

**Employment issues likely to impact on the businesses of  
Bus & Coach Association members**

*Phil O'Reilly address to Bus & Coach Association Napier 18 July 2005*

Thanks for the invitation to be with you this morning. It's great to be able to spend time with one of New Zealand's significant industry associations, one that plays a substantial part in our economy.

In my line of work I'm very focused on the success of New Zealand businesses. I get to visit a lot of great New Zealand companies. The transport sector is a vital partner to those companies, and is a major contributor to the success of all of us.

I say 'all of us' because it's a fact – a sometimes overlooked fact – that *business success means community success*. This is a message that Business NZ is very keen to get across. In essence, successful business means new roads, good schools, generous retirement pensions, timely hip operations, and all the other things that make up a high standard of living.

So we want to see the environment for doing business as good as it can be. At Business NZ, it's our mission to promote a business-friendly environment, where there's sensible employment legislation, appropriate levels of tax, and where business success is really celebrated.

We've done quite a lot of work on the things that are needed to get a business-friendly environment, and have narrowed it down to seven key areas – we call them 'seven pillars' because they're the things that support, or hold up, the economy. If you're interested, you can download this Seven Pillars book from the Business NZ website.

You've asked me to comment on one of those areas today – the subject of *employment issues*, in light of the coming election.

Before I do, I'd like to say that this is an issue that's discussed quite intensively at the moment in Business NZ's affiliated industries group, of which your executive director John Collens is a valued member.

That group includes 57 industry associations, and our discussions allow for associations to agree on their responses to issues that affect them – so you as individual businesspeople can be assured that your association can be backed up by the weight of opinion of numerous other industry associations, representing many thousands of people in business.

Employment law and employment issues can be complicated. When you have an MMP environment with eight or more political parties and with the ability for policies to be traded off in coalition talks following the election, it becomes quite

hard to get a handle on the kind of employment law environment we might get following the election.

I will run through the employment policies of the main parties in a moment, but first I'd just like to say that it's useful to have some key themes to check party policies against.

From the point of view of many in business, those key themes are flexibility and productivity.

For businesses of all sizes, flexibility and productivity are extremely important. We're all focused on meeting the needs of customers or clients – that's how we earn a crust. And customers and clients are getting more and more demanding as time goes by – they want better and better goods and services, and more and more convenience. That's great – it means we're part of a community whose living standards are increasing.

But it also means that every business has to work harder to meet the customer's needs. It means being more productive, more available, and more focused on the service we provide.

Achieving that requires flexibility and a real focus on productivity. It requires a flexible mindset by the employer and by employees, for customer needs to be met. That means we need employment law that allows for flexibility, and allows employers to reward those employees who are similarly focused on customer needs.

Employment law in this country has been through quite a few swings of the pendulum.

Back in the seventies and eighties we had a very inflexible system – compulsory unionism, national awards and an adversarial 'us and them' relationship between employers and unions.

Then the pendulum swung, and in 1991 we got the Employment Contracts Act, or ECA. This Act focused on the contract between the employer and employee, and allowed the parties to negotiate for and make a contract for the things they each needed. It allowed employers to achieve high productivity levels with flexibility of operations. And it allowed employees to bargain for appropriate rewards in return.

During the 1990s the Employers Federation did some large-scale surveying of how employers and employees felt about the ECA. The results were pretty clear-cut. There was a very low disapproval rate - less than a quarter of those surveyed disapproved of the ECA. Around two thirds of the respondents said they liked being able to negotiate direct and they liked being able to earn more in

return for higher productivity. And even in the early days of the ECA, a majority could see that it was favourable for the economy.

This was not a view shared by the union movement however. With the ECA, the legislation had shifted from one that was very focused on unions, to an Act that did not mention unions specifically. You could argue that it didn't need to, because the ECA allowed for any bargaining agent that the employer or employee wanted – including unions.

But the union movement had had a long history of entrenched protection, with a number of arbitration and conciliation institutions revolving around them – and they were not happy about losing that status.

So, when the National Party lost office in 1999 and Labour became the Government, the ECA was replaced, in the year 2000, by the Employment Relations Act (ERA).

As you will know, the ERA is less concerned with flexibility, and more concerned with protections for unions and for certain classes of employees. The ERA has given unions back their monopoly over negotiating collective agreements and, particularly as amended last year, has made it easier to achieve multi-employer collective agreements (MECAs).

This is because the ERA - which introduced the concept of good faith - now states that the duty of good faith requires the employer to conclude a collective agreement once bargaining has started. This makes it very hard for an employer to do anything *but* accept a MECA.

Yet MECAs (which set the terms and conditions of employees across multiple enterprises) make it hard for employers treat their employees as individuals. So it's harder to reward individuals for increased productivity.

And it can be very difficult for a business that's part of a MECA when there are profitability problems. Imagine you are a small bus operator, for example, and you've got caught up in a MECA that requires you to pay your employees at the same rate as the employees of other larger and more profitable bus companies. If your profitability falls for whatever reason, you might have difficulty meeting those pay rates – but you'll be forced to keep paying them, under the terms of the MECA.

The danger of MECAs is that they can ratchet up wages across a whole sector, regardless of individual productivity factors - and they could also facilitate large-scale strikes involving whole sectors of the economy.

Fundamentally, the ERA is based on the viewpoint that there is an imbalance of power between employers and employees – it's a view that says the employer always has more power.

Well, I have to say that all the successful businesses that I've been part of or that I've observed – what they all have in common is an appreciation of the value of their employees. They understand that their greatest competitive advantage is their people. They want to be an employer of choice. So it's not about who has more power – it's about how well we can all perform, pulling together cooperatively for a common aim.

However, the reality is that we now have employment legislation that is very focused on unions and very focused on protectionism.

And we have an election looming before the end of September. We have some clear choices that can be made between a protectionist approach and a flexibility approach.

Not all party policies have been released yet but it's possible to gain some idea of what could be in store from earlier announced policies – even though some are a bit self-contradictory.

So, Labour first. Probably Labour has the clearest agenda and, as is only to be expected, it is unashamedly interventionist. Labour does tend to believe that it can make people behave by passing another law – hence the increased emphasis on good faith in last year's ERA Amendment. And it also tends to believe that it knows best how businesses should be run. Even though Business NZ has been told there are no more employment relations changes in the pipeline, there are current indications that that might not be the case.

First up there is the Employment Relations (Flexible Working Hours) Bill not, admittedly, a Labour initiative but sent to a select committee with Labour's support. The bill has no chance of becoming law before the election but if that should happen afterwards, in its present form it would require employers, on request, to offer flexible work hours to employees with children under the age of 5 (or under the age of 18 if the child were disabled). A refusal to comply with the employee's proposal could see a compliance order by the Employment Relations Authority should the employee opt to appeal.

Now that may not bother Bus & Coach Association members too much since I'm sure some of you already offer flexible hours (particularly in the school bus area). On the other hand, a statutory requirement to comply with a flexible work hours request has made life hard for some UK employers where similar legislation is in place. There, the right is only to request flexible hours, not, as here, to *have* flexible hours (unless the employer can make a good case why not).

Even so, the UK legislation has run into a ‘first-come-first-served’ problem: in many cases the *first* staff requesting flexible hours have been able to get it, but employers have not then been able to extend the scheme to later staff wanting flexible hours –obviously, because most employers need most of their employees present during business hours.

Now, why should we need legislation of this kind? Generally, employers are very happy to accommodate individual needs where they can. That’s a voluntary approach, consistent with an employment relationship based on good faith.

But there’s a big difference between a *voluntary* consideration of an employee’s request, and a *compulsory* regime involving the Employment Relations Authority and the courts. Basically, workplace flexibility is simply good practice – something that an employer of choice would want to offer. It’s not something that should be imposed by law.

And what about other employment changes that are in the pipeline under Labour?

Well, Labour’s 2002 policy summary talked about *reducing compliance costs associated with the bargaining process*. In essence, that means fostering more multi-employer collective agreements (MECAs), as in the 2004 Amendment to the ERA.

We can expect to see more MECAs unless that legislation is revoked after the election.

The engineers union has talked about engaging “with business on industry lines rather than as thousands of independent enterprises” - and that, I should say, is code for getting those enterprises into MECAs. The union would assert this as one way to increase productivity but individual enterprises might not necessarily see it that way.

Then there are the work/life balance and state pay equity exercises that the Labour Department currently has under way. The Flexible Working Hours Bill would go some way towards meeting work/life balance intentions but further down the track consideration could also be given to limiting working hours along the lines of the 48-hour a week maximum imposed by the European Directive on Working Time. I’m sure there are some MPs with whom that kind of limitation would find favour. It has to be said, however, that for the time being at least the Labour Government does not appear to be planning any actual legislation along those lines.

And that applies too to pay equity. The recent exercise looking at wages in the areas of health, education, and the core public sectors is supposed to result in

changes in those areas (as it already has for nurses' pay) but not for the private sector.

Nevertheless, the expectation is that pay equity type pay rises promoted in the state sector will trickle down to the private sector. And some women's groups will be pushing, at the very least, for pay audits, particularly for employers taking up government contracts.

Pay audits would require an employer to examine every job in the enterprise to ensure that if a job more usually performed by women was less well paid than other jobs more usually performed by men, the female rate would be raised.

Labour's 2002 policy also talked about establishing a Ministerial Advisory Group to examine the adequacy of redundancy pay and expanding paid parental leave to include those who have had more than one employer in the previous year and the self-employed.

Part of that last proposal has already been achieved but the urge to make parental leave available to more and more individuals (including those employed casually) remains strong.

Taking paid parental leave means the employee in question having a right to return to the job. A problem with this is that the current policy does not require the employee in question to say if they are definitely going to come back following parental leave. Many new mothers decide near the end of their parental leave period, that they won't in fact return to the job – this can create a lot of uncertainty for employers, especially employers of casual staff.

One change made by the 2004 Amendment (of which the consequences haven't been felt to any great extent yet), was the tightening of the personal grievance procedure to make terminating employment that much harder.

Whether a dismissal was justified must now be determined by considering whether what the employer did was *what a fair and reasonable employer would have done*, not whether it was fair and reasonable by the employer's own standards. That, effectively, allows whoever is deciding the matter to substitute *their* view for employer's view of the need for the dismissal.

[SLIDE 17: NATIONAL] As for National, the party says what is needed is a high-wage, productive economy, achieved through greater flexibility. National would back away from Labour's greater attachment to multi-employer bargaining and would seek to reduce the monopoly bargaining powers that unions currently enjoy. So if National were in charge it seems that employers and employees would have the right to bargain as they choose, that there would again be neutrality between individual and collective employment contracting, and freedom to bargain collectively with or without a union.

National intends to introduce a 90-day probationary period when the personal grievance provisions would not apply. That would allow more potential employees to be given a chance, since, given the problems of getting rid of an unsatisfactory employee, employers tend nowadays to look for someone they know in advance can do the job.

National also intends to change the new Holidays Act's definition of relevant daily pay and reduce compliance costs to employers around statutory holidays. How this would be done is not clear. And National would re-introduce competition in work-place accident insurance, allowing employers to choose their own insurer but apparently providing for something less than total privatisation.

With respect to health and safety legislation, National considers that Labour's 2002 amendments, including the addition of work-related stress, and compulsory union representation, "added excessive compliance costs without adding to workplace safety". National says it would do something about that.

As for the other main parties, their policies fall somewhere in between Labour and National – except for ACT, which would simply return to common law contract at will. (No need for a probationary period as either party could terminate the employment as and when they chose, subject only to any contractual notice period.) ACT would also remove the current state monopoly on ACC.

United Future would increase workplace skills by getting more young people into industry training. It would do this by increasing the number of modern apprenticeships to 10,000. It would also review the ERA's grievance and dismissal procedures and employment law itself, to ensure the latter reflects "the reality of workplace relations in small businesses".

The party points out that it opposed Labour's employment law reforms and says it intends to promote a modern, flexible labour market avoiding wholesale changes to employment relations legislation but improving what is there already to make it better. United Future would provide for a 6 months' grievance-free probationary period.

Last year's Amendment to the ERA gave the Green Party a lot of what it wanted but if it had its way there would also be a "35-hour standard working week" and a "high level Commission into the future of work". Like Labour, the Greens have a natural urge to regulate.

The Greens have not expressed any opinion on the issue of a grievance-free probationary period, but it can safely be assumed that the Greens would see the introduction of an effective probationary period from the union's point of view.

NZ First would establish an industrial relations advisory group, although its purpose is a little obscure. NZ would raise the minimum and youth wage (as it seems Labour also intends to, until the minimum wage is at least \$10 an hour) and “review the practice of short term employment contracts”.

NZ First expresses concern about what it sees as discrimination against people aged 50 plus and would amend equal employment opportunities laws to ensure such discrimination ends. To that party, current age discrimination provisions are merely “a token gesture”

NZ First wants more money for OSH inspections and would review the Holidays Act to ensure fairness and flexibility, but would lock in four weeks annual leave – something that is probably here to stay whichever party holds the post election reins. (National would allow the fourth week to be worked and paid for by mutual employee/employer agreement.)

NZ First have not expressed any opinion on the issue of a grievance-free probationary period.

What ACT wants is entirely clear and what Labour wants is reasonably so, but what businesses are likely to *get* is not so certain. Given, under MMP, the plea bargaining nature of the post election situation, whether there will be more or less labour market intervention will be largely a question of wait and see. But whatever happens, doubtless concessions one way or the other – more intervention or less - will have to be made.

Not all parties have expressed their intentions on all issues yet. So it is not yet possible to do a proper comparison of their employment policies. But I would suggest that if in doubt, you should weigh every promise you hear made in the coming campaign against the two key issues of productivity and flexibility. These are the issues that have the capacity to impact most on our workplaces in the future.