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Marie Alexander
Clerk
Employment and Accident Insurance Legislation Committee
Parliament Buildings
WELLINGTON

SUBMISSION BY THE NEW ZEALAND MANUFACTURERS FEDERATION

ON THE

EMPLOYMENT RELATIONS BILL

New Zealand Manufacturers Federation
P O Box 11543
WELLINGTON

The New Zealand Manufacturers Federation Inc (ManFed) welcomes the opportunity to make a submission to the Employment and Accident Insurance Legislation Committee on the Employment Relations Bill.

ManFed represents both regional associations and sector groups of manufacturers and has a total membership of about 2600 companies. The sector is a significant contributor to the New Zealand economy, representing about 18% of GDP. In its broadest definition, manufacturing comprises 87% of New Zealand exports, sector sales total $51 billion and total employment numbers 280,000.

ManFed's submission is in four parts:

I. Introduction;
II. Industry New Zealand or Warehouse Economy?;
III. Specific Concerns of Manufacturers;
IV. A Summary of Recommended Changes.

ManFed also seeks to appear in person before the committee to speak to its written submission and to address any issues the committee may wish to raise.

PART I - INTRODUCTION

The Manufacturers Federation does not welcome the introduction of the Employment Relations Bill because of the profound uncertainty it has and will generate for the economy and for individual businesses a significant period of time after its introduction. The Federation acknowledges that for elements of current labour market law may not have worked as well as they might. We would have preferred a review of that law rather than its wholesale replacement with another. This has not contributed to business confidence as a survey of manufacturing members, covered later in this submission, clearly demonstrates.

Nevertheless, our assumption is that the Employment Relations Bill will be enacted into law, with its core objectives essentially intact. The Federation's submission is made on that basis. ManFed has set out to focus specifically on the likely impact of the Bill on New Zealand manufacturers, rather than attempting to address all of the potential issues arising for employers from the Employment Relations Bill.

1.1 A Review Clause

While there may be debate over any assertion that the Bill is unlikely to enhance New Zealand's competitiveness, there can be no debate about the significant uncertainty the Bill creates for New Zealand's productive sector. There is thus a compelling case for the Bill to contain a clause setting out a process for automatic review. This would enable unforeseen practical consequences of the Bill's provisions to be addressed, it would permit changed circumstances to be taken into account, and for issues regarding the potential for elements of the Bill to be captured by those of ill-will, whether they be employers, employees or unions to be addressed. In sum, the inclusion of a review process in the Act would provide a signal to business and industry of the Government's recognition both of apprehensions about the impact of the Bill and the difficulty of accurately delivering all of the Bill's objectives as intended to real workplaces.

ManFed recommends that reviews be tripartite in nature, with unions, employers and Government represented on a body responsible for undertaking a review. The review progress would be triggered by any one of the three parties at, for example, yearly intervals from commencement of the Act. Matters for review should encompass any section of the Act, excepting those providing for core principles in Clause 3, and should include proposed new sections that would not negate those core principles.

Any proposed changes to the Act would require the consensus of the three parties. If nothing else within its submission results in changes to the Bill, ManFed asks that the Government consider including an automatic review clause within the Bill.

PART II - INDUSTRY NEW ZEALAND OR WAREHOUSE ECONOMY?

2.1 The Changed Economic Environment

All manufacturers, given New Zealand's open economy, must compete in markets that are globally competitive whether domestically or overseas. Maintaining competitiveness is thus critical to the growth of the economy overall, for growing jobs and for paying for the social and environmental outcomes New Zealanders seek.

This competitiveness is now measured on global, not local, criteria. It is a reality that New Zealand is not in a position to influence these criteria very much. They include global standards of quality, speed of delivery and pricing as well as the creation of value. Increasingly, New Zealand manufacturing and industry comprise part of a global supply chain in which failure to maintain competitiveness will result in failure to secure orders and thus the retention of jobs. Effective supply chain management is critical; there is no point in the production of quality widgets from Industry New Zealand on a just-in-time basis for input to the supply chain of Industry USA if, say, there are arbitrary delays in transporting the widgets to the customer; the same principles would apply if critical New Zealand input costs are higher than those of global competitors as end prices to customers are struck on a globally competitive basis.

A key element in maintaining competitiveness is having available a skilled and flexible workforce capable of meeting the changing requirements of the marketplace. On the other hand escalating costs including those associated with employment, that are not tied to compensatory increases in productivity, place the viability of individual businesses at risk. This is particularly so with the small and medium sized enterprises which constitute the majority of businesses in New Zealand. These same small to medium enterprises are those businesses with the greatest potential to grow employment. They need assurance that employment and associated compliance costs will be reasonable and that they will have the ability to adjust to market changes.

While such companies do not usually have the option of going offshore and taking the jobs of New Zealanders with them, downsizing or closing up entirely remain real options. Each must inevitably lead to reduced employment opportunities, particularly for those who are unskilled.

Moreover, recent research shows that those New Zealand firms which already fully involve staff in decision making processes are more successful than those that do not. Those that do not tend to stagnate, if not go out of business. By complicating the direct relationship between employers and employees the Government runs the risk of hurting the very people it is trying to protect. World class manufacturers, including those in New Zealand, recognise that their employees are their most valuable asset, and treat them accordingly. A culture which encourages participation of employees and which empowers them through training and development programmes is required, as are incentives to attain a firm's objectives, such as performance pay. Managers who listen to employees and act on any concerns tend to avoid the "us versus them" attitude. Studies in the 1990's show significant improvement on the part of New Zealand enterprises in these areas.

ManFed acknowledges that there are still New Zealand enterprises that need upskilling in this area. The Bill, however, provides little incentive or support for employers to do so.

In ManFed's view a number of the proposed provisions of the Employment Relations Bill, can have as their outcome only a reduction in this country's overall global competitiveness. This must lead in turn to poorer economic growth and fewer jobs.

There is currently a business environment of significant uncertainty, generated at least in part by concerns about what the Employment Relations Bill may mean in practical terms for the businesses of individual manufacturers. This concern is manifesting itself in the manufacturing sector as a lack of investment intention. Despite very positive growth shown in NZIER figures for the December 1999 quarter, the Quarterly Survey of Business Opinion shows deepening pessimism among businesses. Main contributors to this pessimism are fears about the economic impact of some of the Government's policies, particularly in the area of labour market law changes, coupled with concerns about the Reserve Bank's intentions. In the manufacturing sector this pessimism has manifested itself in a lack of investment in new capacity despite rises in output, overall sales and new orders.

Underlying this concern is a feeling that employers may lose effective control of their business, which for a significant number has been the product of a lifetime of commitment. Factors could include the likelihood of disruption experienced by key elements impacting on a manufacturer's business from elsewhere in their supply chain.

Disclosure of sensitive information that may, however inadvertently, reach competitors holds a special concern particularly when it might provide a signal to others of new developments, expansion into new export markets or a signing of a lucrative deal. Compliance costs associated with the Employment Relations Bill are another general area of concern, particularly for smaller enterprises. SMEs will have a particular difficulty and cost in producing the requisite information that meets likely "good faith" criteria when their primary focus is on nurturing their business. These are, after all, the same businesses that not infrequently struggle to produce the data required by their own accountants.

2.2 Impact of Current Labour Market Law

The current New Zealand business environment is the result of over a decade of economic reform, one key element of which has been labour market law. The general thrust of this reform has proceeded in other OECD countries and, in the great majority, continues.

Current labour market law has contributed to New Zealand's economic growth because of the competitiveness it has delivered that has in turn enabled New Zealand producers of goods and services to survive a small and fragile open economy on the distant edge of a global marketplace. The merits of the proposed employment framework need to be considered in relation to the law as it presently stands. The figures quoted below are derived from Statistics New Zealand data.

2.2.1 More or less Jobs?

Much of the debate has focused on whether labour market law adopted at the end of 1991 has grown jobs or whether it has led to greater unemployment. There is no simplistic yes or no answer to that question. Employment growth is a product of several inter-related factors such as monetary and fiscal policy settings and broader economic reforms, rather than any one particular factor. What it is possible to say is that between the end of 1991 (when significant labour market reform occurred) and the end of 1999 total employment

grew by 21.8%. Full time employment grew by 19.4% and part-time employment grew by 30.7%.

By comparison, between 1985 (when the Labour Force survey was first introduced) and December 1991 total employment declined by 6.8%. Over the same period full time employment declined by 12% and part time employment increased 19.6%.

These figures suggest that for whatever reason(s) the economic climate was more conducive to job growth, both full and part time, subsequent to 1991. Equally, prior to 1991 full time employment was on the decline, while part-time employment increased significantly.

Furthermore, if one looks at the reverse of the coin, it cannot be said that the present labour market law contributed to a rise in unemployment or to casuality of the workforce. Between 1985 and 1991 unemployment rose by 186.3%. Between 1991 and 1999 it declined by 42.4%. This was achieved along with an increase in the participation rate (ie the percentage of the working age population in employment) during the period, and despite a growth in the working age population.

It has also been suggested that current labour market law has led to a decline in the quality of employment. The same statistics clearly suggest otherwise. The greatest growth in part-time work occurred over the period 1985 – 1991, before the current industrial relations legislation was put in place. Similarly, the growth in part-time workers who would have worked more hours or accepted full time employment had it been available was significantly greater over the same period than subsequently between 1991 and 1999. Moreover, the growth that has occurred since 1991 in this area can be attributed to at least in part to the increased number of students staying at school or going on to tertiary education. This consequence is positive given the equally clear evidence of continuing disparity between skilled and unskilled wage growth.

2.2.2 Better Paying Jobs?

One claim has been that the labour market reforms of the early nineties have enabled or facilitated a fall in real wages. This is not the case. Overall nominal wage growth has matched the growth in consumer price inflation over the period the current labour market framework has been in force. Moreover, the statistics used to measure wage growth record the pre-tax rate and, therefore, do not reflect the positive impact on take-home pay of changes in effective tax rates over this period nor the impact of the 1995 and 1998 tax cuts.

What we have seen, and which is becoming more pronounced if anything, is wage differentiation between the skilled and unskilled. This cannot be laid at the feet of labour market reforms, but rather reflects a greater demand for those with specific skills as a result of economic restructuring. The real issue, perhaps, is how best to increase the level of skills in the work force.

2.2.3 What About Productivity?

Productivity, or its decline, has been another area of contention. Claims have been made that current industrial relations law has contributed to a fall in productivity and that Australia, for example, has achieved far higher growth rates in the absence of legislation

similar to that currently in force. It is again simplistic to attribute productivity or the lack of it to one piece of legislation. Other factors that have an impact on its growth must include monetary policy, broader economic reforms and improved New Zealand competitiveness, for example, in infrastructural reforms.

Productivity growth in the late 1980's was distorted by the "Think Big" investments which, were highly capital intensive but created little employment.

In the 1990's price measurements have become less accurate than in the previous decade because of the lack of adequate Government funding to maintain accurate producer price output data or data on the capital stock used in production. This factor has served to under represent the true level of productivity by at least 1% per annum.

Moreover, the productivity data that is being quoted in the media may not reflect the true picture. It is flawed for a number of reasons. One of the major problems is that the data is unable to reflect the major restructuring which has taken place in the manufacturing sector as import protection has been stripped away. A good example is recent data for the transport equipment sector where car assembly activity ceased in 1998. In the year to September 1999 sales fell by 12% while the total hours worked in the sector fell by just 2.2%. Productivity statistics show this as a fall in productivity. In fact the data is showing that the assembly plants which closed had high sale levels but required fewer staff to produce the level of those sales than other areas of the sector because of the high imported content in the vehicles.

A further factor that has distorted productivity figures for the 1990's is growth in non-factory floor, value-adding activity such as marketing. Such activity is labour intensive, and hence reduces New Zealand's productivity statistics, but also creates employment and increases our global competitiveness. Using the measures of employment and competitiveness Australia fares much worse with its higher unemployment rate and a comparatively more poorly performing manufacturing sector. Between 1991 and 1999 Australian manufacturing GDP grew by 13.9% while New Zealand manufacturing GDP grew by 20.1%.

On balance, current industrial relations law is a critical element of a broader package of economic measures which have led to increased employment and greater competitiveness. It follows that the legislation intended to replace that presently prevailing must be judged on its ability to make a similar, if not significantly better, contribution in these areas.

PART III - SPECIFIC CONCERNS OF MANUFACTURERS

As part of preparing this submission a survey of manufacturing members was carried out to ascertain:

- whether members saw positive aspects to the Employment Relations Bill;
- how members viewed their relations with staff and with unions at present; and
- the issues of greatest concern in the new Bill.

In general terms manufacturers assessed the Bill in terms of its potential ability to:

- maintain if not enhance the current economic environment, of which the Employment Contracts Act was a critical element, which has contributed to increased employment and greater competitiveness over the past nine or so years;
- maintain labour force flexibility essential to the maintenance of New Zealand's global competitiveness;
- provide balance in employer/employee relations; and
- deal with the fact that people do not always act in "good faith", that there is always the possibility of seizure of the process by persons of ill-will, whether they be employers or employees and therefore the need to ensure that the ability for individuals to cause mischief is minimised.

Manufacturers' uncertainty about the environment posed by the Employment Relations Bill was clearly reflected in their response to the survey, as was their commitment to the workplace flexibility created by the ECA. Because much of manufacturing and industry has remained with formal union structures, most of those responding saw a continued role for unions, but one where employees were left with the genuine choice of accepting the union as a bargaining agent or not, and one where they retained an inalienable right to communicate with their employees. Of those that responded 68% had collective employment contracts in place, with 90% considering they worked well. Most of those who considered they worked well also had union members on the staff (75%). Over 91% of respondents believed that their relationship with unions and their representatives was either good or very good. The balance had no union contact.

What was of concern to just over half of those who responded to the survey was recent changes in attitude they had noted in some staff and union representatives. Positions were becoming more entrenched, staff expectations of what the Bill might mean in terms of wage increases and other benefits had been heightened. One commented that union membership had doubled since the election.

Manufacturers were then asked to identify six elements of the Bill that gave them most cause for concern.

3.1 Manufacturers' Six Key Concerns

3.1.1 Provision of Information Requirements

The single most significant issue by far relates to the Clauses requiring provision of information under the requirements of good faith bargaining. In particular, those requiring

the union and employer to provide to each other at the commencement of bargaining, during bargaining as is necessary, and on request, information (including financial information and business planning and forecasting) that might reasonably be expected to be relevant to their participation in bargaining [clause 33(1)(e)].

Manufacturers saw this requirement as having a direct impact on their ability to remain competitive. Particularly in relation to multi-employer bargaining which could see them having to provide their most commercially sensitive information, and the risk of its inadvertent leakage to their direct competitors.

It is not clear why forecasts and business planning information should need to be made available. These are of particular commercial sensitivity given that they relate to a potential future, which may or may not occur, rather than the present. A further concern, given the detailed and complex financial nature of most of the information in question, was the ability of those in receipt of the information to accurately interpret it. For example, one manufacturer said that his company already paid above average rates of pay, along with over-time, superannuation and health care benefits. The worry, however, was that once unions had access to the books they would seek a larger slice of profits without making allowances for the risks the company faced such as changing interest rates and cyclical markets, opting instead to consider only the bottom line. It was also felt that unions might not fully appreciate that owners and investors needed a rate of return on the capital employed, but that employees could not negotiate for increases of the same magnitude on a sustained basis without placing jobs at risk.

Considerable advantages to both unions and to employers were seen in first:

- a clearer definition of what information might need to be provided in a course of bargaining, for example, it should be directly related to a claim or claims being made by those party to the bargaining. There should not be the opportunity to engage in a “fishing expedition” as has happened with the Official Information Act;
- specifying that information must be disclosed only to the negotiating team or alternatively and preferably, having the Bill allow for parties to collective bargaining to provide the requested information to a neutral third party to determine, for example, its relevance to the bargaining process, and to control the manner of its release, or to decide that its nature is of such sensitivity that it should be made available in part or not all. Details of this provision, including a mechanism for triggering the process, could either be placed in the body of the legislation or included in a code of good faith; and,
- ensuring there are clearly defined sanctions for the inappropriate disclosure of information to other parties. These could be defined within a code of good faith.

We consider that the establishment of a process which permits requested information to be assessed by an independent third party – perhaps an “employment ombudsman” - as to its relevance to the bargaining process and to determine the manner of its release would go a considerable way towards addressing manufacturers concerns while also meeting the intentions of the Bill. Such a process would be triggered by either party should the provision of information, its quality, or its sensitivity be disputed. A lot of heat could be removed from the process, leaving the relationship between the bargaining parties more positive than might otherwise be the case.

Accordingly, ManFed submits that:

(a) the information required to be made available should be restricted to that directly related to a claim or claims being made by those party to the bargaining. There should not be the opportunity to engage in a "fishing expedition" as has happened with the Official Information Act;
(b) an independent and appropriately qualified third party be established to whom information that is in dispute, may be referred. Details of this provision, including a mechanism for triggering the process, could either be placed in the body of the legislation or included in a code of good faith; and
(c) there are clearly defined sanctions for the inappropriate disclosure of information to other parties.

These objectives could be achieved by:

(a) deleting Clause 33(1)(e) and replacing it with the following:

> **Once bargaining arrangements have been agreed and negotiations commenced, the union and employer may be required to supply information; including that of a financial nature where there is a stated inability to meet claims being advanced on economic grounds, directly related to claims being made by the parties. Where its release is disputed by either party, the information in question is to be referred to suitably qualified and independent third party to determine its relevance to the negotiation and whether it should be withheld, or released in part or in whole, and the form any information to be released should take.**

(b) by adding an additional two paragraphs to follow on from Clause 35(2)(c):

> **(d) only be requested after bargaining arrangements have been agreed and negotiations commenced;**
> **(e) be directly related to a claim or claims being made.**

(c) by amending Clause 35(3)(a) so that it reads:

> **the information requested is directly related to claims being made by the parties;**

(d) by deleting Clause 35(5)(b) as it is not clear at all how information relating to the relationship between the employer and union would have relevance to whether negotiations were being conducted in good faith;

(e) by deleting Clause 35(6)(a) and replacing it with:

> **must not be disclosed beyond the appointed/elected negotiating team with the agreement of both parties;**

(f) by deleting the word "reasonable" in Clause 35(6)(b); and

(g) by adding a further Clause 35(10):

> **where unauthorised disclosure beyond the appointed/elected negotiating team then the penalties as defined in the appropriate good faith code shall apply.**

It is also recommended that the Committee ensure that the Bill adequately spells out what is to happen should either party decline to make the information requested available after due discussion between the parties about the request.

A further related and equally significant concern relates to Clause 4(4)(c). The wording is so wide as to effectively require an employer to disclose to all employees and union representatives (who might work for another employer party) to a mutual multi-employer agreement, everything to do with the activities of the business. This is impractical and inappropriate in a number of cases and does not take into account other legal requirements such as those relating to the Companies Act and the New Zealand Stock Exchange. Under this Clause, a union of two, in a large company where the rest of the staff are on individual agreements, could rightly expect to be advised of everything to do with the activities of the business. Omission to consult by the employer could result in the claim that he or she had failed to act in ”good faith”.

Accordingly it is submitted that Clause 4(4)(c) be deleted.

3.1.2 A Perceived Lack of Balance in the Employment Relations Bill

The second most significant concern for manufacturers is uncertainty generated by what is perceived as a lack of balance in the Employment Relations Bill as it currently stands. There is an emphasis in the Bill on union rights and employer obligations, rather than a balanced mix of both. The Bill gives union representatives almost unfettered access to the workplace, while employers are not permitted to communicate directly with affected employees while collective bargaining is underway without union approval. Unions are able to commence collective bargaining earlier than employers, while employers are to collect union dues, pay for and distribute to employees a range of material related to collective agreements, union coverage and dispute resolution processes and pay for union members to attend employment relations education leave. Employees should retain a genuine choice as to whether they belong to a union or not. Employees should be able to negotiate their own collective agreement or appoint an agent, other than a union representative, to act on their behalf.

Manufacturers seek to retain the direct relationship they have with employees and which the ECA fostered. The intervention of a state sanctioned third party, along with a number of the provisions of the Employment Relations Bill erodes this direct relationship. As indicated earlier in this submission there are indications that good working relationships that have developed over the duration of the ECA are now at risk with the re-emergence of the “them and us” approach that prevailed prior to the ECA.

The lack of importance, or primacy, attributed to this relationship is evident in Clause 4(2) where the relationship between employer and employee is listed seventh.

It is submitted that Clause 4(2) be renumbered, with the current Clause 4(2)(g) be renumbered as Clause 4(2)(a) with the other paragraphs renumbered accordingly.

The following are examples of the lack of balance seen in the Bill:

3.1.2 (a) The Right to Communicate with Employees

Employers want to be able to communicate directly with employees on matters relating to their terms and conditions of employment. It is hard to see how requiring union agreement before this can happen while collective bargaining is underway will assist in meeting the Bill's objective "to build productive employment relationships through the promotion of mutual trust and confidence".

It is submitted that Clause 33(1)(d)(ii) be amended to read:

> **must not, the course of negotiations for a collective agreement directly communicate matters impinging on these negotiations with employees if the communications misrepresent the situation, or are likely to mislead employees, or are otherwise made in bad faith, or constitute an attempt or have the effect of negotiating directly with employees. The same requirements are to apply to communications to persons from their representative or advocate.**

3.1.2 (b) Employees Right to Choose

Many manufacturers currently have a number of collective employment agreements in place. The employees themselves negotiated these with or without the assistance of a union. The Bill in its present form does not permit employees to retain this freedom even though the move to limit collective bargaining goes beyond the requirements of the ILO Convention covering the rights to organise and to bargain collectively. Moreover, other Conventions expressly give employees the right to choose their representative or representatives. Limiting collective agreements only to union members does impose subtle pressure on employees to join a union. Similarly, other measures within the Bill, such as Clauses 46(h) and 46(i) could be seen as exerting pressure on employees to remain with a union. Both provisions run contrary to the principle of freedom of association.

3.1.2 (c) Union Right Of Access to the Workplace.

Under the provisions currently in the Bill a union, or unions, have effectively an open right to enter a workplace. The only qualifier to this is that it "must be at reasonable times". In theory a small workplace could be overrun with representatives of various unions seeking to recruit members, to discuss union business and for other wide ranging reasons. Moreover, as the Bill currently stands there is nothing to preclude one union poaching another union's members, or to talk to another union's members.

It is submitted that Clause 22(1) be amended to read:

> **A person group or organisation seeking to represent an employee or employees in negotiations, may be given access to the workplace at times mutually agreed with the employer for the purpose of gaining authority to present employees**

It is further submitted that Clause 22(2) be amended to read:

> **A designated representative of an employee or employees for the purpose of negotiating an employment agreement may, for the purposes of those negotiations be given access to the workplace at times mutually agreed with the employer during any period when employers are employed to work in the workplace to discuss matters relating to those negotiations with the employee(s)."**

Should it be decided not to proceed with these recommendations then it should be noted that Clause 22(3)(e) does not at present require the individual's consent to be given.

3.1.2 (d) Commencement of Bargaining

It is not clear what justification there might be for permitting unions to initiate bargaining for a collective agreement 20 days earlier than an employer. This is another example of the lack of balance in the Bill.

According it is submitted that in Clauses 48(2)(b), 48(3)(b) and in 48(4)(b)(ii) "40 days" is deleted and "60 days" substituted and that in 48(4)(b)(l) "100 days" is deleted and "120 days" substituted.

3.1.2 (e) Employment Relations Education Leave (EREL)

The provision of paid EREL is an issue for a number of manufacturers, particularly those employing only a small number of staff, where productivity would be adversely affected by staff absences. This argument is supported by the report to the Minister of Labour of 8 February 2000 which notes that EREL, as currently in the Bill, will cost employers an additional $10 million. As it is only open to union members it also seems logical to base the calculation of entitlement on the number of union members, rather than the sum of employees.

Accordingly it is submitted that:

(a) Clause 86(a) be amended to read:

> **(a) who is employed by an employer with twenty or more full time equivalent employees that is party to-**

(b) Clause 88(3) be amended to read:

> **The maximum number of days of employment relations education leave that a union is entitled to allocate in a year to an employee is three days, unless the employee's employer agrees to the allocation of additional days.**

(c) Clause 89(1) be amended to read:

> **The maximum number of days of employment relations education leave that a union is entitled to allocate in respect of an employer is based on the number of full-time equivalent employees, who are members of that union, employed by the employer as at 1 March 2001 and every subsequent year, and is determined in accordance with the following table:**

(d) the table in clause 89 be amended by:

inserting in the first line

> **Full-time equivalent employees, who are members of the union, as at 1 March in 2001 and subsequent years**

deleting the line commencing "1-5" and amending the line starting "6-50" to read "20 – 50"; and

(e) In addition the scale of paid ERE leave should be revised to allow for up to two days per annum for 1 to 35 full time equivalent employees, three days for 25 to 50 employees and four days over 50 employees.

3.1.3 Multi-Employer Agreements

A major concern is that large sectors of manufacturing will be rolled back into industry collectives destroying the competitiveness and enterprise advantage achieved with individual site agreements. In sum, there is a concern that the sector will go back to the old system of national awards. One possible outcome could be the ratcheting of wages unrelated to enterprise capabilities. This inappropriate in today's open economy, where New Zealand is importing more than it is exporting, because manufacturers will not be able to raise prices to compensate. Companies want to be assured negotiations will be enterprise based.

Under current labour market law, employers are not compelled to enter into multi-employer agreements with the distinct possibility of having to bargain with competitors which that would have entailed. Moreover, it seems unreasonable that an employer who may in fact have signed a multi-employer agreement should face strike action because other employers party to the bargaining have not signed the agreement. A further and equally important concern is the potential under the Bill as it stands for a strike to occur simultaneously, for example, in all New Zealand ports, or airports, in support of a multi-

employer agreement. Hard won and costly export markets could be lost, after years of time and money invested in building the relationship, at a permanent cost to job creation.

Accordingly, ManFed would seek to have Clause 103 of the Bill amended with the insertion of a new Clause 103(c) "is concerned with the issue of whether a collective employment agreement will bind more than one employer".

3.1.4 Compliance Costs

The Bill in its present form brings with it considerable compliance costs additional to those currently faced by employers. These can have only a negative impact on a firm's competitiveness. For small manufacturers these costs may make the difference between employing additional staff or not. Some, such as the need for employers to pay for Employment Relations Education leave, and costs associated with enhanced union access rights have already been covered elsewhere. There are also costs associated with stop work meetings.

One significant area of compliance cost is the amount of information the employer is required to provide employees with, and the regularity with which this is to be done. For example:

- by 31 October all employees are to be given a copy of the Bill's Second Schedule diagram telling them about the process to be followed in resolving an employment relationship problem;
- the same diagram must be provided to all employees on commencing work, on leaving, and at any time during the course of employment if requested;
- all new employees who are not union members, who enter into an individual employment agreement with an employer party to a collective agreement covering the work to be done with a notice stating a variety of facts relating to the collective agreement; and
- all employees must before entering into employment be given a copy of the intended individual agreement, outlining a variety of facts relating to the agreement.

It is not clear why an employer should have to advise all employees that bargaining has commenced for a collective agreement. This is something which could be undertaken by the union in the course of its consultation with employees and during its recruitment activities.

Accordingly it is submitted that Clause 51 be deleted.

Similarly, Clause116(1) may be impractical when an employee terminates their employment. Experience shows that employees may abandon their employment or leave feeling aggrieved. It may not be possible to contact the employee. Alternatively, by handing over the information the employer may well be encouraging an employee to take a personal grievance even though the employer's action may have been fully justified.

Accordingly it is submitted that Clause 116(1) be amended to read:

> **An employer must give to each employee, at the beginning of the employee's employment, and at any other time if requested including termination of that employment, written information about the services and procedures available under this Act for resolving employment relationship problems.**

3.1.4 (a) Deduction of Union Fees

This requirement is another compliance cost for the employer and Clause 67(1) which provides that a collective agreement is to be treated as if it contains the provision that requires an employer to deduct union fees, albeit with the agreement of the employee, impinges on individual choice and freedom. The assumption surely must be that the collective agreement does not contain a deduction provision.

Accordingly it is submitted that:

> **(a) "contains" is deleted from Clause 67(1) and "does not contain" is substituted, and**
>
> **(b) "exclude or" is deleted from Clause 67(2).**

3.1.4 (b) Continuity of Employment

Clause 64. It is inappropriate to allow for enforcement of a collective agreement beyond its expiry date, particularly as individual employees are immediately covered by the terms and conditions in the collective agreement that applied prior to its expiry under clause 77(2).

Accordingly it is submitted that Clause 64 be deleted.

Clause 66 poses considerable difficulties for manufacturers and other employers in today's globally competitive marketplace. The traditional right of an employer to manage their business, to restructure in the face of changing circumstances, or to sell their business is essential. Moreover, "just cause for dismissal" is not defined. It is also unclear whether a written redundancy agreement per se is sufficient to invoke Clause 64(3).

Accordingly it is submitted that Clause 66 be deleted in its entirety.

3.1.4 (c) Liability on Directors and Officers

The liability on directors, officers or agents of a body corporate for outstanding wages and any other money payable to an employee provides further disincentives to establishing and maintaining businesses, again small businesses where governance id frequently undertaken at nominal cost (and risk) by local professionals such as accountants and lawyers.

Accordingly it is submitted that Clause 245 be deleted.

3.1.5 Fixed Term Contracts – Seasonal Employment

The Bill specifies under Clause 81 - Fixed Term Contracts, that an employee is deemed to have been unjustifiably dismissed where a contract specifies employment will end at the close of a specified date or period unless the employer can establish there were genuine operational reasons for specifying the date or period, and that at the end of the date or period the employer considered that those reasons continued to apply.

The restraints under Clause 81 on the ability of employers to offer fixed term contracts puts a limitation on flexibility and the ability to restructure organisations where appropriate. There is also the broader issue of the unreasonable burden of proof placed on an employer to show they are not engaged in unjustifiable dismissal.

For a number of industries within the manufacturing sector fixed term contracts are a genuine operational requirement, for example with seasonally based industries such as tanning and clothing. Moreover, it is not always possible to specify an end date with precision. Some businesses have an unpredictable seasonality with the end of "the season" dependent on a variety of factors outside of the employer's control such as the climatic conditions for that year. However, both employer and employee know that the work is not permanent.

The seasonal nature of some industries needs to be formally recognised so that an employer does not need to go through the process at the end of each season of having the prove why the employee has not been dismissed unjustifiably.

It is therefore submitted that Clause 81 be deleted in its entirety. If not, then existing sub-Clause 81(2) should be deleted and the following new sub-Clause 81(2) inserted:

> **Where, because of the operational requirements of a business or enterprise, a fixed term contract is allowed to continue beyond its stated termination date, that contract shall not be open to challenge as being other than a fixed term contract, provided the employee has been given no express or implied promise of renewal or legitimate expectation of renewal.**

3.1.6 Unfair Bargaining For Individual Employment

Clause 83(2) relates to unfair bargaining due to "diminished capacity". It is unclear as to what constitutes diminished capacity, who will determine it, and whether there is a timeframe for declaring diminished capacity, for example, is 6 months after signing the contract reasonable? This lack of clarity could lead to increased litigation. It could also act as a positive disincentive to employ some people such as the elderly, or those for whom English is a second language, for fear that a subsequent claim of unfair bargaining will be made. "Emotional distress" will be hard to refute. The previous definition under the ECA of employment contracts "procured by harsh and oppressive behaviour or by undue influence or by duress" is well tested and it would appear less open to frivolous and vexatious claims.

Accordingly it is submitted that Clause 83 be deleted and the following substituted:

(a) 83(1) **Where any party to an employment agreement alleges;**

(a) that the employment agreement, or any part of it, was procured by harsh and oppressive behaviour or by undue influence or duress; or

(b) that the employment agreement, or any part of it, was harsh and oppressive when entered into,

that party may apply to the Authority for an order under this section;

(b) 83(2) **An allegation of the type referred to in sub section (1) may be made in proceedings before the Authority commenced for that purpose or in the course of other proceedings properly brought before the Authority;**

(c) 83(3) **The Authority may exercise the powers contained in sub sections (4) and (5) of this section only on the application of a party to the employment agreement and not of its own motion;**

(d) 83(4) **Where the Authority is satisfied, on the application of a party to an employment agreement, that an allegation of the type referred to in sub section (1) of this section is true, the Authority may make one or more of the following orders:**

(a) an order setting aside the agreement (either wholly or in part);

(b) an order directing any party to the employment agreement to pay any other party such sum by way of compensation as the Authority thinks fit;

(e) 83(5) **In making any order under this section the Authority shall take into account all the circumstances surrounding the creation of the agreement or the relevant part thereof;**

(f) 83(6) **Any order under this section may be made on such terms and conditions as the Authority thinks fit; and**

(g) 83(7) **Except as provided in this section, the Authority shall have no jurisdiction to set aside or modify, or grant relief in respect of, any employment agreement made under the law relating to unfair and unconscionable bargains.**

3.2 Other Issues of Concern

3.2.1 Application of the Act

One of the stated objectives of the Bill is to "acknowledge and address the inherent inequality of bargaining power in employment relationships". It is not clear whether those on high incomes would need protection from the alleged inequality of bargaining power. It is therefore recommended that a new clause be inserted to limit the application of the Act to those earning up to 50% more than the average wage as determined by Statistics New Zealand from time to time.

3.2.2 Strike Action

ManFed does not support any move that would give legitimacy to any form of strike action over and beyond that associated with collective bargaining. Separate and more appropriate arenas exist to address issues, for example, of Government policy or which relate to the international arena. Other, more appropriate fora, such as Parliament exist for this purpose.

3.2.3 'Working day' should not be restricted to weekdays

Clause 5 "working day" " is defined as a day of the week other than Saturday, Sunday, public holidays, and the period 25 December to 2 January. Many manufacturers, particularly those meeting the needs of export markets, regularly work on weekends as do those filling an urgent order. This requirement is normally covered in existing employment arrangements. As currently worded, Clause 5 implies other days are "non working days" and therefore a target for penal and overtime payments.

"Working day" as opposed to "non working days" has little relevance in today's global environment where delivery times are a key element not only of competitive advantage but also of enterprise and job survival.

Accordingly it is submitted that the definition of "working day" be deleted from Clause 5.

3.2.4 Independent Contractors

What Clause 6(2) might mean in practice is a matter of considerable concern for manufacturers, many of whom employ independent contractors and have well established working contractual arrangements in place. Moreover the Court of Appeal has already established a variety of tests to determine whether an individual is a contractor or an employee. Clause 154 also provides a process for determining the employment status of a contractor.

Accordingly, it is submitted that Clause 6(2) be deleted in its entirety.

3.2.5 Codes of Good Faith

The Minister responsible should not be able to unilaterally impose a code of good faith nor be able to decline the recommendation by the committee to approve a code of good faith.

Accordingly it is submitted that Clause 40 be deleted in its entirety.

3.2.6 Probationary Period

This section relates to probationary periods and requires the employer to prove justifiable dismissal if the probationer's employment is terminated either during or at the end of the probationary period. What this does is to act as a positive disincentive to an employer to take on those who may be only marginally employable for a number of reasons. Those most likely to be affected are unskilled young people. Employers should be able to take on a new employee for a limited period to determine whether the arrangement will be satisfactory to both parties, without the employee concerned having recourse to the statutory personal grievance procedure. This is the case in many overseas jurisdictions and acts as an encouragement to employers to provide employment.

Accordingly it is submitted that Clause 82(b) be amended to read;

> **during the period of probation so specified (which must not exceed three months) the probationary employee shall not be entitled to bring a claim of personal grievance before the Employment Relations Authority or the Employment Court unless the grievance relates to unlawful discrimination or sexual or racial harassment.**

3.2.7 Personal Grievance Processes

This section extends the grounds for a personal grievance to actions of an indirect nature, for example indirect sexual and or racial harassment, and indirect duress. It is considered that indirect harassment or duress is capable of virtually open-ended interpretation and would be difficult to refute.

Accordingly it is submitted that:

(a) Clause 121(2)	**add "significant" before "nature" and delete "indirectly";**
(b) Clause 122	**Delete the word "indirectly"; and**
(c) Clause 123	**Delete "indirectly".**

Clause 127(2) is entirely unreasonable and speculative in its assumption that an employer ought reasonably to be aware that an employee has alleged a personal grievance.

Accordingly it is submitted that Clause 127(2) be deleted.

3.2.8 Leave in Exceptional Circumstances

Clause 127(4) provides the Employment Relations Authority with the power to grant leave for a personal grievance to be submitted outside the normal 90 day period.

Accordingly Clause 128 is unnecessarily prescriptive and should, therefore, be deleted.

For the sake of consistency Clause 127(5) should also be deleted.

3.3 CONCLUSION

Manufacturers have serious and compelling concerns about how some aspects of this Bill could impact on their ability to remain competitive. This has in turn created considerable uncertainty within the sector. We ask that a review clause be provided to enable unforeseen practical consequences of the Bill's provisions to be addressed, it will permit changed circumstances to be taken into account, and for issues regarding the potential for elements of the Bill to be captured by those of ill-will to be addressed as reiterated in paragraph 5.1 below.

PART IV - SUMMARY OF RECOMMENDED CHANGES

It is submitted that:

5.1 an automatic review clause be added to the Bill to enable unforeseen practical consequences of the Bill's provisions to be addressed, to permit changed circumstances to be taken into account, and for issues regarding the potential for elements of the Bill to be captured by those of ill-will to be addressed. It is further recommended that the review be tripartite in nature, with unions, employers and Government represented on the body undertaking the review. The progress could be triggered by any one of the three parties at, for example, yearly intervals from commencement of the Act. Any proposed changes to the Act would require the consensus of the three parties.

5.2 a new clause be inserted to limit the application of the Act to those earning up to 50% more than the average wage as determined by Statistics New Zealand from time to time.

5.3 the ability to strike or lockout be limited to circumstances related to collective bargaining.

5.4 Clause 4(2) be renumbered. The current Clause 4(2)(g) be renumbered as Clause 4(2)(a) with the other paragraphs renumbered accordingly.

5.5 Clause 4(4)(c) be deleted.

5.6 the definition of "working day" be deleted from Clause 5.

5.7 Clause 6(2) be deleted.

5.8 Clause 22(1) be amended to read:

> A person group or organisation seeking to represent an employee or employees in negotiations, may be given access to the workplace at times mutually agreed with the employer for the purpose of gaining authority to present employees.

5.9 Clause 22(2) be amended to read:

> A designed representative of an employee or employees for the purpose of negotiating an employment agreement may, for the purposes of those negotiations be given access to the workplace at times mutually agreed with the employer during any period when employers are employed to work in the workplace to discuss matters relating to those negotiations with the employee(s).

Should it be decided not to proceed with these recommendations then it should be noted that Clause 22(3)(e) does not at present require the individual's consent to be given.

5.10 Clause 33(1)(d)(ii) be amended to read:

must not, the course of negotiations for a collective agreement directly communicate matters impinging on these negotiations with employees if the communications misrepresent the situation, or are likely to mislead employees, or are otherwise made in bad faith, or constitute an attempt or have the effect of negotiating directly with employees. The same requirements are to apply to communications to persons from their representative or advocate.

5.11 delete Clause 33(1)(e) and replace it with the following:

Once bargaining arrangements have been agreed and negotiations commenced, the union and employer may be required to supply information; including that of a financial nature where there is a stated inability to meet claims being advanced on economic grounds, directly related to claims being made by the parties. Where its release is disputed by either party, the information in question is to be referred to suitably qualified and independent third party to determine its relevance to the negotiation and whether it should be withheld, or released in part or in whole, and the form any information to be released should take.

5.12 add an additional two paragraphs to follow on from Clause 35(2)(c):

(d) only be requested after bargaining arrangements have been agreed and negotiations commenced;

(e) be directly related to a claim or claims being made.

5.13 amend Clause 35(3)(a) so that it reads:

the information requested is directly related to claims being made by the parties;

5.14 delete Clause 35(5)(b).

5.15 delete Clause 35(6)(a) and replace it with:

must not be disclosed beyond the appointed/elected negotiating team with the agreement of both parties;

5.16 delete the word “reasonable” in Clause 35(6)(b);

5.17 a further Clause 35(10) be added:

where unauthorised disclosure beyond the appointed/elected negotiating team then the penalties as defined in the appropriate good faith code shall apply.

5.18 In Clauses 48(2)(b), 48(3)(b) and in 48(4)(b)(ii) “40 days“ is deleted and “60 days” substituted and that in 48(4)(b)(I) “100 days” is deleted and “120 days” substituted

5.19 Clause 51 be deleted.

5.20 Clause 64 be deleted.

5.21 Clause 66 be deleted.

5.22 Delete “contains” from Clause 67(1) and substitute “does not contain”.

5.23 Delete “exclude or” from Clause 67(2).

5.24 Delete Clause 81.

5.24(a) If not then existing sub-Clause 81(2) be deleted and the following new sub-Clause 81(2) inserted:

Where, because of the operational requirements of a business or enterprise, a fixed term contract is allowed to continue beyond its stated termination date, that contract shall not be open to challenge as being other than a fixed term contract, provided the employee has been given no express or implied promise of renewal or legitimate expectation of renewal.

5.25 Clause 82(b) be amended to read;

82(b) during the period of probation so specified (which must not exceed three months) the probationary employee shall not be entitled to bring a claim of personal grievance before the Employment Relations Authority or the Employment Court unless the grievance relates to unlawful discrimination or sexual or racial harassment.

5.26 Clause 83 be deleted and the following substituted:

83(1) Where any party to an employment agreement alleges;

(a) that the employment agreement, or any part of it, was procured by harsh and oppressive behaviour or by undue influence or duress; or

(b) that the employment agreement, or any part of it, was harsh and oppressive when entered into,

that party may apply to the Authority for an order under this section.

83(2) An allegation of the type referred to in sub section (1) may be made in proceedings before the Authority commenced for that purpose or in the course of other proceedings properly brought before the Authority.

83(3) The Authority may exercise the powers contained in sub sections (4) and (5) of this section only on the application of a party to the employment agreement and not of its own motion.

83(4) Where the Authority is satisfied, on the application of a party to an employment agreement, that an allegation of the type referred to in sub section (1) of this section is true, the Authority may make one or more of the following orders:

(a) an order setting aside the agreement (either wholly or in part);

(b) an order directing any party to the employment agreement to pay any other party such sum by way of compensation as the Authority thinks fit.

83(5) In making any order under this section the Authority shall take into account all the circumstances surrounding the creation of the agreement or the relevant part thereof.

83(6) Any order under this section may be made on such terms and conditions as the Authority thinks fit.

83(7) Except as provided in this section, the Authority shall have no jurisdiction to set aside or modify, or grant relief in respect of, any employment agreement made under the law relating to unfair and unconscionable bargains."

5.26 Clause 86(a) be amended to read:

(a) who is employed by an employer with twenty or more full time equivalent employees that is party to-

5.27 Clause 88(3) be amended to read:

The maximum number of days of employment relations education leave that a union is entitled to allocate in a year to an employee is three days, unless the employee's employer agrees to the allocation of additional days.

5.28 Clause 89(1) be amended to read:

The maximum number of days of employment relations education leave that a union is entitled to allocate in respect of an employer is based on the number of full-time equivalent employees, who are members of that union, employed by the employer as at 1 March 2001 and every subsequent year, and is determined in accordance with the following table:

5.28 (a) and the table in clause 89 be amended by:

inserting in the first row

Full-time equivalent employees, who are members of the union, as at 1 March in 2001 and subsequent years

deleting the row commencing “1-5” and amending the row starting “6-50” to read “20 – 50”.

5.29 the scale of paid ERE leave should be revised to allow for up to two days per annum for 1 to 35 full time equivalent employees, three days for 25 to 50 employees and four days over 50 employees.

5.30 Clause 103 of the Employment Relations Bill be amended and a new Clause 103(c) “is concerned with the issue of whether a collective employment agreement will bind more than one employer” inserted**.**

5.31 Clause 116(1) be amended to read:

> An employer must give to each employee, at the beginning of the employee’s employment, and at any other time if requested including termination of that employment, written information about the services and procedures available under this Act for resolving employment relationship problems.

5.32 Clause 121(2) add “significant” before “nature” and delete “indirectly”.

5.33 Clause 122 delete the word “indirectly”.

5.34 Clause 123 delete “indirectly”.

5.35 Clause 127(2) be deleted.

5.36 Clause 127(5) should be deleted.

5.37 Clause 128 be deleted.

5.38 Clause 245 be deleted.