Submission

by

Business NZ

to the

Foreign Affairs, Defence and Trade Select Committee

on the

Transnational Organised Crime Bill 2002

March 2002

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TRANSNATIONAL ORGANISED CRIME BILL 2002

SUBMISSION BY BUSINESS NEW ZEALAND

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1. PART 1 - INTRODUCTION

1.1 This submission is made on behalf of Business New Zealand, incorporating regional employers' and manufacturers' organisations. The full regional members comprise the Employers and Manufacturers Association (Northern), Employers and Manufacturers Association (Central), Canterbury Manufacturers' Association, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association. Business New Zealand represents business and employer interests in all matters affecting the business and employment sectors.

1.2 Business New Zealand is the leading national organisation representing the interests of New Zealand's business and employing sectors comprising some 76,000 individual enterprises. Business New Zealand champions policies that would transform and accelerate the growth of high value added goods and services to significantly improve the prosperity of all New Zealanders. One of Business New Zealand's key goals is to see the implementation of policies that would see New Zealand retain a first world national income and to regain a place in the top ten of the OECD in per capita GDP terms.

1.3 The submission is directed only to proposed amendments to the Immigration Act 1987 which would impose increased liability on employers who employ someone not lawfully entitled to work in New Zealand.

2. Recommendation

2.1 Delete from Part 3 of the Bill (amending the Immigration Act 1987) clauses 20 and 21.

2.2 If the above recommendation is not accepted and clauses 20 and 21 are retained, on a without prejudice basis, at the very least provide an 0800 number so that employers can check on an individual's employment status. An employer who can establish that a check using this number has been carried out will then have an absolute defence to a charge of employing "without reasonable excuse".

3. Discussion

3.1 While conscious of the mischief to which the amendment Act's new offence provisions are directed, Business New Zealand believes strongly that the punitive approach adopted will do little to achieve the Government's purpose.

3.2 Leaving aside the new maximum fine of $50,000 for knowingly employing someone not entitled to work (having been told by an immigration inspector that the person concerned may not undertake employment), new section 1A (clause 20) appears to assume that establishing entitlement is a simple matter. It is not.

3.3 New Zealand's population is becoming increasingly multicultural in character with, as part of the mix, numbers of people from a diverse range of countries who have been granted permanent residency and so have every right to take up paid employment here.

3.4 As well, there are people who do not have to apply for residency provided that on entry they have produced the correct passport – Australian citizens with a valid Australian passport and Australian permanent residents with a valid Australian resident return visa come into this category.

3.5 Samoans can gain special residency under the Samoan quota system as can adopted family members, adopted according to cultural custom (dependent children can be aged anything up to 24 years). Pitcairn Islanders too have a special residency category, as do citizens of Kiribati and Tuvalu.

3.6 New Zealand has reciprocal arrangements with a number of countries entitling many individuals aged between 18 and 30 years to work in the country on a temporary basis. Applicants from Canada, the Netherlands, Malaysia or Singapore may apply for a working holiday visa once they are in New Zealand, although residents of other countries participating in the Working Holiday Scheme must apply from outside the country.

3.7 The above are just some of the special categories applicable to working in New Zealand. They of course operate on the assumption that persons seeking employment will have any necessary documentation with them when they do so. That could well be described as a fond hope.

3.8 Employers, on the other hand, may be exceedingly anxious to fill their employment vacancies as promptly as possible. Moreover, an employer seeking to establish national or ethnic identity – and therefore the likelihood of work entitlement – is faced with statutory restrictions. The Human Rights Act makes discrimination on such grounds unlawful. So an employer who inquires about entitlement on the basis that the prospective employee may not have the right to work in this country is facing a difficult task. He or she – given New Zealand's existing and growing ethnic diversity – could well be confronted by a very indignant job applicant, a permanent resident with every entitlement to work and deeply resentful of any suggestion that that might not be the case.

3.9 In guidelines for employers on "Hiring Staff and Terminating Employment" the New Zealand Employers' Federation (now amalgamated with the Manufacturers' Federation to form Business New Zealand) referred to the fact that the Immigration Act currently makes it an offence knowingly to employ someone who does not have a work permit. The guidelines (still in use) point out that employers should not risk being in breach of the Human Rights Act by making subjective judgements about job applicants but should ensure job application forms contain the following question:

> "If you are not a New Zealand citizen:
> Do you have the right of permanent residency in New Zealand? or
> Do you have a permit to work in New Zealand?"

The question concludes by stating: "If yes, can you provide evidence if required?"

3.10 Under the amendment Bill that final question would no longer be adequate. The employer would be bound to require evidence to be presented. That, however, presupposes that the prospective employee can be expected to answer the first question honestly, which will not necessarily be the case. In any event, expecting many small employers to be sufficiently aware of the intricacies of the legislation and the different categories of workers that exist to ask such a question in the first place is expecting a great deal. Fruit growers, for example, with fruit needing to be picked, are not likely to turn away someone without a work permit physically with them, but anxious to work, if there is no-one else on offer.

3.11 Moreover, if an employer were to seek evidence in the form of a birth certificate (copies of which, in any event, many people do not have) that might, in some circumstances, open the employer up to a charge of age discrimination.

3.12 As well as the problem referred to above and the difficulties small employers will face, mention has also been made of a likely clash of legislative obligations given any perceived need to establish ethnic or national origins. For many larger employers wanting to hire numbers of employees speedily for a specific task "employee profiling" may well come to be seen as the only practical solution. In other words, because of time constraints, the employer or manager will select only those candidates for employment whose voice and appearance indicate their probable (legal) employment status.

3.13 The current attitude – that employers will keep order for the government if the penalties for not doing so are sufficiently high – is very much to be regretted. This punitive approach will do nothing to prevent attempts to work in New Zealand while at the same time it will put local employers, small employers in particular, in a most invidious position. Such strict liability legislation, where someone acts in good faith, asks appropriate questions but still faces prosecution and high fines, may well prove yet another disincentive for employers to employ.

3.14 New Zealand is now very much a polyglot country where not even the possession of an obviously foreign accent is a clear indication of lack of entitlement to engage in paid employment. And however much governments think they should, individuals do not always carry relevant papers on them.

3.15 It is sufficient that employers can expect to be charged with an offence if they knowingly employ someone not entitled to work having been told so by an immigration inspector (as currently). It is not necessary to create a new offence of allowing or continuing to allow a person not entitled to undertake employment to do work unless the employer has a reasonable excuse for doing so. Given that lack of knowledge is not a "reasonable excuse", it is difficult to see how, as things stand, an employer could offer a proper defence to such a charge. Employers should not be turned into quasi immigration officers, nor should they face the sort of "think of a really big number" fines that the amendment Bill sets out ($10,000, $50,000 and $100,000). The Bill's proposals are not the way to solve New Zealand's immigration problems.

3.16 The Bill's explanatory note opens with the statement that "The Bill contains the provisions that are needed in New Zealand law to implement obligations under the United Nations Convention against Transnational Organised Crime and its Protocols on the Smuggling of Migrants and Trafficking of Persons". But punishing employers in the way proposed has little if anything to do with this major purpose and certainly does not address the mischief to which the Bill is purportedly directed. At the point at which someone illegally in the country is seeking employment he or she is already a resident (albeit an illegal resident), while any employer who gives such a person work is probably most unlikely to have had any association with the kind of "organised criminal group" whose activities the Convention aims to curb.

3.17 The enhanced statutory offences under the Immigration Act, and the sanctions imposed, are far from being the kind of "dissuasive" sanctions Article 10 of the Convention contemplates. Directed at employers with no involvement whatsoever in transnational organised crime they are nothing so much as an inappropriate over-reaction to what is, admittedly, a very difficult problem.

4. Recommendation

4.1 Delete from Part 3 of the Bill (amending the Immigration Act 1987) clauses 20 and 21.

4.2 If the above recommendation is not accepted and clauses 20 and 21 are retained, on a without prejudice basis at the very least provide an 0800 number so that employers can check on an individual's employment status. An employer who can establish that a check using this number has been carried out will then have an absolute defence to a charge of employing "without reasonable excuse".