

State Sector Amendment Bill (No 3)

Government Bill

As reported from the Education and Science Committee

Commentary

Recommendation

The Education and Science Committee has examined the State Sector Amendment Bill (No 3) and recommends that it be passed with the amendments shown.

Introduction

The State Sector Amendment Bill (No 3) makes amendments to the State Sector Act 1988 and the Education Act 1989. A main focus of the bill is to address problems arising from the fact that the State Services Commissioner's ability to negotiate collective agreements is currently compromised as school Boards of Trustees retain all the usual rights, duties, and powers of an employer for all other purposes. This includes the ability to discontinue pay of striking employees, and to suspend or lock out employees who are bargaining for a collective agreement. To rectify this situation the bill:

- empowers the Commissioner to exercise the related powers of an employer when negotiating collective agreements
- requires the union bargaining for a collective agreement to give prior notice of industrial action
- empowers the Commissioner to suspend striking employees by notifying the relevant union rather than separately advising each employee.

The bill also facilitates the retention of Board employees and provides them with employment certainty in the event of a school merger or closure.

Amendments to clarify the Commissioner's powers during negotiation

We recommend an amendment to new section 74AA, as inserted by clause 4. The clause sets out the Commissioner's powers during negotiations for a collective agreement. We recommend that new section 74AA(3), which concerns the Commissioner's powers to suspend employees by giving notice to the employees' union, be amended to clarify that this power is restricted to the circumstance where there is a strike. This is to address concerns that the power of suspension might be applied retrospectively.

We also recommend an amendment to section 74AA(4) and the insertion of new section 77AA(5A) to clarify that when suspending or locking out an employee, the Commissioner must comply with the Wages Protection Act 1983. Currently employees who are suspended or locked out are not entitled to remuneration for that period, and an employer is entitled to seek repayment of any incorrectly paid amount. As the bill specifies that the Commissioner may act as employer for the purpose of recovering costs from Board employees, the amendment to section 74AA(4) clarifies that Board employees are entitled to the same statutory safeguards as any other employee. This includes the duty of the employer to give notice to employees of the intention to recover overpayments. The insertion of new section 74AA(5A) allows that duty to be exercised by the Commissioner.

Commissioner may cover Boards for costs or damages

We recommend an amendment to section 74AB(2), as inserted by clause 4. Section 74AB provides that the Commissioner will cover Boards of Trustees for costs or damages arising out of the exercise of powers conferred on the Commissioner. However, a Board is not covered if the costs arise out of conduct of the Board 'that is not in good faith or that is engaged in without reasonable care'. The proposed amendment will clarify that it is the responsibility of the Commissioner to decide whether the conduct of the Board is in good faith.

Employees must give sufficient notice of a strike

We recommend amendments to new section 74AC(1), as inserted by clause 4, in order to ensure that all relevant bodies are given sufficient notification of a strike action. Firstly, we recommend that a strike by employees of a Board is only lawful if both the Commissioner and the Board are given written notice. This written notice may be in electronic form. Secondly, for health and safety reasons we recommend that 3 days' written notice must be provided. This is because, without sufficient notice, issues may arise as to the care and supervision of the children involved.

Boards are obligated to provide information on a strike

Employees not participating in a strike must be notified that this has been relayed to the Commissioner

We recommend that new section 74AD(1), as inserted by clause 4, be amended. New section 74AD concerns a Board's obligation to notify the Commissioner about employees' participation in a strike. The proposed amendment adds a requirement for the Board to notify employees not participating in a strike that the Commissioner has been advised of their non-participation.

Minister may reduce a Board's education grant if that Board fails to comply with its obligation to inform the Commissioner

We recommend that new section 74AD(6), as inserted by clause 4, be deleted. We believe this subsection to be redundant as the Minister already has the power to deal with any breaches by Boards.

Amendments to clarify redundancy provisions

We recommend amendments to new section 77HA, as inserted by clause 5, to clarify the circumstances in which employees in a school undergoing a closure or merger are eligible for redundancy compensation on technical grounds. The intent of clause 5 is to provide a general framework under which employees of a Board can be compensated where they are disadvantaged as a result of a school merger or closure. Processes to deal with specific situations will still need to be developed separately within this framework. This is in line with established practices for negotiating redundancy arrangements in collective employment agreements.

We recommend amendments to new section 77HA to clarify the circumstances under which an employee is not entitled to technical

redundancy compensation. This section provides that employees in a school affected by a closure or merger who are offered a substantially similar position in another school on no less favourable terms and conditions of employment should not be eligible for redundancy compensation. Amendments to new section 74HA(1)(b) clarify that employment offered in ‘another school’ refers to the replacement school or another school directly affected by the merger or closure. It may also refer to a continuing school where there is a merger. An amendment to new section 77HA(2)(a) specifies that the substantially similar position offered may be a ‘functionally equivalent position’. A definition of a ‘functionally equivalent position’ is provided by the insertion of new section 77HA(3).

Employees not obligated to work on days in substitution for days lost due to industrial action

Clause 6 amends section 65A of the Education Act 1989, which provides for the Minister to prescribe the number of half days during which a school must be open for instruction during a year.

We recommend that proposed new section 65A(2B), as inserted by clause 6, be deleted. This proposed new section enables the Minister to direct that a school must open for a specified time (to be determined by the Minister) in substitution for any prescribed half days lost due to a strike or lockout. We consider it is inappropriate that the Minister be given powers that no other employer has. In effect it would mean that teachers could be obligated to attend their workplace as a direct consequence of having taken industrial action.

Minority view

The New Zealand National Party, the ACT Party, and Donna Awatere Huata are opposed to this bill. We believe it reinforces the ethos of centralised bargaining of teachers’ employment contracts, and reduces the reality that the true employers are the Boards of Trustees. It would be more appropriate to move toward more flexible employment agreements, rather than increasing the powers of the State Services Commissioner.

Appendix

Committee process

The State Sector Amendment Bill (No 3) was referred to the committee on 10 December 2003. The closing date for submissions was 30 January 2004. We received and considered 4 submissions from interested groups and individuals. We heard 3 submissions. Hearing of evidence took 1 hour and 40 minutes and consideration took 1 hour and 28 minutes.

We received advice from the State Services Commission and the Ministry of Education.

Committee membership

Hon Brian Donnelly (Chairperson)

Lynne Pillay (Deputy Chairperson)

Donna Awatere Huata

Dr Ashraf Choudhary

Helen Duncan

Hon Bill English

Dr Wayne Mapp

Bernie Ogilvy

H V Ross Robertson

Deborah Coddington (non-voting member)

Metiria Turei (Non-voting member)

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (majority)

Subject to this Act,

Text struck out by a majority

Struck out (unanimous)

Subject to this Act,

Text struck out unanimously

New (majority)

Subject to this Act,

Text inserted by a majority

<Subject to this Act,>

Words struck out by a majority

<Subject to this Act;>

Words inserted by a majority

Hon Trevor Mallard

State Sector Amendment Bill (No 3)

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The Parliament of New Zealand enacts as follows:

1 Title

- (1) This Act is the State Sector Amendment Act (No 3) **2003**.
- (2) In this Act, the State Sector Act 1988¹ is called "the principal Act".

¹ 1988 No 20

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Part 1

Preliminary provisions

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Purposes

The purposes of this Act are—

- (a) to enable the State Services Commissioner, in negotiating collective agreements applicable to employees of

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- Boards of Trustees, to exercise, subject to certain exceptions, the powers available to an employer under the Employment Relations Act 2000; and
- (b) to require the unions representing employees of Boards of Trustees to give prior notice of a proposed strike; and 5
 - (c) to require Boards of Trustees to report to the State Services Commissioner on the conduct of strikes that affect the schools of those Boards; and
 - (d) to preclude compensation for technical redundancies that arise out of the reorganisations of schools, and to provide that certain provisions governing appointments are not to apply to the appointment of persons affected by such reorganisations; and 10
 - (e) to make related amendments to the principal Act and to the Education Act 1989. 15

Part 2

Amendments concerning employees of Boards of Trustees

Amendments to principal Act

- 4 New sections 74AA to 74AD inserted** 20
- The principal Act is amended by inserting, after section 74, the following sections:
- “74AA Commissioner’s powers when collective agreements are negotiated**
- “(1) During the negotiations for a collective agreement that is to bind any employees of a Board of Trustees, the Commissioner has, for the purpose of those negotiations, all the rights, duties, and powers of an employer under the Employment Relations Act 2000 in respect of those employees. 25
 - “(2) To avoid doubt and without limiting the generality of **subsection (1)**, it is declared that the powers referred to in that subsection include the power to lock out or suspend employees. 30
 - “(3) Despite **subsection (1)**, in the case of employees who are members of a union, the Commissioner may exercise the power of suspension by advising the union of the class or classes of employees who are, or are to be, suspended, and, if the union is so advised, the suspension 35

takes effect on the date specified for the purpose in the advice, and the Commissioner need not—

- “(a) separately advise any employee who is included in any such class; or
 - “(b) comply with section 89 of the Employment Relations Act 2000. 5
- “(4) *<Despite any other enactment, in>* *<In>* any case where the Commissioner has suspended or locked out an employee by virtue of this section, the Commissioner may, at his or her discretion, give either or both of the following directions: 10
- “(a) that the employee is not to be remunerated in respect of the period of the suspension or lockout:
 - “(b) that any amount paid to the employee in respect of that period be deducted from any remuneration otherwise payable to the employee. 15
- “(5) Any direction under **subsection (4)**—
- “(a) may be given to any person responsible for effecting payments or transfers of sums of money required for the remuneration of the employee; and
 - “(b) must be followed by the person. 20

New (majority)

“(5A) The Commissioner may give any notice that, as a result of a direction under **subsection (4)(b)**, is required to be given to an employee under section 6(3)(b) of the Wages Protection Act 1983.

- “(6) **Subsection (1)**— 25
 - “(a) overrides section 77E(2); and
 - “(b) is subject to **sections 74AC and 74AD**.
- “(7) In this section and in sections **74AB to 74AD**, **Board of Trustees** means a Board of Trustees constituted under Part IX of the Education Act 1989, and includes any Commissioner appointed under that Act to act in place of the Board of Trustees. 30

“74AB Boards of Trustees indemnified by Commissioner

- “(1) If, in any claim or proceedings, a Board of Trustees becomes liable for costs or damages that arise from the exercise or purported exercise of any of the powers conferred on the 35

Commissioner by **section 74AA**, the Commissioner must, out of money appropriated for the purpose by Parliament, indemnify the Board for those costs or damages.

- “(2) However, a Board of Trustees may not be indemnified for any costs or damages to the extent that those costs or damages arise out of conduct of the Board that *⟨is not in good faith or that is engaged in without reasonable care⟩*⟨, in the reasonable opinion of the Commissioner,—⟩ 5

New (majority)

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|---|
| <p>“(a) is not in good faith; or
“(b) is engaged in without reasonable care. 10</p> |
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“74AC Strikes in schools to be notified

- “(1) A strike by employees of *⟨a⟩* *⟨any⟩* Board of Trustees is not lawful for the purposes of the Employment Relations Act 2000 unless the Commissioner ⟨and each Board of Trustees⟩ is given *⟨written⟩* notice ⟨in written or electronic form⟩ of the proposed strike *⟨3 days⟩* before the commencement of the proposed strike. 15
- “(2) The notice required by **subsection (1)** must state—
- “(a) the nature of the proposed strike, including whether or not the proposed action will be continuous; and 20
- “(b) the school or schools that will be affected by the proposed strike; and
- “(c) the period of the proposed strike, which is to be specified by giving the date on which the proposed strike is to commence and the date on which the proposed strike is to end. 25
- “(3) The notice must be signed by a representative of the employees’ union.
- “(4) Unless the notice is withdrawn before the commencement of the strike, every employee is, throughout the period stated in the notice, deemed to participate in the strike if— 30
- “(a) the employee’s duties are normally performed in a school affected by the strike; and
- “(b) the strike relates to the negotiation of a collective agreement that will bind the employee; and 35

“(c) the employee’s name has not been notified to the Commissioner in a current notice given under **section 74AD**.

“(5) The provisions of this section are in addition to, and not in derogation of, the provisions of the Employment Relations Act 2000.

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“74AD Employers to notify Commissioner about participation in strikes

Struck out (majority)

“(1) As soon as reasonably practicable after the commencement of a strike notified under **section 74AC**, the Board of Trustees of each school to which the notice relates must provide the Commissioner with a list of the names of the employees of the Board who are not participating in the strike notified by the notice.

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New (majority)

“(1) As soon as reasonably practicable after the commencement of a strike notified under **section 74AC**, the Board of Trustees of each school to which the notice relates must—

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“(a) provide the Commissioner with a list of the names of the employees of the Board who are not participating in the strike notified by the notice; and

“(b) notify each of those employees that he or she has been included in the list.

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“(2) A Board of Trustees that has complied, or is to comply, with **subsection (1)** must, at the written direction of the Commissioner, provide the Commissioner with any information required by the Commissioner about the conduct of the strike to which the notice under **section 74AC** relates.

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“(3) Information under **subsection (2)** may, without limitation, include, or consist of, information about the number of hours worked by any employee or any class of employee.

“(4) The Commissioner may, at the Commissioner’s discretion, require a Board of Trustees to inform the Commissioner, by a specified date, as to the Board of Trustees’ compliance with the provisions of, or any directions given under, this section.

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“(5) If the Commissioner has reasonable grounds for believing that a Board of Trustees has failed to comply with the provisions of, or any directions given under, this section, the Commissioner may report those grounds to the Minister of the Crown who is for the time being responsible for the administration of Part VIIIA of the Education Act 1989.” 5

Struck out (unanimous)

“(6) On receipt of a report under **subsection (5)** about a Board of Trustees, the Minister may, after consultation with the Board of Trustees, for the purpose of promoting compliance with this section, reduce, by any amount the Minister thinks fit, any grant payable to the Board of Trustees under section 79 of the Education Act 1989.” 10

5 New sections 77HA and 77HB inserted

The principal Act is amended by inserting, after section 77H, the following sections: 15

“77HA Restriction of compensation for technical redundancy arising from closure or merger of schools

“(1) An employee in a school is not entitled to receive any payment or other benefit on the ground that his or her position in the school (the **previous position**) has ceased to exist if— 20

“(a) the previous position ceases to exist because the school is closed under section 154 of the Education Act 1989 or is affected by a merger under section 156A of that Act; and

“(b) in connection with that closure or merger,— 25

Struck out (majority)

“(i) the employee is offered equivalent employment in another school (whether or not the employee accepts the offer); or

New (majority)

“(i) the employee is offered equivalent employment (whether or not the employee accepts the offer)— 30

New (majority)

“(A) in the case of a merger, in the continuing school or in another school directly affected by the merger; or

“(B) in the case of a closure, in the replacement school or in another school directly affected by the closure; or

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“(ii) the employee is offered, and accepts, other employment in <the continuing school or in the replacement school or in> another school <directly affected by the merger or closure>.

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“(2) Equivalent employment in relation to the employee’s previous employment is employment <in the other school>—

“(a) in substantially the same position <or in a functionally equivalent position>; and

“(b) in the same general locality; and

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“(c) on terms and conditions of employment that are no less favourable than those that apply to the employee immediately before the offer of equivalent employment (including any service-related redundancy, and superannuation conditions); and

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“(d) on terms that treat the period of service with the school in which the previous position was held (and any other period of service recognised for the purposes of the previous position as continuous service) as if it were continuous service <with the other school> <for the purposes of the position offered to the employee>.

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New (majority)

“(3) A functionally equivalent position is a position that, in relation to the employee’s previous position,—

“(a) is generally similar in role, duties, and status; and

“(b) requires similar qualifications, training, skills, and experience, but may have a different title.

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“77HB Appointment of employees following closure or merger of schools

- “(1) Sections 77G and 77H do not apply to an appointment to a position in a school if—
- “(a) the appointment is made in connection with the closure of a school under section 154 of the Education Act 1989 or the merger of schools under section 156A of that Act; and
- “(b) the position that the person previously held has ceased to exist as a result of the closure or merger.
- “(2) **Subsection (1)** does not apply to the appointment of an employee to the position of principal.”

Amendment to Education Act 1989

6 Amendment to section 65A of Education Act 1989

Section 65A of the Education Act 1989 is amended by inserting, after subsection (2), the following *<subsections>* *<subsection>*:

- “(2A) If, because of a strike or lockout, a school is not open for instruction on any half-day, the school is, for the purposes of subsection (2), deemed to be open for instruction on that half-day.”

Struck out (majority)

- “(2B) If, during any year a school or class of school is affected by a strike or lockout, the Minister may substitute another number for the number of half-days prescribed or deemed to be prescribed in respect of the school or class of school for that year.”

Legislative history

3 December 2003	Introduction (Bill 100–1)
10 December 2003	First reading and referral to Education and Science Committee