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# Employment Relations (Restraint of Trade) Amendment Bill

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*18/09/2023*

## **Employment Relations (Restraint of Trade) Amendment Bill**

### **1 Introduction**

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Employment Relations (Restraint of Trade) Amendment Bill (**Bill**).
- 1.2 This Member’s Bill seeks to amend the Employment Relations Act 2000 (**Act**) to:
- (a) prohibit the use of restraints of trade in employment agreements for lower and middle income employees; and
  - (b) require employers of higher income employees to consider whether a restraint of trade is appropriate, and to compensate such employees for any restraints of trade.<sup>1</sup>
- 1.3 This submission has been prepared with input from the Law Society’s Employment Law Committee,<sup>2</sup> and makes some recommendations to improve the clarity of the Bill.
- 1.4 The Law Society does not wish to be heard. However, we would be happy to meet with the select committee to discuss the submission and answer any questions.

### **2 Meaning of “proprietary interest”**

- 2.1 New section 67J(1)(b) provides that a restraint of trade provision is of no effect unless the employer has a proprietary interest which is described in the employee’s employment agreement. While the meaning of the term “proprietary interest” has been discussed in case law,<sup>3</sup> it is not defined in the Bill or the Act.
- 2.2 To provide greater clarity to employers and employees, we recommend including a definition of “proprietary interest”, which identifies the various categories of interests which can be legitimately protected (including, for example, confidential and commercially sensitive information, and intellectual property). In the absence of a definition, there may be disputes as to whether a restraint of trade provision is in fact enforceable (even where an employer has complied with the requirements in new section 67J(1)), and employees could be restrained by provisions which may be unenforceable.

### **3 Effect of restraint of trade provision**

- 3.1 New section 67J(3) provides that a restraint of trade provision ceases to have effect on the day that is 6 months after the date on which the employment ends (or on an earlier date agreed by the parties). This could lead to differential treatment of employees depending on whether their employer chooses to (for example) end their employment sooner by paying them in lieu of notice, or placing them on garden leave – in such circumstances, an employee

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<sup>1</sup> Explanatory Note.

<sup>2</sup> See the Law Society’s website for more information about this committee:  
<https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/employment-law-committee/>.

<sup>3</sup> See, for example, *Transpacific Industries Group (NZ) Limited v Harris and Anor* [2013] NZEmpC 97, *Air New Zealand Ltd v Kerr* [2013] NZEMPC 153, *H & R Block Ltd v Sanott and Another* [1976] 1 NZLR 213, and *Spirax Sarco Ltd v Hewitt* [2021] NZERA 246.

placed on garden leave would effectively be shut out of the workforce for a longer period (albeit on pay) than an employee who is paid in lieu of notice.

- 3.2 We therefore invite the select committee to consider providing further clarity as to whether garden leave will have any effect on the application of the new provisions.

#### **4 Part-time workers**

- 4.1 New section 67J(1)(a) provides that a restraint of trade provision only takes effect where an employee's "average weekly earnings" exceed the "threshold weekly rate" (which is three times the minimum weekly adult rate prescribed under section 4 of the Minimum Wage Act 1983).<sup>4</sup>

- 4.2 It is possible for an employee's average weekly earnings to exceed the threshold weekly rate on a full-time equivalent (**FTE**) basis, but drop below the threshold weekly rate on a part-time basis. It is unclear whether the intention is for such part-time employees to be categorised as 'high income earners' who can be subject to restraint of trade provisions under the Bill.

- 4.3 The select committee should therefore consider whether the definition of "average weekly earnings" ought to be amended to take into account part-time employees who may earn more than three times the minimum weekly adult rate on an FTE basis, perhaps by reference to:

- (a) the number of hours worked, rather than the number of weeks; or
- (b) a fixed FTE salary which is regularly revised to accommodate any changes to who might be considered a "higher income employee" over time (but noting that it may be burdensome for employers to keep track of whether the threshold has changed).



Caroline Silk  
**Vice-President**

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<sup>4</sup> New section 67I(1).