PPTA

NEW ZEALAND POST PRIMARY TEACHERS' ASSOCIATION

TE WEHENGARUA

www.ppta.org.nz

SUBMISSION

to the

Transport and Industrial Relations

Select Committee

on the

EMPLOYMENT RELATIONS AMENDMENT BILL

ABOUT PPTA

1. PPTA represents approximately 16,500 secondary teachers, principals, and manual and technology teachers, in New Zealand; this is the majority of teachers engaged in secondary education – approximately 90% of eligible teachers choose to join PPTA. PPTA is an affiliate member of the New Zealand Council of Trade Unions ("**CTU**").

2. Under our constitution, all PPTA activity is guided by the following objectives:
   (a) To advance the cause of education generally and of all phases of secondary and technical education in particular.
   (b) To uphold and maintain the just claims of its members individually and collectively.
   (c) To affirm and advance Te Tiriti O Waitangi.

3. PPTA is not affiliated to a political party and our members individually support a broad spectrum of political parties in Parliament. However, PPTA have consistently promoted policies that promote progressive economics, social policy and employment relations policy. At our 2012 Annual Conference, PPTA members endorsed the following alternative economic model:
   (a) A fairer tax system;
   (b) Effective public services;
   (c) Addressing the public debt myth;
   (d) Investing heavily in education and training;
   (e) Regulating financial markets and limiting corporate excess;
   (f) Respect for the rights of workers (paid and unpaid) and learners; including:
      (i) Legislation that promotes union membership and collective bargaining;
      (ii) Avoiding a unilateralist approach to employment relations by engaging employees, employers and those not yet in employment in ways which add value to the economy and society;
      (iii) Engaging in employment relationships that outlive economic cycles and extend beyond the walls of individual organisations;
      (iv) Rejecting a low wage economy (which will help to stop the outflow of skilled labour from Aotearoa / New Zealand).
   (g) Retaining New Zealand's state assets in full public ownership;
   (h) Promoting the idea that we are cultural citizens not just economic citizens;
   (i) Closing the pay gap between the minimum and maximum wages paid across a workforce or industry; and
   (j) Fiscal policy that acknowledges the importance of the environment.

EXECUTIVE SUMMARY

4. PPTA is strongly opposed to the Employment Relations Amendment Bill ("**the Bill**") and submits that the Committee recommend to the House that it not proceed.

5. The proposed changes are contemplated in the context of a workforce that is already largely de-regulated and de-unionised, where there is a growing inequality crisis in New Zealand. As teachers, our members and their schools are a core part of the community. As a result, our submission covers both the broader negative effects that these changes will have on society and the particular effects that the proposed

changes will have on the education system, teachers and student learning and achievement. The proposals in the Bill are:

(a) Likely to further entrench and deepen inequality in our society;
(b) Inconsistent with the health and safety changes recommended by the Independent Taskforce on Workplace Health and Safety ("**the Taskforce**");
(c) Inconsistent with our international obligations;
(d) Inconsistent with fundamental principles of natural justice; and
(e) Inconsistent with the object of the Employment Relations Act 2000 ("**the ERA**"), in particular, it does not "acknowledg[e] and address the inherent inequality of power in employment relationships" or "promote collective bargaining".

6. We have provided particular comments on the following proposals in the Bill:
   (a) Changes to the duty of good faith when employment is at risk;
   (b) Removal of the duty to conclude during collective bargaining;
   (c) Application to conclude bargaining;
   (d) Written strike notice and lock-out notices;
   (e) Pay deductions for partial strikes;
   (f) Repeal of the 30 day rule for new employees;
   (g) Changes to rest and meal breaks; and
   (h) Changes to Multi-Employer Collective Agreements ("**MECAS**").

7. Many of the proposals in the Bill attempt to reverse the good faith amendments to the ERA that were introduced in 2004. We note that these amendments enjoyed good cross-party support: and passed with consensus from the following parties: Labour Party, Māori Party, Green Party, Progressive Party and New Zealand First Party.

8. Good faith encourages fairness in process and dealing with each other with respect. Even where there might be points of difference, the ERA encourages on-going communication and resolution for those areas where there can be common agreement. Every day our teacher members are responsible for modelling these behaviours to our students because they are essential part of being a good citizen and making a positive contribution to society.

9. We endorse the recommendations made by the New Zealand Council of Trade Unions ("**CTU**") and the Service and Food Workers Union ("**SFWU**"). The CTU has undertaken comprehensive analysis of the current economic and legal framework in New Zealand, the combined impact of the proposed changes, and the international obligations that will be breached through passing this Bill. They have also provided detailed analysis of specific proposals, which we support. The SFWU have a large number of workers who will be impacted by the proposals to Part 6A of the ERA and are best placed to provide detailed comment on the effect of those provisions.

10. We also endorse the submission made by the Judges of the Employment Court in respect of the changes proposed in clause 61 of the Bill. The Court has expressed concern that the policy in the Bill appears to have been decided without consideration given to the current practice for how employment law decisions are made. They submit that there is a very real risk that announcing a decision automatically in a highly emotive context, with a prima facie appearance that it has not been properly

considered, will significantly undermine the reputation of the Employment Relations Authority and will adversely affect the administration of justice. Clause 61 of the Bill will lead to bad decisions (or the perception of bad decisions), increased appeals, and a strong feeling from parties in a case that justice has not been done. Ultimately, this will cost the public purse more money, with no efficiencies gained, along with a loss of confidence in our judicial system

11. The current balance is not right. The law should provide a context that supports teachers' professional development and student learning, not encourage protracted negotiations and bullying behaviour. The Bill is particularly harsh on the rights of vulnerable workers who need statutory protection. The proposals will perpetuate low wages, inequality, poverty and the further exploitation of vulnerable workers.

12. Ultimately, the law we make should reflect the kind of society we want to live in. Not through concentrating wealth and influence in a few with a race to the bottom in employment conditions for the rest. Instead, we need to re-balance the law so that employment conditions suit the majority of people who are affected.

13. We would like to appear before the Committee in support of our submission.

CONTEXT OF THE CHANGES

14. This section of the submission outlines the context in which the proposals in the Bill are being made, including:
    (a) Growing inequality in New Zealand;
    (b) The challenges with the current law; and
    (c) Changes to health and safety law and culture, as recommended by the Taskforce.

Inequality

15. Over the past 30 years, New Zealand has become an increasingly unequal society. For example, "New Zealand:
    - Now has the widest income gaps since detailed records began in the early 1980's;
    - From the mid-1980s to the mid-2000s the gap between rich and the rest has widened faster in New Zealand than in any other developed country;
    - The average household in the top 10 per cent of New Zealand has nine times the income of one in the bottom 10 per cent; and
    - The top 1 per cent of adults own 16 per cent of the country's total wealth, while the bottom half put together have just over 5 per cent."[1]

16. The continued and persistent trend in inequality can be seen in the Salvation Army's forewords to their annual State of the Nation reports over the past five years:

    2009 *"It does appear that **our recent social progress is quite fragile and might easily reverse with the deteriorating economic conditions that we and the rest of the world face.** The best example of this is the recent*

[1] Rashbrooke, Max *Inequality: A New Zealand Crisis* (Bridget Williams Books Ltd., 2013), pp 1 to 2.

advances in reducing rates of child poverty. Regrettably this progress was based mainly on the prospect of growing employment with policies such as Working for Families backing up this focus."[2]

2010 *"There is no denying that the recession is taking a social toll. Unemployment is at a five-year high,* ***gains made over the past five years in reducing child poverty have probably been lost, and there are signs of a widening income gap between the well paid and the poorly paid****."*[3]

2011 *"This report shows that* ***child poverty rates have climbed back*** *to where they were five years ago, that* ***violence towards children and youth unemployment are as bad as they were five years ago****, and that the* ***educational disadvantage suffered by Māori children continues*** *and may even be getting worse."*[4]

2012 *"We have* ***two clear choices*** *here: one is to continue the path we have been on* ***more or less continuously for the past three decades****,* ***concentrating wealth and influence, and driving the marginalised further into the shadows*** *with yet more restrictive welfare entitlements and a yet more punitive criminal justice system. The other is to act more inclusively and to work consciously and deliberately at ways of ensuring that the most marginalised New Zealanders, and in particular, many poor families and unemployed young people, feel as though they are valued and valuable members of our society."*[5]

2013 *"The reality is that the New Zealand economy has crawled since the beginnings of the global financial crisis in late 2007: real per capita GDP has declined while total GDP on a production basis has grown by just over 3% in real terms over the past five years. In response, nearly 150,000 New Zealanders have left for Australia since late 2007—more than the population of our fourth largest city. Despite this exodus, almost 300,000 New Zealanders are jobless and official unemployment is at a 10-year high.*

Yet the alarm bells are not ringing. The media is enthusiastic about rising house prices, and the Government remains singularly focused on reducing its deficit, while refusing to consider increasing taxes even to pay for the one-off costs of the Christchurch earthquake rebuild. ***Child poverty remains resolutely stuck at around 20% of New Zealand children****, despite a Ministerial Committee on Poverty being established. Auckland's housing shortage continues to grow and despite attempts to reform the effectiveness of Housing New Zealand,* ***many households in need of decent housing don't currently have those needs met****—resulting in too many New Zealanders living in unhealthy, unaffordable and insecure accommodation.*[6]

"… ***it's naïve to believe and dishonest to suggest that these solutions do not require more tax dollars****. The source of these extra tax dollars is,*

[2] *Into troubled waters* (State of the Nation report, Salvation Army, February 2009), pg. 4.
[3] *A road to recovery* (State of the Nation report, Salvation Army, February 2010), pg. vi.
[4] *Stalled* (State of the Nation report, Salvation Army, February 2011), pp. v - vi.
[5] *The Growing Divide* (State of the Nation report, Salvation Army, February 2012), pg. viii.
[6] *She'll Be Right* (State of the Nation report, Salvation Army, February 2013), pp. 7-8.

of course, a problem particularly considering the global economic situation. In our view the need for a society that is just and gives every citizen the right to participate economically and socially is so important, that ways must be found to find this additional tax revenue."[7]

17. As teachers in the public education system, our members have first-hand knowledge of the impact that poverty and rising inequality, through unemployment and low wages, can have on students' learning and achievement. Child poverty, and inter-generational poverty, continues to be a problem and teachers attempts to deal with the effects of poverty are well documented (for example, the effect that poverty has on students' cognitive abilities). The PPTA recently commissioned independent research by academics Liz Gordon and Brian Easton, which found that there is a direct link between socio-economic status and achievement.

18. It is important to remember that inequality affects all of society, not just those in poverty. In its 2011 report on inequality, the OECD had the following comments for Governments about the need to, and benefits of, tackling inequality:

> "Rising income inequality creates economic, social and political challenges. It ca**n stifle upward social mobility**, making it harder for talented and hard-working people to get the rewards they deserve. Intergenerational earnings mobility is low in countries with high inequality such as Italy, the United Kingdom, and the United States, and much higher in the Nordic countries, where income is distributed more evenly (OECD, 2008). The resulting **inequality of opportunity will inevitably impact economic performance as a whole, even if the relationship is not straightforward**. Inequality also raises political challenges because it **breeds social resentment and generates political instability**. It can also fuel populist, protectionist, and anti-globalisation sentiments. **People will no longer support open trade and free markets if they feel that they are losing out while a small group of winners is getting richer and richer**."[8]
>
> [Emphasis added].

19. It should come as no surprise that low wages go hand in hand with inequality. The CTU submission provides ample evidence of the growing number of people with relatively low wages in New Zealand compared to our Australian counter-parts. This difference is not simply the result of economic growth through exploiting mineral wealth in Australia. What matters is how the wealth is shared through the population and with those who are generating the wealth (i.e. the workers and the employer). Employment law helps to provide tools and structures (such as an entitlement for a minimum wage or an entitlement to rest breaks) and addresses the inherent imbalance in power within the employment relationship so that there is a fairer bargaining position between employers and workers.

20. Low wages persist when the law does not adequately address the inequality between employers and workers. Unlike New Zealand, Australia has maintained high employment conditions through a legal framework that supports unions and workers,

[7] Ibid, pg. 9.
[8] *Divided we stand: why inequality keeps rising* (OECD, 2011), pg. 40.

alongside the rights of employers to run their businesses. The sky has not fallen down. Australian businesses remain profitable.

Challenges with the current law

21. The deregulation and de-unionisation of the New Zealand workforce since the passage of the Employment Contracts Act 1991 has been a major factor contributing to lower wages and employment conditions in New Zealand.

22. In its submission on the Employment Relations Bill (the forerunner to the Employment Relations Act 2000 ("**the ERA**")), the CTU made the following comment on the impact of the Employment Contracts Act 1991:

> "…unemployment, underemployment and the number of jobless [increased]. Real wages increased only marginally, and there has been a **growing gap between those on high and those on low incomes**. The quality of employment has deteriorated for many."[9]
>
> "For nine years the lack of protections for workers under the Employment Contracts Act 1991, has led to exploitation, a lack of respect for workers, and an aggressive attack on unions... At this stage we merely quote from the letter of one union member who wrote to the Labour Department about her experience.
>
> > "As soon as the Employment Contracts Act came in everything changed in this place. We were told – now he'd do it his way. First he got rid of the union, and some were threatened that if they belonged to the union they would be down the road. The contracts were never negotiated. We were called in one by one and given this printed document with a place to put your signature. Some of the young ones were not allowed to take their contracts home for their parents to read."
>
> The CTU acknowledges that there will be "bad" employers under any industrial law but **it is the duty of the Government to recognise the inequality of power in most employment relationships, as we have done as founding members of the International Labour Organisation, and ensure that our domestic law reflects (as a minimum) the protections required by international labour conventions** in a political climate which respects those rights. The ECA and the political climate of the past nine years, gave bad employers licence, encouragement and sustenance. Employer organisations have been slow to criticise such behaviour and attempted to ignore the growing public concern about the treatment of workers under the ECA.
>
> The ECA has been at its most unfair in the effect on the treatment of vulnerable employees. Employees can be "vulnerable" for a number of reasons. They could be new employees. Unsure of what the job involves and unaware of their rights. They could be casual or very part-time employees, contract employees, homeworkers, pieceworkers, on a fixed-term contract, or seasonal employees unsure when the season will start or finish.
>
> An employee could be vulnerable because they are one of many seeking a job and only too aware of how replaceable they are. Their skill levels could be low. That does not mean that they should get the same pay as more skilled employees. But it does mean that **a modern employee relations law should recognise and understand the problems faced by vulnerable employees. Their bargaining power is weaker than other employees. Under the ECA, this weakness was magnified many times. These are the workers who most**

[9] Page 7.

need basic legal protections, fair processes, and genuine access to collective bargaining."[10]

23. The ERA passed into law and set out the following object for a redefined industrial relations context in New Zealand:

> The object of this Act is —
> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship —
> (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
> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
> (iii) by promoting collective bargaining; and
> (iv) by protecting the integrity of individual choice; and
> (v) by promoting mediation as the primary problem-solving mechanism; and
> (vi) by reducing the need for judicial intervention; and
> (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.[11]

24. While the ERA and its 2004 amendments removed some of the worst excesses of the Employment Contracts Act 1991 and recognised the role of unions in the workplace, casualised and low-paid work persisted in many industries. The current law continues to inadequately support unions from organising small and independent workplaces and there are heavy restrictions over the circumstances in which workers can strike.

25. The Minister of Finance, Hon Bill English, has put on record his Government's stated intention of supporting higher wages:

> "Everyone would like to see incomes higher, particularly in the low- and middle-income households."[12]

26. Through our submission, we outline how this stated aspiration for higher wages will not be achieved through the proposals in this Bill and how the mechanisms are deliberately designed to undermine the collective voice of workers through unions in the workplace.

Undermining changes to health and safety law

27. Good workplace conditions require good regulation, which includes union access and worker engagement. This position is supported by the Taskforce, which recommends

[10] Pages 12 to 14.
[11] Section 3.
[12] Q and A television show.

sweeping changes to the health and safety legislation in New Zealand.[13] PPTA supports the Taskforce's recommendations.

28. One of the key findings of the Taskforce (of relevance to the Bill) is that poor worker engagement and representation in workplace health and safety is a critical weak link:

> "In the Robens model, **effective worker participation is vital** to managing health and safety issues successfully in the workplace. Yet it is an aspect of the **New Zealand working environment** that is too **often ineffective and often virtually absent**.
>
> **New Zealand falls well short of the strength of worker representation legislation and levels of engagement operating in comparable jurisdictions.**
>
> Workers have many rights and protections under New Zealand law. These include the right to raise health and safety issues in relation to their work, to have these addressed, and to refuse tasks where conditions remain unsafe. Formal mechanisms, including health and safety representatives and health and safety committees, are commonly used to support these protections. Evidence of agreed participation systems is also required from firms with 30 or more employees.
>
> **All too frequently, however, these mechanisms are poorly implemented if at all. Or they are not fit for purpose given the increasing 'casualisation' of the modern workforce, i.e. the growth in self-employed, temporary, seasonal and part-time workers and contractors.**
>
> While some workplaces have highly effective mechanisms for employee participation, others do not. Consequently there is uneven ownership of the workplace health and safety system and of initiatives to improve outcomes.
>
> There are a number of factors at play in this:
>
> a. There is **limited support in the legislation for worker engagement**, e.g. smaller firms are not required to have formal participation mechanisms such as health and safety representatives. Further, the law does not ensure that there is sufficient time for health and safety representatives to perform their functions
>
> b. There is a lack of regulator enforcement of and guidance around the provisions, e.g. there are no ACoPs or support tools for small firms
>
> c. Employees often lack awareness of their rights and, if they are aware, fear reprisals if they exercise them
>
> **d. Union density has fallen substantially, and there are increasing levels of unorganised, casual, contract and short-term labour in the workplace**
>
> e. Many managers lack the awareness, motivation to engage and capabilities needed to respond effectively to workers raising health and safety issues

[13] At the time of writing this submission, we note that the Government has yet to respond to the Taskforce's final report.

f. Many businesses prioritise production targets over health and safety concerns.

…

Some [employees] reported being fearful of recriminations through pay docking (e.g. if broken equipment was reported) or losing their jobs. Seasonal, contractual and otherwise vulnerable workers were noted as particularly unlikely to report events."[14]

[Emphasis added]

29. This short extract from the Taskforce's report identifies the underlying causes that are contributing to the appalling rates of workplace injury, death and occupational health problems, in particular:

(a) The problems with an increasingly transitory and casualised workforce – for many New Zealanders, the de-regulated employment law environment means that job security is a thing of the past;

(b) The absence of a legal framework empowering workers to speak out when their legal rights and entitlements (such as the right to a safe workplace) are undermined; and

(c) Importantly, a legal framework that supports unions to work with, and on behalf of workers, to engage with employers on important issues in the workplace.

30. The importance of worker participation was emphasised by the Taskforce as one of the key levers for change:

"Internationally, the value of worker participation in workplace health and safety is acknowledged through conventions and directives by organisations like ILO and the European Union. It is also reflected in UK research that finds "joint arrangements, through which workers are represented and consulted on their health and safety, is likely to have better outcomes than arrangements in which management acts without consultation.

… there needs to be a major 'mind-shift' in New Zealand society and in workplaces… Everyone must feel empowered to intervene when they see an unsafe situation."

31. Enhanced worker engagement and a stronger position for unions is reflected in the Taskforce's recommendation, for example:
    - The new health and safety agency should be constituted on a tripartite basis, including an independent chair and members reflecting the interests of workers, unions, employers and iwi, as well as other people involved in the workplace health and safety system;

[14] *The Report of the Independent Taskforce on Workplace Health and Safety He Korowai Whakaruruhau* (Independent Taskforce on Workplace Health and Safety, April 2013), pp 24 to 25.

- PCBUs[15] should have explicit legal responsibilities to consult, as far as reasonably practicable, workers who are likely to be directly affected by matters relating to health and safety;
- The new agency should provide increased support for worker participation, including workers who raise workplace health and safety matters, workers who are hard to organise or to reach, and unions' existing rights of entry;
- PCBUs should have explicit legal responsibilities to identify workplace health and safety matters in employment agreements; and
- The new agency should be required to consult health and safety representatives and committees and unions in all interactions with workplaces (such as during investigations or assessments).

32. The evidence from the Taskforce is clear that enhanced worker and union involvement in the workplace needs to be further supported, and the law strengthened, to achieve the gains that New Zealanders want to see in health and safety.

33. The Government's proposals in the Bill achieve the opposite result.

34. Further weakening the legal support that exists for workers and unions will undermine the proposed changes to health and safety law and New Zealanders' expectations that the Government is genuine about improving health and safety following the disaster at Pike River mine.

35. Ironically, the Government has recognised this fact in the Health and Safety (Pike River Implementation) Bill in clause 10(b) where it states that one of the key functions of the new health and safety agency should be to:

> "Make recommendations for changes to improve the effectiveness of the workplace health and safety system, including legislative changes."

36. Health and safety law is a subset of employment law – it does not sit in isolation but is part of a broader regulatory framework that affects how employers, workers and unions behave in a workplace. The Australian model law for health and safety that the Taskforce has recommended should be adopted here operates well in Australia in the context of a supported unionised workforce. The Taskforce was explicit that, in order to achieve significant improvements in health and safety in New Zealand, or even the rate of improvement aspired to by the current Government, the whole suite of measures recommended by the Taskforce needed to be adopted by the Government – it could not just pick and choose.

37. It is unfortunate, then, that the Government have chosen to introduce the Bill at all, let alone to be proposing these changes before the new agency has been established and allowed an opportunity to comment on the impact it will have on worker and union engagement – recognised by the Taskforce as a key component for a strong health and safety environment. The evidence supports strengthening not weakening union involvement in workplaces if we are to achieve real and sustainable culture change.

[15] Used by the Taskforce in its report to mean "person conducting a business or undertaking".

THE EMPLOYMENT RELATIONS AMENDMENT BILL

Introduction

38. Social legislation affects people's lives and should therefore have a broad consensus.

39. There is no consensus on these changes. The proposals in the Bill are:
    (a) Inconsistent with the health and safety changes and policy direction recommended by the Taskforce;
    (b) Likely to further entrench and deepen inequality in our society;
    (c) Inconsistent with our international obligations;
    (d) Inconsistent with fundamental principles of natural justice; and
    (e) Inconsistent with the object of the ERA, in particular, it does not "acknowledg[e] and address the inherent inequality of power in employment relationships" or "promote collective bargaining".

40. PPTA are strongly opposed to the proposals in the Bill and submit that the Committee recommend to the House that it not proceed. Our comments on individual proposals on the Bill are outlined below.

Endorsement for other submissions

41. We support the submissions made by the CTU and the SFWU.

CTU submission

42. The CTU has undertaken comprehensive analysis of the current economic and legal framework in New Zealand, the combined impact of the proposed changes, and the international obligations that will be breached through passing this Bill. They have also provided detailed analysis of specific proposals, which we support.

SFWU submission

43. The SFWU have a large number of workers who will be impacted by the proposals to Part 6A of the Act and are best placed to provide detailed comment on the effect of those provisions. As a society, it is beyond belief that we are even contemplating removing legal protections for some of the most vulnerable workers. The Minister has attempted to justify such a move by claiming that businesses have a right to compete for contracts on the basis of wage payments.

44. This is a one-way race to the bottom. We are not talking about regulating executive salaries and bankers' bonuses, or providing an even-playing field for businesses.

45. Instead, the Government is proposing to change the law to reduce wages for the most vulnerable. These changes will disproportionately impact on women, young workers, immigrant workers, people with low levels of education, and those who are new or returning to the workforce. It will apply to people working as cleaners, in aged care and service workers - often treated as our invisible workforce – who work unsociable hours and split shifts for low wages but are trusted with access to confidential

documents, our loved ones' well-being and human health. These are essential services and the people providing them deserve to be receiving a living wage.

46. In a modern and democratic society, it is not acceptable to "rebalance" the law to further exploit the most vulnerable in our society. We strongly oppose moves to allow poverty wage companies to profit at the expense of good employers. The latter should be supported in their endeavours to provide an ethical workplace. Competition should be reserved for areas such as quality or efficiency in service. We note that retaining the current law in this area is consistent with the Finance Minister's stated ambition of raising wages.

Employment Court submission

47. We also endorse the submission made by the Judges of the Employment Court in respect of the changes proposed in clause 61 of the Bill. We note that the Court has expressed concern that the policy in the Bill appears to have been decided without consideration given to the current practice for how employment law decisions are made in both the Employment Relations Authority and the Employment Court (i.e. on the papers without a hearing or investigation meeting).

48. Our experience of working to support our members during a personal grievance or other industrial matters is that, given the personal nature of the relationship and livelihoods at stake, both parties are frequently highly-charged and emotive. This experience is reflected in the Employment Court's submission.

49. Subsequently, we share the Employment Court's concern that there is a very real risk that announcing a decision automatically in this environment, with a prima facie appearance that it has not been properly considered, significantly undermines the reputation of the Employment Court and Authority institutions and the administration of justice.

50. Clause 61 of the Bill will lead to bad decisions (or the perception of bad decisions), increased appeals, and a strong feeling from parties in a case that justice has not been done. Ultimately, this will cost the public purse more money, with no efficiencies gained but a loss of confidence in our judicial system.

A fair employment law?

51. We would like to emphasise that these changes are contemplated in the context of a workforce that is already largely de-regulated and de-unionised, where there is a growing inequality crisis in New Zealand. As can be evidenced from the report of the Taskforce (discussed above) and the earlier commentary on inequality in New Zealand, the stitching of our social fabric is already under stress and there is no justification in sweeping legislative changes that will further undermine protection for workers.

52. Fairness at work requires collective action from workers because, as we saw in the Taskforce's report, there is vulnerability in acting alone. Many workers, acting

independently, do not feel confident raising legitimate problems or entitlements for fear of reprisal by the employer.

53. This is an unhealthy work culture. The current balance is not right. The law should provide a context that supports teachers' professional development and student learning, not encourage protracted negotiations and bullying behaviour. The Bill is particularly harsh on the rights of vulnerable workers who need statutory protection. The proposals will perpetuate low wages, inequality, poverty and the further exploitation of vulnerable workers.

54. Ultimately, the law we make should reflect the kind of society we want to live in. Not through concentrating wealth and influence in a few with a race to the bottom in employment conditions for the rest. Instead, we need to re-balance the law so that employment conditions suit the majority of people who are affected.

Key issues

55. We have provided particular comments on the following proposals in the Bill:
    (a) Changes to the duty of good faith when employment is at risk;
    (b) Removal of the duty to conclude during collective bargaining;
    (c) Application to conclude bargaining;
    (d) Written strike notice and lock-out notices;
    (e) Pay deductions for partial strikes;
    (f) Repeal of the 30 day rule for new employees;
    (g) Changes to rest and meal breaks; and
    (h) Changes to Multi-Employer Collective Agreements ("**MECAS**").

DUTY OF GOOD FAITH WHEN EMPLOYMENT IS AT RISK

Current law

56. Section 4 of the ERA outlines the general obligation of good faith that exists in employment relationships. Among other things, this includes the following provisions:

> "(1) The parties to an employment relationship specified in subsection (2):
>
> (a) must deal with each other in good faith; and
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything:
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> (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 and communicative; 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 effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, 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.

(1C) For the purpose of subsection (1B), good reason includes:
(a) complying with statutory requirements to maintain confidentiality:
(b) protecting the privacy of natural persons:
(c) protecting the commercial position of an employer from being unreasonably prejudiced."

Proposed changes

57. Clause 4 of the Bill proposes to repeal subsections (1B) and (1C), which relate to the protection and access to confidential information, and replace them with the following:

"(1B) However, subsection (1A)(c) does not require an employer to provide access to confidential information—
(a) that is about an identifiable individual other than the affected employee;
(b) that is evaluative or opinion material compiled for the purpose of making a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more employees;
(c) that is about the identity of the person who supplied the material described in paragraph (b);
(d) that is subject to a statutory requirement to maintain confidentiality;
(e) where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position).

(1C) To avoid doubt,—
(a) the requirements of subsection (1A)(c) do not affect an employer's obligations under—
(i) the Official Information Act 1982:
(ii) the Privacy Act 1993 (despite section 7(2) of that Act):
(b) an employer may provide access to information contained in the same document as the information described in subsection (1B) by providing access to —
(i) that document, with any deletions or alterations that are necessary to avoid disclosing the information described in subsection (1B); or
(ii) a summary of the contents of that document."

Comment

58. We strongly oppose this change.

59. This proposed change significantly restricts the type of information that will be provided to a worker who is at risk of being seriously disciplined or losing their job. For example, a teacher may be accused of swearing at a student by a parent. Under the proposed changes, the accuser would remain anonymous and the information collected as part of an employer's investigation would not be provided to a teacher who is at risk of losing their job. We note that there are particular issues in the school context where there is close contact and relationships with students and parents, and competing interests of different parties.

60. This is clearly unfair.

61. Teachers in this situation will lose the ability to test the veracity of the evidence, the fairness of the process and to respond to any specific claims made about their alleged misconduct. They will lose the ability to explain their actions, or to show that the allegations or facts relied upon were blatantly false or justified in the circumstances.

62. The consequences of losing the ability to access fundamental information about an allegation or investigation, and thus be provided with an opportunity to respond to the allegations or claims, are severe for the individuals involved and are a breach of fundamental principles of natural justice. Without access to the full set of information, it will be even more difficult to show whether a person has in fact been disciplined or fired on an illegal ground, such as discrimination on the basis of religious belief or union membership.

63. The changes also put employers at risk of losing good staff members and making bad decisions where a worker is not given an opportunity to properly respond to the information collected as part of the investigation. There will be a temptation to make decisions based on gossip, gut reactions or simply personal dislike of the individual involved.

64. We refer the Committee to the CTU submission for a comprehensive analysis of the effects of this proposal.

REMOVAL OF THE DUTY TO CONCLUDE DURING COLLECTIVE BARGAINING

Background

65. The duty to conclude collective bargaining as a legal requirement for both unions and employers was introduced in 2004, as part of the Government's review of the operation of the ERA's good faith obligations. In her first reading speech on the Employment Relations Amendment Bill that introduced the changes, the responsible Minister, Hon Margaret Wilson, made the following comment:

> "The settlement of collective agreements have been relatively weak, and unions have faced significant practical barriers in organising employees collectively to effect an agreement….
>
> The bill … provides a new form of assistance to overcome impasses in collective bargaining and facilitate settlement wherever possible. It also makes explicit the principle that collective

bargaining should result in a collective agreement, unless there is a genuine reason why it should not."[16]

66. The need for this change was strongly supported by Sue Bradford, Green MP, who made the following observations on how the good faith obligations had been operating pre-amendment:

> "I think most people realise now that the fears of the right did not come to pass. As has been shown in practice, the Employment Relations Act has not even achieved some of the quite moderate goals for unions and workers that we had hoped for back in 2000. For example, I thought the Employment Relations Act would sort out the whole question of the right to collectively bargain, in that employers, under the concept of good faith, would have to seriously negotiate with workers and their representatives once the process was under way. I was quite naively surprised when union people began to tell me that some employers simply will not and do not negotiate, dragging things out for months, if not years. This is simply unacceptable, and certainly was not the intention of those of us who supported the Employment Relations Act."[17]

67. The 2004 Amendment Bill passed with coalition support and consensus from the following parties: Labour Party, Māori Party, Green Party, Progressive Party and New Zealand First Party.

68. Before this amendment was introduced bargaining was protracted. This is demonstrated by the dates of the different PPTA collective agreements through the 1990's / early 2000's (1994, 1996, 1998-1999, 2001-2002) – which show a gap between commencing bargaining and the conclusion of agreements. Conversely, from 2004 onwards, new agreements have tended to be concluded within the date of the collective (i.e. before an agreement expires) or soon after.

Current law

69. Section 33 of the ERA states the following:

> **Duty of good faith requires parties to conclude collective agreement unless genuine reason not to**
>
> (1) 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, based on reasonable grounds, not to.
>
> (2) For the purposes of subsection (1), genuine reason does not include—
> (a) opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or
> (b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B.

[16] First reading speech, *Hansard* (11 December 2003), vol. 614, pg.10666.
[17] **Iid.**

70. This section is consistent with the current object of the ERA and the inherent nature of good faith. There is a reasonable balance struck between the interests of the employer on one hand and the interests of workers and the union on the other. It does not arbitrarily apply terms where there is no agreement. It even allows parties to not conclude in certain circumstances – i.e. where there are genuine reasons not to.

Proposed changes

71. Clause 7 of the Bill repeals section 31(aa), which sets out the following as one of the Objects of the Part 5 of the ERA relating to collective bargaining, i.e. "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, based on reasonable grounds, not to." This is consequential to the principal amendment in clause 9 of the Bill.

72. Clause 9 of the Bill proposes to repeal section 33 and instead states that there is no duty to conclude, as follows:

> "Replace section 33 with:
>
> **"33 Duty of good faith does not require collective agreement to be concluded**
>
> The duty of good faith in section 4 does not require a union and an employer bargaining for a collective agreement —
>
> (a) to enter into a collective agreement; or
>
> (b) to agree on any matter for inclusion in a collective agreement.""

Comment

73. We do not support these clauses and related changes.

74. The net effect of this change is that employers will be able to simply walk away from bargaining, with a collective agreement falling flat and workers' ability to fairly negotiate a collective agreement significantly compromised. Our experience is that these changes will lead to protracted negotiations take teachers out of the classrooms and lead to worse outcomes for students.

75. This change is clearly inconsistent with one of the key objectives of the ERA, which is to "build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship… by promoting collective bargaining." Without a legal requirement for both parties to go through the process to the end, and make reasonable efforts to conclude, there is likely to either be no conclusion or protracted negotiations. This was the experience of the PPTA and the union movement more generally until the 2004 amendment Bill clarified that the good faith duty in the ERA included a positive duty on both parties to conclude unless there is good reason not to. In drafting the current section 33, the Government was responding to a legitimate problem in workplace relations.

76. It is also inconsistent with the object in the Act that seeks to acknowledge and address the "inherent inequality in power" between the employer and the employee. For example, in the secondary education sector, the Ministry of Education has a total departmental budget of almost $2 billion and approximately 2,324 FTE staff[18]. The Ministry may also call on Crown Law for the purposes of judicial reviews and legal opinions. This is significantly more resource than is available to the PPTA. However, the changes in this Bill would mean that the Ministry for Education could pack up and head back to their office without bothering to genuinely negotiate.

77. We note that the proposed changes are likely to be in breach of ILO Convention 98 and endorse the comments made by the SFWU and the CTU on this point. New Zealand has historically been respected for its commitment to international treaties and conventions, particularly in the area of human rights. If this Bill is enacted, the ILO as an institution will be undermined and other countries will be encouraged to take a laissez-faire attitude to employment law and the rights of legitimate civil institutions, such as unions. Breaching our commitments in the industrial law area sets a precedent for future New Zealand Governments to breach international agreements in other areas, such as world trade obligations that do not adequately consider environmental or employment rights.

78. Our teachers and students are worth more than that.

79. The evidence shows that collective bargaining in education has led to improvements for students, which in turn has a flow-on effect for economic growth and society. The collective agreement terms that have been successfully negotiated by the PPTA in the past have included professional development components, which help to improve student outcomes. For example, extra support for beginning teachers, sabbaticals, study awards, support for kappa haka, Ngā Manu Kōrero and Polyfest, and special classroom teachers that provide mentoring to classroom teachers.

80. It is important to remember that collective agreements ensure that there are common terms and benefits across schools so that all Boards and communities can offer comparable terms and conditions. It also ensures that there is a clear career pathway for all teachers. Inconsistency in terms and conditions creates a disproportionate impact on lower socio-economic groups and the stated Government priorities, such as raising achievement for priority learners.

APPLICATION TO CONCLUDE BARGAINING

Proposed changes

81. Clause 12 of the Bill introduces a new provision that allows a party to apply to the Employment Relations Authority for a determination that bargaining has been concluded.

Comment

[18] 2012 Annual Report for the Ministry of Education (http://www.minedu.govt.nz/~/media/MinEdu/Files/TheMinistry/AnnualReport/2012/MOEAnnualReport2012FullWeb.pdf, last accessed 23 July 2013), pg. 45.

82. This is likely to introduce an additional layer of litigation to industrial disputes, as employers attempt to use the provision to cease legitimate negotiations. We support the CTU's submission on this proposal.

REQUIREMENT TO CONTINUE BARGAINING

Current law

83. Section 32 of the ERA sets out a list of areas that are included, as a minimum, in the definition of good faith for the purposes of collective bargaining. This includes the following:

> "(b) the union and the employer must meet each other, from time to time, for the purposes of the bargaining; and
>
> (c) the union and employer must consider and respond to proposals made by each other; and
>
> (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."

84. This section codified the common law that had developed following the passage of the ERA in 2000 rather than imposing any new requirements on employers.

Proposed changes

85. Clause 8 of the Bill proposes to repeal section 32(1)(ca) of the ERA.

Comment

86. We do not support this clause and related changes.

87. The purpose of section 32(1)(ca) is for the parties to constructively focus on those areas where agreement can be reached – not be stymied over a dead-lock in other areas. Our experience is that negotiations during collective bargaining usually involve more than one issue and that there is frequently a common interest between the employer and the employee in accepting other areas. For example, in 2002 to 2003, we were in an impasse with the Ministry during negotiations on a particular issue. However, both parties agreed to be bound by the results of a dispute resolution process (the PPTA dependent on ratification by its members). It was through the course of this process that parties realised that they were stuck on the wrong problem and subsequently agreement was reached.

88. We note with interest the CTU's comments on this point; that the amendment appears to be treated by officials and the Minister as a consequential amendment to that proposed in clauses 7 and 9 rather than a codification of the existing current law.

89. Although the amendment was passed at the same time as the duty to conclude and forms an essential part of the collective bargaining framework, consistent with the

object of the ERA and our international obligations, it is substantially different and stands alone as an important provision that facilitates successful collective bargaining.

WRITTEN STRIKE NOTICES AND LOCK-OUT NOTICES

Proposed changes

90. Clause 49 of the Bill outlines a series of new obligations on all other unions to provide written notice of any strike (including a partial strike) to both the employer and the Chief Executive of the Ministry of Business, Innovation and Employment. Among other things, this clause will require details about the start and end dates of the strike, the nature of the strike, and the location of the strikes. Similar provisions are intended to apply to employers in respect of lock-outs; however the lock-out notice also requires the employer to specify the names of persons who will be locked out – suggesting that employees may be unfairly singled out.

91. These clauses introduce new provisions and would sit alongside other changes proposed in the Bill that restrict union involvement and successful collective bargaining.

Comment

92. The PPTA is already required to provide written strike notices under the State Sector Act 1988. Our submission on the State Sector Amendment Bill (No. 3), which introduced this change is **attached** as an Appendix to this submission. We do not support this requirement and oppose it being rolled out to other sectors.

93. Strikes (including strikes where there are legitimate health and safety risks) will be significantly undermined through the Government's proposal in the Bill to require written notice, including a scheduled end date for striking.

94. We share the CTU's concern that the new formal notice requirements for strikes will lead to more unlawful strikes being inadvertently taken. The legal punishment for unlawful strikes, and the ability of employers to hire "scab" labour for the duration of the strike in these situations, is a disproportionate response to mistakes made through burdensome administration.

95. It is unclear why the National-led Government is attempting to increase "red-tape" for businesses and not-for-profit organisations, such as unions. This was not stated in its election manifesto commitments or the coalition agreement. In fact, it is the opposite of the commitment made in the National Party's manifesto:

> "Good regulation balances the need to cut red tape, with the need to ensure community safety and environmental protection."

96. Neither community safety nor environmental protection is relevant here. This is simply an administrative burden. We note that such a change is also inconsistent with the ACT Party's manifesto commitment, which included the following statement of principle "lighter regulations make the country more attractive to workers and investors alike."

97. It is important to note that strikes are not the starting point in industrial relations but, consistent with the good faith and other requirements in the ERA, unions and employers are under an obligation to communicate, negotiate and make best endeavours to engage with each other through the collective bargaining process. There are also requirements to engage with the employer about health and safety risks before striking on those matters.

98. The ability to strike remains one of the few ways that workers can collectively influence and safely improve conditions, including health and safety concerns, within an employment relationship and without the individualised threat of losing their livelihoods. Strikes are successful where there is collective action because individual workers cannot be individually targeted by their employer or face reprisals for seeking to improve their employment conditions or respond to health and safety hazard that have not been addressed by the employer.

99. Consistent with the principle of good faith, talks between the union and the employer could resume at any time, and industrial action may cease, making an end date an inflexible and unreliable. It is at the time of striking that the employer often feels the value of his or her workforce as labour is withdrawn and the production or the provision of services ceases. Strikes are by their nature unpredictable, as they represent the break-down in communication between the employer and unions and require endorsement from members before strikes can commence.

100. A requirement to state the end date and nature of the strike in a written notice, combined with the changes to introduce pay deductions for partial strikes, make it more likely that unions will choose to set longer limits and take more serious strike action, rather than be unfairly penalised and have no flexibility to intensify industrial action. This will have the opposite effect than the Government has intended and will harm business and profits for businesses more than the flexibility in the current law.

101. The current provisions in the ERA relating to strikes are consistent with New Zealand's ratification of ICESR and fundamental rights of freedom of association. These changes are not.

PAY DEDUCTIONS FOR PARTIAL STRIKES

Context

102. There are very few partial strikes taken and no evidence presented by the Government to justify the introduction of this law change. For example, the CTU have noted in their submission that in 2012 (the latest data available), there were 10 work stoppages – which is the lowest number on record since the Department of Labour work stoppages series began in 1985.

Proposed changes

103. Clause 56 of the Bill adds new provisions that penalise workers for taking industrial action that constitutes "partial strikes". In particular, the employer will have sole discretion for deducting pay for partial strikes – up to 10% of a salary. This is done by an employer giving notice to either the employer or the union. However, under the Government's proposals, the employer does not need to specify the amount that is deducted, merely the duration of the deductions.

104. Workers are prevented from individually challenging any unauthorised pay deductions themselves (for example, where too much is deducted or where the grounds for deduction are illegal) but must pursue any unjustified deductions by way of employment relationship problem through their unions.

Comment

105. These changes will push workers into taking more serious strike action, rather than suffer the disproportionate penalty of a partial strike, which will ultimately hurt businesses. These changes are also inevitably likely to lead to a lot of personal grievances being taken about deductions, which wastes resources for both employers and unions and ties up the Employment Relations Authority. We note that this is inconsistent with the Government's general policy direction of supporting businesses and reducing public sector spending.

106. We endorse the comments made by the CTU and Rail and Maritime Union in their submissions about how this will negatively impact on constructive employment relationships, which is inconsistent with the object of the ERA. We also want to highlight the CTU's comments that this type of mechanism is not supported by the Freedom of Association Committee of the Governing Body of the ILO.

REPEAL OF THE "30 DAY RULE" FOR NEW EMPLOYEES

Context

107. The thirty day rule ensures that new employees are covered by the terms and conditions of the collective agreement for the first thirty days of work, regardless of their union membership status. The terms of an existing collective agreement act as a baseline standard that may not be negotiated below but a small number of workers may be able to use to bargain above.

108. The thirty day rule exists to help protect vulnerable workers, particularly young workers, immigrant workers and those returning to the workforce, who may otherwise feel induced to accept lower terms and conditions. This ultimately acts to deteriorate the general conditions of the workforce – which we note is inconsistent with the Minister of Finance's stated aim of creating a high wage economy.

109. Our experience is that a union organiser or delegate is unlikely to be present at the time that a new teacher is offered a job. This is a particular issue in remote areas of New Zealand or when teachers are offered fixed-term or acting positions. However, the thirty day rule allows time for a union to speak to a worker about the benefits and legal entitlements relating to union membership, so that a worker can make an

informed choice about union membership, consistent with the principles and our international commitments relating to freedom of association.

110. Currently, many employees are also subject to a "90-day probationary period", as term in their employment agreement – meaning that they could be fired at will by the employer at any point in the first 90 days without the employer having to provide a reason for that decision.

Proposed changes

111. Clause 16 of the Bill proposes to repeal the 30-day rule provision.

Comment

112. Removing automatic coverage under a collective agreement for new employees will encourage employers to offer less favourable terms and conditions, with a serious risk that they will unduly influence new employees not to join the union (and thus not be covered by the collective agreement) – in breach of the union discrimination requirements in section 11 of the ERA. We note that showing that discrimination under section 114 or the duress requirements in section 110 of the ERA has taken place is incredibly difficult.

113. This is a serious change for new workers given that it is proposed to apply in the context of the 90-day probationary period applying at work. These workers are incredibly vulnerable and should not be pressured into accepting an individual agreement or feeling as though their job will be at risk because of the choice they make in respect of union membership.

114. This provision is likely to have a disproportionate impact on young workers, workers who are new to, or returning to, the workforce, female workers, workers who have English as a second language / immigrant workers, and those in low paid work.

CHANGES TO REST AND MEAL BREAKS

Context

115. In 2010, the Government changed the law to establish the following minimum entitlements to rest breaks and unpaid meal breaks:

(a) One paid 10-minute rest break if their work period is between two and four hours;

(b) One paid 10-minute rest break and one unpaid 30-minute meal break if their work period is between four and six hours;

(c) Two paid 10-minute rest breaks and one unpaid 30-minute meal break if their work period is between six and eight hours.

116. If more than an eight hour period is worked, these requirements automatically extend to cover the additional hours on the same basis. Generally, an employment agreement sets out when breaks are to be taken or there is otherwise agreement

between the employer and workers. However, the default position is that breaks should be evenly split over the shift – i.e. not taken all at once.

Proposed changes

117. Clauses 43 to 46 of the Bill propose to repeal minimum entitlements relating to rest and meal breaks. This includes giving the employer the ability to choose if and when a worker may take a rest or meal break.

Comment

118. We are surprised and shocked that such a change is being contemplated by the Government in the face of the Taskforce's report and the Government's stated aspirations to improve health and safety in New Zealand, following the Pike River mining disaster.

119. There will be limited to no improvement in our workplace health and safety if these provisions are introduced. Workers need rest and food to be able to function properly and safely. This is a human right and should not be at the whim of an employer.

120. We would like to endorse the comments made by the CTU, who have provided a comprehensive response to these changes through their submission on the Bill and their submission on the Employment Relations (Meal and Rest Breaks) Amendment Bill in 2010.

121. At a practical level, we note that schools have already accommodated the Government's 2010 changes and to change them again is likely to result in considerable disruption to schools' programmes and student learning.

CHANGES TO MECAS

Context

122. MECAs are one mechanism that was developed for ensuring that there are consistent and minimum employment conditions across a common industry, to reduce the resource intensity of negotiating collective agreements, and to provide certainty and fairness to employers and workers.

123. Although there are improvements that could be made to increase the coverage of MECAs to low density unionised industries and a simpler process for making variations to MECAs, the current law relating to MECAs has help to address a gap that existed when the Employment Contracts Act 1991 abolished the awards system.

124. MECA's are particularly important for workers who are based in small and medium-sized organisations. Workers in these environments are otherwise at risk of low employment conditions because of the isolating nature of their employment, the limited ability for collective action, and the pressure on businesses of this size to compete with other operators through providing low employment conditions and wages.

125. Good employers favour the development of MECAs for efficiency, to establish a common industry standard and to ensure that services and products are not delivered or created based on a race to the bottom price model. This is best practice for developing a sustainable society and economy.

Proposed changes

126. Clause 11 of the Bill would enable an employer to "opt out" of bargaining under a MECA. This would be through invoking the following process:
    (a) Union sends the employer a notice initiating bargaining for a MECA;
    (b) Employer writes to the other parties to the collective agreement, informing them that they are opting out of the MECA within 10 days of receiving the notice of initiation of bargaining.

Comment

127. While the PPTA is not a party to any MECAs there are considerable benefits in having fewer collective agreements to negotiate rather than individually negotiating with each school Board of Trustees. This includes significant efficiencies for the Ministry, as funds that could be invested in student learning are not diverted to Boards for individual negotiations, expertise can be developed, and a whole sector approach to education can be adopted – consistent with the Government's stated priority of "Better Public Services". It also ensures that we are able to dedicate attention to working strategically and constructively with schools to help raise achievement, professionally develop members and build capacity in areas such as health and safety.

128. We refer the Committee to the CTU's submission where it outlines the international obligations of the New Zealand Government in respect of multi-employer bargaining and how these obligations will be breached if the MECA provisions in the Bill are progressed.

129. The efforts of good employers will be undermined by "fly-by-nighters" operating in the same industry who do not support an industry standard and favour marginally increased profit at the expense of their workers' livelihoods. This will be permitted if the proposed MECA changes are progressed.

130. There is a serious risk that imposing a requirement to send an opt out notice to <u>all</u> parties will also encourage other employers to abandon MECA bargaining. This undermines the application of MECAs generally. In addition, union resources will be unreasonably stretched and more workers will lose the benefits and entitlements of union coverage as the ability to organise small worksites, and negotiate individual agreements, will become unmanageable. As discussed earlier, we note that the health and safety aspirations of the Taskforce will be undermined if workers are not supported through union coverage.

131. The law should support, rather than penalise, good employers for paying fair wages and providing good working conditions for employees. Such an approach is consistent with the Minister of Finance's stated intention of creating a high wage economy.

Oral presentation

132. We would like to appear before the Committee in support of our submission.

APPENDIX: PPTA Submission on the State Sector Amendment Bill (No 3) 2004

1. Introduction

1.1 The NZPPTA representing some 15,000 members in State (including integrated) secondary area and composite schools and manual training establishments welcomes the opportunity to make submissions on this Bill.

1.2 There are two main aspects to this Bill – the conferring of powers to the State Services Commissioner to suspend or lock out Board employees who are bargaining for a collective agreement, and amendments to provide certainty to teachers in the event of a school merger or closure.

1.3 As the weight of the Bill (and this submission) is devoted to the first of these aspects, the Association will make some preliminary remarks regarding the policy objectives purported to inform the proposed legislative change.

2. Preliminary remarks: Powers to suspend, lock out or discontinue pay of employees

2.1 In the Explanatory Note to the Bill, the Government suggests that the "ill" to be remedied by the Bill is the alleged advantage in bargaining power Board employees have over other employees as "their incentive to take industrial action is greater". The remedy proposed is to confer on the Commissioner (effectively the Secretary for Education by delegation under the Act) "all the rights, duties and powers of an employer under the Employment Relations Act 2000".

2.2 In respect of this perceived "ill", the Association makes these points:

2.2.1 First, in terms of relative bargaining power, the Association argues that the balance of advantage rests squarely with the Commissioner/Secretary for Education. The Commissioner/Secretary acts directly for and is subject to the dictates and policies of the Government of the day. Furthermore, the Government, as the ultimate employer, has considerable powers at its disposal including the power to regulate and legislate. In the past, the Association has experienced the intervention of government, via legislation, to either change the rules for bargaining or to abrogate a bargained outcome. No other employer has the full powers of the State at its disposal.

2.2.2 Second, whether teachers may or may not lose pay or whether or not they may be suspended or locked out is not an incentive for them to take industrial action. The "incentive", if that is the word, is invariably the principle of the matter; the issue at stake. Industrial action is very much a last resort and is entered into most reluctantly – teachers' uppermost concern is in respect of their students and their education. More often than not, a decision to take industrial

action is driven by an intense belief that the position adopted by Government in bargaining will, ultimately, disadvantage students and their learning. When making decisions about strike action, teachers are aware that pay is at risk and that suspension or lock out could also result.

2.2.3 Third, the industrial action which occurred throughout the 2001-2002 bargaining round reflected a failure on the part of the Commissioner/Secretary for Education to address longstanding problems with secondary teacher supply and the excessive workload generated by the rushed implementation of the NCEA. Many Boards of Trustees chose to support the position of teachers rather than the Ministry position because, as good employers, they were concerned about the stress their employees were being subject to.

2.3 With those points in mind, we will now address the specific aspects of the Bill in detail.

3. Part 1: Preliminary provisions

3.1 Clauses 2 and 3 of this part set out the commencement and purposes of the proposed legislation and, given the construct of the Bill, are appropriate as written. However, the clauses may need to be re-examined should the Select Committee determine to recommend material changes to subsequent provisions in the Bill.

4. Part 2: Amendments concerning employees of Boards of Trustees

4.1 Clause 4 seeks to insert new sections to confer new powers to the Commissioner (Secretary for Education by delegation). Purportedly, these include "all the rights, duties and powers of an employer under the Employment Relations Act 2000". However, for the reasons and explanations which follow, the Association believes the proposed amendments go much further by effectively conferring all of the powers and rights on the one hand, but then obviating the Commissioner (Secretary) from attending to certain of the duties required of an ordinary employer in parallel circumstances on the other.

4.2 The Association submits that this is unfair and will further exacerbate the imbalance that already exists in the bargaining relationships as highlighted in paragraph 2.2.1 of this submission.

4.3 This unfairness and the difference in treatment as between the Commissioner (Secretary) and an ordinary employer arises as follows:

4.3.1 Proposed section 74AA(1) confers to the Commissioner (Secretary) "all the rights, duties and powers of an employer under the Employment Relations Act 2000" in respect of Board employees during the course of negotiations for a collective agreement that will bind those employees. This, the Association

submits, is sufficient to achieve the purported purpose of the Bill assuming the Select Committee and Parliament agrees the purpose has merit.

4.3.2 This is particularly so when this proposed section is read along with section 74(3) of the current Act. Existing section 74(3) provides "Unless otherwise directed in writing by the Commissioner, an employer in the Education service must not lockout or suspend striking employees…" In other words, the current Act already reserves to the Commissioner (Secretary) the power to direct lock out and suspension in the course of bargaining for a collective agreement.

4.3.3 New section 74AA(2), which clarifies that the powers referred to in subsection (1) "include the power to lock out or suspend employees" not only states the obvious but also smacks of vindictiveness. The rights, duties and powers of employers under the Employment Relations Act are abundantly clear, including the power to lock out or suspend employees. These latter powers don't need to be singled out and particularised in the State Sector Act. Subsection 74AA(2) is superfluous and should be struck out.

4.3.4 It is new section 74AA(3) which severely diminishes the duties of the Commissioner (Secretary) in these matters relative to the duties required of an ordinary employer under the Employment Relations Act. Subsection 74AA(3), if passed, will allow the Commissioner (Secretary) to effect a suspension (and also a lock out presumably) by simply advising the union of the class or classes of employees who are, or are to be suspended without the need to:

(a) separately advise any employee of that fact

or without the need to:

(b) comply with section 89 of the Employment Relations Act.

This ease of process to be afforded to the Commissioner (Secretary) including obviating the need to comply with section 89 of the ERA is markedly different from, and of a significantly lesser nature to, the duties of an ordinary employer in identical circumstances under the Employment Relations Act. For that employer, the relevant provisions are sections 87, 88 and 89 (ERA).

Section 87 provides that an employer may suspend the employment of an employee who is party to a strike, and further provides that an employee who is so suspended is not entitled to be paid for the period of the suspension.

Section 88 provides that an employer may suspend a non-striking worker where, as a result of a strike, the employer is unable to provide the work that is normally performed by that employee. Again, a worker so suspended is not entitled to be paid for the period of the suspension.

Section 89, requires an employer suspending an employee under section 87 or section 88 to "indicate to the employee, at the time of the employee's suspension, the section under which the suspension is being effected".

The underlined words from section 89 and the language used in the three sections 87 to 89 are important for the Select Committee to note. The singular word "employee" is used consistently throughout, and in section 89, "the employer must indicate to the employee" concerned the particular section (87 or 88) under which the notice or advice of suspension is being effected. In other words, Parliament envisaged that ordinary employers would deal with employees individually in these matters. No particular convenience or ease of process as that now proposed for the Commissioner (Secretary) was intended.

It might be argued that the employment relations context in the Education service is complex, thus justifying different and lesser requirements in the case of the Commissioner (Secretary). If so, the Association does not accept complexity as a valid reason for such significant differences. Employment arrangements, and human resource and payroll processes among ordinary New Zealand employers are amazingly diverse and complex. For example, a moderately sized New Zealand employer may have a number of entities employing people in a number of different locations. In some cases, these entities may be "self-governing" to various degrees but may have key functions, such as human resource, personnel or payroll processing differently or separately managed. Further, it is possible that some of these functions may be contracted out to specialist providers; payroll processing being not uncommon for example.

Irrespective of the complexity and diversity of arrangements, all employers are subject to the same requirements of the Employment Relations Act. The State and its agencies should remain subject to the same requirements. Subsection 74AA(3) should also be struck out.

4.3.5 Proposed subsection 74AA(4) provides that where the Commissioner (Secretary) has suspended or locked out an employee, she or he may direct:

(a) that the employee not be paid for the period of the suspension or the lock out; and/or

(b) that any amount already paid be deducted from any remuneration otherwise payable to the employee.

This subsection begins with the words “Despite any other enactment . . . ”.

The purpose of this subsection, along with subsection, 74AA(5) would appear to be to allow the Commissioner (Secretary) to direct persons responsible for payroll management (which could include persons in independent companies contracted to provide such services) to effect the pay deductions/pay recoveries as the case may be.

Without prejudice to the merits of the Bill, one would have thought such a provision to be unnecessary. For teachers, the paymaster is the Secretary for Education. For other Board employees and above-entitlement teachers, the paymaster is the individual Board of Trustees. Even if the actual payroll functions are contracted out to some third party, the paymaster remains the responsible party in terms of the law. Thus, where actual processing may be contracted to a third party, the actual employer remains responsible.

Further, the words “Despite any other enactment” at the beginning of the subsection are also concerning. This means that the Commissioner (Secretary) will be exempt from the processes regarding the recovery of overpayments as required by the Wages Protection Act 1983, particularly section 6. That section enables an employer to recover overpayments in certain circumstances, but subject to the employer giving appropriate notice to affected employees and also effecting that recovery within a prescribed time period of the giving of such notice.

If this is to be the case, not only would this advantage the Commissioner (Secretary) relative to other employers, but it would also be inappropriate for a significant employer in the State to be exempt from such basic requirements of the law as to certainty to employees regarding wage and salary payments.

4.3.6 Subsection 74AA(5) allows any direction under subsection (4) to be given to any person responsible for effecting wage and salary payments to employees and requires that person to follow any such direction.

Again, this implies a short-cut and over-riding of process. As just submitted, the actual employer in negotiations is also the ultimate and responsible paymaster, not some third party or other external agency (such as a bank) which may form part of the chain of transfer from the employer’s to the employee’s account. Should any such third party or external agency fail in its part of the transfer process, simple contractual remedies are available. The

responsibility for initiating as the case may be, rests with the employer. The Secretary (acting under delegation) does not need to direct her or himself in this regard.

4.3.7 Subsection 74AA(6) simply clarifies the effects of subsection (1) and the further sections of the Bill to which subsection (1) is subject. Importantly, subsection 74AA(6)(a) removes from Boards of Trustees, the actual day-to-day employers, any discretion at all in the matter. This is unacceptable in the Association's submission. Boards of Trustees have full knowledge of the fact situation as it applies in their respective situations. They have the capacity and the wisdom to act independently and appropriately and it is inappropriate to deny that capacity which Boards are required to exercise in every other circumstance.

The subsection should be struck out.

4.3.8 Subsection 74AA(7) defines a Board of Trustees for the purposes of sections 74AA and 74AB to 74AD following, and achieves it purpose in that regard.

4.4 Proposed new section 74AB sets out to indemnify Boards of Trustees from any liability arising from the exercise of the Commissioner's (Secretary's) powers except where the liability arises out of conduct of the board that is not in good faith or is engaged in without reasonable care. In the context of the Bill, this is a sensible enough provision.

4.5 Proposed section 74AC will deem a strike unlawful unless the Commissioner/Secretary is given written notice of a proposed strike before it commences. The provisions in this section are remarkable in that they effectively negate the provisions of section 83 of the Labour Relations Act as they currently apply to the staffs of schools. In particular:

4.5.1 Generally employees are not required to provide notice of an intended strike under the Employment Relations Act. The only exceptions relate to strikes in what are described as "essential services" and to which sections 90 and 91 of that Act apply. The Education service is not described as an essential service.

4.5.2 Proposed sub-section 74AC(2) will require a notice to state the nature of the action, the school or schools to be affected and the start and end dates of the proposed strike. Again, this is remarkably different from and at odds with the Employment Relations Act provisions applying to comparable employees in other industries. Further, such new requirements surpass and are considerably more onerous than those required in essential services under that Act.

4.5.3 Proposed sub-section 74AC(4) goes on with a unique provision whereby every employee will be deemed to have participated in the strike throughout the period stated in the notice unless an employer

advises otherwise. Again this is hugely different from the situation as it applies now and will continue to apply to the generality of working people. The law as it stands recognises that decisions regarding proposed action may be collectively made but that decisions to actually participate in the action are individually made. What is being proposed will change the status of school staffs fundamentally vis-à-vis ordinary employees and will further serve to undermine the protective principles of the Wages Protection Act already commented on. The scope for litigation and bureaucratic endeavour in the event of mistakes would be enormous as well. Such a change should not be contemplated. Section 74(AC) in its entirety should be struck out.

4.6 Section 74AD which follows requires employers to notify the Commissioner/Secretary of the names of employees not participating in a strike. This too, will effect the reverse of the situation pertaining to all other employers who will continue to identify and provide notice to those employees who do strike. The section continues with provisions which are punitive in nature if not draconian, in particular, the provisions in subsections 74AD(5) and (6) which allow for deductions from grants to boards as the Minister thinks fit where non-compliance is alleged. Such a provision also interferes grossly with the ability of schools to govern their schools in a responsible and deliberative way. Further, the bulk of such grants are to meet students, not staffs' needs. Section 74AD should also be struck out.

4.7 The final provision relating to this aspect of the Bill is in clause 6 which proposes an amendment to section 65A of the Education Act. The proposed new section (2A) which would deem a school to be open for instruction notwithstanding a strike or lockout is sensible and acceptable. However, new section (2B) is not. A provision which will allow the Minister to extend staffs' obligations to attend their work sites because of a strike or lockout smacks of a deliberate undermining of the effectiveness of workers undertaking industrial action. No other employer has this power. Proposed new section (2B) should not be proceeded with.

5. <u>Amendments Surrounding School Closures/Mergers</u>

5.1 The Bill contains two amendments purportedly designed "to facilitate the retention of teachers and to provide them with employment certainty." It is the Association's submission that the amendments proposed achieve that purpose in part only for the following reasons:

5.1.1 Clause 77HB — to the extent that the amendments in this section address complexities around staff transition in mergers, PPTA is in support of the general direction. Regardless of the initial intent, sections 77G (Appointments on merit) and 77H (Obligation to notify vacancies) of the State Sector Act have constantly confounded attempts to develop a smooth staffing transition process to be used in network reviews.

5.1.2 As it stands, the law in respect of mergers can be read three ways:

(a) First, it is possible to view all positions in a merged school as new positions which must be advertised nationally and appointed on merit. This effectively disestablishes all jobs with a resulting high redundancy cost. It is also destabilising for staff and puts curriculum delivery prior to the merger at risk as staff seek jobs elsewhere leaving the schools with vacancies and little prospect of filling them.

(b) A second interpretation argues that staff employed by the continuing board have absolute protection of employment because there has been no change in their employer. This view privileges some teachers' jobs over others, a situation which is not conducive to a smooth process. It also creates wider community tensions from the outset because there is greater perceived value in being the continuing school/board than being one of the merging boards/schools.

(c) The third possible interpretation is one the parties have fashioned to try to overcome the practical difficulties of the first and second interpretations. It argues that all employees are technically employees of the continuing board once it has been established. This approach treats all staff equally, provides a little more certainty about their employment and minimises conflict by requiring all boards in the merger to work together in the interests of the students.

5.1.3 It is important therefore that the situation be clarified. The proposed 77HB makes it clear that in a merger the employer effectively remains the same and therefore there are no actual vacancies. It will remove possible sources of confusion and dispute and will ensure that the legal framework supports the transition process which exists in the collective agreement document.

5.1.4 Clause 77HA — In contrast, the proposed new clause 77HA is unnecessary and will add nothing to the merger/closure process except confusion and litigation.

5.1.5 It has been justified on the grounds that it brings schools into line with the practice prevailing in the public service which allows departmental heads to place surplus staff in other departments and as reflected in amendments to the Act made in 2003. This view takes no account of the existence, since 1989, of 2,300 individual employer boards all with their own distinctive cultures. While the factors defining "equivalent employment" under 77HA (same position, general locality, terms and conditions of employment) may work in relatively homogenous public service departments, they will be problematic in schools where many intangibles affect the employment relationship. A teacher seeking employment will

consider a range of factors such as decile, coeducation, single-sex and even factors like the nature of the board of trustees, the principal's style of management and professional leadership and even the capacity and ability of a particular Head of Department. Similarly boards will have their own distinct preferences about which applicant best fits the school's culture. Empowering the Ministry of Education to ride roughshod over local appointment decisions, a possible consequence of the amendment, is a recipe for disaster.

5.1.6 It is most likely that, in practice, effective managers in the public service give consideration to factors beyond mere "equivalence" when dealing with transfers. In other words, the power to transfer employees is moderated by their understandings about suitability. The problem for schools is that they will not have the flexibility to make those decisions based on local knowledge because the Ministry will simply micro-manage the budget process to minimise redundancy costs. Schools and teachers will be left to manage the consequences. And there will be consequences; teachers compelled to apply for jobs they do not want can simply set out to convince boards they would be an unattractive employment prospect - a subterfuge that simply wastes everyone's time; alternatively along with their union they can endlessly challenge the legal definition of equivalence. Boards unhappy at the prospect of having an applicant they regard as unsuitable imposed on them will similarly resist.

5.1.7 For the record, it is not possible for an employee under either the Secondary Teachers' Collective Agreement or the Secondary Principals' Collective Agreement to accept the surplus staffing option and retain a permanent job. However, it is possible in limited circumstances for teachers to volunteer to leave when a school is found to be over-staffed. In this event, some teachers (with the approval of the board) may take up an option of 30 weeks paid retraining, or 30 weeks as a supernumerary teacher in that school or another school, (providing the new board agrees) or a long service payment option providing they have sufficient service. Let us be clear that we are not talking here about the enormous "golden handshakes" provided in the public sector; a teacher with thirty years' service gets around $20,000 after tax; most get considerably less than that.

5.1.8 To conclude on this point, the proposal in 77HA totally ignores the fact that the employment agreements already contain extensive sections on the management of the surplus staffing processes developed over some thirty years by the Ministry of Education acting for the Government, the New Zealand School Trustees' Association representing boards and PPTA representing secondary teachers. It is not clear why of all the clauses that set out the process for managing surplus staffing, this particular element has

been deemed to require legislative force. What is clear is that there can be no merit in using the heavy hand of legislation to reinforce clauses that have already been agreed by the parties directly affected. Moreover, the capacity for making change, should it become necessary, is constrained once a position is reified in legislation. It would be ironic to amend two sections of the State Sector Act that were found to be unhelpful only to add another rigidity.

5.1.9 In short, we believe this section to be unhelpful at best and positively harmful at worst. It should be struck out. The issues have been and can continue to be successfully dealt with via the collective bargaining process.

6. Conclusion and Recommendation

6.1 The Association has no issue with the no work, no pay principle in the event of strike or lockout. However, it does take serious issue with those provisions in the Bill that fundamentally disturb the status quo for working people in education relative to workers in every other industry. We also see proposed section 77HA as unhelpful and unnecessary.

6.2 It is the essence of the Association's submission, and its recommendation, that the stated purposes of the Bill can be achieved by the insertion into the State Sector Act of proposed sections 74AA(i), 74AA(7) and 74AB possibly, but with consequential amendments and proposed section 77HB; and by the insertion of proposed section (2A) to section 65A of the Education Act. The remaining provisions are unnecessary.