

State Sector Amendment Bill (No 3)

Government Bill

Explanatory note

General policy statement

Bargaining for collective agreements

This Bill amends Part VII of the State Sector Act 1988, which gives the State Services Commissioner (the **Commissioner**) responsibility for negotiating collective agreements for employees of Boards of Trustees (**Boards**). The Bill addresses problems that arise from the fact that Boards retain all the usual rights, duties, and powers of an employer for all other purposes. As the Commissioner has no statutory power to discontinue the pay of employees of Boards or to suspend or lock out those employees, Board employees have had more bargaining power than any other employees and their incentive to take industrial action is greater.

The Bill amends Part VII to redress this imbalance by conferring on the Commissioner all of the rights, duties, and powers of an employer in relation to collective agreement negotiations as if the Commissioner were the employer. This includes the power to discontinue the pay of striking Board employees and to suspend or lock out Board employees who are in bargaining for a collective agreement. The Commissioner will, however, be required to indemnify Boards in respect of any legal challenge that might be brought in relation to the exercise of the Commissioner's powers.

To support the Commissioner's powers, the Bill also provides that where a union that is in bargaining for a collective agreement covering Board employees has given notice of industrial action, union members covered by that notice will be deemed to be on strike from the date set out in the notice, unless the relevant Board has certified otherwise and until the union withdraws the strike notice.

In addition, Boards will be required to provide information about any industrial action, on request from the Commissioner. If a Board fails to comply with this request, the Minister of Education, at his or her discretion, may deduct funding from any future operations grant of that Board.

In addition, the Bill amends section 65A of the Education Act 1989 to provide that during the course of a strike or a lockout a school is deemed to be open for instruction to limit possible court action against a Board for failure to have the school open for instruction in accordance with the Act. However, it also allows the Minister of Education to change the prescribed number of half-days a school must be open for instruction during the school year if that is considered necessary.

School mergers and closures, and technical redundancy

The Bill amends Part VII of the State Sector Act 1988 to facilitate the retention of Board employees and to provide them with employment certainty in the event of a school merger or closure. Accordingly, the Bill provides that where Board employees who are surplus because of a merger or closure of a school are offered equivalent employment by another Board, the requirements to notify vacancies and appoint the person best suited will not apply. However, these amendments will not override any collective agreement requirement to advertise the position of principal in a merged school.

The Bill also limits the compensation payable to Board employees affected by a merger or closure of schools who are offered equivalent employment in the continuing or another school in the same general locality. This is similar to the provisions that apply in reorganisations within the Public Service.

Clause by clause analysis

Clause 1 is the Title clause.

Part 1

Preliminary provisions

Clause 2 provides that the Bill is to come into force on the day after the date on which it receives the Royal assent.

Clause 3 states the purposes of the Bill. In broad terms, these are to give the State Services Commissioner, who has the responsibility of

negotiating collective agreements for employees of Boards of Trustees of schools, the powers that an employer may exercise under the Employment Relations Act 2000 when collective agreements are negotiated. The Bill also precludes compensation for technical redundancies arising out of the re-organisations of schools, and facilitates the employment of Board employees affected by such reorganisations.

Part 2

Amendments concerning employees of Boards of Trustees

Amendments to principal Act

Clause 4 inserts new sections 74AA to 74AD in the principal Act.

New section 74AA provides that the State Services Commissioner has the rights, duties, and powers of an employer under the Employment Relations Act 2000 in respect of employees of Boards of Trustees for the purpose of negotiating collective agreements that will bind those employees. Those powers include the lockout or suspension of employees. In the case of suspensions of employees who are members of a union, the Commissioner need not advise each employee separately or comply with section 89 of the Employment Relations Act 2000 (which requires each suspended employee to be informed of the basis of his or her suspension), but may instead suspend the employees by informing their union. The Commissioner may direct agencies responsible for processing the salaries of employees of Boards of Trustees not to pay employees who have been suspended or locked out for the period of their suspension or lockout or to deduct any pay previously paid for that period.

New section 74AB indemnifies Boards of Trustees affected by an exercise of the State Services Commissioner's powers under *new section 74AA* from any claims that may be brought against them because of that exercise. However, a Board will not be indemnified for any liability that arises out of conduct that the Board engaged in without good faith or without reasonable care.

New section 74AC requires notice to be given of any proposed strike by employees of Boards of Trustees. If the strike takes place, every employee who will be bound by the collective agreement to which the strike relates is deemed to participate in the strike. However, this does not apply to an employee if a notice under *new section 74AD* states that the employee is not participating in the strike.

New section 74AD requires each Board of Trustees affected by a strike notified under *new section 74AC* to advise the State Services Commissioner of those employees who are not participating in the strike. The Commissioner may ask the employer to provide further information about the strike, such as the hours worked by any employee or any class of employee.

The Commissioner may require the employer to state whether the employer has complied with the provisions of *new section 74AD* or any directions given under it. If the Commissioner has reasonable grounds for believing that an employer has failed to comply with those provisions or directions, the Commissioner may report the matter to the Minister of Education. The Minister of Education may, after consultation with the Board of Trustees concerned, reduce the amount of funding that the Board receives under the Education Act 1989.

Clause 5 inserts *new sections 77HA and 77HB* in the principal Act.

New section 77HA precludes the compensation of an employee of a school for the loss of his or her position, if the loss results from the closure of the school or the merger with 1 or more other schools and, as a result of the closure or merger, the employee is offered equivalent employment in another school or accepts any employment in another school. Equivalent employment is defined as employment in substantially the same position and the same general locality as that previously held, and on terms and conditions that are no less favourable than those applicable to the previous position, and under which the employee's service with the previous school is recognised as service with the current school.

New section 77HB permits employees who have lost their positions as a result of a closure or merger of schools to be employed in schools without the need to comply with section 77G or with section 77H of the principal Act (section 77G requires employers to give preference to persons who are best suited to the position; section 77H requires positions to be advertised).

New sections 77HA and 77HB follow sections 30E and 30F of the principal Act, which apply to reorganisations within the Public Service.

Amendment to Education Act 1989

Clause 6 amends section 65A of the Education Act 1989, which authorises the Minister of Education to prescribe the number of half-

days on which a school must be open. The effect of the amendment is to deem a school that is closed for any number of half-days because of a strike or lockout to be open on those half- days. The amendment also enables the Minister of Education to change the number of prescribed half-days for any school affected by a strike or lockout.

Regulatory impact and compliance cost statement

Statement of problem and need for government action

The State Services Commissioner (in practice the Secretary for Education under delegation from the Commissioner) is responsible under the State Sector Act 1988 for negotiating collective agreements for employees of school Boards of Trustees. However, the Commissioner does not have the power to discontinue the pay of striking employees or to suspend or lock out employees who are bargaining for a new collective agreement. Individual Boards retain the power to discontinue pay but have seldom exercised it. Accordingly, Board employees can take lawful industrial action, but not face the same consequences under the Employment Relations Act 2000 as other employees. They therefore have increased bargaining power relative to other employees and a greater incentive to take industrial action.

Secondly, during the recent round of school closures and mergers in the Network Review process, it became evident that there was a need to clarify Boards' ability to offer employees who had lost their jobs a suitable position with another Board without advertising the vacancies and appointing the person best suited. In addition, to facilitate retention of staff and limit unnecessary redundancy compensation payment there is a need for a statutory technical redundancy provision so that an employee who is offered equivalent employment with a continuing or different school in the same general locality will not also be paid redundancy compensation.

Statement of public policy objectives

The absence of a power for the Commissioner to suspend or lock out striking employees, and to deduct their pay, puts Board employees in a position of power that no other employees enjoy. No policy reason exists to treat these employees differently from any other group of employees. The proposals therefore aim to place the State Services Commissioner in the same position as all other employers

during bargaining, by conferring on the Commissioner all of the rights, duties, and powers of an employer in relation to collective agreement negotiations as if the Commissioner were the employer. In school merger or closure situations, the proposals aim to facilitate the retention of teachers and provide them with employment certainty, wherever possible. The Bill will also ensure that affected Board employees are not entitled to redundancy compensation where the Board of the continuing school, or the Board of another school in the same general locality, offers employees equivalent employment.

Statement of options for achieving the desired objectives

The fact that few Boards have exercised their powers to discontinue the pay of striking employees has encouraged escalation of strike action and impacted on the provision of education. It is therefore not desirable to retain the status quo.

Statutory protection is needed for Board employees affected by a school merger or closure. The Bill will enable employers to appoint them to positions in other schools without complying with the statutory requirements to appoint the person best suited or notifying vacancies.

Statement of net benefit of this proposal

The powers to be conferred on the State Services Commissioner by the Bill will reduce the incentives for Board employees to take strike action by requiring them to face the normal consequences provided for under the Employment Relations Act 2000.

The Bill will also facilitate the retention of teachers in a school merger or closure situation and limit the compensation payable to Board employees affected by a merger or closure who are offered equivalent employment in the continuing or another school in the same general locality.

Business compliance cost statement

The proposals do not involve compliance costs for business. However, Boards of Trustees will be required to provide a declaration or return to the Commissioner setting out the names of those employees who did not participate in the industrial action, and other information about the industrial action if and as requested by the Commissioner. There may also be some resource implications for the

Ministry of Education and a practical requirement for Boards to be indemnified in relation to any legal proceedings brought as a result of the exercise of these new powers.

Consultation

The Ministry of Education, Department of Labour and the Treasury have been consulted over the proposed amendments to the Act.

The Post Primary Teachers Association (PPTA), the New Zealand Educational Institute (NZEI), and the New Zealand School Trustees Association (NZSTA) have been consulted regarding the proposals relating to the State Services Commissioner's powers.

Hon Trevor Mallard

State Sector Amendment Bill (No 3)

Government Bill

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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 Boards of Trustees, to exercise, subject to certain exceptions, the powers available to an employer under the Employment Relations Act 2000; and 5
- (b) to require the unions representing employees of Boards of Trustees to give prior notice of a proposed strike; and
- (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 10
- (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 15
- (e) to make related amendments to the principal Act and to the Education Act 1989.

Part 2 20
Amendments concerning employees of Boards of Trustees

Amendments to principal Act

4 New sections 74AA to 74AD inserted

The principal Act is amended by inserting, after section 74, the following sections: 25

“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. 30
- “(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. 35
- “(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 takes effect on the date specified for the purpose in the advice, and the Commissioner need not— 5
- “(a) separately advise any employee who is included in any such class; or
- “(b) comply with section 89 of the Employment Relations Act 2000.
- “(4) Despite any other enactment, 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: 15
- “(b) that any amount paid to the employee in respect of that period be deducted from any remuneration otherwise payable to the employee.
- “(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 20
- “(b) must be followed by the person.
- “(6) **Subsection (1)**—
- “(a) overrides section 77E(2); and 25
- “(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 Commissioner by **section 74AA**, the Commissioner must, out of money appropriated for the purpose by Parliament, indemnify the Board for those costs or damages. 35
- “(2) However, a Board of Trustees may not be indemnified for any costs or damages to the extent that those costs or damages 40

arise out of conduct of the Board that is not in good faith or that is engaged in without reasonable care.

“74AC Strikes in schools to be notified

- “(1) A strike by employees of a Board of Trustees is not lawful for the purposes of the Employment Relations Act 2000 unless the Commissioner is given written notice of the proposed strike before the commencement of the proposed strike. 5
- “(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 10
- “(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. 15
- “(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— 20
- “(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 25
- “(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. 30

“74AD Employers to notify Commissioner about participation in strikes

- “(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. 35

- “(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. 5
- “(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. 10
- “(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. 15
- “(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.” 20
- 5 New sections 77HA to 77HB inserted** 25
The principal Act is amended by inserting, after section 77H, the following sections:
- “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— 30
- “(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 35
- “(b) in connection with that closure or merger,—
- “(i) the employee is offered equivalent employment in another school (whether or not the employee accepts the offer); or 40

- “(ii) the employee is offered, and accepts, other employment in another school.
- “(2) Equivalent employment in relation to the employee’s previous employment is employment in the other school—
- “(a) in substantially the same position; and 5
 - “(b) in the same general locality; and
 - “(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 super-annuation conditions); and 10
 - “(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. 15

“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— 20
- “(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. 25
- “(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** 30
- Section 65A of the Education Act 1989 is amended by inserting, after subsection (2), the following subsections:
- “(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. 35
 - “(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.”