the extent an employer's right not to associate is limited by the inability to opt out of bargaining processes, we consider that limit is proportionate to the importance of the objectives outlined in paragraph 27.
31. For the reasons above, we consider that the limitation on the right of association proposed by the repeal of sections 44A – 44C of the Bill appears to be justified in terms of section 5 of the Bill of Rights Act.

Employees to transfer to new employer

32. Under Part 6A of the ERA, specified vulnerable employees can elect to transfer to a new employer in the event of a sale or transfer of the business, and new employers are bound to employ the transferred employee. Where a transferring employee is a member of a union and bound by a collective agreement, the new employer will become a party to the collective agreement. The Employment Relations Amendment Act 2014 inserted an exemption for SMEs from these provisions. Clauses 30 and 34 of the Bill will repeal that exemption.

³ *Eketone v Alliance Textiles (NZ) Ltd* [1993] ERNZ 783 (CA) at 796.

⁴ *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia* [2007] 2 SCR 391; upheld in *Ontario (Attorney-General) v Fraser* [2011] 2 SCR 3.

33. Clauses 30 and 34 engage SME employers' right to freedom of association, by creating an obligation to enter into an employment relationship with certain existing employees when buying a business. However, we note that a new employer would be aware of this obligation when making the choice to purchase the business. In addition, the employer is able to discharge their association through standard employment practices, for example via redundancy if the relevant conditions are met.
34. Our December 2005 advice on the Bill that originally introduced the transfer provisions contained in Part 6A also considered they engaged s 17. In conducting the s 5 inquiry, that advice found:
- a. ensuring that employees who are specified as particularly vulnerable to having their terms and conditions of employment undermined in restructuring situations have protection from loss of employment and undermining of terms and conditions in restructuring situations, is an important and significant objective, and
 - b. the loss of a new employer's entitlement to bargain about the terms and conditions of a new employment relationship does not affect the overall proportionality of the regime in Part 6A of the ERA because:
 - i. the due diligence process followed by a prospective purchaser of a business will enable the new employer to be aware of the terms and conditions of the transferring employees
 - ii. performance management procedures remain available to new employers when dealing with a transferred employee whose performance may be unsatisfactory, and
 - iii. requiring the new employer to become a party to the collective agreement in relation to a transferred employee ensures the status of the employee's existing employment agreement is retained.
35. That advice concluded that the limit on the right to freedom of association proposed by the regime established by Part 6A is reasonable and justified in terms of section 5 of the Bill of Rights Act. We consider that analysis and its conclusion applies equally in relation to clauses 30 and 34 of the Bill.

Section 27(1) – Right to justice

36. Section 27(1) of the Bill of Rights Act affirms the right of every person to the observance of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognised by law.
37. Section 50K of the ERA currently provides that parties may apply to the Authority for a determination that bargaining has concluded. Clause 8(3) of New Part 2 (to be inserted into Schedule 1AA of the ERA) provides that an application made under section 50K of the principal Act that is not determined or dismissed before the commencement of this clause will be treated as if it were never made.
38. We understand that there has only ever been one application under section 50K to date. However, MBIE advises that the provision is intended to prevent a situation where some applicants may be encouraged to apply for a determination that bargaining has concluded before the Bill's amendments affecting the duty to conclude come into effect.

39. Section 27(1) is intended to protect natural justice rights in relation to matters of procedure, and to ensure that the power of public authorities and tribunals are exercised 'in a fair way'.⁵ Fundamental principles of natural justice include the right to be heard by a decision-maker (before a decision is made), and the right to have an impartial decision-maker. However, section 27 does not preclude changes in the law that affect whether a person has a right to bring a substantive claim. Further, section 27 does not prevent legislative or executive steps being taken to prevent threatened litigation or to affect the potential outcome of that litigation.⁶
40. The transitional provision removes parties' rights to apply for, and the Authority's ability to make, a determination (in accordance with section 50K of the ERA) from the commencement of the Bill. In doing so, the provision removes an applicant's substantive right to have the issue of whether bargaining has been concluded determined by the Authority. For the purposes of section 27(1) we do not consider this provision affects an applicant's procedural rights in respect of an application brought under section 50K of the ERA. Although the transitional provision may raise a question of the constitutional propriety of depriving applicants of the benefit of a declaration in proceedings that have already been commenced, we do not consider it engages section 27(1) of the Bill of Rights Act.

Conclusion

41. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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⁵ See the White Paper, *A Bill of Rights for New Zealand* (1985) AJHR A6 at [10.168] – [10.171]; Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press: Auckland, 2003) at 755.

⁶ *New Health New Zealand Inc v Attorney-General* [2015] NZHC 2138 at [62].