LEGISLATION ADVISORY COMMITTEE
PO Box 180
Wellington 6401

Phone 04 494 9897
Fax 04 494 9859
www.justice.govt.nz/lac
Email LAC@justice.govt.nz

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David Bennett MP, Chair
Transport and Industrial Relations Committee
Parliament Buildings
P O Box 18 041
WELLINGTON 6160

Dear David Bennett

EMPLOYMENT RELATIONS AMENDMENT BILL

1. Thank you for your letter of 27 June agreeing to an extension of time for the Legislation Advisory Committee ("LAC") to provide a submission on the above bill after our meeting on 31 July 2013.

Legislation Advisory Committee

2. The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It produces and updates guidelines for legislation, known as the Guidelines on the Process and Content of Legislation. These have been adopted by Cabinet.

3. The terms of reference of the LAC include:

- to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;

- to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

General comments

4. The ERA is a large and complex piece of legislation of vital interest to working age people, particularly during stressful and vulnerable employment circumstances. While the Act remains predicated on a detailed framework of "good faith" bargaining, the LAC considers there is some potential for confusion between how the new provisions align with the existing framework.

5. It is important that both employees and employers can easily gain a clear understanding of their rights and obligations, and the possible outcome of actions from its provisions, without recourse to judicial authority. LAC acknowledges that the structure of the Amendment Bill is straightforward but questions arise about the practical effectiveness of some provisions. This submission calls the attention of the committee to some situations where clarification would enhance efficacy.

6. The overall view of the LAC is that more certainty could be provided to give effect to the policy objectives sought. Our suggestions relate to:

   A. The conclusion of bargaining
   B. The definition of a partial strike
   C. 6A changes and individualised personal information
   D. Appeal and Review
   E. Disclosure of information to employees likely to be adversely affected

A Conclusion of bargaining

7. New section 50K (cl 12) provides that parties to collective bargaining can apply to the Authority for a determination as to whether bargaining has concluded and a Declaration to that effect means that further bargaining cannot be initiated for 60 days without agreement. Existing s 50J which allows the Authority to make determinations fixing the terms of the collective is unchanged, so seems to provide a parallel option to involve the Authority. There seems some room here for confusion as to which course of action would take precedence. **We suggest** that the potential interaction of these provisions is considered further.

B Definition of partial strike (Part 8: Strikes & Lockouts)

8. New section 95A (cl 56) reads:

   ***partial strike**—(a) means any strike (as defined in section 81) other than a strike that wholly discontinues the employment of the employees;*

9. It is assumed that this definition is intended to cover almost all situations where employees have withdrawn some part of their labour. However, as at present with section 81, there may still be room for disagreement about whether certain actions amount to partial strikes, such as go slow, reduction in performance, work to rule. The new definition of partial strike is the fulcrum for significant new provisions – a requirement for notice in writing

of the duration of the partial strike, and the potential deduction of pay for the amount of work that would have been performed had the partial strike not occurred. Given these serious consequences, the broad nature of this definition seems likely to increase the likelihood of disputes about whether certain actions are partial strikes.

10. Also, the requirement to give notice could be meaningless if parties only gave notice of a partial strike immediately before it commenced. It may be helpful from a practical perspective to require a minimum period of notice such as a certain number of hours, for partial strikes. **We submit** that a tighter definition as to what will be seen as partial strikes, and a requirement for a minimum period of notice would reduce these risks.

C 6A changes: Individualised employee information

11. Clauses 29 to 36 of the Bill relate to the continuity of employment when work is affected by restructuring. They establish a new category of exempt employers, a new situation for workers currently protected in transfer situations, and also introduce the concept of *individualised employee information* to the ERA. In the first instance, we **submit** that further consideration should be given to the scope of application of Part 6A so as to avoid current uncertainty (and litigation) as to whether it applies to particular employees. This uncertainty could in itself result in affected workers' rights not being honoured in a transfer situation.

12. Secondly, we comment on application of the new *individualised employee information* provision. This category of information must be provided to new employers where any employees eligible under the 6A provisions elect to transfer. The information must be "employment-related", and this is expressed to cover any personnel records and information about any disciplinary matters or personal grievances relating to the employee (new section 69OB). This broad definition could potentially include personal information and circumstances that the employee might choose not to disclose to their prospective new employer.

13. As s 7(2) of the Privacy Act will apply, this new provision overrides Principles 6 and 11 of the Privacy Act in relation to information held by the old employer. The new information category thus departs from the approach whereby the purpose for which the information was provided in the first place is relevant to individual rights and subsequent disclosure. Principle 7 of the Privacy Act, about the correction of personal information, and Principle 9 which states that an agency should not keep information for longer than it is required, will continue to apply.

14. We consider it could be difficult for an employee to correct information or ask for it to be discarded after it has gone to prospective new employers who would have no background on the issues. (Moreover the amendments introduce some doubt about what advance information will be given to employees in this situation, refer new section 4(1B)(e) discussed below) There is no requirement for the old employer to let the employee know what information is disclosed or that it will be disclosed at a certain time. As it

stands, the onus appears to be on the employee to ensure that the information is accurate at the time of transfer.

15. **We submit** that new section 69OEA should require old employers to give affected employees access to their *individualised employee information* (preferably in sufficient time to allow them to correct or comment on any perceived inaccuracies before it is disclosed). This simply reinforces Principle 7 of the Privacy Act.

D Appeal and review

16. Clause 61 requires the Employment Relations Authority to meet certain deadlines after conducting an investigation meeting. LAC has some questions about the practical implications of the new provisions.

17. Amended section 174 (cl 61) includes these provisions:

> *(1) At the conclusion of an investigation meeting, the Authority must—*
> *(a) give its determination on the matter orally; or*
> *(b) give an oral indication of its preliminary findings on the matter.*
> *(2) Where the Authority gives its determination orally, the Authority must record that determination in writing no later than 3 months after the date of the investigation meeting.*

18. We support the wish to impose some time constraints for delivery of the Authority's determinations but consider that an oral determination of the Authority's decision, without any requirement to provide reasons, will not assist either party to the dispute in most situations. This seems to be possible under section 171(1)(a) and could potentially raise unrealistic expectations about the full decision, uncertainty as to whether a binding determination has been delivered and also confusion as to when the time limit to file an appeal commences. We note that oral indications of preliminary views are already given by judicial officers where it is thought helpful.

19. **We submit** that the amendment could simply require the Authority to provide a written determination no later than 3 months after the date of the investigation meeting, without any requirement to give an oral determination.

E Disclosure of information to employees likely to be adversely affected by decisions

20. The need for amendment to section 4(1B) is said to arise from the decision in an Employment Court case[1]. This judgment discusses the alignment of the ERA and the Privacy Act 2003, and the decision is predicated on a balancing exercise between the weight given to "good reason" to maintain

[1] Vice-Chancellor of Massey University v Wrigley [2010] NZEmpC 37

confidentiality of documents and personal information of others against the weight to be given to the rights of employees for disclosure.

21. The stated purpose of the amendment is to remove uncertainty for employers created by this judgment and to align the ERA more closely with the Privacy Principles and withholding grounds in the Privacy Act. As the Privacy Act also requires a balancing exercise to be undertaken in relation to requests for personal information, LAC considers there could still be uncertainty for both employees and employers as to what information about restructuring should be disclosed to affected employees.

22. Existing section **4(1A)(c)** 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 the employees affected with:

> (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.*

23. New section **4(1B)** provides that" subsection (1A)(c) does not require an employer to provide access to certain confidential information, including -

> *(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).*

24. On the face of it, the intent of section 4(1B) appears to conflict to some degree with the intent of section 4(1A)(c). It could potentially allow some information of particular interest to employees, prior to decisions being taken, to be withheld. This does not, however, render section 4(1A)(c)(ii) redundant because of the operation of new section **4(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).*

25. Since the employers' obligations under the Privacy Act remain operative, various sections in the Privacy Act (in particular sections 29(1) and (3) which specify what material may be withheld pursuant to principle 6), would be applicable in assessing information for disclosure. Whether they also apply to section 4(1B) is unspecified, but arguably they do as 4(1B) qualifies 4(1A)(c).

26. We consider that the interface of the ERA with the Privacy Act in relation to disclosure to employees is still quite confused because of seemingly conflicting provisions in the ERA and the application of the Privacy Act. Assuming it is intended that the Privacy Act should still apply to such information disclosure situations, it could be made explicit that the Privacy Act qualifies the application of s 4(1B) as well as s 4(1A)(c). Alternatively,

the relevant Privacy Act provisions could be incorporated in the ERA.

27. We **submit** that the intent of the proposed amendments to section 4 of the ERA Relating to disclosure of information to affected employees would benefit from further clarification.

Conclusion

28. Thank you for considering the LAC's submission. The LAC does not wish to be heard on this submission, but is quite prepared to enlarge or appear on any of the foregoing should the Committee so wish.

Yours sincerely

Geoff McLay
Legislation Advisory Committee