

**ORAL SUBMISSION ON THE  
EMPLOYMENT RELATIONS LAW REFORM BILL  
4 MARCH 2004**

We are here to speak constructively – an opportunity long promised us but yet to materialise – on the Employment Relations Law Reform Bill.

I would note that we are not here as an appendage of any political party or as representatives of the ‘big end of town’, simply the unconsulted voice of some 76,000 businesses and enterprises, with whom we have ourselves consulted at length in preparing our submissions.

In support of these, I wish to refer to three considerations that underpin our view that this Bill, in its bland but complex and litigious way, portends a return to compulsory bargaining, compulsory arbitration and national awards. If it does not, it should clearly say so.

**Compliance Cost Statement**

The compliance cost statement to this Bill asserts simply that the costs of implementation ‘cannot be readily quantified’.

The reason for this is not merely a dereliction of a duty to properly advise Parliament. It is also confirmation of Treasury’s report in March last year that the cumulative effect of the package is a regime shift. It is also confirmation of the considered joint view of no less than six departments in July last year that the Bill does not constitute ‘fine-tuning’. I note that it is also worth asking whether, if the impacts of the Bill would be so minimal as some carefully chorus, those advising on the Bill would have instead reported that the compliance costs were also minimal. Indeed, this Bill is effectively the removal and replacement of the current goalposts with a set that last saw service in the early 1980’s.

The challenge for this Committee is thus how to report on such a significant, far reaching change without any considered analysis of its financial or economic consequences over time. How in short, can this Committee and in due course Parliament, proceed without knowledge of the consequences for the Government’s own growth targets or for its Growth and Innovation Framework?

While cynics may suggest that some Bills do in fact proceed without any credible picture of their consequences over time, I am not one of them. In our view, therefore, this Committee has a clear duty to advise Parliament that no adequate consultation with employers has occurred and that without knowledge of its fiscal and financial implications, the Employment Relations Law Reform Bill should not proceed at this time.

**Compliance Costs**

We are happy to share with the Committee some concrete financial analysis of the order of compliance impacts of the Bill.

While the detail is set out in Part A of our written submission, it is important the Committee note that prior to this Bill emerging, nearly three quarters of all businesses believed that employment related costs were on the increase. The total annual business cost of compliance in 2002-2003 spent on employment related issues, including external assistance, prior to this Bill, is a conservative \$665 million or 0.5% of GDP. I would welcome any considered analysis to prove wrong my contention that this Bill would increase these figures by 30-50%.

If there is any lingering doubt in the Committee let me also point to the most recent, December 2003, OECD country report on New Zealand. The OECD is an inter-governmental organisation. It therefore treads warily and lightly in commenting on member government policies. It is remarkable that this report, amongst other pertinent observations on New Zealand's lack of progress towards sustainable, accelerated growth, devotes a couple of pages to careful but explicit warnings about the risks to greater productivity arising from trends in New Zealand towards increased rigidity in the labour market. This report was almost certainly written in the knowledge of this Bill's contents.

## **Issues**

The Bill assaults current freedoms in the workplace – for employers and employees alike, effectively the great majority of New Zealanders that pay their own way in the community – in two major respects:

- by introducing complex and heavy-handed statutory interventions, imported from jurisdictions that only envy New Zealand's growth and employment rates, in the contracting out and sale of business clauses; and
- by perverting the fair dealing meaning of 'good faith' to some amorphous, sticky wad that prescribes outcomes not process. Those outcomes strengthen the monopoly over collective bargaining which the Bill would enforce – not promote – through 24 new situations in which substantial penalties could be applied.

From the detail of our submission at pages 11-18 I would in particular pose the following questions for the Committee to consider in the course of its hearings:

1. Part 1, Clauses 11 and 12 require employers to keep bargaining and conclude a collective agreement. This amounts to compulsory collective bargaining. How will compulsory collective bargaining help a struggling business grow and prosper?
2. The 'freeloading' requirements (Part 1 clause 19) will result in staff on individual agreements being barred from receiving the same deal as those on a collective agreement (when they're doing the same job at the same workplace). If they're doing exactly the same work, why won't staff on individual agreements be allowed to earn as much as those on a collective agreement?

3. Part 1 clause 30 introduces rules to protect so-called vulnerable workers – rules that will impose a hefty contingent liability on many firms. Why use a blunt legal instrument to assist any such category of workers instead of just giving them some more accurately targeted and flexible help?
4. Part 1, clause 37 introduces a new test of justification for managerial actions like dismissals – the test is incomprehensible, theoretical and unworkable. The employer has to act fairly and reasonably in balancing the legitimate interests of employer and employee. None of these terms are defined in the Bill – no-one will be sure of what's meant, so increased litigation is inevitable. How does this help employers and employees in dismissal situations?
5. Why has 'good faith' been given a new and near impenetrable meaning? Where is the balance in an outcome that means 'good for collective agreements'?

## **Conclusion**

We are not suggesting, as some would have us say, that the sky will fall in as a consequence of this Bill's enactment. We agree that this is not some Canute-like diversion into astronomy.

We do submit, however, that this Committee should carefully reflect on the scale and balance of the changes proposed in this Bill that will become ever more evident as time passes, as litigation under this Bill occurs, and as the rituals it would re-establish become ever more divorced from real workplaces and real businesses.

The Committee should also ponder the intended and unintended impacts of complex, litigious and frequently academic and theoretical proposals that reflect little of any real workplace, certainly those outside the Government sector. This Bill will benefit those with employment in the Department of Labour, in employment law, and in the dispute and litigation machinery that they support. It will benefit those given a monopoly in collective bargaining.

Whether this would foster growth and innovation or be in the longer term interests of either employers or employees is something for the Committee to decide. We submit that it would not be in the national interest and that this Bill should not proceed.