Submission

by

Business NZ

to the

Transport and Industrial Relations Select Committee

on the

Employment Relations Law Reform Bill

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1. INTRODUCTION

1.1 Encompassing five regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, Canterbury Manufacturers' Association, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 53-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

1.2 In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

1.3 Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.

1.4 Almost all economists recognise that a dynamic, flexible labour market is a critical ingredient for an increased rate of economic growth. Flexible economies have been found to grow faster than rigid economies. This is because a legislative framework that enables flexibility in wage-setting and labour adjustment provides firms with the ability to adjust more rapidly and smoothly to both positive and negative economic supply and demand shocks. Economies with a flexible labour market are also more likely to be more productive and innovative than those with more rigid, centralised labour markets.

1.5 Business New Zealand welcomes the opportunity to comment on the Employment Relations Law Reform Bill ('the Bill'). We recognise the importance of employment legislation to the facilitation of innovation, productivity and economic growth and have assessed the Bill against this requirement and its likely impact on business. Unfortunately, the Bill will cause the New Zealand business environment to be less conducive to innovation, productivity, and economic growth. As a result it will make New Zealand a less desirable place to invest and do business and will reduce the country's international competitiveness.

2. SUMMARY OF RECOMMENDATIONS

1. That the Bill not proceed.

2. That if the Bill is to proceed it should:

   a) undergo further review with the aim of promoting labour market flexibility;

   b) undergo further review with the aim of reducing compliance costs;

   c) take account of Business New Zealand's suggestions in its response to the Employment Relations Act Review.

3. That if the Bill is to proceed it proceeds only in line with the amendments recommended in Part C of this submission (clause-by- clause analysis).

The remainder of this submission comprises three broad parts, respectively:

- **Part A: The Business and Economic Implications of Labour Market Policy Direction**, including discussion on the importance of a flexible labour market to innovation, productivity, and economic growth; and compliance cost implications.

- **Part B: The Employment Relations Law Reform Bill**, including discussion on the Employment Relations Act Review; the Bill's Regulatory Impact and Compliance Cost Statement; discussion of the key changes contained in the Bill; and analysis of the key clauses.

- **Part C: Clause by clause analysis,** setting out recommended changes.

PART A: THE BUSINESS AND ECONOMIC IMPLICATIONS OF LABOUR MARKET POLICY DIRECTION

3. IMPORTANCE OF A FLEXIBLE LABOUR MARKET

3.1 A flexible labour market is critical for innovation, productivity, and economic growth. As the OECD noted in its most recent report on New Zealand:

There is increasing evidence that flexibility in wage-setting and labour adjustment can have sizeable benefits for economic performance in both the short and long-term. Stricter employment protection legislation (EPL) and high costs of unskilled labour (e.g., a high minimum wage) reduce the pressure on the employed to moderate their wage claims in a downturn, and the same factors can curb the adjustment of employment to a changing economic environment.

First, flexible economies tend to grow faster, with rigidities having a stronger impact the further the country is behind the technological frontier. Strict EPL lowers productivity in systems with an intermediate degree of centralisation/ co-ordination – i.e., where multi-employer wage bargaining is predominant without co-ordination. This is the direction that the New Zealand government seems to want to move in its industrial relations reforms. Hiring and firing costs also hamper entrepreneurship and impede the process of firm creation and destruction, with several recent studies having found that firm turnover is an important determinant of productivity growth. Adjustment costs can also reduce investment in new technologies because it becomes more difficult to retool and re-organise the labour force in response to changing market opportunities.

Second, flexible economies are more resilient. They tend to get hit less hard by economic shocks and bounce back quicker. That in turn results in smaller swings in output, inflation and exchange rates. Recent OECD work on the impact of structural and labour market rigidities on economic resilience has found that a flexible economy:

- *Is better placed to take advantage of permanent supply shocks (such as a rise in productivity) and to weather temporary supply shocks (such as droughts). With wages and prices moving more quickly, monetary policy is more able to speed up and smooth out the adjustment process (e.g., United States policy being more able to "test the economy's speed limit") and accommodate the productivity pick-up in the 1990s);*

- *Has an advantage when hit by a temporary demand shock (such as the Asian crisis), though possibly at the cost of a larger inflation shock in the very short term (OECD, 2003i). The initial impact on unemployment is about the same in flexible and rigid economies, but it takes longer for unemployment to recover when adjustment is held back by labour-market rigidities. In assessing the overall social loss, if policy makers care more about unemployment than inflation, or care more about the medium-term*

than about the short-term, then cumulative social losses are much lower than in the flexible economy.[1]

3.2 The OECD has observed that New Zealand's labour market framework is one of the most flexible in the OECD. Though many policies have influenced the indicators below, a flexible labour market has been a major common contributor to recent significant improvements:

- The total number of people employed increased by 33.1% between September 1991 and September 2003 (i.e., from 1,448,900 to 1,928,300).[2]
- The official unemployment rate fell from 10.7% in September 1991 to 4.3% in September 2003.[3]
- Average total hourly earnings increased by 34.2% in nominal terms between September 1991 and September 2003 (i.e., from $14.64 to $19.65) and by 8.1% when adjusted for inflation.[4]
- The number of businesses increased by 26.3% between 1997 and 2003 (i.e., from 256,370 to 323,839).[5]
- Average multi-factor productivity growth increased from an average of 0.09% per annum for 1988-93 to an average of 1.32% per annum for 1993-2002.[6]
- Average GDP growth rates increased from 1.3% per annum for 1980-92 to 3.4% per annum for 1993-2003.[7]
- Average CPI inflation fell from 11.6% per annum for 1980-90 to 1.9% per annum for 1993-2003.[8]

3.3 These indicators show the New Zealand economy has become more resilient than in the 1970s and 1980s and is now a more attractive place in which to do business. They demonstrate that a flexible labour market has improved living standards as measured by increased employment opportunities, less unemployment and higher incomes.

3.4 New Zealand's economic decline of the 1970s and 1980s was arrested in the early 1990s following a general freeing up of the economy in the late 1980s together with a move to a more flexible labour market. As a result, New Zealand's GDP per capita as a percentage of the OECD average has remained stable (at around 83%) over the past decade. While this is an improvement on the earlier steady decline, more must be done to promote higher rates of growth to catch up with the OECD average, let alone the top 10.

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[1] *OECD Economic Survey: New Zealand*, OECD, December 2003, page 98.
[2] *Household Labour Force Survey*, Statistics New Zealand.
[3] Ibid.
[4] *Quarterly Employment Survey*, Statistics New Zealand.
[5] *Business Demography Statistics*, Statistics New Zealand.
[6] *Productivity in New Zealand 1988-2002*, M Black, M Guy and N McLennan, New Zealand Treasury, June 2003.
[7] *Gross Domestic Product*, Statistics New Zealand.
[8] *Consumer Price Index*, Statistics New Zealand.

3.5 The OECD made an observation to this effect in its report on New Zealand, noting that past macroeconomic and structural reforms have contributed to stronger economic growth, but not enough to lift GDP per capita into the top half of the OECD. Business New Zealand agrees that the key challenge is to boost productivity and that there are a number of residual weaknesses in fundamentals that need to be addressed if ambitions for higher levels of productivity and economic growth are to be realised.

3.6 There is merit in Government policies that would improve global connectedness (e.g. trade negotiations), skills development (e.g. industry training initiatives) and talent (e.g. improvements to immigration policy) and Business New Zealand has also welcomed the Government's undertaking policy work on productivity, small business issues and infrastructure development.

3.7 However there is cause for concern about the growing inconsistency between the Government's goals for economic growth and the policies being pursued in a number of areas that will reduce productivity growth and ultimately GDP.

3.8 Many recent significant policy changes have been in employment relations, holidays and occupational health and safety, with pay equity also back on the agenda. These changes will add cost and reduce flexibility; as noted by the OECD, the trend toward a more rigid labour market "is not consistent with the Government's goal of raising per capita incomes"[9].

3.9 The direction being taken towards a more rigid and centralised labour market will make it difficult to achieve the productivity gains required for GDP per capita growth to exceed 4% per annum. The current direction in labour market policy is more likely to result in lower growth with New Zealand's relative OECD position deteriorating once more.

4. COMPLIANCE COST IMPLICATIONS

4.1 The business community accepts that compliance requirements are a necessary part of doing business, however if too onerous they can create significant costs. According to the 2001 Ministerial Panel on Business Compliance Costs, high compliance costs stifle innovation, hinder competitiveness, deter compliance, and discourage firms from growing and taking on more staff.

4.2 Business New Zealand has welcomed past initiatives to address concerns about compliance costs. Examples include the 2001 Ministerial Panel on Business Compliance Costs and subsequent Government reports in response to its recommendations; the establishment in 2003 of a Small Business Advisory Group to advise Ministers on small business issues; and requirements for all policy and legislative proposals to include Regulatory Impact and Compliance Cost Statements.

[9] *OECD Economic Surveys – New Zealand*, OECD, December 2003, page 12.

4.3 There is a problem however in the Government's willingness to consider compliance reduction proposals only if consistent with Government policy, so ruling out around 25% of the Ministerial Panel's recommendations, particularly in critical areas such as tax, employment legislation and the Resource Management Act. Since 2001 numerous compliance costs have increased, many in the employment area (e.g. the Health and Safety in Employment Amendment Act, Holidays Act etc).

4.4 Business New Zealand and KPMG have begun an annual cost compliance survey (see www.businessnz.org.nz under 'surveys'). 760 businesses of all sizes and from varied industries responded to the inaugural 2003 survey. Future surveys will allow trends to be tracked over time, to better assess the impact of policy and legislative change.

4.5 The remainder of this section discusses some of the survey's key findings as they relate to employment relations.

Compliance cost priorities

4.6 The high relative priority respondents gave to employment-related compliance costs reflects legislative changes in recent years. Although 35.5% of respondents listed tax as their highest priority for action (ahead of health and safety in employment (HSE) on 22.8%), adding respondents' top three priorities resulted in HSE (64.9%) overtaking tax (60.8%), with employment relations (47.6%) and ACC (38.7%) also prominent. With the changes to the ERA foreshadowed in this Bill the priority assigned to employment relations issues is likely to increase in the 2004 survey.

4.7 Businesses with 10-19 and 50-99 full-time equivalent employees (FTEs), the 'government, personal services and other' (this includes the health and education sectors), trade and hospitality, finance and business services, and manufacturing sectors were most likely say that employment relations compliance costs had increased.

Compliance cost trends

4.8 There was a strong perception among respondents that employment-related compliance costs had increased more than for other areas. 72% said employment relations' compliance costs had increased, second only to HSE (83%).

4.9 Businesses with 10-19 and 50-99 FTEs, manufacturers and those in the primary sector were most likely to say that employment-related compliance costs had increased.

Estimating compliance costs

4.10 The average respondent spent approximately 550 hours on employment-related issues over the preceding 12 months (including HSE, employment

relations, holidays and ACC requirements). Assigning a conservative rate of $19.04 per hour for managerial time gives an average cost of $10,466 for the year, or around $161 per FTE. The maximum reported hours spent by an enterprise on employment-related compliance requirements was 32,000.

4.11 58.3% of respondents also engaged external assistance for employment matters. On average, these enterprises spent $8,625 on such advice for the year, or around $133 per FTE. The maximum amount spent by an enterprise for external advice for employment-related compliance requirements was $400,000.

4.12 On average, respondents had total employment-related compliance costs of $15,495 for the preceding 12 months, or around $239 per FTE and 0.19% of turnover. Employment-related compliance costs were 29.4% of total compliance costs, just behind tax with 30.1%.

4.13 The survey found that costs per FTE were high for small businesses, particularly those with 6-9 FTEs ($836 per FTE). Compliance costs per FTE fell steadily the larger the business (to $181 per FTE for the 100+ FTE group). The sectors with the highest employment-related compliance costs per FTE were trades, hospitality, construction and utilities.

4.14 Based on the results of the Compliance Cost Survey, we have estimated employment-related compliance costs to amount to approximately $665 million for the 2002/03 year, or 0.5% of GDP (this includes HSE, ACC, Holidays as well as ERA requirements).

Conclusion

4.15 The 2003 Business New Zealand-KPMG Compliance Cost Survey reveals a strong concern in the business community about the direction of recent employment-related policy. Respondents wanted a high priority placed on action on employment-related compliance cost areas, a reflection of a strong perception that the compliance burden in these areas has been growing rapidly and that the reported time spent and costs incurred to comply are high.

4.16 Developments since the 2003 survey such as amendments to the Holidays Act and the introduction and consideration of the Employment Relations Law Reform Bill make it likely that the high profile for employment-related compliance costs will continue in the 2004 survey results.

5. REGULATORY IMPACT AND COMPLIANCE COST STATEMENT

5.1 Business New Zealand supports the requirement for the inclusion of a Regulatory Impact and Compliance Cost Statement in all policy and legislative proposals and in the explanatory notes to all legislation. Done correctly, these statements help ensure that officials and Ministers properly consider the implications of their proposals during the policy development process, and help assist submitters to hold these processes to account.

5.2 Unfortunately the Employment Relations Law Reform Bill's Business Compliance Cost Statement lacks economic analysis and quantification of costs. There is no discussion on costs associated with behaviour change and the likely need for businesses to seek more external advice to deal with new obligations and complexities.

5.3 The Bill's Business Compliance Cost Statement acknowledges that there would be 'transitional compliance costs associated with becoming familiar with the new legislative provisions' and concedes that most employers would be affected to some extent, with those in the manufacturing, health and education sectors impacted upon most heavily.

5.4 However additional compliance costs resulting from this Bill are likely to be an ongoing concern for business, not simply a matter of transition. The comment in the Statement that "it is expected that the compliance costs to business will reduce over time as they become familiar with the new legislation" is not supported by evidence.

5.5 It is unacceptable merely to state, as the Bill's compliance cost statement does, that "compliance costs cannot be readily quantified". A Bill of this kind that will inevitably impose increased costs on the employing sector of the community should, for the purposes of transparency, be accompanied by credible departmental estimates of what those costs are likely to be.

PART B: THE EMPLOYMENT RELATIONS LAW REFORM BILL

1. EMPLOYMENT RELATIONS ACT REVIEW

6.1 The Employment Relations Law Reform Bill is the product of the Employment Relations Act Review. At the time of the Review, Business New Zealand responded, submitting:

(i) That any group of employees, whether or not members of a registered union, should be able to bargain collectively with their employer.
(ii) That the concept of 'good faith", while requiring an employer who does not wish to negotiate a collective agreement to meet with the union to discuss the matter, should not also require the parties to go through the exercise of considering the detail of individual clauses.
(iii) That the formulation of bargaining claims and reporting back on negotiations should be done either during one or both of the legislatively provided union meetings (section 26 of the Employment Relations Act) or outside work time to avoid adverse effects on productivity.
(iv) That recognition should be given to the fact that the so-called "balance of power" now frequently lies with employees and that at the least, a salary bar above which personal grievance and employment agreement provisions do not apply should be reintroduced.
(v) That the legislation should provide for an effective probationary period when the Act's personal grievance provisions do not apply.

6.2 In the light of the Employment Relations Law Reform Bill's likely negative consequences, Business New Zealand requests consideration of the above suggestions as a constructive alternative to the direction taken by the Bill.

6.3 The Review process was initially intended to result in some "fine-tuning" of the principal Act. Instead, as the Ministries of Economic Development, Education and Health, the State Services Commission, Te Puni Kokiri and Treasury commented to the Cabinet Economic Development Committee in July 2003 (EDC (03) 130, released by the Minister of Labour): "A number of proposals … represent significant changes to the legislation and do not, in agencies' view, fall within the scope of 'fine tuning'".

6.4 The same agencies also commented that Ministers had previously considered a number of issues and decisions made had struck "a balance between the objectives of the Act (including promoting collective bargaining and good faith employment relationships) and *limiting compliance costs*, broadly defined, for business" (emphasis added). Compliance cost reduction is not, however, a feature of this Bill even though the Minister of Finance stated specifically in response to a question posed at Business New Zealand's Conference on 17 July 2002 that the Labour Party had no intention of loading additional tax on business and was not going to trample on business.

7. KEY ISSUES – GOOD FAITH AND THE NEW APPROACH TO BARGAINING

Extension of good faith principal

7.1 Good faith in the Bill's terms "requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive, communicative and supportive". What that will involve is far from clear but what is evident is that the words used are subjective enough to support almost any allegation of breach of good faith that might be made in the course of bargaining, and in other situations as well. The concept of mutual trust and confidence, long held by the courts to be a feature of the employment relationship, is well understood. New and vague wording directed to specific outcomes will lead only to litigation, in the process ensuring that employment relationships do not improve.

7.2 The Bill purports to apply good faith to all aspects of the employment relationship but it is apparent that the concept's new – and major - function is for use in undermining the right of employers to manage their enterprises in the most effective way. Good faith is no longer a process but an end in itself. Not only can it be used to require employers to conclude collective and multi-party agreements and/or to enforce compulsory arbitration, it can also be used for penalty purposes if bargaining for an individual agreement (of whatever kind) does not occur, to challenge the provisions of individual agreements alleged to undermine collective bargaining and in a variety of ways to complicate the employment process at the employer's expense. The one-sided way in which good faith is applied, plus fines for non-compliance, make the term in itself something of an anomaly.

Good faith undermines commercial confidentiality

7.3 Clause 6 inserts a new subsection (1A) that, among other things, requires employers proposing to make a decision likely to have an adverse effect on their employees' employment to provide them with access to relevant information about the decision. Employees must also be given the opportunity to comment before a decision is made.

7.4 The clause introduces an element of uncertainty in that it cannot be known if and when employees will challenge confidentiality claims. Challenges of this kind, together with an obligation to consult possibly at too early a stage in the planning process, could undermine a proposed sale of business or transfer of a non-core activity leading to lost employment opportunities rather than the protection of existing jobs.

Collective approach hinders competitiveness

7.5 Cabinet paper EDC (03) 130 indicates that the aim of the Bill is to "further assist the cultural change towards increased collectivism", to enable New Zealand to "compete domestically and internationally on the basis of quality,

through enhancing our ability to attract and retain labour and to promote quality investment in human capital." However the majority of New Zealand's trading partners are moving towards enterprise-based industrial relations systems in the interests of flexibility and economic growth and away from the kind of centralised system envisaged by the Bill.

Collective bargaining under the ERA

7.6 One rationale for the Bill's development is the failure of the Employment Relations Act (the Act) to bring about any great increase in collective bargaining and union membership. It should however be recognised that this is because many organisations and individuals have found bargaining at the enterprise level has provided more incentives and rewards than the universally collectivist approach that formerly prevailed, allowing employers to manage employment relations as they manage any other part of their business. By contrast, as previously noted, the Bill uses good faith to assist the "cultural change towards increased collectivism".

7.7 The fact that good faith in relation to collective bargaining has hitherto been understood as a process not requiring any particular outcome was recognised by the employer and union parties when developing the Act's Code of Conduct for good faith bargaining. Currently, good faith does not, as it does under the Bill, *require* the parties to conclude a collective agreement.

Pressure for collective agreements

7.8 Under the Bill, however, good faith would pressure enterprises into collective agreements under threat of a fine. This goes beyond the Act's purpose of ''promoting" collective bargaining and comes close to "compelling" it. Under threat of a good faith fine of up to $10,000, enterprises would be required to:

- keep bargaining even if deadlocked;
- conclude a collective agreement (an enterprise may not walk away from a claim for a collective agreement but is required to settle);
- meet to discuss a claim for a multi-employer collective agreement (MECA) even if the enterprise does not want to participate in one; and
- conclude a MECA (an enterprise may not walk away from a claim for a MECA but is required to settle).

7.9 Compulsion of this kind ignores the fact that a system of voluntary compliance, leaving the parties free to reach their own agreements, is likely to be more durable than one based on the threat of compulsory arbitration and fines.

Collective bargaining monopoly restricts choice

7.10 The Bill's extended collective bargaining provisions exacerbate the difficulties caused by the monopoly over collective agreements that the Act gives to unions. Employers and employees who want to work under a collective rather than under a collection of individual agreements and who do not want to

engage in the formalities of establishing an in-house union have only one choice – to use an existing union, even if they consider that union does not properly represent their interests.

Collective bargaining monopoly contravenes ILO

7.11 With reference to the collective bargaining monopoly, ILO Convention 87 on Freedom of Association asserts that employees have the right to join organisations of their own choosing "subject only to the rules of the organisation concerned" (Article 2). The Convention neither mentions unions nor does it require an employees' organisation to have external rules imposed upon it, although this is the case in New Zealand. The fact that the Act limits collective bargaining to registered unions can therefore be seen as a contravention of employees' – and employers' - freedom of association. Freedom of association should not, however, be a union prerogative.

Further extension of union authority

7.12 Clause 16 allows union members to authorise their representatives to sign new collectives on their behalf, bypassing the ratification process currently required. This is a device to speed up bargaining but one that may operate against the interests of union members since, once authority has been given, they will no longer be in a position to oversee what has been agreed to on their behalf.

7.13 Clause 26 inserts into all individual agreements a provision requiring employers to deduct union fees from employees' wages and salaries should they in the future join a union. Since joining the union is likely to mean coverage under a collective agreement, in this, as in the situation above, collective bargaining is promoted through a "default" mechanism, with true freedom of choice diminished as a consequence. The clause can be excluded or varied but unless that happens will be activated by union membership. Given the Bill's thrust towards collective agreements it seems undoubted that there will be many employees to whom this imposed obligation comes as something of a surprise, aside from compliance cost implications for employers.

Financial incentives for collective agreements

7.14 Clause 8 allows collective agreements to contain a term or condition to recognise the benefit of having a collective agreement. This legitimising of financial incentives for choosing a collective over an individual agreement creates an anomaly in that it excludes from the prohibited preference category something that is clearly a preference for joining the union "in relation to terms and conditions" (prohibited in terms of section 9(1)(b)). By contrast, it is unlikely that offering better terms and conditions in individual agreements would go without challenge, section 9(2) of the Act notwithstanding. The lack of even-handedness demonstrated by the proposed provision again serves to undermine real freedom of association.

7.15 Since a term or condition of the kind referred to above is likely to encourage employees to join collective agreements, its effect will be adverse for enterprises that find individual agreements more appropriate. Individual agreements allow employers to deal directly with their employees and thereby manage employee relations as they manage all other aspects of their business. It will be to the detriment of good employee relations if the proposed change has the sort of outcome anticipated.

Facilitating and determining collective bargaining

7.16 New sections 50A to 50J (clause 15) insert a bargaining facilitation process as well as a process whereby the Employment Relations Authority can determine collective agreements in the event of a serious and sustained breach of good faith that has significantly undermined the bargaining. These sections represent a return to third party intervention in the bargaining process at the behest of only one party, both in respect to facilitation and in allowing the Employment Relations Authority to determine the collective agreement if agreement cannot otherwise be reached. In the latter situation a high threshold is set but the process itself constitutes compulsory arbitration. Unions should not be able to enforce collective bargaining when they cannot achieve collective agreements through their own efforts.

Multi-employer collective agreements

7.17 Clause 14 inserts a new section 48A that provides for the coercion of enterprises into multi-employer collective agreements (described under "Pressure for collective agreements" above). If a union makes a claim for a MECA, the employers concerned are required to meet once to discuss the claim or risk a good faith fine. However, because the purpose of the first meeting is to put in place a bargaining arrangement, the requirement to develop such an arrangement will of itself mean that bargaining must continue until a MECA is achieved – under the threat of a good faith fine and/or compulsory arbitration if it is not. The standardisation of wages and conditions imposed by a MECA hampers the flexibility and competitiveness desired by enterprises.

Subsequent party clauses to enlarge MECAs

7.18 Subsequent party clauses, whereby an employer (or employers) other than the original bargaining party may be added to a previously negotiated collective agreement are sanctioned by clause 18. While extension to a new employer is by agreement, the fact that lawful strike action may be taken will often mean such agreement is not been willingly obtained. On the contrary, given the ability to take or threaten strike action to achieve collective coverage, the existence of a subsequent party clause may well see employers who do not want coverage under a particular collective forced to join it or face the costs of opposing coverage.

7.19 Subsequent party' clauses also have the ability to widen a MECA into a very large umbrella device similar to a national award. Recent calls (3 February) by the Engineering, Printing & Manufacturing Union for industry-wide bargaining attest to this ability. Going back to a system of national awards, as in the 1970s and 1980s, would be a retrograde step. National awards involve the centralised setting of wages and conditions to the detriment of flexibility, competitiveness and economic growth. The fact that within the first six months of the Employment Contracts Act there was a complete breakdown of the former award system showed that business does not want agreements of this kind. Forcing employers into multi-party agreements takes no account of factors such as size of business, business profitability and market share and can also mean competitor firms becoming privy to commercially sensitive information.

Constraining individual agreements

7.20 The return to collectivism and the undermining of individual choice are emphasised by the approach taken to individual agreements. Clause 19 inserts into the Act new sections 59A and 59B requiring enterprises to enter into bargaining for every individual agreement, with a 'take it or leave it' approach to offering a job susceptible to punishment by a good faith fine. The ability to pass on the terms and conditions of one collective to another collective is similarly constrained. The former requirement would be particularly onerous for enterprises with large numbers of employees currently on individual agreements since it would have the effect of channelling employees towards collectives – undermining employers' and employees' freedom of choice. It is also unclear whether the new provision is intended to apply only to wages and salaries or whether any term or condition, however standard – time of starting and hours of work, for example – must also be open for negotiation.

7.21 Organisations could find themselves facing claims of breaching the Act's prohibition on preference if they offer slightly better terms and conditions as a way of overcoming the problems the new provisions will cause. There are practical difficulties for employers (as there can be for unions in the case of a subsequent collective agreement) if individual terms and conditions must be separately negotiated to avoid any allegation of undermining collective bargaining. Obtaining union agreement to pass on terms and conditions after consultation, as the clause allows, is not a very likely concession.

7.22 The potential for breach of good faith claims (and fines) based on preference grounds means employers have little ability to provide better terms and conditions than those of a collective. And yet lesser terms and conditions are an obviously difficult option. Again it is the employer who faces the costs, all the more invidious in that unions can negotiate "benefit" (bonus) clauses in collective agreements, as previously noted.

7.23 Clause 23 underlines the above change by requiring (via a new section 63A) the parties to bargain for an individual employment agreement, whatever the nature of the agreement - individual employment agreements, terms and

conditions additional to those of an applicable collective, terms and conditions after the first 30 days of employment, terms and conditions of fixed term and probationary agreements and so on. Although there will be many occasions on which bargaining over individual terms and conditions will occur, there will be other situations where the number of employees on individual agreements means bargaining is not a feasible option.

7.24 A legislative obligation to bargain rather than present an agreement that the employee or potential employee is free to accept or reject takes no account of varying employer circumstances and is a cost some businesses will be unable to bear. Prescribing what must happen in every instance, with employers potentially facing penalties if it does not happen, is an excessive intrusion on employers' right to manage their businesses as effectively as possible. Discriminating against individual choice is not the way to promote collective bargaining.

30-day rule retained

7.25 The rule whereby non-union staff work under the terms and conditions of any relevant collective employment agreement for the first 30 days of their employment, is to be retained. As Cabinet papers indicate, Ministers initially agreed that the rule should be dispensed with; however, at unions' behest the rule has stayed. But as Business New Zealand pointed out in its submission to the Review, employees are capable of making their own decisions about such matters and it is time-consuming and inefficient to extend the process of entering into an individual agreement by postponing its completion for a 30-day period. It is also, paradoxically, an invitation to the free-loading that the Bill's individual bargaining requirements aim to remove – those requirements notwithstanding.

8 KEY ISSUES – OTHER PROVISIONS

Fixed term employment undermined

8.1 Clause 27 provides that if a fixed term agreement does not state in writing that the way in which employment will end and the reasons for ending the employment in that way, the employee can treat the employment as continuing. It is a further example of the way in which the Bill undermines the right of employers to organise work in the most effective way.

8.2 It is not in anyone's interests that short-term employment should be made permanent in the way this clause provides. Employers may well be unable to afford the extra financial burden imposed and, as well, there may be insufficient work for the employee to do, setting in train the prospect of subsequent employment termination, the potential for personal grievance action and the further costs that that can impose.

Probationary arrangements extended

8.3 Clause 28 entitles individuals employed under a probationary arrangement to treat the employment as continuing if the fact of the probationary period is not stated in writing. This not only undermines the right of employers to manage their business appropriately but also denies individuals the chance to undertake work for which they may well prove satisfactory by giving them employment opportunities they may otherwise not have had.

8.4 Making provision for effective probationary arrangements (as recommended in the final analysis part of this submission) so that there will be no potential for a personal grievance if the employment does not work out would have benefits for employees as well as employers. It is a feature of many jurisdictions overseas and is, as well, recognised by ILO Convention 158 (Termination of Employment) as a ground for exclusion from Convention coverage.

Union access and employer's right to manage

8.5 Clause 9 prevents employers from deducting the cost of time spent in discussion with union officials from an employee's wages. This is a further diminution of the employer's right to manage. Time spent away from the productive process is a cost on business and the inability to recoup the costs of lost production is an added burden for business to carry. This clause also provides the potential for "mini" strike action since no limitations are placed on the number of employees who can take part in union discussions. Should that happen, there would be an added burden imposed on enterprise productivity.

New personal grievance test for justification

8.6 New personal grievance provisions (clause 37) are a reaction to the *Oram* case and while embracing the union concern that an employer's decision to dismiss should be judged on the objective basis of what a reasonable employer (not the actual employer) would have done, nevertheless introduce a subjective "fairness" element.

8.7 Current procedural fairness interpretations already act as a disincentive to employ – getting employment terminations right can be subject to the Employment Court's quite different view of what was fair in a procedural sense. However, the requirement to decide what is "fair and reasonable to both parties in all the circumstances", in the process considering and balancing "the legitimate interests of the employer and employee", introduces a new element of uncertainty. Making the process of dismissing unsatisfactory employees more difficult than it is at present creates a real disincentive to employment growth.

8.8 In determining the reasonableness of a dismissal from the particular employer's point of view the Court of Appeal has latterly come to recognise that similar circumstances may have different consequences depending on the nature of the employing organisation. Employers already face the costs of

defending decisions to dismiss and are discouraged from employing by the possibility of personal grievances, mediation procedures notwithstanding. Even where a dismissal is substantively justified by the nature of an employee's conduct or performance, procedural fairness requirements, as noted, mean that any decision to dismiss is fraught with hazard. Balancing legitimate interests imposes an additional burden in that it can be argued that losing one's job is never in the employee's legitimate interests. The new provisions are an added cost on business that will benefit only the legal fraternity.

Sale and transfer/contracting out of business

8.9 Although there is no evidence that any real problem exists, the Bill, via clause 30, inserts a new Part 6A into the Act limiting the right of employers to deal with their investment in the most appropriate way. It is a commercial reality that businesses, particularly small businesses, are frequently sold, leased or merged or that the decision is often taken to contract out certain types of work – especially those that are not part of an organisation's core business.

8.10 Sale of business/contracting out decisions are not lightly taken but rather are made in the best interests of organisational profitability or survival. For example, a Department of Labour paper prepared for the Government's Contracting Out Advisory Group in 2001 referred to the decision in *Unkovich v Air New Zealand Ltd* which dealt with a decision to contract out part of the airline's catering operation. What the case did not indicate was that the company went on to sell the whole of its catering operation, resulting in ongoing employment opportunities and the introduction into the New Zealand market of a specialist airline catering sector.

8.11 It is notable that clause 66 of the original Employment Relations Bill also attempted to deal with the issue of continuity of employment in the event of organisational change. The presence of the clause evoked considerable opposition and led to its removal. Significantly, a Labour Department report subsequently noted support for the clause from employees, unions and academics (none of whom have responsibility for business viability) but with adverse comment coming from "a very large number of employers, employers' organisations and some others opposed".

8.12 Similarly, a survey carried out in 2001 (in response to the Ministerial Advisory Group on Contracting Out) demonstrated cross-sectoral opposition to any imposed restructuring provisions. It also expressed general concern at the effect that imposed obligations of this kind would have on employers and business, and on the economy.

8.13 The Advisory Group itself called for submissions and heard individuals in Auckland, Wellington, and Christchurch. There was no support from any employers, and employer representatives on the Advisory Group could not agree to any legislative intervention.

Transfer of business and "specified categories" of employees

8.14 The impulse to preserve the jobs of "specified categories of [vulnerable] employees" or to ensure they are compensated if jobs cannot be preserved, can only be satisfied at the expense of general employment creation.

8.15 The above effect is recognised on page 7 – and also on pages 14 to 15 – of EDC (03) 123 where reference is made to the impacts on business of continuity of employment proposals – reduction in purchase price, increased transaction costs, lower growth, greater use of casual employees or contractors and so on. But costs of this kind notwithstanding, the paper goes on to provide that the "basic right" of employees "to transfer" should be universal and that anything less would undermine that basic right. That conclusion demonstrates a worrying misreading of basic economic effects.

8.16 It has been rightly said that economics is the science of tracing the effects of a proposed or existing policy on some special interest in the short run and on the general interest in the long run. It is for this reason that it is never a solution to support individuals for continuing to perform a service that has lost its value (or to require employers who cannot afford to do so to pay employees for continuing to perform that service), particularly given the existence of a social welfare system that can provide temporary relief if required. The employer here is, in the words of a nineteenth century essayist, William Graham Sumner, "the Forgotten Man" and, as the author of the text "Economics in One Lesson", Henry Hazlitt, goes on to say, it is the Forgotten Man "who is always called upon to staunch the politician's bleeding heart by paying for his vicarious generosity."

8.17 Legislation that fetters employers' ability to deal with their investment and which removes labour force flexibility results in a higher cost of capital for the employer because the cost of achieving the return on shareholders' funds is higher. The attractiveness of an economy such as New Zealand's that is small, isolated and dependent to a significant degree on overseas investment is lessened if there is an employment environment that makes investment risky. This in turn has a negative impact on the employer who either cannot attract investment capital or whose costs of borrowing increase. And, over time, there are detrimental consequences for the workforce as employment opportunities become more limited. By ensuring – as this legislation does - that the cost of capital and the risks of investment in New Zealand will increase, investors are more than likely to decide that their capital can best be utilised elsewhere. For smaller employers who may themselves be heavily indebted - and there are many such in the food and cleaning industries – the immediate decrease in market value and loss of equity could well spell disaster.

8.18 Clause 30's provisions relating to "specified categories of employees" – engaged in cleaning, and food services in all places of work, cleaning, food, care taking and laundry services in the education sector, and cleaning, food, orderly or laundry services in the health sector - provide an absolute right of transfer to a new employer. Thereafter, should redundancy become an issue,

the obligation to pay redundancy compensation would pass to the new employer. This obligation is underpinned by the Employment Relations Authority's right to set redundancy levels in the event of a failure to agree what should be paid.

8.19 There is also the concern that the Minister can extend the range of activities affected (clause 66) and that unions in other industries will not be slow to make their own demands for similar protections. Extension is after consultation with the Minister and with employers and their representatives and employees and their representatives but experience indicates that the views of unions are far more likely to prevail than those of employers, even given the requirement to consult.

Transfer of business - other employees

8.20 The Bill makes clear what is required in relation to specified categories of employees but in other cases requires employment agreements to include a process to be followed in negotiating with a new employer about restructuring and about what will be done at the time of restructuring. These requirements are not as draconian as those that apply to specified employees; nevertheless they will produce similar consequences. Experience overseas – for example, in Australia, Europe and the United Kingdom – demonstrates the capacity of this kind of legislation to result in enervating disputes of which lawyers are the chief beneficiaries.

8.21 In relation to "other employees" what is to happen by way of employee protection is left to the parties to determine. Nevertheless, the intention is to impose restrictions on employers who are negotiating for the sale and transfer of their businesses or in respect to contracting out that will inhibit their ability to deal with these issues in the most effective way.

Contracting out Advisory Group

8.22 As previously noted, the issues of contracting out/sale and purchase of business were the focus of a Government Advisory Group that produced its final report in November 2001. The employer representatives on the Group rejected a clause developed by the CTU as failing to recognise the reality that in a growing and dynamic economy sale and transfer of businesses and contracting out occur on a daily basis. To restrict these activities would be to restrict the growth and dynamism that collectively benefits all participants. For many prospective employers an absolute requirement to provide redundancy payments would be an unsustainable liability.

8.23 Consequently, as an appropriate alternative to CTU proposals, employer representatives proposed the development of a Best Practice Guide. The Guide would assist parties in understanding the need to give information in a timely manner and to discuss the various options that might be available should a situation of sale and purchase or contracting likely to impact on existing employees arise. The employer representatives also recommended that the situation be monitored over a period of time in light of sections 4 and

54 of the Act, to assess the impact these sections have when contracting out or sale of business occurs. Employer representatives were of the view that developing a Best practice Guide would sit comfortably with the monitoring aspect and assured the relevant Ministers that employers would be available to participate in the development of the Guide in a constructive manner.

8.24 By contrast, what the Bill proposes, in respect to "specified categories of employees" and "other employees", will, as previously stated, have a dramatic effect on both internal and overseas investment, raise the cost of capital and undermine growth in the New Zealand economy. It will reduce the value of small business owners' personal investment in their businesses, discourage their future growth, and discourage others from making start-up investments. Associated compliance costs are significant for small and large businesses alike.

9. CONCLUSION

9.1 In responding to the Review of the Employment Relations Act Business New Zealand noted that the Act is built on the assumption of an imbalance in bargaining power between employees and employers. However with the changing nature of work, and in a tight labour market, with many trade and professional skills in short supply, the situation is more often than not reversed – the balance of power more usually favours employees and potential employees. Individual employees are, for example, free to walk away from their jobs as and when it suits them but employers have no corresponding ability to dismiss employees for unsatisfactory work or because they do not "fit" with the enterprise without running the risk of opportunistic personal grievance claims.

9.2 It was with the intention of rectifying this perceived power imbalance that the Act itself was introduced. Moving from a situation where collective and individual bargaining had become matter of choice, it sought to emphasise the importance of collective over individual agreements. The disappointment for its proponents has been the Act's failure to produce the desired response. This Bill is the consequence of that failure. Currently, people have the choice whether or not to belong to a union and whether or not to be covered by a collective agreement. Since the Employment Relations Act came into force union membership has moved from 17% to 20% but this has been largely in the public sector. Does this indicate that Government is not trusted as an employer?

9.3 As has been emphasised, the Bill's aim is to take New Zealand back to the era of collectivism by placing difficulties in the way of individual bargaining and rewarding those who join the collective and therefore the union – something like compulsory unionism by another means. Compulsory arbitration also beckons – employers' freedom of association and choice is simply not a consideration.

9.4 The Bill puts considerable reliance on good faith, using the good faith concept as a means of controlling (far more than the Act) the behaviour of parties to an employment relationship. From Business New Zealand's point of view, however, it is employers who will make the greatest concessions to good faith since, in the Bill's terms, good faith equates inevitably to collectivism. It is small comfort to quote, as the Minister of Labour has done, the highly regulated labour market systems of some countries overseas. To reiterate what was stated in the latest OECD report on New Zealand:

"There is increasing evidence that flexibility in wage-setting and labour adjustment can have sizeable benefits for economic performance in both the short and the long term. Strict EPL [employment–protection legislation] lowers productivity in systems with an intermediate degree of centralisation/co-ordination – i.e. where multi-employer wage bargaining is predominant without co-ordination. This is the direction the NZ government seems to want to move in its industrial relations reforms. Hiring and firing costs also hamper entrepreneurship and impede the process of firm creation and destruction, with several recent studies having found that firm turnover is an important determinant of productivity growth. Adjustment costs can also reduce investment in new technologies because it becomes more difficult to retool and re-organise the labour force in response to changing market opportunities … flexible economies are more resilient. They tend to get hit less hard by economic shocks and bounce back quicker … Recent OECD work on the impact of structural and labour market rigidities on economic resilience has found that a flexible economy:

- *is better placed to take advantage of permanent supply shocks (such as a rise in productivity) and to weather temporary supply shocks (such as droughts). With wages and prices moving more quickly, monetary policy is more able to speed up and smooth out the adjustment process …*
- *has an advantage when hit by a temporary demand shock … The initial impact on unemployment is about the same in flexible and rigid economies, but it takes longer for unemployment to recover when adjustment is held back by labour-market rigidities. In assessing the overall social loss, if policymakers care more about unemployment than inflation, or care more about the medium term than about short-term blips, then cumulative social losses are much lower in the flexible economy."*

9.5 So why is New Zealand moving backwards? How can the country reach the top ten of the OECD when we ignore what that organisation suggests?

Below is a clause-by-clause analysis of the Bill provided on a without prejudice basis.

PART C EMPLOYMENT RELATIONS LAW REFORM BILL – CLAUSE-BY-CLAUSE ANALYSIS

This Part of the submission also contains recommendations relating to employment relations education leave, codes of practice and equal pay not considered under Part B of this submission.

PART 1 EMPLOYMENT RELATIONS ACT 2000

Clause 5 Object of this Act (amending section 3)

Recommendation

(1) Retain the words "mutual trust and confidence" in section 3(a) and delete the words "good faith".
(2) Delete new subparagraph (i) and retain existing subparagraph.
(3) Retain the word "bargaining", or, delete section 3(a)(ii) of the Act.

Add a new subclause (4):
(6) "For the avoidance of doubt, this Act shall have application only to those earning up to twice the annual average wage as determined by Statistics New Zealand from time to time."

Comment

The words mutual trust and confidence have been well-defined by the courts and are clearly understood. Good faith, on the other hand, has hitherto been a process not leading to any defined conclusion. To introduce a new good faith concept is to introduce confusion that will lead to unnecessary litigation.

The word "bargaining" should be retained (in section 3(a)(ii)) to recognise that employment relationships do not automatically involve inequality – bargaining included. The concept of inequality is open to challenge and the better recommendation is to delete subparagraph (ii) of section 3(a) in its entirety.

The new subclause proposed above would limit the application of the Bill and the Act to persons who can with certainty be considered capable of negotiating their own employment arrangements without the need for the prescription this legislation involves. The statement in section 3(a)(ii) regarding an imbalance in (bargaining) power is, in any event, contested, but its application to higher wage earners is patently absurd. Persons with the qualifications, skills and experience to earn twice the average wage almost invariably have the balance of

power, including bargaining power in their favour. They do not need the assistance of this restrictive legislation.

It should be noted that a limitation of the kind proposed existed prior to the Employment Contracts Act. If the country is to return to something like the labour market rigidities of the past, similar exemptions to this kind of labour market approach should again apply.

Clause 6 Parties to employment relationship to deal with each other in good faith

Recommendation

Delete the new subclause (1A) proposed for section 4, and new subsections (6) and (7)

Amend current subsection 4(c) by deleting the words "including the effect on employees of changes to the employer's business", and subsection 4(d) by inserting the words "recognising that such proposals need to be considered in the context of commercial reality and sensitivity" at the end of the subsection.

Comment

(1A) The insertion of the new subsection (1A) into section 4 is unnecessary and introduces subjective concepts likely to give rise to litigation as parties to an employment relationship endeavour to establish whether they have, in the eyes of mediators/decision-makers, been "active and constructive in establishing and maintaining a productive employment relationship" by being "among other things, responsive, communicative and supportive". The new subsection sounds like a counsel of perfection and establishing what the new concepts involve will give legal representatives a considerable amount of work. However as things stand, the well-understood and long-accepted requirement of mutual trust and confidence between the parties to an employment relationship more than adequately expresses what is required of them. The introduction of new and undefined terms can only complicate, not enhance, that relationship.

It is unacceptable that an employer who is "proposing" to make a decision "likely to" have an adverse effect on his or her employees' employment should have to provide access to relevant information and the opportunity to comment before the decision is made. There needs to be a recognition of the reality for employers wanting to engage in business restructuring that the timing of an announcement of sale or of the negotiation of an arrangement "likely" to impact on the employer's employees

must be carefully managed. While clause (1A)(c) should be deleted, current subsections 4(c) and (d) should be retained but amended by deleting the words "including the effect on employees of changes to the employer's business" from subsection 4(c) and inserting the words "recognising that such proposals need to be considered in the context of commercial reality and sensitivity" at the end of subsection 4(d).

ss (6) (7) To make it a breach of good faith to advise an employee not to be involved in collective bargaining is potentially to put employers in a very difficult situation. Employees may well seek advice from their employers as to which form of employment agreement to work under and to deny the employer the ability to offer an opinion is to deny both parties the right to communicate with each other – itself, in essence, a breach of good faith. It is a strange law that would dictate how employers must conduct their employment relationships, and not at all conducive to fostering the productive relationships the Bill purports to espouse.

By the same token, it is anomalous to impose a penalty for supposed breaches of good faith - again, not the most effective way to build an effective employment relationship.

Clause 8 Prohibition on preference

Recommendation

Delete new subsection (3) proposed for section 9.

Comment

The proposed new subsection would operate effectively as a bribe encouraging employees into collective agreement coverage and therefore into union membership. It is a not very subtle way of encouraging union membership growth and says little for the ability of unions to attract members on their own merit. It is likely also to be inequitable in that were employers to offer non-union members slightly better terms and conditions than those of a relevant collective agreement (and under this legislation the terms of a collective cannot readily be passed on), this would be certain to call forth allegations of bribery undermining the collective bargaining process.

Clause 9 Access to workplaces

Recommendation

Delete proposed new subsections (4) and (5), or

Add to subsection (5) the words:

" – provided that discussion does not exceed a period of 15 minutes and is with one employee only".

Comment

As the new subsections currently read, no time limit is imposed on discussions with an employee and these, as a consequence, could go on for quite lengthy periods. It is not in the interests of either the employer or the employee that productivity should be reduced in this way without some corresponding recompense to the employer. In such circumstances this can only be achieved by means of a wage deduction. The potential for "mini strikes" has been referred to in Part B of this submission.

Clause 10 Object of this Part

Recommendation

Delete new paragraph (aa) proposed for section 31.

Comment

See comment under clause 12.

Clause 11 Good faith in bargaining for a collective agreement

Recommendation

Delete new paragraph (ca) proposed for section 32(1).

Comment

This paragraph gives legislative recognition to the decision by the Employment Relations Authority in the *INL* case, ignoring the view of the employer involved in collective bargaining as set out in Business New Zealand's response to the Employment Relations Act Review. As with the changes introduced by clauses 10 and 12, what is proposed represents a clear statement of the Government's view that employers, unlike unions, have no rights of freedom of association.

Clause 12 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to

Recommendation

Delete clause 12. Retain existing section 33.

Comment

Again, as with the changes made by clauses 10 and 11, the introduction of a new section 33 clearly demonstrates that employers in nearly all instances will have no choice but to negotiate a collective agreement once bargaining has been initiated – whether an enterprise or a multi-employer collective agreement. Removing the right for employers to have a say in what is best for the individual enterprise is a complete denial of freedom of association. What is likely to constitute a "genuine" reason for not concluding a collective agreement is anybody's guess but defending the point will provide legal representatives with a great source of revenue. For the employer, negotiating the hazards of associated "good faith" requirements will mean time away from genuinely productive activities that result in employment generation.

Clause 14 New section 48A inserted

Recommendation

Delete clause 14, or
If the clause is retained, delete proposed new subsections 48A (4)-(6).

Comment

Proposed new section 48A is not required as the Act currently provides for unions and employers to engage in multi-party bargaining without recourse to instructions on how to this is to be done. It is apparent therefore that the purpose of the proposed new section is to ensure multi-party agreements are concluded regardless of the wishes of the employers concerned who may well want agreements that suit their particular enterprise circumstances, taking into account such matters as size of organisation, market share and profitability. As it stands, the clause is in any event internally inconsistent in that it states (subsection (2)) that "each union and employer must attend, at least, the first meeting of the parties …" – leading to the assumption that that is all that is required - but goes on (subsection (4)) to indicate that the purpose of this meeting is to enter into a bargaining arrangement. Bargaining arrangements are intended to set out "a process for conducting the bargaining in an effective and efficient manner" leading, it is apparent, to the requirement to conclude a multi-employer collective in the absence of a "genuine" reason not to. Compulsion by another name.

If the recommendation to delete clause 14 is not accepted, at the very least the proposed new section should end at subsection (3), removing the compulsory element that would otherwise apply.

Clause 15 New heading and sections 50A to 50J inserted

Recommendation

Delete clause 15 in its entirety.

Comment

The effect of the provisions of this clause will, if the clause becomes part of the Act, be to reintroduce a form of compulsory arbitration. Currently there is nothing to prevent the parties to collective bargaining from seeking outside assistance if both (or all) agree. But this should be done by agreement and not at the behest of one only of the bargaining parties. This is the case both in relation to the new form of compulsory arbitration and to the new facilitation process that the clause also introduces.

It should be recalled that compulsory arbitration ceased to be a feature of the New Zealand industrial relations system some 20 years ago and that when in vogue, went hand in hand with a restriction on the right to strike while bargaining was in progress. The insertion of a right to compulsory arbitration in the event of some breach of good faith, so-called, is in itself a retrograde step. It is made worse by allowing the right to take industrial action to continue during the arbitration process.

In effect, what is proposed is the reintroduction of the worst interventionist policies of the past with nothing in the way of ameliorating features (though in the latter days of compulsory arbitration the strike limitation had come to be much abused). It will be argued that compulsory arbitration is a last resort to be used only when it can be shown that there has been a breach of good faith “sufficiently serious and sustained as to significantly undermine the bargaining”. That admittedly, is a high threshold but establishing that the threshold has or has not been reached should (as with determining what is a genuine reason for not concluding a collective agreement) again be of greatest benefit to lawyers.

It is of particular concern that recommendations from the facilitation process may be made public and that the Employment Relations Authority member who conducts facilitation may also fix the provisions of a collective employment agreement in compulsory arbitration. This would suggest that little will change from one process to the other and that what is

determined through compulsory arbitration will very much reflect the recommendation that precedes it.

Clause 16 Ratification of collective agreement

Recommendation

Delete clause 16.

Comment

The requirement for ratification by those represented may delay the process of concluding a collective agreement but acts as a reasonable check on union activities. It should be retained to enable those represented to know what the union has agreed to, before endorsing that agreement. Prior authorisation should not be permissible.

Clause 18 Application of collective agreement to subsequent parties

Recommendation

Delete clause 18.

Comment

The extension of coverage by a collective document to subsequent parties was a feature of an outdated industrial relations system that had, by the time it disappeared, long proved a handicap to employers aiming to compete and grow their enterprises in a rapidly changing economy. Earlier legislation, it is true, contained a subsequent party provision of general application - rather different from clause 18 which provides for a negotiated subsequent party provision. However given the tenor of this Bill with its specific emphasis on unions and collective bargaining, there seems every likelihood that a subsequent parties' clause will be inserted into a collective if that is what the union wants. This is in marked contrast to Business New Zealand's submission which decried the current tendency of unions to negotiate multi-employer agreements with named employers and then, on the expiry of their collective agreements, threaten industrial action against the employers concerned to "encourage" them into the previously-negotiated collective. This clause merely legitimises that unfortunate process.

Clause 19 Breach of duty of good faith to pass on in individual employment agreement terms and conditions agreed in collective bargaining or in a collective agreement.

Recommendation

Delete clause 19.

Comment

The purpose of this provision appears to be to encourage employers to persuade employees into unions and therefore into collective coverage. It has to be recognised that employees are not necessarily willing union members but many employers will be tempted to urge them to become so (although they are not permitted to do the contrary) because of the difficulty of ensuring individual agreements do not repeat the provisions of any relevant collective. There are numbers of employers who have few employees on collectives but many on individual agreements. For them the logistics involved (new subsection (4), paragraphs (a)-(e) of proposed new section 59A notwithstanding), will make it difficult to refrain from passing on collective terms, particularly because if better terms and conditions are offered, there is a similar chance of provoking union protest. Proving whether or not a breach of good faith has occurred simply offers further opportunities for lawyers, undermining the employer's ability to provide productive employment in the process. It is a strange sort of logic that believes the imposition of a penalty – as the Bill envisages – is an encouragement to good faith behaviour.

Similar comments apply in respect to the passing on of the terms and conditions of one collective in another. Business New Zealand queries if this provision is not in fact at odds with existing section 50 which, by providing for consolidation of bargaining, indicates that it is appropriate to harmonise collective terms and conditions.

Clause 20 Object of this Part

Recommendation

Retain the current wording of section 62(1)(a)(ii). Do not add the words "but not limited to".

Comment

The words "mutual trust and confidence" already adequately define the employer/employee relationship. Any extension of meaning can only result in unnecessary litigation to the detriment of that relationship.

Clause 21 Employer's obligations in respect of new employee who is not a union member

Recommendation

Delete section 62 (to which this clause refers), or

In proposed new subsection (1A) where, in parenthesis, the word "employees" is used for the second time, substitute "employee"' in its place.

Comment

Business New Zealand asked in its submission for the 30-day rule to be dispensed with and regrets that that proposal has been ignored. It is time wasting and inefficient to extend the process of entering into an individual agreement relevant to both the employee and employer by postponing the agreement's completion for a 30-day period. At the very least employees should be able to waive the "entitlement" and, if they wish to, negotiate an individual agreement immediately.

If the above is not to happen, the reference in new subsection (1A) should be to "any other employee" since the section is directed to the employment of a new employee, not several employees.

Clause 23 New section 63A inserted

Recommendation

Delete clause 23. Retain section 64.

Comment

While the urge to protect employees can be understood, the requirements imposed on employers by this section will simply help in assigning the employment process to the too hard basket. As Cabinet papers recognised, the consequence of the Bill's time-consuming demands is likely to be a growth in the use of independent contractors if not of non-standard forms of work. The provisions of this clause are a shining example of how a rigid adherence to interventionist principles can triumph over everyday realities. Sometimes employers and employees will negotiate, sometimes they will not. However, whichever applies, the employee gains employment, surely a better consequence than life on the dole. One can only wonder why an employer would consider employing anyone in the presence of legislation that imposes a penalty for getting things wrong.

Clause 24 Section 64 repealed

Recommendation

Delete clause 24. Retain section 64.

Comment

See comment under clause 23.

Clause 25 Terms and conditions of employment where no collective agreement applies

Recommendation

Where, in parenthesis, the word “employees” is used for the second time, substitute “employee”’ in its place.

Recommendation

It is understood that the purpose of this clause, like clause 21, is to clarify that a collective agreement covering named employees can also extend to a new employee for the first 30 days of employment. However, as the section to be amended in this way (section 65) refers only to the individual employee, the amendment should do likewise.

Clause 26 New section 65A inserted

Recommendation

Delete clause 26.

Comment

Section 55 of the Act already inserts a union fee deduction clause into collective agreements (the clause may be excluded or varied) so there is no reason to insert such a clause into individual agreements (presumably anticipating that many employers and employees will not appreciate that this clause, too, can be varied or excluded). To that extent the provision largely overrides the ability of employees to make individual choices and is abhorrent for that reason alone.

Clause 27 Fixed term employment

Recommendation

Delete clause 27.

Comment

Requiring the reasons for concluding fixed term employment to be stated in writing and if this is not done, somehow magically turning a limited period of employment into a full-time job represents a remarkable sleight of hand. Since it is likely to be smaller employers who are unaware of such a law change, the urge to limit enterprise growth potential by imposing an unlooked for cost of this kind can only be wondered at.

Clause 28 Probationary arrangements

Recommendation

Delete clause 28.

Rewrite the introductory statement and paragraph (a) of existing section 67 as a new subsection (1) and delete paragraph (b) and substitute:

> (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 in terms of this Act unless the grievance relates to unlawful discrimination or sexual or racial harassment".

Comment

New Zealand is unusual among OECD countries in not having a minimum probation period for new employees. As Business New Zealand pointed out in its Review submission, and as the OECD's 2003 Economic Survey of New Zealand confirms, many employers would be prepared to increase staff numbers given a trial period during which new staff could be laid off without risking a personal grievance if things did not work out.

Clause 29 Unfair bargaining for individual employment agreements

Recommendation

Delete clause 29

Comment

This deletion is necessary if Business New Zealand's recommendation re clauses 23 and 24 is accepted.

Clause 30 New Part 6A inserted

Recommendation

Delete clause 30.

Comment

Specified categories of employees

The proposed new Part 6A which is directed to the issue of continuity of employment in the event of business restructuring should be deleted in its entirety. The question of how the issue of organisational restructuring should be dealt with has been considered in the first part of this submission; as has been noted there, the dynamic process of firm creation and destruction is a key determinant of productivity growth. The urge to protect employees' jobs in such circumstances is understandable but paradoxically job protection for some leads only to a reduction in job numbers overall.

Where restructuring involves the employees of one employer (employer A) moving to another organisation with employees of its own (employer B), matters are further complicated by the fact that preserving employer A's employees better terms and conditions of employment will undoubtedly cause resentment among the new firm's employees. It is probably safe to assume that employer B's employees do have less generous terms and conditions since unsustainable cost escalation (wage costs included) is a basic reason why restructuring becomes necessary.

It is also the case that employers engaged in restructuring will, regardless of their ability to do so, be penalised either by a requirement to pay redundancy or by having to accept a lesser price than might otherwise have been expected. This is because the redundancy requirement, if not met, passes to the new employer. For small employers, of whom the cleaning and food industries have many, this loss of equity may well prove devastating.

It is not sufficiently well understood that protective provisions for employees provide no incentive to employ in the first place and ultimately disadvantage those employees they are intended to protect. Redundancy compensation may have a tiding over effect but is no substitute for being able to move quickly to new employment.

If the dangers inherent in the Bill's "Specified categories of employees" restructuring provisions are to be avoided, the payment of redundancy should be restricted to situations where an employment agreement provides for redundancy compensation and to the amount of compensation provided. Re-employment by a new employer should occur only where the first employer's employees have received a reasonable offer of employment from the new employer (that is, not necessarily with terms and conditions identical to those under which they

have hitherto worked), with redundancy compensation not available if the offer is refused.

As well, there should be no ability for the Employment Relations Authority to set redundancy compensation levels. Allowing the Authority to determine redundancy compensation is a further example of the determination of those who framed the Bill to take New Zealand back to the third party interventionism of a former time that has long since shown itself to be the inhibitor of employment growth.

Consequential amendment

Delete Schedule 1.

Other employees

Provisions relating to "Specified categories of employees" are particularly prescriptive and concerning but those applying to "Other employees" similarly impose unnecessary burdens on employers that they may not be able to support. Instead the issue of employment protection should in all cases be left to parties themselves to deal with and negotiate about to the extent that they are in a position to do so. Imposing arbitrary obligations – even given some ability to negotiate on the matter - can only have deleterious downstream effects. Again the question of transfer to the new employer should depend on the employee receiving a reasonable offer of employment. Redundancy compensation (from the current employer) if provided for in the relevant employment agreement should be payable only where no offer of re-employment has been received. It should not be available to employees who turn down reasonable employment offers from the new employer.

Clause 31 **Interpretation** (in relation to Employment relations education leave)

Recommendation

Delete the definition of "eligible employee" and retain the current definition.

Comment

Currently only union members covered by collective agreements or engaged in collective bargaining are eligible for employment relations education leave. Given the problems experienced by employers who are required to allow employees coming within these categories time away from work, education leave eligibility should not be extended to all union members, whether within

those categories or not. Lost productive time is not in anyone's interest.

Clause 35 New part 8A inserted (Codes of Employment Practice)

Recommendation

Delete this clause.

Comment

The objection to codes of employment practice arises from the inclination of courts to treat them as rules to be followed, not as guidelines – a conclusion emphasised by proposed new section 100C – "Authority or Court may have regard to code of practice". However, in many situations a one-size-fits-all code of practice solution will be inappropriate. Both employment practice and employment relationship problems are matters for the immediate parties, initially at least in the latter case. Codes of employment practice limit flexibility and the ability to develop workable solutions. The kind of limited involvement of the parliamentary process in their development provided for by the Bill would make them even less desirable.

Clause 37 New section 103A inserted

Recommendation

Delete clause 37.

Comment

Clause 37 purports to insert into the Act's personal grievance provisions a new section (s103A) that would introduce a "test for justification" in relation to decisions to dismiss. It is understood that this has been done to ensure dismissal decisions are judged on the basis of the approach a "reasonable employer", rather than the actual employer, would have taken in dismissing an employee, or taking an action that disadvantages the employee in some way. This in itself is a retrograde step since in cases of misconduct or poor work performance, is evident, only the employee's employer is in a position to know how it will affect the business and other employees. However more than that, into what is intended to be an objective test, subsection (2) of the new section introduces an element of subjectivity by requiring the employer to consider and balance the legitimate interests of both the employee and employer in determining whether or not to dismiss. This would seem to take the obligation imposed on the employer beyond a mere consideration of the factors referred to in subsection (1) (were the employer's actions and how the employer acted fair and

reasonable to both parties in all the circumstances), since employees will rarely if ever see dismissal as being in their "legitimate interests".

Consequently, in effect, the new section moves beyond the procedural fairness read into personal grievance legislation by the courts and requires a consideration of whether an otherwise justified dismissal was fair to the employee concerned. This use of the term "fair" introduces a new concept and it remains to be seen what "legitimate interests" the courts will now take into account. However, it needs to be recognised that dismissing an unsatisfactory employee is already an exercise fraught with difficulty. Making it even harder to do so serves only as a discouragement to employ, something that anecdotal evidence suggests is an increasingly common employer or potential employer reaction, official unemployment statistics notwithstanding.

Clause 53 Jurisdiction

Recommendation

Delete clause 53.

Comment

Enough has already been said in relation to clauses 15 and 30 to make it clear that Business New Zealand is opposed to any third party intervention in the bargaining process or in determining whether or what amount of redundancy compensation must be paid in a given case. These are matters the parties concerned must decide for themselves in accordance with individual enterprise circumstances. Anything else is a return to the sclerotic policies of the past.

Clause 58 New sections 179A and 179 B inserted

Recommendation

Delete proposed new section 179B.

Comment

This is a consequential deletion required on the basis of the recommendation made in relation to clause 15.

Clause 66 New section 237A inserted

Recommendation

Delete clause 66.

Comment

This is a consequential deletion required on the basis of the recommendation made in relation to clause 30. Business New Zealand refutes the need for inflexible business restructuring provisions in respect to the current "Specified categories of employees". That being the case, there can be no need for any extension of those specified categories. The fact that proposed new section 237A(2)(b) requires the Minister to consult "such employers" involved can only be viewed with a degree of cynicism. It is employers' experience that while they are often consulted, the opinions and recommendations they provide are frequently ignored.

Clause 67 Recommendation

Delete clause 67

Comment

The proposed new Schedule IA should be deleted in line with recommendations in relation to clause 30 (re restructuring and specified categories of employees).

Clause 71 Transitional provisions

Recommendation

Delete clause 71.

Comment

This is a consequential deletion required on the basis of the recommendation that the Bill should not proceed. But, in any event, retrospective legislation is rarely desirable; when it intrudes on the ability of respective bargaining parties to manage their own affairs – as many of the provisions here do - it is entirely unacceptable.

PART 2 EQUAL PAY

Clause 72 Recommendation

Reword clause 72(a) as follows:

> "The purpose of this Part is to address gender-based discrimination in pay by –
>
> (a) requiring an employer, in relation to the same or substantially similar work, to provide equal pay to

employees of the same or substantially similar capabilities and experience employed in the same or substantially similar circumstances."

Omit subparagraphs (i) and (ii).

Comment

It is important to recognise that there are reasons why not all employees performing the "same or substantially similar work" will necessary receive the same rate of pay. Reasons of this kind, although set out in the interpretation section under the term "special rate of pay", should therefore be included in the purpose statement to acknowledge from the outset the inescapable fact that some employees (of whatever gender) are more valuable than others – more effective in their work–performance, more experienced in the work they are doing, and so on. This will often be true even though, on paper, the employees in question have the same or similar qualifications. It cannot be too strongly emphasised, notwithstanding the definition noted above, that the Bill should provide no opportunity to put employers into the situation of being unable to attract essential expertise because paying more for the services of a particular individual to do the same kind of job as someone of the opposite sex could give rise to an equal pay claim. Even in the case of identical jobs (translation services for example), it may be necessary to pay more to attract someone who can translate a less well known language over the wage paid to translators of more commonly understood languages. For the employer, only one higher wage rate may be supportable in economic terms.

Subparagraph (ii) should be deleted to remove the possibility of across-employer comparisons. Even though covered by multi-party collective agreements employers are still entitled to negotiate individual terms and conditions with their employees and may do so for the kinds of reasons referred to above. Fishing expeditions of this sort should therefore not be permissible, particularly as they take no account of employer ability to pay – something that may already have been compromised by the requirement to join a multi-party document. They are also likely to provide a competitor employer with commercially sensitive information or, at the very least, to allow a competitor firm to draw inferences about the state of another firm's business from information acquired.

Clause 74 Interpretation

Recommendation

Remove the term "multi-employer collective agreement".

Comment

As noted, across-employer comparisons of the kind envisaged should not be permissible.

Clause 76 Recommendation

Reword subclause (2) as follows:

> **"**An employer must provide equal pay to each of his or her employees who, having the same or substantially similar capabilities and experience and being employed in the same or substantially similar circumstances, performs the same or substantially similar work."

Omit subclause (2).

Comment

These are consequential amendments required on the basis of recommendations made in relation to clause 72. The first recommended change serves to reinforce subclause (4).

It is noted that the equal pay provisions assume that if a Labour Inspector decides that an employee is not receiving equal pay that is the end of the matter. Because of the compliance costs involved, both immediately and from potential flow-on effects, provision should be made for appeals against an Inspector's decision. It cannot be assumed that Labour Inspectors are infallible in such matters but as matters stand, the Bill's concern in this subpart appears to be entirely with the enforcement of the Labour Inspector's decision.

RECOMMENDATIONS

1. That the Bill not proceed.

2. That if the Bill is to proceed it should:

   a) undergo further review with the aim of promoting labour market flexibility;

   b) undergo further review with the aim of reducing compliance costs;

   c) take account of Business New Zealand's suggestions in its response to the Employment Relations Act Review.

3. That should the Bill proceed, it proceeds only in line with recommended amendments.