Regulatory Impact Statement

Improving how collective bargaining operates

Agency Disclosure Statement

1 The Government's Policy Manifesto outlines the following areas of reform to improve collective bargaining to reduce bureaucracy and costs:

- i remove the requirement that non-union members are employed under a collective agreement for their first 30 days;
- ii allow employers to opt out of negotiations for a multi-employer collective agreement;
- iii remove the requirement to conclude collective bargaining; and
- iv apply partial pay reductions for partial strikes or situations of low-level industrial action.

2 In addition to the manifesto policy commitments, other proposals considered to further the policy manifesto goals are:

- v make the timeframes when bargaining may be initiated the same for both unions and employers;
- vi amend the requirements around the use of bargaining process arrangements; and
- vii lower the threshold at which the Employment Relations Authority can accept a reference for facilitation.

3 This Regulatory Impact Statement has been prepared by the Department of Labour (the Department). It provides analysis of proposals to improve how collective bargaining operates, including the four areas of legislative change identified by the Government's Manifesto.

4 The Department has not considered options relating to multi-union collective agreements (MUCA) because there are very few MUCAs and there is little evidence of any problems with this type of bargaining. Unions are able to not be a party to multi-party collective bargaining if the result of balloting of union members is negative.

5 The Department's analysis is based on qualitative research undertaken in 2009 and cases considered by the employment institutions. There is limited evidence on the size and underlying causes of the problems being assessed. While the Department is able to access data on concluded collective employment agreements, the Department does not have data on how much bargaining has been initiated and not concluded, or on how long, on average, bargaining takes.

6 The Department will undertake monitoring and evaluation of the changes expected to have the most influence on how bargaining operates, such as the removal of the requirement to conclude and allowing partial pay reduction for partial strikes. The Department will monitor details from strike notices and collective agreements.

7 The Department has been instructed by the Minister of Labour on key features of the policy design. The analysis of the policy proposals has had varying consultation due to time constraints and limited ability to consult on options. There is limited assessment of the options and limited assessment of the impacts on other parts of the employment relations framework.

8 These proposed changes to the Employment Relations Act 2000 (the Act) are likely to affect employees, employers, and unions involved in collective bargaining. Overall, the proposed options are likely to increase choice and reduce compliance costs for some employers. They will reduce choice for unions and employees, and may expose New Zealand to critical international scrutiny over its international labour obligations. The Department notes that any changes to the policy settings in the collective bargaining area may culminate in broader impacts on the employment relations framework.

9 Overall, removing the requirement to conclude an agreement and introducing partial pay reductions for partial strikes (where used) are likely to have the biggest impact on the bargaining environment. These proposals will reduce bargaining where there are poor relationships between employers and unions or low unionisation and encourage litigation in the short term to test the new boundaries. The proposals will have little impact on workplaces that have a productive bargaining relationship.

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Introduction

This paper assesses the regulatory impact of the proposals developed by the Department of Labour as advice to Cabinet on options for reform to improve the efficiency of collective bargaining. A summary of the seven legislative proposals and their assessment against criteria is provided below.

Table 1: Summary of the assessment of the proposals

	Choice / flexibility	Efficiency of bargaining	Compliance costs	Objectives of the Act / International obligations	Overall impact on collective bargaining compared with status quo
Proposal 1 – Repeal the 30-day rule for new employees	Increase for employers	Not applicable	Neutral	Uncertain	- No direct impact on collective bargaining in the short term
Proposal 2a – Allow an employer to opt out of multi-employer bargaining when they receive notice of initiation for bargaining	Increase for employers; decrease for employees who wish to be in a Multi-Employer Collective Agreement (MECA)	May increase	May reduce for some employers	Inconsistent	- Reduce initiations for multi-employer collective bargaining - Reduce the number of MECAs, likely to result in more Single Employer Collective Agreements (SECAs) covering the same employees - Minimal impact on the public sector
Proposal 2b – Allow an employer to opt out of multi-employer bargaining within 40 days of receiving notice of initiation for bargaining	Increase for employers; decrease for employees who wish to be in a MECA	May increase	Not clear	Inconsistent	- May encourage surface bargaining (one party bargains with no intention to conclude an agreement) - Reduce the number of MECAs, likely to result in more SECAs covering the same employees - May increase bargaining costs due to the delay from employers opting out - Minimal impact on public sector
Proposal 3 – Clarify that good faith does not require a concluded collective agreement	No change	May increase	May reduce costs in some instances	Inconsistent	- May encourage surface bargaining - Fewer collective agreements concluded – may have negative impact on employment relationships
Proposal 4a – Introduction of partial pay reductions for partial strike action (Proportionate Amount)	Increase for employers	May increase or decrease	May increase costs in some instances	Uncertain	- Gives employers a proportionate response to partial strikes - May help parties return to collective bargaining - May create a secondary dispute on the amount reduced - Could lead to increase in intensity of partial strike action and number of complete strikes or lead to less strike action

	Choice / flexibility	Efficiency of bargaining	Compliance costs	Objectives of the Act / International obligations	Overall impact on collective bargaining compared with status quo
					- May see new forms of action created to avoid pay reduction - Not knowing the amount of any reduction beforehand may not deter partial strike action, prolonging bargaining
Proposal 4b– Introduction of partial pay reductions for partial strike action (Simple Mechanism)	Increase for employers	May increase or decrease	May increase costs in some instances	Uncertain	- Gives employers an additional response to partial strikes - Amount of reduction is not proportionate to action - May help parties return to collective bargaining - Could lead to increase in intensity of partial strike action and number of complete strikes or lead to less strike action - May see new forms of action created to avoid pay reduction
Proposal 5 – Amend the timeframes when bargaining may be initiated	May increase for employers/decrease for unions	Not clear	Not clear	Inconsistent	- Addresses the perception of being unfair to employers - May create gamesmanship around who initiates and cross-initiation - May result in confusion about who the relevant parties to the bargaining are - May create legal disputes about who initiated first
Proposal 6 – Amend the requirements around the use of bargaining process arrangements (BPA)	May decrease for all parties	Not clear	Not clear	Consistent	- May increase or decrease efficient bargaining - May shift focus of disputes from bargaining to BPA negotiation
Proposal 7 – Lower the threshold for facilitation	No change	Increase	May reduce	Consistent	- Facilitate the conclusion of collective bargaining - Help avoid industrial action - May reduce protracted bargaining

Status quo and problem definition

1 The Government's Policy Manifesto outlines the following areas of reform to improve collective bargaining to reduce bureaucracy and costs:

i remove the requirement that non-union members are employed under a collective agreement for their first 30-days;

ii allow employers to opt out of negotiations for a multi-employer collective agreement;

iii remove the requirement to conclude collective bargaining; and

iv apply partial pay reductions for partial strikes or situations of low-level industrial action.

2 In addition to the manifesto policy commitments, other proposals considered to further the policy manifesto goals are:

v making the timeframes when bargaining may be initiated the same for both unions and employers;

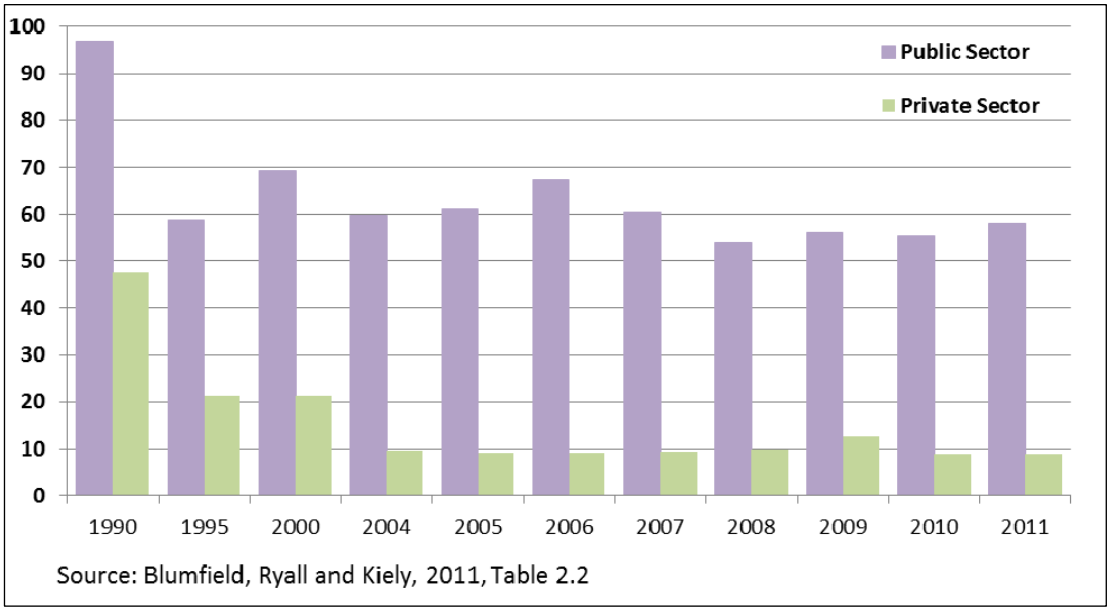
vi amend the requirements around the use of bargaining process arrangements; and

vii lower the threshold at which the Employment Relations Authority can accept a reference for facilitation.

3 The Employment Relations Act 2000 (the Act) and the Code of Good Faith in Collective Bargaining provide the framework for collective bargaining in New Zealand.

4 Collective agreement coverage is around 13 percent of the total employed labour force. Collective agreement coverage in the private sector is nine percent (covering 120,600 employees) and 58 percent in the public sector (covering 177,800 employees). In line with the general decline in union membership seen since the 1990s, collective agreement coverage has been declining since 1991, particularly in the private sector (Graph 1).

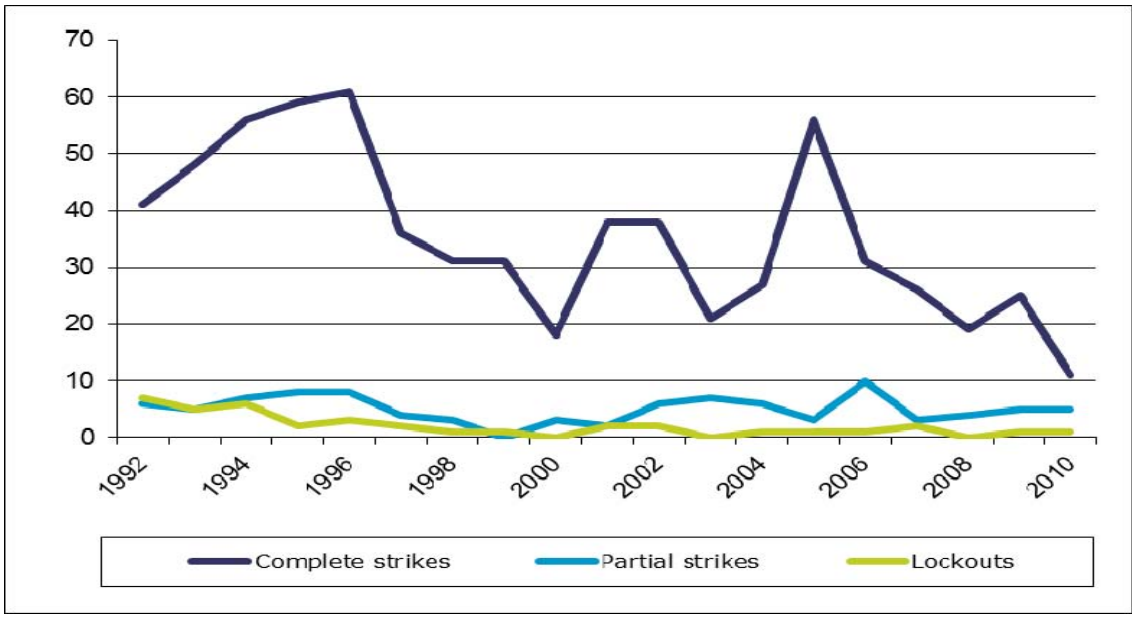
Graph 1: Collective agreement density 1990-2011
(percent of persons employed, selected years)



5 Most collective agreements are between single employers and single unions (SECAs). Multi-employer collective agreements (MECAs) cover around 26 percent of collectivised workers and are primarily found in the public sector (65 percent of core Government employees are covered by MECAs). This is a significant increase from 33 percent in 2009. The health sector has the highest coverage of MECAs at 77 percent of collectivised workers. Multi-union collective agreements (MUCAs) cover around 17 percent of collectivised workers.

6 There are a number of soft and hard measures that could indicate the efficiency of collective bargaining. Indicators such as wage growth can have mixed causation, and no data is collected on other measures, such as bargaining time or costs. The only quantitative data sources which are available as an indicator of the efficiency of the collective bargaining framework, or a measure of the magnitude of the policy problem, is work stoppages. In the December 2010 year, there were 17 stoppages in total, a decrease of 14 stoppages compared with the December 2009 year (31 stoppages). The 2010 year includes 11 stoppages in the private sector involving 4,053 employees, and six stoppages in the public sector involving 2,341 employees. This is the lowest number of stoppages recorded for any December year in the current time series, which started in 1986[1]. Graph 2 shows that work stoppages have been generally declining.

Graph 2: Work stoppages 1992-2010
(Annual, calendar years)



Source: Statistics NZ

7 While the declining work stoppages imply the current system is working well, there are areas in the bargaining process that could be improved. Where employers' specific needs or concerns are not taken into account, the bargaining process can be costly for employers in terms of the resources necessary to devote to it.

[1] http://www.stats.govt.nz/browse_for_stats/income-and-work/Strikes/WorkStoppages_HOTPDec10qtr.aspx.

8 There are also indications that some difficulties arise in collective bargaining when parties are not fully aware of their rights and obligations around the bargaining process.

9 The scale of the problem in collective bargaining is influenced by each parties' perspective and the weight they give to the purpose or outcome of bargaining. Parties' perceptions of bargaining will influence their behaviour.

30-day rule for new employees

10 The current legislation provides that if the work of a new employee is covered by a collective agreement and the employee is not a member of the relevant union, the employee is employed on the terms and conditions in the collective agreement for their first 30 days of employment. Employers and employees are able to agree to additional terms and conditions of employment that are not inconsistent with the collective agreement. This is referred to as the "30-day rule". After 30 days, if the employee does not join the relevant union, the employer and employee are able to vary the individual employment agreement as they see fit (i.e. terms and conditions can be increased or decreased). The 30-day rule was designed to provide an initial period of protection for new employees (as employees are considered to be more vulnerable at the start of employment) and to prevent employers undermining existing collective agreements by offering lesser conditions of employment for the same type of work covered by those agreements. It was also designed to encourage employees, if they wished to retain the conditions of the collective employment agreement (CEA), to join the union at the end of the 30 day period.

11 The 30-day rule prevents an employer offering terms and conditions inconsistent with or less than those in the collective agreement to new employees at the start of their employment. It also requires a review of the terms and conditions at the end of the 30 days. The provision limits choice by setting defacto minimum terms of employment.

12 The Department of Labour's 2003 research[2] found that some employers at large organisations reported that the 30-day rule was administratively difficult.

Multi-employer collective bargaining

13 The promotion of collective bargaining, including multi-employer collective bargaining, is a key feature of the current framework. Once bargaining for a multi-employer collective agreement has been initiated, employers cited in the initiation are required to attend bargaining sessions and consider and respond to the claim for a multi-employer collective agreement. It means that employers have to meaningfully participate in the bargaining until that point, consistent with the broader duty of good faith under the Act.

14 Multi-employer bargaining can be costly. The provision inhibits choice and can be costly for employers in terms of the resources and time necessary to devote to the bargaining process. Employers have to participate meaningfully in the bargaining even if they believe that a multi-employer agreement will not meet their individual business needs.

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[2] Department of Labour, *Evaluation of the Short-Term Impacts of the Employment Relations Act 2000,* 2003.

15 The Department's research in 2009[3] found:

a in some cases of protracted and acrimonious bargaining (generally involving unions bargaining for a MECA), some employees perceived that the costs of union membership exceeded the benefits. Some unionised employees had reservations about MECAs due to the possibility of losing some terms and conditions they previously had in order to accommodate additional employers in the collective; and

b employers with larger numbers of staff considered that it was cost effective to negotiate one collective agreement; employment relations benefited in terms of consistency of terms and conditions for employees. However, few employers could see the benefits of MECAs.

The requirement to conclude a collective agreement

16 Under the Act, the duty of good faith requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason[4], based on reasonable grounds, not to.

17 This is a high threshold. Anecdotal evidence suggests that some employers have to continue to bargain when agreement is unlikely because they do not meet, or believe they do no meet, the threshold to cease bargaining. Bargaining can then become protracted and costly.

Strikes and lockouts

18 Under the Act, an employer and union must be bargaining for at least 40 days before either party can initiate strike action, unless the action is on the grounds of safety or health under section 84.

19 Currently only essential services described in Part A or B of Schedule 1 of the Act, certain passenger transport services, and schools must provide notice of a proposed strike.

20 Employers faced with partial strike action have three options available for response: suspension, lockout, or accept the partial performance. Some employers consider that the current responses are ineffective or not proportionate to the strike action.

21 The Department does not hold information about how parties use and react to partial strikes (or strikes more generally). There may be a perception that allowing employees to partially strike without it affecting their pay tilts the balance of power around industrial action towards unions.

When bargaining may be initiated

22 Under the Act, in situations where there is an applicable collective agreement in force, unions are able to initiate bargaining for a new collective agreement 60 days before the expiry of the current CEA. Employers are able to initiate bargaining 40

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[3] Department of Labour, *The Effect of the Employment Relations Act 2000 on Collective Bargaining*, July 2009. The survey included 3,930 employees of which 2,083 (53 percent) were union members employed at 156 businesses (out of 341 businesses who were invited to participate in the survey).

[4] The Act does not provide a definition for "genuine reason" but provides that genuine reason does not include opposition to, or objection in principle to; bargaining for, or being a party to, a collective agreement; or disagreement about including a bargaining fee clause under Part 6B of the Act.

days before the expiry of the current CEA; provided the union has not already initiated. Where there is more than one CEA in force these dates are extended but the union is still able to initiate bargaining 20 days earlier than the employer[5].

23 The Department is not aware of any problems with the current initiation of bargaining rules. Historically unions have predominately been the party to initiate. However, there may be a perception that the differential timeframes tilt the balance of power around initiation towards unions.

Bargaining process arrangement

24 As soon as possible after bargaining has been initiated, the parties must exercise their best endeavours to reach agreement on a bargaining process arrangement. A bargaining process arrangement is a document that sets out parties' expectations of each other at different stages of the bargaining. The Code of Good Faith provides guidance to parties on the duty to act in good faith, including a section on agreeing to a bargaining process.

25 Parties can run into disputes which can protract bargaining if they do not lay the ground rules for the bargaining, including how they will address any issues that may arise during the bargaining process. Parties do not always have a bargaining process arrangement in place or the arrangement may not always be well developed.

Facilitation

26 The Act provides a facilitation process that enables parties to collective bargaining who are having serious difficulties in concluding a collective agreement, to seek the assistance of the Employment Relations Authority in resolving the difficulties. Under the Act, the grounds for facilitation are where:

a a party has failed to comply with the duty of good faith, and the failure was serious and sustained and has undermined the bargaining;

b the bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties;

c the bargaining has been interrupted by one or more protracted or acrimonious strikes or lockouts; and

d during bargaining, a strike or lockout has been proposed which, if it was to occur, would be likely to affect the public interest substantially.

27 Disputes that protract bargaining can make it inefficient and costly. There is a high threshold parties must meet in order to apply for facilitation from the Employment Relations Authority, which may be a barrier to parties resolving problems.

28 Use of facilitation is low. Between 2006 and 2010, there were 26 applications for facilitation: 22 of them were accepted, two were declined, and the other two had other outcomes. Anecdote suggests that in some cases the threshold for facilitation is too high.

[5] Section 41 sets out when collective bargaining may be initiated.

Objectives

29 The Government's objectives for the wider employment relations framework are to increase flexibility and choice for employers and employees; ensure that the balance of fairness is appropriate for both groups; and increase workplace productivity.

30 To support the Government's wider efficiency and productivity goals, the Department identified the following objectives for this suite of policy initiatives:

a ensure the balance of fairness for all parties in collective bargaining;

b increase choice and flexibility;

c ensure compliance costs for parties are not increased; and

d comply with the objectives of the Act and the relevant international conventions.

31 The criteria we have used to assess the proposals are:

a choice and flexibility;

b efficient bargaining;

c compliance costs;

d consistency with the objectives of the Act and international obligations[6]; and

e impact on collective bargaining process compared with the status quo.

Regulatory impact analysis

Assessment of the seven legislative proposals:

Proposal 1 – repeal the 30-day rule for new employees

Description of the proposal

32 Under this proposal, the 30-day rule would no longer apply to new employees whose work is covered by a collective agreement but who are not members of the relevant union. The effect of this change would be that employers and employees will be able to agree to terms and conditions that are inconsistent with the terms and conditions of the relevant collective agreement from the start of their employment relationship. Employers will still be required to provide a copy of the collective agreement and proposed individual agreement and employees will continue to have the opportunity to seek independent advice and propose changes. Employees will still be able to join a union at any time, and be covered by the terms and conditions of the relevant collective agreement.

Analysis of benefits and costs/risks

33 The main benefit of this proposal is that it increases choice for employers by allowing them to negotiate individual terms and conditions of employment from the

[6] The objectives of the Act and international obligations have been grouped together as a criteria because of the inter-relatedness of the two. The objectives of the Act explicitly state the promotion of collective bargaining and the promotion of the observance in New Zealand of the principles underlying International Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively..

start of the employment relationship that are inconsistent with those of the relevant collective agreement.

34 There is the possibility that this proposal will undermine collectively bargained outcomes by enabling employers to offer agreements that undercut the collective agreement for non-union employees performing the same type of work. Against this, there is a low possibility that removing the 30-day rule may increase union membership by increasing the incentive to join the relevant union if the terms and conditions of the collective agreement are better than those in the proposed individual agreement.

35 The proposal does not impose new compliance costs on employers, but some employers may lose the cost-constraining effect of the 30-day rule.

36 The risk that employee protection will be reduced might be mitigated by the requirement for employers to provide a copy of both the collective agreement and proposed individual agreement so employees can make an informed choice. However, this mitigation might be undermined by non-compliance with this requirement.

37 A summary of agencies' main comments on the impacts of this proposal to the public sector are outlined in Appendix 1: Impact of Collective Bargaining Proposals on the Public Sector.

Proposal 2a – allow an employer to opt out of multi-employer bargaining when they receive notice of initiation for bargaining

Description of the proposal

38 This proposal seeks to address the lack of choice for employers about whether or not to be a party to multi-employer bargaining and reduce the costs associated with that bargaining. The proposal would allow employers to choose not to engage in multi-employer bargaining at the outset. Where an employer receives notification of initiation they could opt out of the multi-employer bargaining by giving written notice to the union(s) and other parties within 10 days of receiving the notification. If an employer did not opt out within this time period then the employer would be required to participate in bargaining in good faith towards concluding a multi-employer collective agreement.

39 While the alternative arrangements to MECAs will be determined by the parties, it is likely that employers who opt out of bargaining for MECAs will negotiate one or more SECAs instead. These SECAs may be more relevant to specific organisational needs.

Analysis of benefits and costs/risks

40 The benefits of this proposal are:

a greater choice for employers on whether they are a party to multi-employer collective bargaining;

b potential recognition of the differing resources of employers (although this is possible now through the bargaining process arrangement);

c reduced compliance costs for employers, and an ability to negotiate collective agreements more relevant to particular businesses (as they are able to more easily move to single employer collective bargaining); and

d potential improvements in efficiency of multi-employer bargaining as only willing parties will continue with bargaining.

41 This proposal may have a detrimental impact on employee and union choice regarding their preferred form of collective bargaining. The proposal will also affect the amount of multi-employer bargaining undertaken and concluded (although this is not a significant part of bargaining generally).

42 This proposal will likely be seen by unions as being inconsistent with the statutory objective of the Act to promote collective bargaining and International Labour Organisation (ILO) Convention 98 on the Right to Organise and Collective Bargaining, which New Zealand has ratified. While ILO Convention 98 does not contain any express prohibition on employers opting out of multi-employer bargaining, unions may argue the proposal undermines the Convention's intent to encourage collective bargaining. It is therefore possible that New Zealand would face some form of examination in the ILO initiated by unions under the supervisory mechanisms for compliance with International Labour Conventions.

43 This could take the form of a referral for examination by the Committee on Application of Standards at the International Labour Conference, a representation by unions to the ILO for an investigation of the alleged non-compliance or, in an extreme case, a formal complaint to the ILO Committee on Freedom of Association. The nature and timing of any such action would depend on the timing of the changes themselves, as well as the perceived impact of the changes on workers and union rights of freedom of association and collective bargaining[7].

44 Being investigated by the ILO will also involve costs to the Government in terms of time and effort required to respond.

45 A summary of agencies' main comments on the impacts of this proposal to the public sector are outlined in Appendix 1: Impact of Collective Bargaining Proposals on the Public Sector.

Proposal 2b – allow an employer to opt out of multi-employer bargaining within 40 days of initiation

Description of the proposal

46 This proposal addresses the same problem as Proposal 2a. It allows an employer to opt out at a specific point of bargaining - after 10 days but before 40 days after initiation - by providing written notification to the union(s). Requiring the employer to engage with the bargaining process for a minimum period gives the employer the opportunity to participate in the bargaining process on an exploratory basis and exit on an informed basis.

[7] It is likely that unions will take a complaint to the ILO and the ILO will send a committee of experts to New Zealand to investigate and determine a finding as to whether New Zealand is in breach of the conventions. This happened during the 1993 and 1995 period after the New Zealand Council of Trade Union's complaint to the ILO that the Employment Contracts Act 1991 violated ILO Convention No. 87 on Freedom of Association and the Right to Organise (1948) and ILO Convention No. 98 on the Right to Organise and Collective Bargaining (1949).

Analysis of benefits and costs/risks

47 This proposal provides the same benefits and costs as Proposal 2a. The key difference is that engaging employers in the MECA process for a short period of time may enable them to make a more informed decision on whether to opt out.

48 This proposal may lead to bargaining behaviour that is not in good faith (e.g. surface bargaining, that is going through the motions of bargaining with no intention of reaching an agreement) and may be seen as setting a "desired" length of time for bargaining. It may increase bargaining costs, particularly if all employers choose to opt out and cause delay to the bargaining process. It is likely to reduce the number of multi-employer collective agreements. This risk may be slightly offset by the possible increase in single employer collective agreements.

49 As before, this proposal is likely to be seen as inconsistent with the objectives of the Act and ILO Convention 98 and the risks of New Zealand being examined in international forums over this is similar to that discussed in paragraphs 42 and 43.

Proposal 3 – clarify that good faith does not require a concluded collective agreement

Description of the proposal

50 This proposal will amend section 33 of the Act to reflect the original position that the duty of good faith does not require the parties to agree on any matter for inclusion in a collective agreement or enter into a collective agreement. The parties are still expected to participate in bargaining in good faith with the intention of reaching an agreement. The amendment continues to recognise that while conclusion of an agreement is the desired outcome of bargaining, it is not always practicable to achieve this.

Analysis of benefits and costs/risks

51 This proposal addresses the concern that the requirement to conclude an agreement could be the cause of protracted and fruitless bargaining because parties have to keep bargaining even when it is unlikely that an agreement will be reached. By clarifying that it is not a breach of good faith to not conclude a collective agreement, parties may cease protracted and fruitless bargaining more easily. This will avoid unnecessary waste of time and costs.

52 However, this proposal may encourage poor bargaining behaviour (such as surface bargaining) as was seen prior to the 2004 amendment to the Act, when one party has no intention of concluding an agreement and does no more than going through the motions to avoid a breach of good faith complaint. Parties may abandon attempts to reach an agreement, where it may have been possible to do so under the current framework.

53 This change will have a signalling effect that employers can walk away easily, when the real intent is to signal that a possible outcome of collective bargaining is that the parties to bargaining will not be able to reach agreement. This may cause disputes around when bargaining has ended. This may cause deterioration of the employment relationship and see an increase of staff turnover, particularly where there is a strong union presence and commitment to collective bargaining. There is also a risk that fewer collective agreements will be concluded.

54 A summary of agencies' main comments on the impacts of this proposal to the public sector are outlined in Appendix 1: Impact of Collective Bargaining Proposals on the Public Sector.

Proposal 4a – introduction of proportionate pay reductions for partial strike action

Description of the proposal

55 This proposal seeks to provide a proportionate response for employers when faced with partial strike action, by introducing partial pay reduction for partial strikes as follows:

a Unions will be required to provide employers with notification of all strike action. Notification will include a description of the nature of the proposed action. Further requirements as to form and delivery of notifications will apply.

b Once notification is received, employers may choose to reduce striking employees' pay. Employers will need to undertake a calculation:

i identifying what work the employee is not performing,

ii estimating how much time an employee usually spends doing the type of work during a day, and

iii working out how much this time is as a proportion of the employee's hours of work for that day. Employers will be able to calculate the proportion for a group of workers that have substantively similar duties.

c Employers will not have to notify employees that they are reducing their pay.

d Employees, through the union, may request information on how the employer calculated the pay reduction. The employer must provide this information as soon as practicable after receiving the union's request.

e If the union thinks the pay reduction is incorrect they must first raise it with the employer. If the parties are unable to reach agreement, the union may go to the Employment Relations Authority for a determination.

f The Wages Protection Act 1983 will be amended to allow employers to recover overpayments due to partial strike action.

Analysis of benefits and costs/risks

56 The policy intent of this proposal is to even the balance and create a proportionate response to partial strike action.

57 Receiving notification of the work employees will not be undertaking allows the employer to accurately work out the proportion to reduce. As the reduction is in proportion to the action, it is a more fair and balanced response for employers.

58 As employees do not receive notification of the amount that their pay will be reduced by before the strike action commences, this proposal may not encourage employees to reconsider taking partial strike action and may encourage employees to op for total withdrawals of labour.

59 Any dispute around the proportion or compliance of notification creates a secondary issue and takes the focus away from bargaining, potentially prolonging the bargaining process. This will create legal costs for parties and put pressure on the resources of the employment institutions.

60 Depending on the definition of partial strike, employees could be innovative in the type of action they take to avoid having their pay reduced. If custom and practice are included in the definition of partial strike, goodwill and discretionary effort will be discouraged. If custom and practice is not included most irritant action will not be covered by this proposal.

61 Notification requirements for all strikes will increase compliance costs for unions.

62 A summary of agencies' main comments on the impacts of this proposal to the public sector are outlined in Appendix 1: Impact of Collective Bargaining Proposals on the Public Sector.

63 This proposal is largely based on the Fair Work Act in Australia, which is currently undergoing a review. The outcome of the review will not be available until May 2012.

Proposal 4b – introduction of a simple mechanism that enables partial pay reductions for partial strike action

Description of the proposal

64 This proposal addresses the same problem as Proposal 4a. It allows the employer to reduce an employees pay by a set amount prescribed in legislation in response to a partial strike. Union will be required to notify the employer of the strike action.

Analysis of benefits and costs/risks

65 Similar costs and benefits to Proposal 4a exist for Proposal 4b.

66 The main benefit of this proposal is to establish a proportionate response to partial strike action. It is also likely to discourage low level, irritant action. Determining the amount of the reduction will be substantively easier than in proposal 4a and will avoid disputes about the amount of the reduction.

67 However, the reduction to pay will not be proportionate to the action. As the reduction is set it is likely to incentivise employees to take action that is greater than the proportion set in legislation or encourage total withdrawals of labour.

68 Depending on the definition of partial strike, employees could be innovative in the type of action they take to avoid being subject to a partial reduction. If custom and practice are included in the definition of partial strike, goodwill and discretionary effort will be discouraged. If custom and practice is not included most irritant action will not be covered by this proposal.

69 Wider notification requirements for all strikes will increase compliance costs for unions.

Proposal 5 – amend timeframes around when bargaining may be initiated

Description of the Proposal

70 The timeframes set out in the Act for when employers can initiate bargaining will be made the same time period as the period that currently applies to unions.

Analysis of benefits and costs/risks

71 This proposal will remove the perception that the balance of power around initiation is in favour of unions.

72 Having the timeframe the same may create gamesmanship around who initiates bargaining and cross-initiation may occur. Confusion about who the relevant parties

to the bargaining are or legal disputes about who initiated first will create extra costs, will take the focus away from bargaining, and may generally prolong the bargaining process.

73 A summary of agencies' main comments on the impacts of this proposal to the public sector are outlined in Appendix 1: Impact of Collective Bargaining Proposals on the Public Sector.

Proposal 6 – amend the requirements around the use of bargaining process arrangements

Description of the proposal

74 This proposal aims to increase the effective use of bargaining process arrangements (BPAs) by setting out in legislation some key factors that must or could be included in a BPA or around the use of BPAs. Possible changes to the legislation include:

a requiring BPAs to be agreed in writing;

b where there is multi-employer bargaining, requiring employers to have a separate BPA setting out how they will behave towards one another and to require unions to have a separate BPA setting out how the union parties will behave towards one another; and

c promoting the use of mediation services where parties are unable to agree to a BPA.

Analysis of benefits and costs/risks

75 The policy intent of this proposal is to ensure that parties have a common understanding of the ground rules for bargaining and their expectations of each other. The main benefit of this proposal is that it will increase the impetus for parties to discuss the best way to conduct their bargaining and create a shared understanding about the process. This should make the bargaining process more effective and reduce the time required to conclude an agreement. It should also make it easier to resolve disputes through a clear, agreed process. This proposal is consistent with the objectives of the Act and the relevant ILO Conventions.

76 However, increasing the prescription around BPAs may reduce flexibility and will not suit all parties' individual circumstances. Legislative change is unnecessary as some of the policy objectives for this proposal could be met through other measures such as raising awareness.

77 There will be increased disputes if no agreement on a BPA can be reached; or the focus of disputes may be shifted from substantive bargaining issues to the BPA process. This will have resourcing implications for the Employment Relations Authority and mediation services.

78 On balance, there is considerable uncertainty about whether additional requirements for BPAs would assist or hinder the bargaining processes.

Proposal 7 – lower the threshold for facilitation

Description of the proposal

79 This proposal is intended to improve access to third party assistance to help parties resolve disputes and reduce protracted bargaining. Parties would be required to have attempted to resolve any disputes through mediation first. The threshold for facilitation would be lowered by incorporating the following changes:

a the bargaining has been protracted but not unduly so, and extensive efforts have failed to resolve the difficulties; and

b where there has been industrial action without requiring the action to be protracted or acrimonious.

Analysis of benefits and costs/risks

80 Improving access to facilitation may enable parties to conclude bargaining faster and more efficiently, avoid industrial action and enhance productivity. This proposal reflects the objectives of the Act.

81 Facilitation will not increase if there are other barriers to its use, such as consideration of commercial sensitivity. In these circumstances, the proposal will not remove the barriers to the appropriate use of facilitation. If the use of facilitation significantly increases, there might be resourcing implications for the Employment Relations Authority. We do not expect the increase to be significant, however, because this change is not intended to discourage parties from resolving problems amongst themselves or at mediation first.

Consultation

82 Consultation has been limited to some state agencies: the Treasury, the State Services Commission, the Ministry of Health, and the Ministry of Education. Their input informed the development of the policy proposals and their comments have been included in the Cabinet paper where possible. The Department of the Prime Minister and Cabinet has been informed of the development of the options.

83 Additional discussions on partial strikes were undertaken with the NZ Fire Service, Public Service Association, Council of Trade Unions, Business NZ, and the Ministry of Justice. Agencies representing employers stated working out a proportional reduction in Proposal 4a is feasible and not onerous. Concern was expressed that a simple mechanism in Proposal 4b would result in an outcome that was not fair or balanced. Unions expressed concern around the undermining of the right to strike and the definition of partial strike action.

84 Agencies' comments on the draft cabinet paper generally supported the amendments to flexible working arrangements. The table below is a summary of agencies' main comments around the amendments to collective bargaining.

Agency	Comment	Response
Ministry of Health	Query about reported figure of strikes and lockouts	Work stoppage statistics are compiled from the record of strike or lockout (Form 3's) submitted to the Department under section 98 of the Act. Stoppages are identified by scanning newspapers and by regular contact with employee and employer organisations. Once a dispute is identified in any of these ways, a Form 3 is sent to the employer for completion. Information gathered in this way is used to estimate the number of stoppages that are in progress at the end of each month. Employers who do not complete the Form 3 are not included in the statistics. New Zealand follows the International Labour Organisation (ILO) recommendations for the recording of strikes and lockouts. All data relating to each work stoppage is recorded in the month in which it ends. If there are two or more separate periods of industrial action that relate to the same issue, then these are grouped together and counted as one stoppage. A single stoppage may therefore consist of one or more periods of industrial action held in different places or at different times, but which concern the same issue[8].
Ministry of Health	Query if definition of strike to be amended	The Department currently has no intention to amend the meaning of strike within section 81 of the Act. The Ministry of Health's comments will be taken into consideration during drafting, should a definition of partial strikes be required.

[8] Statistics New Zealand "*Work Stoppages: December 2010 Quarter Technical Notes"* www.stats.govt.nz

Ministry of Health	Query if employers can continue to offer individual employment agreements based on the prevailing collective agreement	Section 59AB of the Act deals with the passing on of terms and conditions from a collective agreement to an individual agreement. This section addresses the undermining of collective bargaining or collective agreements by employers who automatically pass on collectively bargained terms and conditions to employees not covered by that collective bargaining or agreement. This does not mean, of itself, that an employer cannot offer other employees the same, or substantially the same, terms and conditions as those in the collective agreement. Unions and employers are still able to agree that collective terms and conditions may be passed on to other employees or other unions. Where there is such an agreement the employer can, in good faith, pass on collective terms and conditions. Terms and conditions negotiated on an individual basis will only be "not inconsistent" with the collective agreement if they deal with a matter which the collective agreement does not deal with or if they are superior to terms and conditions which are legislative minimum rather than fixed conditions by the collective agreement. Additional terms and conditions of an individual employment agreement roll over automatically when an employee becomes party to a collective employment agreement. The rolled over conditions do not need to be specifically agreed to, so long as they are not inconsistent with the collective employment agreement.
Ministry of Health	Employers should be granted an advantage in the timing of initiation of bargaining	The Minister of Labour requested the timeframes to be the same for both unions and employers.
The Treasury	Suggest to include impact to the public sector	The Department has included comments on the impact to the public sector based on agency consultation.
The Treasury	Recommend an alternative option instead of proportional partial pay reductions: to have a minimum rate of reduction set out in legislation and allow employers to go beyond this as the significance of the strike increases.	The Department has considered a simple mechanism. The proposed option may address some problems. However, it is likely to also have the costs outlined in proposal 4b. The Minister of Labour preferred a proportionate response. The Department notes that some work may be disproportionately disruptive to the employer or the proportionate pay reduction may be hard to work out.
The Treasury	Query if definition of strike to be amended.	See response to same question by Ministry of Health above.
Ministry of Social Development	General comment repealing 30 day rule for new employees will disadvantage young people, those exiting benefits for employment, and other vulnerable workers.	Employers will continue to be obligated to provide new employees with a copy of the collective agreement if employees' work is covered by the collective agreement, and proposed individual employment agreement. The Department supports MSD advising their clients of their employment rights when they seek employment.
Ministry of Education	General comment that implementation of proportionate pay reductions for partial strikes will be difficult.	The Department notes implementation of proportionate pay reductions for partial strikes may be difficult for some employers.

Ministry of Education	Query why only the union has the ability to seek an interim injunction if there is an on going dispute.	Employers will continue to be able to apply for an interim injunction should they consider that strike action may be unlawful. The proposed change is to allow unions to apply for an interim injunction should they consider that the proportionate pay reduction may be unlawful. The purpose of this change is to provide some protection for employees from an unscrupulous employer who may deliberately make a disproportionate pay reduction in order to force employees to end the strike.
State Services Commission	General comment not setting a minimum notice period for all strike action has potential issues.	The Department considered having a minimum notice period. However, it was considered that this would be too great a change and the rationale for a minimum period was not strong enough (e.g. time for employers to decide what response to make and work out the amount of a reduction) when compared to the rationale for essential services (e.g. time to make alternative arrangements to protect lives or ensure animal welfare). Also, to be balanced, the change would impose similar requirements on lockouts which is further than what was signalled in the Government's election manifesto.
State Services Commission	If section 53 remains in its current form, then which party initiated first will have increased significance.	The Department agrees and recommends that section 53 of the Act be amended so that a collective agreement remains in force for up to 12 months after its expiry date while bargaining continues when bargaining for its replacement is initiated by either the union or the employer (not just the union as the current provision provides for).
State Services Commission	Changes to the timeframes for initiation of bargaining will create dispute about which party was the first to initiate bargaining.	The Department agrees.
Ministry of Foreign Affairs and Trade	Comments focus on the international implications of the proposals, recommended rewording of paragraphs.	The Department has reworded paragraphs on international implications.
Ministry of Justice	Proposals appear to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.	The Department has included text in the Cabinet Paper under Human Rights Implications.
Ministry of Women's Affairs	No comment.	
Te Puni Kokiri	No comment.	

Conclusions

85 We have been unable to put a dollar value on the above proposals. For this reason a quantitative cost-benefit analysis is not possible. For some proposals, forming conclusions about the net impact of each proposal depends to a large extent on a judgement about the relative weighting of the effects associated with it.

86 We conclude:

a Proposal 1 increases choice for some employers (although possibly by imposing more costs on them). Its impact on union membership is not clear.

b Proposals 2a and 2b may increase choice and reduce compliance costs for some employers and increase efficiency of collective bargaining (proposal 2a only). It may result in fewer MECAs, which are likely to be replaced with SECAs. Unions are likely to see the proposal as being inconsistent with ILO Conventions and may seek some form of ILO examination. The judgement about whether there is net benefit or cost for these two proposals depends on the weight given to each of these considerations.

c Proposal 3 increases efficiency and reduces costs for some employers but may reduce the number of collective agreements. An implementation risk is that it might lead to poor bargaining behaviours, which would offset some of the benefits.

d Proposal 4a and 4b will decrease the efficiency of bargaining if parties are focused on secondary disputes around the pay reduction. The efficiency of bargaining will be improved if it discourages parties from partaking in irritant strike action.

e Proposal 5 is likely to increase disputes around who initiated bargaining and who is a party to the bargaining. The impacts on collective bargaining are unclear due to the lack of evidence on any problems.

f Proposal 6 may increase efficient bargaining but may shift disputes from bargaining process to BPA negotiation (i.e., making bargaining less efficient). It is not clear whether there is a net benefit.

g Proposal 7 may increase efficiency and reduce costs for parties. It might have minimal risks in terms of limited use because of other barriers, or costs with increased resourcing implications for the Employment Relations Authority.

h Overall, removing the requirement to conclude a collective agreement and partial pay reductions for partial strikes (where used) are likely to have the biggest impact on bargaining behaviour, reduce bargaining where it is already marginal and encourage litigation to test the new boundaries.

87 The Minister of Labour has decided to progress proposals 1, 2a, 3, 4a and 5 in order to improve the efficiency of collective bargaining.

Implementation

88 The legislative proposals need to be implemented through amendments to the Employment Relations Act 2000 and the Wages Protection Act 1983. The Department is responsible for administering the Acts and provides information for employers, unions, and employees through its website, contact centre, and other customer services on an ongoing basis. Information provision will be undertaken within the Department of Labour's existing baseline funding.

Monitoring, evaluation and review

89 The Department will undertake monitoring of the Act through media reports, research and use of mediation services, and the Employment Relations Authority.

90 Currently, information on how the bargaining process works in practice is limited. The Department will undertake monitoring and evaluation of the proposals expected to have the most influence on how bargaining operates such as the removal of the requirement to conclude and allowing partial pay reductions for partial strikes. The Department will monitor details from strike notices and collective agreements.

91 The enhanced notification requirements on strikes will lead to more accurate recording and reporting of work stoppages. The Department will be able to more accurately measure the size and scale of work stoppages and report this back to the Minister and international agencies.

92 The Department will include questions in its annual survey of employers to get information on uptake, awareness, and barriers from the changes.

APPENDIX 1: IMPACT OF COLLECTIVE BARGAINING PROPOSALS ON THE PUBLIC SECTOR

Proposed change	SSC	Health	Education
Requirement to conclude a collective agreement	Would reduce costs by providing more choices for employers to implement their employment relations strategies. Union tactics may become more aggressive if employer lets bargaining lapse.	Unlikely to make a difference. DHBs see CEAs as meeting their business needs currently so wish to conclude a CEA.	Bargaining may be more efficient. Incentives to limit scope of bargaining so that matters that are better addressed outside of a CEA are not included.
Repeal of 30-day rule	Impact on collective bargaining unclear. May encourage union membership. Risk that employees may retain higher terms and conditions from IEA if then join CEA. May increase costs for employers.	May increase costs in some instances (e.g where recruitment difficulties exist due skill shortages, or individuals have strong bargaining power).	Will have little impact on schools due to State Sector Act (State Services Commissioner able to determine terms and conditions in IEAs. The promulgated IEAs tend to closely follow CEAs). May remove some administrative costs.
Opt out of multi-employer bargaining	Unlikely to make significant difference.	Unlikely to make a difference. MECAs currently meet DHB business needs as it provides consistency across national services and service provision.	Will have no impact on schools due to State Sector Act (State Services Commissioner has delegated power to the Secretary of Education to negotiate CEAs on behalf of all schools). May have more relevance for wider education sector.
Proportionate pay reductions for partial strikes	May reduce partial strike action as there will be a financial penalty. Unclear if it will increase complete strikes.	Support provision but concerned about potential negative impact on service delivery.	Support provision but in practice the steps for working out proportionate pay reductions will be extremely difficult to put into practice.
Same timeframes for initiation	May create disputes about which party initiated bargaining.	-	May create disputes about which party initiated bargaining.