

Regulatory Impact Statement: Partial strikes

Coversheet

Purpose of Document	
Decision sought:	Cabinet decisions on the ability to make pay deductions in response to partial strikes
Advising agencies:	Ministry of Business, Innovation & Employment
Proposing Ministers:	Minister for Workplace Relations and Safety
Date finalised:	24 October 2024
Problem Definition	
<p>There is an opportunity to change the settings in relation to partial strikes to restore better balance to collective bargaining situations. Partial strikes are a form of strike action where the action undertaken by the employees does not involve the full withdrawal of labour. Employers do not have an option to make a proportionate response to partial strikes undertaken by employees during bargaining. The only active responses available (suspension or lockout) would result in more disruption for the employer.</p> <p>If there is no consequence to a partial strike for employees, the incentive for unions to return to bargaining is reduced, disrupting the symmetric incentives on both parties during industrial action. Negotiations</p> <p>The use of partial strikes is also observed in some private sector bargaining situations.</p>	
Executive Summary	
<p>The removal of the provision that enabled employers to make a small or proportionate pay deduction when employees participate in a partial strike, has created an imbalance. Under the status quo, if a partial strike occurs, an employer can only suspend or lockout an employee, or do nothing. A suspension or lockout would result in a consequence for the employee, i.e. no pay, but would exacerbate the disruption for the employer. So often partial strikes occur without consequence for employees. This provides an incentive for greater use of partial strikes as a form of industrial action which could increase overall disruption for third parties such as customers and the public and result in more protracted bargaining.</p> <p>To address this concern, the Minister for Workplace Relations and Safety is seeking Cabinet decisions to enable employers to make partial pay deductions in response to partial strike action. In the time available, only the options previously included in the legislation, and some variants of them, were considered.</p> <p>The previous provisions enable an employer to either calculate a proportionate pay deduction or make a flat 10 percent pay deduction. The analysis also considered options that involved a proportionate pay deduction only or a flat 10 percent pay deduction only.</p> <p>The ability of an employer to make a flat 10 percent pay deduction may be disproportionate if used in response to low-level partial strike action such as wearing a</p>	

union t-shirt (in place of the standard uniform). Anecdotal evidence of this behaviour was the reason for the removal of the whole provision in 2018. However, the ability to make a flat 10 percent deduction enables an employer to undertake a response without the compliance costs involved in undertaking a calculation of a proportionate pay deduction, particularly when there are large workforces involved or it is highly difficult to quantify the amount of the employees' time/output being impacted by the partial strike. It also recognises that partial strike action can negatively impact employers in a number of ways that are not directly linked to output, ie indirect impacts on the business' profitability, reputation or brand.

Only enabling an employer to make a pay deduction if based on the prescribed calculation would ensure the response is proportionate but would make it impractical in some situations for employers to use the provisions, which would reduce the intended impact of the change.

A flat 10 percent pay deduction on its own creates similar incentives to the status quo. If the only response is a 10 percent pay deduction, there is an incentive to undertake a partial strike action that results in a greater than 10 percent disruption.

International obligations

There are international obligations related to strike action under which a pay deduction for partial strike action is permitted provided the amount of the deduction is commensurate with the period of the strike. [International relations](#)

[Redacted text]

Consultation

The views of Public Service agencies were mixed. Some had experienced issues with the partial strikes while others had not. [Free and frank](#)

[Redacted text]

MBIE's view

MBIE agrees that providing an employer an ability to make a proportionate response to a partial strike would restore better balance to collective bargaining situations. There are two options that were assessed as better than the status quo: the reinsertion of the previous partial strikes provisions (Option 2) and an option that amends the provision to ensure an employer can only deduct pay that is proportionate to the work not undertaken (Option 3). Both have advantages and disadvantages. On balance, MBIE's recommended option is Option 2, which is the Government's proposal.

Limitations and Constraints on Analysis

In the time available, we have not been able to consider whether there are other options that could address the concerns regarding prolonged bargaining and partial strikes. We have also not been able to consider more detailed changes to the previous provisions.

Data

We have tried to identify data on the use of partial strikes and any correlation with the length of bargaining but there are significant data limitations. We are particularly interested to identify if this relationship changed when employers did have a proportionate response to partial strikes available – between 2015 and 2018.

We are not aware of any available data on the length of collective bargaining that could inform this analysis. The Public Service Commission surveyed Public Service Agencies for information on the length of their collective bargaining. The information provided highlighted the variability of time taken to reach agreement during bargaining. It was not, however, possible to get a clear sense from information provided regarding any trends in the length of public service bargaining due to the changes in partial strike settings in 2018, as there were a number of other factors that would have impacted this (eg COVID impacted the availability of people to progress bargaining).

MBIE compiles data about work stoppages in New Zealand using the information from the strike or lockout forms submitted to MBIE under section 98 of the Employment Relations Act (ER Act). Work stoppages include strikes, including partial strikes (action initiated by unions) and lockouts (action initiated by employers). We have concerns, however, regarding the quality of this data as it is self-reported by the employer and therefore reliant on the employer accurately providing information regarding the strike. MBIE does not have any mechanisms under the legislation to compel employers to comply in reporting strikes to MBIE. In addition, prior to 2014 not all work stoppages were included in reporting. Work stoppages were only included in the report if they involved more than five person-days of work lost.

The settings in relation to partial strikes are, however, only one aspect of the legislative settings that impact collective bargaining. In addition, collective bargaining is impacted by the social, political and economic context that it occurs within. Therefore, even if we had more reliable data, it would be difficult to predict based on that data what the response to the proposed changes would be.

Consultation

We consulted with the Public Service Commission, Ministry of Health, Health NZ and Ministry of Education on the issues they had experienced in relation to collective bargaining. PSC also sent a survey to Public Service agencies seeking input in their experiences in relation to collective bargaining. PSC received a response from 19 agencies and provided a summary of the responses to MBIE to help inform this RIS. We also sought input from several publicly funded agencies on their experiences and views regarding partial strikes.

Due to the timeframes and process for developing the analysis, we were unable to undertake wider stakeholder consultation. However, we have taken into account views from stakeholders provided when the amendment being assessed in this RIS was subject to a select committee process in 2013 (when the changes currently being proposed were implemented) and in 2018 (when they were removed). We do not consider the business and worker views on these proposals would have changed significantly since then as they reflect a view consistent with the approach the people or organisations they represent are likely to continue to have. In addition, at the end of 2023 BusinessNZ (the peak body for employers) reiterated their preference for partial strikes provisions to be reinserted.

Responsible Manager(s) (completed by relevant manager)

Beth Goodwin

Manager

Employment Relations Policy

Ministry of Business, Innovation and Employment



24 October 2024

Quality Assurance (completed by QA panel)

Reviewing Agency:

Ministry of Business, Innovation and Employment

Panel Assessment & Comment:

The Regulatory Impact Analysis (RIA) panel consisting of representatives from the Ministry of Business, Innovation and Employment has reviewed the Partial Strikes Regulatory Impact Statement (RIS). The panel has determined that the RIS **partially meets** the quality assurance standards for regulatory impact analysis.

The panel acknowledges the limitations and constraints on the analysis in the RIS, particularly the very short turnaround timeframe. This timeframe has prevented the authors from undertaking extensive research to locate evidence from comparable jurisdictions.

The panel's opinion is that:

- the RIS lacks quantitative data to support the problem statement and recommended option – this is explicitly acknowledged throughout the RIS
- the lack of quantitative data is, to a limited extent, compensated for through the use of qualitative evidence, however, this has resulted in:
 - reliance on historical evidence
 - use of anecdotal evidence
 - untested assumptions being made
- insufficient consultation has been undertaken
- how the government will address its Treaty obligations is not discussed.

Section 1: Diagnosing the policy problem

There was a change made to remove provisions relating to pay deductions for partial strikes in 2018

1. Partial strikes are a form of strike action, previously defined in the *Employment Relations Act 2000* (the Act). It is where the form of action undertaken by the employees does not involve the full withdrawal of labour, such as a go-slow order, partial discontinuance of work, failure to accept work that forms part of normal duties, or breaking their employment agreement.
2. When a strike (whether it is a full or partial strike) occurs, employers can respond by locking out or suspending the employees and not providing pay. In this situation, there are negative consequences for both sides – the employees are losing pay and the employer is losing output. This provides an incentive for both sides to cease industrial action, and return to the bargaining table, as soon as practical.
3. However, for partial strikes, the employer's options are to accept the partial strike action and the related output loss or breach of the employment agreement or to lock out or suspend the employees for the duration of the strike (removing their entitlement for wages). In many cases of a partial strike, the lockout or suspension option may be a disproportionate response and could inflict greater losses on the employer.
4. This disincentive to suspend partially striking employees means that when partial strikes occur, the consequences fall solely on the employers and there is less incentive for the employees to cease industrial action (compared to the incentives that apply for full strikes) and return to bargaining.
5. The Employment Relations Amendment Act 2014 (which came into force March 2015) introduced the ability for employers, in partial strike situations, to either reduce an employee's pay by a proportionate amount (calculated in accordance with a specified method that is based on time not undertaking work) or deduct a fixed percentage (10%) of their wages.
6. The policy intent of that change was to provide for more balanced and appropriate responses to partial strike action and to incentivise parties to reach agreement sooner by allowing employers to undertake specified pay deductions.
7. The ability for employers to undertake specific pay deductions was repealed by the Employment Relations Amendment Act 2018 (which received royal assent December 2018), due to concerns that:
 - a. allowing employers to deduct wages for partial strikes means that workers are more likely to abandon the partial strike action, weakening workers' bargaining position or it may force workers to fully withdraw labour, causing disputes to escalate.
 - b. employees were losing pay for low level action such as breach of uniform policies (for example wearing union t-shirts in place of standard uniforms).
8. The removal of the ability to deduct pay for partial strikes means employers are again faced with a narrow set of options for responding to partial strike action: suspension, lockout, or accept the partial performance.

There are concerns that the 2018 changes have led to an increase in prolonged bargaining and a higher level of partial strikes

9. It has been suggested, [Free and frank](#), that partial strikes have become increasingly common due to the lack of incentives to avoid or cease this type of action. This results in additional costs and can impact service delivery. In the public sector, the effect of a strike by frontline services is often borne by the public. The

employer is therefore incentivised to not suspend the employees, as the public would be further inconvenienced through the response by the employer.


10. The disruption from a partial strike could be considered a positive if the use of partial strikes is instead of a full strike (which would have greater impacts). However, it could be considered a negative if it leads to increased strike action overall. Whether there is any evidence available to indicate which outcome is more likely is considered below.

Work stoppage data collected by MBIE

11. MBIE compiles data about work stoppages in New Zealand using the information from the strike or lockout forms submitted to MBIE under section 98 of the ER Act. Work stoppages include strikes including partial strikes (action initiated by unions), and lockouts (action initiated by employers). The work stoppage data on the number of full strikes and partial strikes, and the number of person days lost, could provide an indication of the impact on partial strike provisions (which were in place from March 2015 to December 2018) on the amount and scale of industrial action overall.
12. Neither the number of partial strikes and full strikes, or number of person days lost, show any clear pattern in relation to the ability of employers to make partial pay deductions in response to partial strikes. We have concerns, however, regarding the quality of this data as it is self-reported by the employer, and is therefore reliant on the employer accurately providing information regarding the strike. MBIE does not have any mechanisms under the legislation to compel employers to comply by reporting strikes to MBIE¹.
13. Therefore, we are unable to predict whether the use of partial strikes, leads to an increase or decrease in strike action overall (ie whether it is being used in addition to, or instead of, full strikes).

Anecdotal information from the public sector

Free and frank



¹ In addition, prior to 2014 not all work stoppages were included in reporting. Work stoppages were only included in the report if they involved more than five person-days of work lost, ended before 31 December 2013 and were reported to the Ministry.

17. Examples of previous partial strikes in the public sector, and their impact, are set out below.
18. Health New Zealand recorded 28 strike notices for partial action for the 20-month period Jan 2023 to August 2024 (noting some of the action undertaken included refusing to work overtime, which would not be covered by the proposed partial strike provisions²). Costings and impact vary across type of strike, specialty and region. One example (of the 28 strikes) is illustrative: the recent Magnetic Resonance Imaging and Nuclear Medicine Technician partial strike actions over two weeks in August 2024. Across 15 districts, approximately 1700 scans were deferred, representing an estimated reduction of around 50 percent of scans, coupled with increased outsourcing to cover urgent scans which caused a loss in ACC revenue, significant increases in all waiting lists, delays in diagnostic and early treatments for time-critical conditions such as cancer, and redeployment of front-line staff to cover work.
19. Financial impacts are not captured nationally but for example the estimated direct costs in three of the 15 health districts of outsourcing the urgent scans in that fortnight were: for Canterbury \$105,000; South Canterbury \$59,000 and Taranaki \$40,000. A fourth district, Hawke's Bay, estimated that its waiting list grew from 890 to 1269 over the period, and – given the capacity limitations on scanning machines - that it would take 15 weeks and \$250,000 to return to previous productivity levels. Other districts reported the (uncosted) impacts on non-striking workers doing extra duties to cover, as well as morale and interpersonal relationships due to the disruptions. Health furthermore noted that while full strike costs have traditionally been reimbursed through a central Ministry contingency fund, the complexity of partial strikes costs was managed differently at each district and from baseline operating funds.
- * 20. Corrections officers refused to use the Integrated Offender Management System, which had a significant impact on Corrections' ability to manage prison.
21. A partial strike by Oranga Tamariki social workers involved not undertaking certain caseload types and tasks above their pay grade. The impact in this situation was limited services being available for clients (families and children), and a removal of all employees from a given work environment in the absence of supervisory requirements³.
22. In 2022 Fire and Emergency New Zealand (FENZ) staff who were members of the New Zealand Professional Firefighters Union withheld activities such as processing and sending non-critical situation reports, gathering and reporting statistics, training and other administrative tasks. In response, FENZ pulled volunteer staff and managers from other stations to cover the work.
23. Another example of the impact of partial strikes in the public sector was the disruption caused by teachers refusing to teach particular student-year groups on specified days. Teachers were still working but most affected students did not attend school on those days, disrupting their learning and impacting the ability of some parents to work.

Free and frank

* Correction: MBIE has been made aware, subsequent to the submission of the RIS, that the partial strike action by Corrections officers noted at paragraph 20, was not carried out.

² Allowable pay deductions explicitly excluded situations of a refusal to work overtime, or a refusal to perform on-call work if the employees would otherwise receive a special payment for performing that work.

³ As part of the action undertaken, corrections officers and social workers also refused to do overtime, which had additional impacts.

24. We are aware of number of instances of partial strike action occurring in the funded or private sector including:
- Transdev train operators
 - Airbus aircraft engineers
 - H&M Auckland retail staff.
25. Following the formation of the current government in 2023, BusinessNZ included partial strikes in the list of employer relations issues of concern to its members.

Stakeholder views

26. The information we received from the Public Service Commission, Ministry of Health, Health NZ and Ministry of Education is summarised above. PSC also sent a survey to Public Service agencies seeking input in their experiences in relation to collective bargaining. PSC received a response from 19 agencies and provided a summary of the responses to MBIE to help inform this RIS. We also sought input from several publicly funded agencies on their experiences and views regarding partial strikes.
27. Included below are the stakeholder perspectives from views expressed on these topics in previous processes such as the Select Committee process in 2013, when the provisions enabling partial pay deductions were introduced and the requirement to conclude collective bargaining was removed and in 2018, when those changes were reversed. We do not consider the business and worker views on these proposals would have changed significantly since then, as they reflect a view consistent with the approach the people or organisations they represent are likely to continue to have. In addition, at the end of 2023, BusinessNZ (the peak body for employers) reiterated their preference for partial strikes provisions to be reinserted.

Employers and employer representative groups supported, and unions and employees opposed, the ability to make partial pay deductions for partial strikes

28. When the provisions enabling employers to make partial pay deductions (which the options would be based on) were considered by Select Committee in 2013⁴:
- Many employees and unions were opposed to the proposal for employers to be able to make partial pay deductions. The key arguments made by submitters opposed were that the change:
 - i. could lead to higher-level industrial action that would be more disruptive to customers, patients and students
 - ii. was unfair as an employer could reduce pay during “work to rule” when employees were still performing their contractual duties
 - iii. would mean it would be difficult to accurately estimate the information needed to calculate partial pay deductions using the formula. Some said that a 10% deduction would be disproportionate to the action being taken or would incentivise employees to undertake actions above this threshold.
 - iv. would lead to more disputes and increased litigation as parties tested the new law
 - v. would mean employers’ notices of deductions could be worded in a way that intimidated employees.

⁴ *Departmental Report for the Transport and Industrial Relations Committee, 2013.*
[2b5c7e80b51ec8331603ecfd77f5129fd4c8a87c \(www.parliament.nz\)](https://www.parliament.nz/b5c7e80b51ec8331603ecfd77f5129fd4c8a87c)

- The proposed change did not attract a lot of comment from employers. Where they did comment employers generally welcomed the change because they saw it as giving them a more proportionate response to partial strikes.
29. When the partial strikes provisions were repealed in 2018⁵:
- Union submissions supported this amendment on the basis that the ability of employers to deduct pay for partial strike action leaves employees with limited options to take meaningful industrial action, making full strikes more likely. Some submissions took the view that there were few problems with partial strike action prior to the amendments allowing pay deductions. Submitters described the perceived positive benefits of partial industrial action in allowing members to highlight grievances, while limiting disruption to the employer and the public. Partial strike activity mentioned by submitters included not wearing uniforms, wearing badges or clothing to inform the public about industrial issues or refusing certain tasks or requirements such as performance reviews. Submitters also stated that taking partial strike action meant low-level disputes such as issues with rosters or uniforms, that would not typically justify a full strike, could be highlighted and addressed faster and with less disruption.
 - Employers and employer representative groups were of the view that removing pay deductions for partial strikes would remove the only proportionate response employers had to the strike action, leaving either doing nothing and absorbing the cost, or resorting to lockout. These submitters highlighted concerns that removing pay deductions could lead to more frequent strike action, the cost of which would be borne by the employer.

Impact on particular populations

30. There is very limited information about population groups, union membership and the impacts of collective bargaining. Some groups, including Māori and Pacific people, are somewhat disproportionately represented among people who have union membership and collective bargaining coverage. These groups **may** therefore be more likely to be impacted by changes to collective bargaining settings than other groups.
31. However, not all collective bargaining involves industrial action. Whether Māori and Pacific people would be more likely to be impacted, would depend on the degree to which the unions that have high Māori and Pacific membership choose to use industrial action following the proposed change. Given that it is not possible to determine how bargaining parties will use the new settings in their industrial strategies, it is unclear what the population impacts will be.

International context

32. Enabling employers to make partial pay deductions in response to partial strikes would be consistent with the approach in Australia (from 2009) and the United Kingdom (UK) (in case law from the 1980s). We also looked into the Canadian and Irish systems but did not find evidence of partial strike provisions.
33. In both Australia and the UK, an employer has three responses to a partial strike. They can accept the reduction in work and pay the employee their normal pay, they can

⁵ *Departmental Report to the Education and Workforce Committee*, 2018. https://www.parliament.nz/resource/en-NZ/52SCEW_ADV_76257_3573/4e8ba21974efb6d004db979b76b371508dea790a

make a reduction proportionate to the loss of work resulting from the partial strike or they can suspend or lockout the employees and not pay them.

34. It appears that the Australia and UK systems only permit a reduction proportionate to the work lost. The previous New Zealand provisions differ in two ways from that approach:
- A partial strike can be a breach of a term in the employment agreement, not just a reduction in work performed (e.g. a uniform violation)
 - A flat ten percent reduction is able to be made irrespective of the impact of the partial strike.

What objectives are sought in relation to the policy problem?

35. The specific objective for the interventions being assessed by this RIS is to ensure the incentives for employees and employers relating to industrial action during collective bargaining are appropriately balanced.
36. Ensuring the incentives are appropriately balanced is expected to promote efficient and effective collective bargaining and minimise undue impacts on consumers and the public resulting from industrial action during collective bargaining.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

37. The criteria we have used to assess the options are:
- Impact on employers' bargaining position / flexibility
 - Impact on employees' bargaining position
 - Efficiency of bargaining (including the impact on consumers and the public)
 - Proportionality
 - Implementation costs / administrative efficiency
 - Consistency with international obligations.

What scope will options be considered within?

38. This RIS only considers options in relation to reintroducing the ability for employers to provide a proportionate response to a partial strike.
39. In the time available, we have not been able to consider whether there are other options that could address the concerns regarding prolonged bargaining and partial strikes. We have also not been able to consider more detailed changes to the previous provisions.
40. The options analysed for partial strikes are focused on the mechanism for determining what reduction in pay can be made and involve combinations of the two elements of the previous provision, that is a proportionate response and a flat percentage reduction in pay.

Options - Partial strikes

41. The following options are assessed below:
- Option one - Status quo (no action)
 - Option two - Enable employers to **either** make a proportionate pay reduction, or a set reduction of 10%, for partial strikes (ie re-insert the provisions that were in force between 2015 and 2018)
 - Option three - Enable employers to **only** make a proportionate pay reduction for partial strikes
 - Options four - Enable employers to **only** make a set and low wage reduction (ie 10%) for partial strikes.
42. We did consider whether to include a different percentage reduction. There are arguments for a lower reduction than 10%. Prior to 2018, when it was possible to reduce pay for partial strikes, some employees were having their pay reduced for actions that did not involve any withdrawal of labour e.g. wearing a union t-shirt (instead of the required uniform). Some may consider that it is disproportionate to reduce pay by 10% where the employee is completing all their work tasks. However, including a lower percentage would severely limit the utility of enabling employers to make a percentage reduction.
43. Another way to address this concern could be to limit the use of partial strikes to situations where the action has affected outputs. However, as outlined above, we have not been able to consider more detailed changes to the previous provisions (including changes to the definition of a "partial strike" where a deduction can be made). Substantial analysis and consultation would be required to determine how this could be defined and the potential impacts. In addition, while partial strikes may involve action that does not impact the employee's output, the action still involves breaking the

employment agreement in some way, which could have indirect impacts on the business' profitability.

44. Enabling employers to deduct a higher percentage would mean employers could utilise the simple mechanism for low to medium level partial strike action (reducing their compliance costs and risk of litigation). However, it could increase the situations where the amount of pay deducted is higher than the value of the work not being performed.

International relations

A higher percentage would also increase the risk of the types of the concerns that were part of the rationale for repealing the partial strike provisions in 2018 – where the amount of pay being deducted was considered unfair given the level and type of strike action being undertaken. It could encourage partial strike action to start at a higher level (so that it is at, or above, the level of the percentage deduction).

Option one – Status Quo

45. Employers are currently not able to make a proportioned or nuanced response when faced with partial strike action. Their only options are to:
- Continue to pay the striking employees their full pay
 - Suspend or lock-out the employees for the duration of the strike, meaning the employers are not entitled to any pay but are also suspended from completing any of their work.
46. Suspending employees that have signalled they will undertake a partial strike increases the impact on the business and the services that they deliver. This is particularly unpalatable in the public sector, where it would result in a greater impact on the public services and therefore the public. This could result in a negative perception of the employer (ie the government for public services) as they may be blamed for making the situation and impacts worse by suspending the striking employees. As a result employers, particularly those in the public sector, may feel unable to take any action in response to a partial strike.
47. This lack of an ability to make a nuanced response to partial strikes, calls in question whether the balance of power between employers and employees in relation to industrial action is correct, as employees are generally able to partially strike and continue to partially strike without any financial consequences.

Option two to four – enable employers to make partial deductions from pay for partial strikes (with differing mechanisms for how that is calculated)

48. All of the options (aside from the status quo) are intended to provide an ability for employers to make a partial deduction of pay in response to partial strike action in relation to collective bargaining (but not if the strike was on safety or health grounds).
49. This will have a positive impact on employers' bargaining positions but could have a negative impact on employees' bargaining positions.
50. The options would address concerns that the ability to hold partial strikes without any consequences reduces the incentive on the employee side to reach an agreement and bring an end of strike action. Any resulting reduction in strike action would reduce the impact on consumers and the public (if the reduction in partial strike action is in relation to public services). On the other hand, it could be seen as weakening the employees' bargaining position, as employees may be more likely to abandon strike action due to the costs associated with it. While there could be a risk that it drives employees towards full strike action, this does not seem high, as the consequence of a full strike is higher compared to a partial strike (even if a partial pay deduction is allowed). In addition, unions and employees may still favour partial strikes over full strikes as they

could be considered a more socially acceptable tool for action, because they are not as disruptive as a complete strike and so are more likely to keep public support.

51. Both Australia and the United Kingdom enable employers to make proportionate pay deductions in response to partial strikes.

Option two – Enable employers to either make a proportionate pay reduction, or a set reduction of 10%, for partial strikes (ie re-insert the provisions that were in force between 2015 and 2018)

52. Under option two, employers have two options for reducing the pay of employees who are party to a partial strike: a proportionate pay deduction made by using a specified calculation method set out in the Bill, or a fixed deduction of 10%. If the employer decided to use the calculation method (rather than a fixed deduction of 10%), then for the employee (or group of employees) they need to:

- Identify usual hours of work for the day of the partial strike
- Identify the work they will not be performing because of the strike
- Estimate how much time they would have spent performing the work that is not being performed
- Calculate the time not-performing as a percentage of their usual hours.

53. The detailed calculation methodology is aligned with the approach taken in Australia.

54. If the employer decides to make a pay deduction in response to a notice for a partial strike, they are required to provide written notification about the deduction to employees before the deduction is made.

55. This option provides:

- a simple mechanism for making a fixed-rate partial deduction. If employers were required to calculate the deductions for all partial strike action, the cost and complexity of this may be disproportionate for low level strike action. The risk of challenge would also be lower for this type of mechanism, as they could only challenge the basis for the deduction, not the basis for calculating the deduction.
- a more complicated calculation that would be proportionate. There would be more costs and risk of challenge associated with this method. However, this is justified by the greater impact of a potentially larger deduction. This enables the employer to decide, based on the size of the partial strike, whether it is worth the extra compliance cost and risk in making a more precise deduction using the calculation. Alternatively, it also gives employers the option to calculate an exact rate lower than 10%, should they wish to be scrupulous while sending a message to employees.

56. The inclusion of a simple mechanism for making a deduction could be considered unfair if it enabled or encouraged employers to make a decision that was higher than the amount of work not performed during the partial strike. Setting the amount low (ie at 10%) helps mitigate this risk as in most cases the amount being deducted would be less than the value of the work not being performed. This could be seen as unfair to the employer; however, they have the option of using the more complicated calculation to deduct a higher amount if they consider this is appropriate given the scale of the partial strike.

57. International relations

[Redacted text]

Option three - Enable employers to make a proportionate pay reduction for partial strikes

58. Under option three, employers would only be able to deduct the amount that is proportionate to the amount of work not being performed. This could be considered the fairer approach for employees and employers, as the amount deducted is never under or over the value of the work not being performed. This approach reflects the approach taken in Australia. It is likely to be seen as consistent with our international obligations, as any deduction made would be commensurate with the period of the strike.
59. However, it would result in increased administrative costs for employers (in order to meet the requirements of the proportionate calculation). Depending on the type of partial strike action being undertaken, it could be very difficult and time-consuming to estimate the time associated with the work not being performed. There could be an increased risk of litigation with this option (as employees could challenge the way in which the amount deducted is calculated), although the costs of taking such action may impact the likelihood of it occurring. The administrative costs and difficulties are likely to mean that it would not be practical to use for low level strike action, meaning there would continue to not be an accessible response in those situations.
60. The main trade-off for this option is, therefore, between the proportionality (which is high) and administrative efficiency (which is lower). The lower administrative efficiency would impact the situations in which it is practical to make the deduction, which has flow-on effects for the other criteria (such as the impact of the employer's bargaining position and efficacy of bargaining).

Option four – Enable employers to only make a set and low wage reduction (ie 10%) for partial strikes

61. Under option four employers would only be able to deduct the specified amount of pay (10%) regardless of the scale of the partial strike. This would have lower compliance costs, as it would be easier for the employer to determine the amount of the reduction. It would also avoid disputes about the amount of the reduction.
62. However, the reduction in pay may not always be proportionate to the strike action. As outlined in option two, a 10 percent blanket deduction could be disproportionately high in some circumstances of low-level strike action by employees. International relations
63. On the other hand, a 10 percent blanket deduction may also be considered an inadequate response by employers if the partial strike results in a withdrawal of labour or a loss of output of greater than 10 percent. Under this option (compared to option two) the employer does not have the option of using the more complicated calculation to deduct a higher amount. This mismatch between action and response, could incentivise partial strike action that is more than just low-level action.

How do the options compare to the status quo/counterfactual?

	Option 1 – Status Quo	Option 2 – Enable employers to make a proportionate pay reduction, or a set reduction of 10%, for partial strikes [Prev. approach]	Option 3 – Enable employers to only make a proportionate pay reduction for partial strikes	Option 4 – Enable employers to only make a set and low wage reduction (ie 10%) for partial strikes
Impact on employers' bargaining position / flexibility	0	++ If faced with a partial strike, enables an employer to make a more nuanced response. Employers can take either a simple or more complicated approach based on the level of strike action.	+ Enables nuanced response to partial strikes but may not be practical for all employers to use (due to compliance cost and payroll inflexibility) especially those with large workforces.	+ Enables more nuanced response to partial strikes, but limited in what the amount deducted can be.
Impact on employees' bargaining position	0	-- Employees would face a consequence for a partial strike so would be expected to use them less frequently. Relative to the status quo this weakens their bargaining positions.	- More employees would face a consequence for a partial strike compared to the status quo but probably fewer than under option 2 as some employers may find it impractical to make a proportionate calculation.	- More employees would face a consequence for a partial strike compared to the status quo. However, it could encourage employees to take partial strike action resulting in greater than 10% output loss and the response would not be proportionate.
Efficiency of bargaining (including the impact on consumers and the public)	0	+ Expected to incentivise parties to return to bargaining table & reduce use of partial strikes (and impact of these on third parties). There is a chance it could encourage escalation of strike action but unclear.	+ Expected to incentivise parties to return to bargaining table and reduce use of partial strikes (and impact of these on third parties). There is a chance it could encourage escalation of strike action but unclear.	0 Could discourage low-level partial strike action but could encourage partial strike action that leads to a reduction in work above 10% (but less than 100%).
Implementation costs / administrative efficiency	0	++ Includes a simple mechanism that can be used for low level strike action (where calculation difficult or not cost effective) and a more complicated one when level of strike action makes it cost effective to utilise	0 Some employers may find it impractical, or not cost-effective, to make a proportionate calculation.	+ Simplest to calculate.
Proportionality	0	- Could result in employers making pay reductions that are disproportionate to some low-level actions taken.	+ Enables only a proportionate response	- Could result in employers making pay reductions that are disproportionate to some low-level actions taken.
Consistency with international obligations	0	International relations		
Overall assessment	0	++ Enables simple, clear, response for low level strike action but could result in disproportionate pay deductions for low-level partial strike action if flat-rate is applied when reduction in work is less than ten percent. Allows a more complex, but proportionate, response for more significant partial strike action.	+ Ensures a proportionate response to a partial strike action but requires complicated calculation for even low-level strike action, impacting the practicality of utilising the deduction especially for large workforces.	0 Enables simple, clear, response for low level strike action but could result in disproportionate pay deductions for low-level partial strike action if flat-rate is applied when reduction in work is less than ten percent. But like the status quo, could encourage greater strike action (ie above the amount that can be deducted for)

Example key for qualitative judgements:	++	much better than doing nothing/the status quo/counterfactual	-	worse than doing nothing/the status quo/counterfactual
0	+	better than doing nothing/the status quo/counterfactual	--	much worse than doing nothing/the status quo/counterfactual
			?	impact unclear

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

- 64. It is difficult to predict in advance how employers and unions will respond if employers are able to deduct pay for partial strikes, particularly given collective bargaining is impacted by the other collective bargaining legislative settings and the political and economic context.
- 65. MBIE, however, considers there is a rationale for re-introducing the ability for employers to make partial pay deductions in response to partial strikes if the approach carefully balances the impact on employees' and employers' bargaining positions.
- 66. The status quo, where there is no proportionate response available to employers for a partial strike, means an employer is faced with an all-or-nothing response. They can either suspend or lockout the employees, thereby exacerbating the loss of labour which may arise because of the partial strike, or do nothing. Given that a suspension or lockout involves greater disruption to the employer's workplace, the prevailing response appears to be to do nothing. Thus, it appears that unions can take partial strike action, which can have an impact on the employer or third parties such as customers or the public, with no consequence.
- 67. Without both sides incurring costs during partial strikes (or at least the potential for there to be a cost), the incentives on the employee and employer to return to the bargaining table are unbalanced. MBIE considers that providing an employer with the ability to make a proportionate response to a partial strike would restore better balance to collective bargaining situations.
- 68. We consider that there are two options that are better than the status quo:
 - Option 2 is the reinsertion of the partial strike pay deduction provisions that were in place between 2015 and 2018. Affected employers will likely already be familiar with the approach and it gives them two options for calculating the pay deduction which could reduce the administrative costs and payroll challenges that large employers may face. This will mean that it is more likely that some form of pay deduction will be practical in situations where it is difficult to accurately determine the amount of time and output impacted by the partial strike (even if it is lower than the reduction in output). However, the ability to apply a flat deduction rate of 10 percent creates a risk of a disproportionate response. The size of this risk is not clear, as when the provisions were repealed in 2018, only anecdotal information about employers applying a flat rate inappropriately was provided. Employers would also only be able to apply the deduction if the action amounted to strike action. The ability to make a 10% deduction for strike action that does not involve a reduction in output recognises that partial strike action can negatively impact employers in a number of ways that are not directly linked to output.
 - Option 3 is option 2 without the ability to apply a flat ten percent deduction. This would mean any pay deduction would be proportionate. However, given the range of partial strike action that is possible, it can be very difficult to calculate with certainty the amount of time that the task that is not being performed would take. International relations [redacted]
[redacted]
[redacted]
[redacted] Therefore the administrative costs and payroll challenges may mean that under this option some employers still don't have an effective response to a partial strike.
- 69. Overall, on balance, MBIE recommends option 2. Without an ability to make a flat deduction, some employers would continue to not have an accessible response to

partial strike action. This would reduce the effectiveness of the change in improving the balance of the incentives for employees and employers relating to industrial actions.

What are the marginal costs and benefits of the option?

70. The preferred option is to enable employers to make a proportionate pay reduction, or a set reduction of 10%, for partial strikes.
71. In 2022, there were 235,000 employees covered by collective agreements in the public sector and 124,000 employees in the private sector⁶. Not all collective bargaining processes involve strike action and only a portion of those involve partial strike action. Therefore, not all the employees (or their employers) that are covered by collective bargaining will be impacted by these changes.
72. The impact of these changes is difficult to estimate given the inability to predict what collective bargaining may be affected and how outcomes may differ from those that otherwise may have occurred. However, it could shift the incentives and therefore bargaining dynamics for some parties. A greater proportion of workers in the public sector are covered by a collective agreement, so any impacts are likely to be felt by public sector employers and employees than private sector.
73. The main direct cost for **employees** undertaking partial strike action is the loss of pay if employers respond. However, this mirrors the benefit to employers. There could be other costs such as challenges in response to pay deduction actions by employers. There could be indirect impacts if there are changes in bargaining dynamics but this is too difficult to predict with any certainty.
74. There could be compliance costs for **employers** in calculating and making pay deductions.
75. We expect there would be fewer partial strikes so employers would benefit from less output lost due to partial strikes and third parties would benefit from less disruption.
76. There is unlikely to be any significant impact on the regulator.

Section 3: Delivering an option

How will the new arrangements be implemented?

77. The legislative proposals need to be implemented through amendments to the ER Act.
78. MBIE is responsible for administering the ER Act and provides information for businesses, unions and employees through its website, contact centre and other customer services on an ongoing basis. Information provision and updates to website content would be undertaken within MBIE's existing baseline funding.

How will the new arrangements be monitored, evaluated, and reviewed?

79. MBIE collects data about work stoppages in New Zealand using the information from the strike or lock-out forms submitted to MBIE under section 98 of the ER Act. As outlined in the limitations and constraints section, we have concerns regarding the quality of this data as it is self-reported by the employer and therefore reliant on the employer accurately providing information regarding the strike. MBIE does not have any mechanisms under the legislation to compel employers to comply, by reporting strikes to MBIE. An enforcement mechanism is not being considered as part of this proposal and would likely be very resource intensive for MBIE to enforce. MBIE will

⁶ "Employment Agreements: Bargaining Trends and employment law update 2021/2022", Centre for Labour, Employment and Work. 2022.

continue to work to amend and improve the form and related processes (within limitations).