Submission by

BusinessNZ

GROWING PROSPERITY AND POTENTIAL

to the

Education and Workforce Select Committee

on the

Employment Relations Amendment Bill

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EMPLOYMENT RELATIONS AMENDMENT BILL – SUBMISSION BY BUSINESSNZ[1]

1.0 INTRODUCTION

1.0 BusinessNZ welcomes the opportunity to make a submission to the Education and Workforce Select Committee on the Employment Relations Amendment Bill ("the Bill"). It wishes to appear before the Committee to present its submission.

2.0 OVERVIEW

2.0 BusinessNZ opposes the Bill. BusinessNZ is concerned that implementation of the Bill in its present form will:

- Unnecessarily prolong collective bargaining and increase prospects of industrial action.
- Breach the privacy of employees who choose not to join a union, and place them at subsequent risk of duress from unions trying to recruit them.
- Constrain the ability of employees who do not wish to join a union and who wish to negotiate improved conditions of employment.
- Diminish the employment prospects of young, inexperienced or unskilled people.
- Disrupt business operations by introducing default conditions that require employees to take breaks at the same time.
- Create extra work and compliance costs for employers where the primary beneficiary of the extra work is unions, not enhanced workplace productivity.
- Require employers to subsidise the work of unions by providing paid time off for workplace delegates.
- Conflict with the objects of the Act and with international labour standards.
- Diminish the ability of New Zealand businesses and their employees to prosper and grow.

2.1 BusinessNZ's concerns over the Bill fall into two main categories

2.1.1 Conflicts with the Government's overall objective of a high performing, high wage economy as well as to the legislative objective[2] of building productive workplace relationships founded on good faith.

2.1.2 Increased complexity and imposed extra processes that will increase compliance costs, slow business responsiveness to economic conditions and inhibit growth.

Recommendations (made on a without prejudice basis)

It is recommended that the Select Committee:

- **Amend** clause 4 (proposed s18A (2)(b)) by adding "(iii) what arrangements are being, or have been, made to ensure the normal work of the delegate is not unreasonably disrupted while the delegate is undertaking the activities."
- **Delete** clauses 5 – 8
- **Delete** clauses 9, 10 and 11.

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[1] Background information on BusinessNZ is attached as Appendix One.

[2] Section 3 of the Employment Relations Act 2000

- **Delete** clause 12 or, in the alternative, clarify the aim of enabling early initiation by unions, even if this is in the explanatory notes. This would provide the necessary guidance to courts called upon to resolve disputes over the application of this clause.
- **Delete** clause 13.
- **Delete** clause 14.
- **Delete** clauses 18- 20 or, in the alternative, delete proposed section 63AA from Clause 18.
- **Delete** clause 19 or, in the alternative, delete proposed changes to section 65 of the Employment Relations Act 2000 ("the Act").
- **Delete** clause 22
- **Delete** clause 26
- **Delete** clause 27.
- **Delete** clause 29 or, in the alternative, increase the threshold to 50 full time equivalent employees.
- **Delete** clause 32.
- **Delete** clause 35 or, in the alternative, provide in proposed section 69ZE that "where reasonable and practicable" in subsections (3) to (7) includes consideration of the need to maintain business continuity.

3.0 CONFLICTS

3.0 Several clauses in the Bill as written are almost certain to create conflict in the workplace. This runs directly counter to section 3 of the Act, which sets out its Objects; viz,

- to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
- by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
- by acknowledging and addressing the inherent inequality of power in employment relationships; and
- by promoting collective bargaining; and
- by protecting the integrity of individual choice; and
- by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
- by reducing the need for judicial intervention.

3.1 In this regard, several of the Bill's clauses deserve specific mention.

Paid time off for delegates

3.1.1 ***Clause 4*** entitles union delegates to reasonable paid time to represent its members. However, proposed new section 18A (2) is constructed in a fashion that is more likely than not to lead to conflict. The way in which it is constructed gives a choice to the delegate between *agreeing* with the employer that time may be taken without notice (s18A(2)(a)) or simply *telling*

the employer when and for how long they intend to spend time on union duties in each occasion they seek to do so (s18A(2)(b)). Experience suggests that the latter option will prevail.

3.1.2 The proposed right to paid time off section is broad and undefined in terms of what "*reasonable paid time*" would mean. Any challenge by the employer under s18A (3), particularly to the delegate who exercises the right in s18A (2)(b), is an inherent source of conflict and disruption. What constitutes unreasonable disruption to an employer's business or a delegate's work performance offers considerable scope for disagreement. This is unlikely to reduce the need for judicial intervention.

3.1.3 Allowing delegates time off to undertake their duties is not new, and employers generally are not opposed to providing payment for employees to undertake certain union activities that are seen by the employer as necessary or indirectly beneficial. However, if the proposed section is enacted, it will apply across all workplaces, including those without a collective agreement. In many workplaces, there will be no history of union delegates having "paid time", so it may be difficult and potentially contentious to decide the boundaries of what "reasonable paid time" actually means.

3.1.4 Furthermore, large workplaces with high union membership tend to have more union delegates and will be disproportionately impacted by a requirement to give them all paid time off for union activities.

3.1.5 Potential for conflict could be reduced if the employer is aware that a delegate's absence from their normal work was not going to cause disruption. To that end it is recommended that proposed s18(2)(b) be amended by adding *"(iii) what arrangements are being, or have been, made to ensure the normal work of the delegate is not unreasonably disrupted while the delegate is undertaking the activities."*

Duty to conclude bargaining

3.1.6 ***Clauses 9 – 11 and 14*** require bargaining parties to conclude a collective agreement unless there are genuine reasons not to. They also require parties to continue bargaining until all matters have been exhausted even when some matters are already stalemated. Aside from being in conflict with the Objects of the Act[3], this proposal is a direct breach of international labour standards as it effectively makes settlement of a collective agreement mandatory. This is contrary to Article 4 of the Right to Organise and Collective Bargaining Convention 1949 (No.98), ratified in 2003 by the last Labour Government, which requires that national mechanisms for collective bargaining and conciliation be voluntary. The International Labour Organisation's tripartite Committee on Freedom of Association has the role of investigating complaints of non-compliance with Convention 98 by ILO member states. In this regard, the CFA has made several definitive statements,[4] including:

> *"The voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principle of freedom of association."*

[3] in particular; to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—by protecting the integrity of individual choice; and by reducing the need for judicial intervention.

[4] pp185-186, *Freedom of Association,* Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (5th (Revised) edition)

"Collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining."

"Legislation which lays down mandatory conciliation and prevents the employer from withdrawing, irrespective of circumstances, at the risk of being penalised by payment of wages in respect of strike days, in addition to being disproportionate, runs counter to the principle of voluntary negotiation enshrined in Convention No 98."

3.1.7 At the operational level there are practical consequences too. For instance, proposals to restructure businesses, often for reasons of economic survival, can be held up while bargaining continues. The courts have held that affecting conditions of workers covered by a collective agreement that is being bargained for, by attempting to conduct a restructuring exercise via consultation away from the bargaining table, is a breach of the employer's good faith obligations. The proposed provision strengthens that view and makes it likely that the requirement to settle a collective agreement will become a tactical tool in any attempt to resist change. This has negative connotations for growth and productivity.

3.1.8 It is recommended that clauses 9, 11 and 14 be deleted.

Initiation of bargaining

3.1.9 ***Clause 12*** permits unions to initiate collective bargaining 20 days earlier than an employer can. On its face, the reason for this is unfathomable since good faith bargaining requires all claims to be considered and responded to before bargaining can reasonably be considered complete. This requirement will be further strengthened by ***Clause 10*** of the Bill, which inserts a new section 32(1)(ca) stating that "*even though the union and employer have come to a standstill or reached a deadlock about a matter, they must continue to bargain (including doing the things specified in (b) and (c)) about any other matters on which they have not reached agreement*".

3.1.10 It may be that the proposed change is designed to prevent employers from initiating bargaining for a single collective agreement when the union has indicated that it wants to join the employer to bargaining for a multi-employer collective agreement. This has been a tactic adopted by some employers in the past. However even this situation would be subject to the requirements mentioned above. Proposed clause 12 therefore creates potential confusion as to what advantage is conferred by early initiation, which may in turn detract from an efficient bargaining process.

3.1.11 It is recommended that clause 12 be deleted. In the alternative, clarity as to the aim of enabling early initiation by unions would be helpful, even if this is in the explanatory notes. This would provide the necessary guidance to courts called upon to resolve disputes over the application of this clause.

Meal breaks

3.1.12 ***Clause 35*** inserts new meal break provisions which provide for specified breaks. It is helpful that the Bill exempts essential services. That said, the default provisions that apply when agreement is not reached on the timing of meal breaks are a certain source of conflict, and of significant negative consequences for productivity and the economy.

3.1.13 The practical effect of proposed section 69ZE(3)-(7) is that employers whose employees all start at the same time become entitled to meal breaks at the same time unless the employer and employees have agreed otherwise. This

will be of particular concern for employers who run continuous process operations (e.g. 24/7) that are not essential services. This includes nearly all manufacturing operations, which by definition means the proposed provisions may have a material impact on national productivity.

3.1.14 Impacts will also be felt in any operation that requires continuous cover of situations e.g. nursing and aged care, retail and so on.

3.1.15 Another example is in any activity that is weather dependent, e.g. aviation, where activities such as aerial mapping, crop dusting and the like experience considerable variability in starting and finishing times. This variability in starting and finishing times for work periods would render it virtually impossible to comply with the Bill's provisions in the event there was no agreement between employers and their employees as to when breaks should be taken. This is because the Bill requires breaks to be taken at the statutorily specified times in the event of no agreement on timing This puts employers in the position of breaching the law simply because of a lack of agreement with employees over the timing of meal breaks. BusinessNZ cannot recall a time when a government put employers in such a position. Effectively forcing a breach of the law by the imposition of default provisions is unjustifiable.

3.1.16 It is acknowledged that clause 35 does provide that, in the absence of agreement otherwise, breaks must be taken at the specified times where "reasonable and practicable". However these words are minimised in their effect by the exemption provided to essential services. Clearly the Bill deems it reasonable and practicable for essential services to organise breaks to minimise disruption to services, but this explicit ability is not extended to any other businesses. It can therefore be argued that maintaining continuous operations in non-essential businesses is not an intended feature of the Bill, *other than by agreement between employees and employers*. This places the power to maintain business continuity squarely in the hands of employees and/or their unions.

3.1.17 Constructing rights to meal breaks in the manner proposed then provides an obvious opportunity for low level industrial action. Employees bargaining for a collective agreement can legitimately use lack of agreement on meal break times to force regular shutdowns on businesses. Businesses would be powerless to respond to such situations as their employees, in taking breaks at the specified times, would be acting lawfully. Enabling this opportunity strikes against the heart of the Act's objects as set out in paragraph 3.0 above. It is also hardly conducive to growing the economy.

3.1.18 It is recommended that clause 35 be deleted or, in the alternative, provide in proposed section 69ZE that "where reasonable and practicable" in subsections (3) to (7) includes *"consideration of the need to maintain business continuity and safe operation"*.

4.0 COMPLEXITY

4.0 Some clauses arguably add considerably to existing compliance processes employers must follow. By definition they increase the time required to complete required processes, and increase compliance costs. Unless these costs can be offset by efficiencies or productivity gains they become a net drain on overall productivity and prosperity to the ultimate detriment of everyone

4.1 Clauses that arguably increase complexity, add unnecessary process and increase compliance costs include:

Insertion of pay rates into collective agreements

4.1.1 ***Clause 16*** requires a collective agreement to contain "*the rate of wages or salary payable to employees".* As with many of the changes contained in the Bill, this change closes the door on a specific dispute involving a company that did not wish to include rates of remuneration in its collective agreement[5]. This is despite the fact that over 96% of collective agreements already contain rates of remuneration[6].

4.1.2 Legislating for this requirement does more than force one reluctant company to include rates of remuneration in its collective agreement. It also creates legislative minima that will affect other areas of employment. In particular it will impact what an employer may agree with a new employee who decides not to join the union and the applicable collective agreement in their workplace. This is because the Bill essentially prohibits a new employee from entering into an individual agreement that is inconsistent with an applicable agreement *at any time*.

4.1.3 Proposed subsection 62(7) (clause 18) permits a new employee who has elected not to join the relevant union after the first 30 days, and their employer, to vary the individual agreement that applied for the first 30 days, as they see fit. However proposed subsection 65(1) (clause 20) essentially restricts the term "as they see fit" to situations where the employee's work is not covered by a collective agreement. Proposed subsection 65(3) ties the individual agreement back to proposed subsection 63A(6) (clause19) which allows a collective agreement to contain a coverage clause that may be applied to persons doing work covered by the collective.

4.1.4 Read this way, it is arguable that no employee, despite the fact they may have chosen not to join the relevant union, may be employed on an individual agreement that is inconsistent with an applicable collective agreement. By virtue of the clause 16 requirement to include pay rates in collective agreements, this affects what an employer may pay an employee in an individual employment agreement. The Bill's provisions therefore act as a potential cap on what employers may pay non-union members[7]. This construction will act as a brake on employers setting pay rates that are in excess of what is earned by collectivised employees and will almost certainly act as an inhibiting factor to the recruitment and retention of skilled employees who choose not to join a union. This has no positive implications for anyone.

4.1.5 It is recommended that clauses 18, 19 and 20 be deleted from the Bill.

Amendments to Part 6A

4.1.6 ***Clause 32*** restores coverage of Part 6A to small business (<20 employees) who currently are exempt from its provisions. Timeframes for employees to make choices to (not) transfer to a new employer are also extended. Small service-based organisations, such as cleaning and catering businesses, typically are not resourced to manage the complexities of Part 6A, which was the reason for exempting them, and removing the exemption is likely to be disproportionally burdensome. Extended timeframes for employee choice, while of benefit to employees, likewise may impact on the economics of a

[5] *First Union Inc. v Jacks Hardware and Timber Limited t/a Mitre 10 Mega, Dunedin, and Mitre 10, Mosgiel* [2015} NZEmpC 230 needed

[6] Employment Agreements: Bargaining Trends and Employment Law Update 2017 para 3.5.

[7] If passing on provisions are strengthened, as suggested in the Labour Party's 2017 election manifesto, this may lead to employers having to "pay" to enhance the conditions of individual agreements above those provided by an applicable collective agreement. See also paragraph 5.0.7

transfer of business. The move therefore needs to be weighed against the need to ensure employee rights are also respected.

4.1.7 It is recommended that clause 32 be deleted.

5.0 OTHER COMMENTS

5.0 Aside from concerns about conflicts with the Object of the Act and increased complexities, a number of clauses create other issues that deserve comment.

Union access to workplaces

5.0.1 ***Clauses 5-8*** remove the present requirement for union representatives to seek permission to access workplaces and talk to workers. This change is overtly designed to enhance and facilitate the ability of unions to recruit new members. While union officials are required to comply with workplace policies and procedures, including health and safety, they may circumvent these requirements when they cannot find the employer or a representative of the employer. This was a key reason behind the current requirement that prior permission be sought to enter the workplace. In light of the ability to circumvent the requirements of current section 21(3), clauses 5 – 8 increase the risk to employers of non-employees being in the workplace without their knowledge. At a minimum, this decreases their ability to foresee and manage issues that might cause disruption to work processes or harm to employees.

5.0.2 It is recommended that clauses 5- 8 be deleted.

Repeal of ability to opt out of bargaining for a multi-employer collective agreement (MECA)

5.0.3 **Clause 13** repeals the current ability of employers to opt out of bargaining for a multi-employer collective agreement (MECA). This means that all employers cited by the relevant union(s) as potential parties to a new MECA (or the renewal of one) must participate in bargaining. Bargaining for a MECA will be further subject to the provisions of clauses 9 and 10 of the Bill, requiring all cited employers to agree to a MECA unless there are genuine reasons not to, and to remain at the bargaining table until all matters have been dealt with. This package of provisions considerably strengthens the ability of unions to obtain MECAs. However it commensurately strengthens the probability of fractious bargaining and increased industrial tension. Furthermore, the compulsion to settle inherent in clauses 9 and 10 conflicts with the Object of the Act and with international labour standards governing collective bargaining[8].

5.0.4 Further, the Act's information confidentiality protections (s34) notwithstanding, compulsory MECA bargaining fails to recognise such matters as differences in employer size, profitability and ability to pay, or the need for commercial sensitivity. That commercial confidentiality can by no means be guaranteed has long been an employer concern.

5.0.5 As the courts have noted, the union was likely to have members employed by a competitor and must allow potential employees, who ask, to see a relevant collective's terms and conditions. Expectations of confidentiality were, in the court's view, even if genuinely-based, unrealistic in practice. So the collective's terms and conditions can scarcely remain entirely confidential. This will be of significant concern to many employers.

[8] See Para 3.1.4

5.0.6 It should be noted that MECAs are not the same as the proposed Fair Pay Agreements (FPAs). MECAs will apply to all union members employed by each of the employer parties to the MECA[9], whereas FPAs will apply to all employees in a particular class of work, irrespective of who their employer is or whether they are union members or not.

5.0.7 It is recommended that clauses 13 and 14 be deleted.

Terms and conditions of new employees

5.0.8 ***Clauses 18-20*** reinstate an earlier requirement that new workers be covered by an applicable collective agreement for the first 30 days of their employment. Crucially, they also insert provisions that define the scope of coverage clauses in both collective agreements, and individual agreements negotiated by those who have elected not to join an applicable collective agreement after the first 30 days of employment. A key concern here is that the operation of these clauses may inhibit what an employer may agree with a new employee who has decided after the first 30 days not to join the union and the applicable collective agreement.

5.0.9 Clauses 19 and 20 of the ERA Bill provide that collective coverage applies to named employees or the work of those employees, even if the work is done by other people. Similarly the ERA Bill's provisions for individual agreements, where an individual elects not to join a union after thirty days, apply the same concept of coverage. The effect is that any individual who elects not to join the union in a workplace where there is an applicable collective agreement will not be able to negotiate terms that are inconsistent with the collective agreement.

5.0.10 While not stated in the Bill, these clauses also connect the issue of collective coverage with that of "passing on", which is an issue identified in the Labour Party 2017 election manifesto as requiring strengthening[10]. Consideration of rules governing passing on has been delayed beyond the passage of the Bill. However, the Bill's provisions provide a critical "landing pad" for advancing the passing on issue. Union members are already protected from discrimination, and rules around making payments to the union if workers want to be covered by a collective agreement without joining the negotiating union already exist[11]. The specific reference to strengthening passing on provisions in the Labour Party election manifesto could therefore be interpreted as heralding a shift from the present position where a bargaining fee for passing on conditions is negotiable, to one where the fee is compulsory. This would effectively constitute compulsory unionism since unions would receive income from members and non-members alike where the terms of a collective agreement covered their work.

Provision of information to new employees and unions

5.0.11 ***Clauses 17-19*** are designed to ensure that new workers have all necessary information and access to unions at the commencement of their employment. These clauses expand on past requirements that new employees be given information about the existence of applicable collective agreements and details of how to contact the relevant unions. The proposed changes will require the employer to give details of new employees (*including prospective*

[9] including employers who join the MECA as subsequent parties

[10] Where an employer elects to apply terms and conditions negotiated into a collective agreement to non-union employees in their workplace in the interests of maintaining a consistent approach to their workforce, particularly where they are doing the same work.

[11] Part 6B, Employment Relations Act 2000

employees) to the relevant union, and to require new employees to complete forms containing their details, for transmission to the union by the employer.

5.0.12 Requiring employers to provide details of new employees to unions is a step too far and raises issues of privacy and duress. While proposed subsection 63AA (2) provides for the employee to object to having their details transmitted to the union on the required form, proposed new subsection 63AA (5) requires the employer to, inter alia, provide the union with the names of employees who fail to complete and return a form unless the employee has objected to the transmission of that information.

5.0.13 However, since the form required by subsection 63AA(2) is the mechanism for objection, failure to fill out the form can be read as enabling subsection 63AA(5), requiring the union to be informed of the name of the new employee who has not returned the form. In other words, by not filling in the form the employee has not objected. Under subsection 63AA (5) the employer must then transmit to the union names of employees who prefer not to provide information on the requested form. This in turn enables the union concerned to contact and put pressure on a new employee to join the union.

5.0.14 This would be a clear breach of sections 9 and 11 of the Act, which prohibit coercion and duress in relation to becoming or not becoming a member of a union. This very possibility strikes at core concepts of privacy. It is simply a bridge too far.

5.0.15 Furthermore, the proposed changes add considerable bureaucracy to recruitment processes in businesses that have collective agreements. They seem designed solely to assist union efforts to recruit new members, and have no apparent beneficial implications for business productivity.

5.0.16 The earlier recommendation to delete clauses 18, 19 and 20 for the Bill is therefore reiterated. In the alternative, proposed section 63AA should be deleted from clause 18.

Repeal ability to deduct pay for low level industrial action

5.0.17 ***Clause 22*** repeals the ability of employers to make partial deductions from the wages of employees who engage in low level industrial action. This would restore the all or nothing approach that existed under the previous Labour Government i.e. employers would have to stop *all* pay for workers irrespective of the level of industrial action, or do nothing. However, much industrial action stops short of a full withdrawal of labour, instead taking the form of "work to rule", "go slows" etc. These all reduce productivity.

5.0.18 Currently employers can respond proportionally to strike action, by reducing the pay of striking employees in proportion to the estimated value of lost productivity. Labour's proposal leaves only the "nuclear" option on the table. The change will increase the effectiveness of low level industrial action by protecting the pay of employees engaged in low level industrial action, albeit this is based on an apparent assumption that employers would not lock out or stop the pay of employees where they did not completely withdraw from the workplace. Given that strike action is restricted to supporting collective bargaining, the proposal will also strengthen the ability of workers and unions to conclude collective agreements, particularly new ones at an industry level (e.g. a country-wide work to rule by all supermarket checkout operators, or all train drivers or bus drivers).

5.0.19 Whether intended or not, the above effect is further strengthened by proposed changes to meal break provisions as employees may take breaks

simultaneously at the times prescribed in the Bill if there is no agreement with the employer to have them at different times. Should this happen, the employer will be denied even the "nuclear option", as the disruption caused by simultaneous meal breaks will be protected by the fact that the Bill's default provisions for the taking of meal breaks will make this action lawful. Overall, this clause is more likely to disrupt rather than enhance good faith relationships in the workplace.

5.0.20 It is recommended that clause 22 be deleted from the Bill.

Discrimination against union members

5.0.21 ***Clauses 24–26*** enhance protections for unionised employees. In particular clause 25 adds to the ability of unions to defend the negotiation of specific advantages for their members, by virtue of existing subsection 9(3) of the Act. While section 9 overall prohibits preference based on (non) union membership, subsection 9(3) effectively exempts the conditions of collective agreements from this prohibition. That said, preference issues have rarely arisen in the past and have been particularly challenging to prove. It may be that business concerns remain more academic than real.

5.0.22 ***Clause 27, on the other hand,*** adds to the existing rebuttable presumption that the employer discriminated against the union member because of involvement in activities of a union by adding the criterion of union membership. This is a very significant development because a rebuttable presumption is a reverse onus of proof, i.e. the employer is guilty until the allegation can be rebutted.

5.0.23 Inclusion of union membership in the ambit of rebuttable presumptions has potentially significant implications for the performance management of employees. A union member whose lack of work performance is being challenged has only to allege discrimination on the grounds of union membership and the process of performance improvement becomes a litigation based on the allegation. The employer must then defend the allegation before being able to proceed with improving the performance of the employee. In the meantime productivity, both of the employee or employees) concerned and of employees in the wider workplace, may be unduly affected.

5.0.24 It is recommended that clause 27 deleted.

90 Day trial periods

5.0.25 ***Clause 29*** retains the existing 90-day trial period scheme but restricts its use to employers who employ fewer than 20 employees. It is as yet unclear whether the 20-person threshold is FTEs or actual bodies. This needs to be clarified. If it is bodies, the restrictions will be wider still as many small businesses employ part-time staff.

5.0.26 Unless accompanied by a rapid, effective and significant investment in lifting the average level of pre-employment skills of New Zealand youth, the removal of trial periods for large businesses (which employ around 80% of all NZ workers), coupled with the proposed removal of starting-out rates and a significant increase in the minimum wage, will impact most severely on young people looking for their first job. It will also impact relatively more severely on disabled workers and workers attempting to return to the workforce after an absence, notably parents returning after rearing children and those who have been unemployed for some time. Overall unemployment, and particularly

youth unemployment, will inevitably rise as a result. It is noted that the press has recently reported Treasury support for this view.[12]

5.0.27 It should be noted that a limit at any level introduces a requirement for the recording and monitoring of employee numbers to defend the use of trial periods. The Bill is silent on what happens when an employer who has engaged employees on trial periods falls below the cut-off level. Businesses that, having been above it, fall below the cut-off will face an additional burden of proving that those employees who are on trial periods were engaged on them legitimately. What happens in these circumstances needs to be clarified if a cut-off threshold is to be retained.

5.0.28 Moreover, critics of the 90-day trial scheme arguably have misunderstood its purpose. For instance, research which found little evidence of job growth as a result of the introduction of 90 day trial periods missed the point that the purpose of trial periods is to give people, who would otherwise find difficulty in being recruited, a better chance to compete for existing jobs, not to increase the number of jobs available. Recent surveys of employers in the Auckland area indicate overwhelming support among smaller employers for the 90-day trial period. This supports arguments that the 90-day trial scheme is in fact successful and should be fully retained or at least expanded beyond the minimal levels proposed.

5.0.29 It is recommended that clause 29 be deleted or, in the alternative, coverage of the scheme be increased to employers who employ 50 or fewer full-time equivalent employees.

Restore reinstatement as the primary remedy for dismissal

5.0.30 ***Clauses 38 and 39*** require the ERA to provide for reinstatement whenever it is practicable and reasonable to do so. This ignores the fact that most dismissals result in a breakdown of trust on both sides. Most dismissed employees would prefer to move on rather than return to a workplace that doesn't want them. That said, the clause does leave the issue to the discretion of the ERA, and experience suggests there will be little change in reality.

6.0 CONCLUSION

6.0 The Bill as it stands contains provisions that conflict with the objects of the Act and with international labour standards. It also contains provisions which may breach employee privacy and may render employees susceptible to pressure to join unions. It creates constraints on employers who wish to offer different conditions of employment to employees who do not wish to join a union. It restricts the ability of employers who may wish to "take a chance" on people who would otherwise find difficulty in obtaining employment. It requires employers to subsidise the work of unions by providing paid time off for workplace delegates. Many of its provisions create extra work and compliance costs for employers. The primary beneficiary of the extra work is unions, not enhanced workplace productivity or concomitant employment creation.

6.1 Overall the Bill does not demonstrably advance the ability of New Zealand businesses and their employees to prosper and grow. It should not proceed.

[12] Treasury advice released under the Official Information Act

Background information on BusinessNZ

BusinessNZ is New Zealand's largest business advocacy body, representing:

- Regional business groups EMA, Business Central, Canterbury Employers' Chamber of Commerce, and Employers Otago Southland
- Major Companies Group of New Zealand's largest businesses
- Gold Group of medium sized businesses
- Affiliated Industries Group of national industry associations
- ExportNZ representing New Zealand exporting enterprises
- ManufacturingNZ representing New Zealand manufacturing enterprises
- Sustainable Business Council of enterprises leading sustainable business practice
- BusinessNZ Energy Council of enterprises leading sustainable energy production and use
- Buy NZ Made representing producers, retailers and consumers of New Zealand-made goods

BusinessNZ 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.

In addition to advocacy and services for enterprise, BusinessNZ contributes to Government, tripartite working parties and international bodies including the International Labour Organisation (ILO), the International Organisation of Employers (IOE) and the Business and Industry Advisory Council (BIAC) to the Organisation for Economic Cooperation and Development (OECD).