NEW ZEALAND BUSINESS ROUNDTABLE

SUBMISSION ON EMPLOYMENT RELATIONS BILL

MAY 2000

1 Introduction

1.1 This submission on the Employment Relations Bill (the Bill) is made on behalf of the New Zealand Business Roundtable (NZBR), an organisation consisting primarily of chief executives of major New Zealand firms. A list of current members is attached. The organisation's purpose is to contribute to the development of sound public policies that reflect overall New Zealand interests.

2 General issues

Government policy

2.1 The Employment Relations Bill raises two major concerns about government policy, one substantive and the other procedural.

2.2 The substantive concern is the impact that the Bill will have on other areas of government policy including on price stability, unemployment, investment, the balance of payments, economic growth and the government's accounts. The extra rigidity that will be introduced into the labour market risks exacerbating unemployment. Wage increases in excess of productivity increases must be compensated for by higher unemployment. Either way higher interest rates are likely. Government support for the Reserve Bank and the Reserve Bank Act would then be critical to avoiding even greater pressure on interest rates. The government is also affected as an employer. It is likely to be one of the first victims of multi-employer agreements, for example in hospitals. Since the minister's publicly stated aim is to raise wages and conditions for large numbers of workers, it follows that there are fiscal risks here for the government. In short, the measures are a threat to economic stability, investment and job creation in New Zealand.

2.3 The procedural concern relates to the complete failure of the policy making process leading to the Bill to match up either to the Cabinet Office requirements or to any principles of sound policy making. There is no clearly defined problem, no explanation of what is wrong with the current state of affairs, apart from the statement that it is contrary to government policy, and

no consideration of whether the measures proposed will advance the ostensible goals or whether alternatives would be better. The Regulatory Impact Statement (RIS) is so lacking in content as to reduce the process to a charade.

The nature of labour market relationships

2.4 In all areas of human endeavour, individuals and groups come together to form relationships in order to better themselves and, given sound laws and institutions, the wider community. The labour market is one example of this: firms need labour services in order to be able to produce goods and services that consumers want to buy. Workers want to engage in productive activity and earn an income. The goal is always to deliver goods and services to customers in competition with other firms in which employers and employees are cooperating in similar fashion. The competition is not between employers and employees but between employers for staff and employees for jobs.

2.5 Cooperative workplace relationships can only be sustained if both employers and employees have a clear understanding of the terms of their relationship and if the incentives the two groups face are aligned. Employment contracts or agreements are one way of ensuring that this happens. As in other spheres of human activity, voluntary agreements to cooperate are negotiated and maintained only if they make both parties better off, compared with the alternatives they face.

Employers and employees face diverse circumstances

2.6 There is no 'one-size-fits-all' form of employment agreement that will necessarily make firms and workers better off.

2.7 Firms vary enormously in their size and consequent ability to focus on non-core objectives. While there is a small number of large firms that employ professional human resource practitioners, 86 percent of New Zealand firms employ five or fewer workers. The owners of these firms are focused on their business, are inexperienced in dealing with unions, lack time to deal with the

kind of complex employment arrangements favoured by unions, and lack the money to employ specialists. These firms, which include many of the innovators that drive economic growth, already have difficulty coping with regulatory burdens and will be especially severely affected by the measures proposed.

2.8 As a consequence of the diverse nature of the labour market, we observe a range of labour market and business arrangements, including permanent long-term career structures, fixed-term contracts, secondments, sub-contracting, partnerships and joint ventures.

2.9 The diversity of these mutually agreed arrangements is a reflection of the wide range of circumstances that firms and workers face, including differences in:

- the goals and objectives of each party;
- the financial and non-financial costs and benefits of alternative employment arrangements;
- the risks and rewards for each party with investments that are specific to the relationship (eg in training, plant and equipment);
- employer and employee preferences about the mix of contract terms and conditions (eg the mix of wage vs non-wage remuneration, job security and hours worked);
- the demand and supply conditions faced by firms with respect to the goods and services they are producing (eg the degree of competition and the nature of the production process); and
- the demand and supply conditions faced by workers with respect to the skills they possess.

Limited resources, risk and uncertainty are unavoidable

2.10 As with all human relationships, labour market arrangements need to take account of some fundamental considerations. First, given that natural

resources, physical capital and human skills are limited, neither party to the employment relationship can be assured of getting exactly what they want. Compromise is inherent in forming sustainable agreements. Labour market outcomes reflect the interaction of the demand for and supply of skills, not the will of one party over another.

2.11 Secondly, *both* parties face risks. For example, employees who take on firm-specific skills are at risk of the firm failing. Conversely, firms that make irreversible investments in large-scale plant and equipment are exposed to the risk of skilled employees departing or withdrawing their labour. Employment agreements will attempt to minimise or insure against these problems, but risks of conflict are almost always present in all human relationships. It is important that the parties to the employment relationship are able to deal with these problems themselves.

2.12 Thirdly, for both firms and workers, decisions about labour market arrangements are made in an environment of considerable uncertainty about the future. For example, product market conditions can change frequently. Similarly, the future demand for and supply of skills is uncertain.

Employment arrangements need to reflect current realities

2.13 The diverse circumstances, risks and uncertainties described above are illustrated by the realities faced by employers and employees in New Zealand today:

- New Zealand is a small, open economy exposed to frequent shifts in domestic and international trading conditions. It is inevitable that adverse shocks will occur, and businesses will need to be able to respond to them.

- Markets for many goods and services are now global. A high proportion of New Zealand firms face international competition. This means that the wages and conditions they agree with their employees must ultimately reflect the productivity of those workers. Most New

Zealand firms are very small by international standards. Few, if any, can exercise market power internationally.

- The international mobility of capital and labour varies considerably across industries and skill types. Some firms and investors can quickly shift their capital to countries that offer the best return, while others are involved in longer-term commitments. Similarly, some workers face high demand and rewards for their skills internationally while others face more limited options locally.

- Technological change is resulting in rapid shifts in best-practice production techniques and the composition of skills. New Zealand's comparative advantage increasingly lies in sectors requiring significant investments in human capital.

- Socially, New Zealand is becoming more diverse. One consequence of this is that individuals are seeking a wider range of employment options during their working lives.

Summary

2.14 Employees and employers face disparate, complex and uncertain pressures. Mutually beneficial arrangements will only be achieved if they are able to determine contract types, terms and conditions that best suit their specific circumstances. Moreover, given the risks and uncertainties they face, it is critical that the arrangements they agree are adaptable, allowing both parties to hedge their risks and respond to future change. Multi-employer agreements are a major threat to the flexibility required of businesses to respond to changing conditions, as is the rule that new employees on individual contracts must, for the first 30 days, be on the same terms as any applicable collective agreement. Changes of this nature will impact especially adversely on small businesses and the unemployed and underqualified.

3 How the law can help

3.1 Well-designed legislation, in tandem with common law, can help employees and employers form and maintain mutually beneficial employment

relationships. In particular, as in other areas, the law has a role to play in: establishing the basic rights around contract formation and application (eg freedom from duress), providing mechanisms for assisting in the interpretation and enforcement of private contracts, and limiting the ability of either party to act in any way that reduces the overall benefits delivered by the relationship. A critical aspect of this last role is the promotion of competition.

3.2 In setting legislative rules and establishing common law standards, the fundamental benchmark for legislators and the courts must be whether a particular rule maximises benefits to the community as a whole, taking account of the costs of doing so. In practice this means that the value of any proposed new rule should be assessed against a range of standard public policy criteria, in particular whether changes in the law protect individual rights and are efficient and equitable.

3.3 In short, the best contribution the law can make to a labour market that generates jobs and expands living standards is to facilitate and enforce private agreements and to limit the ability of either employer or employee groups to erect unjustified barriers to entry to industries and skill groups.

4 The Employment Contracts Act

4.1 It is useful to assess the Employment Contracts Act 1991 (ECA) against the foregoing public policy criteria. Compared with previous labour market regulation in New Zealand, the ECA was a significant step in the right direction. Prior to the Act, employment arrangements in New Zealand were characterised by:

- a significant proportion of employment contracts set by parties other than the individual employers and employees to whom they applied;
- costly disputes over contract negotiation and interpretation and coverage;
- different rules applying to different employees (eg whether or not they were members of a union) and different contract types (eg collective vs individual contracts); and

- the exercise of market power by some employee and employer groups.

4.2 The costs of this regime were obvious: it contributed to a rate of economic growth that was one of the poorest in the OECD during the 1970s and 1980s, and the unemployment rate almost trebled between the mid 1980s and the early 1990s.

4.3 In stark contrast to the previous regime, the ECA facilitated the formation of individual contracts at the firm level, encouraging firms and workers to negotiate terms and conditions that reflected their circumstances. In doing so, it enhanced incentives to invest in best-practice skills and technologies. The Act also reduced the scope for costly disputes (although, as discussed below, the personal grievance provisions of the ECA were a notable exception to this pattern) and it did away with arbitrary distinctions regarding the status of different employees or contract types.

The ECA has contributed to job growth

4.4 The benefits of the ECA to New Zealand as a whole are undeniable. Despite the challenges of the 1997/98 Asian crisis, the post-ECA period has been one of substantial employment growth, with over 300,000 additional jobs being created. Economic growth in New Zealand has been much more 'job rich' than in Australia in the 1990s due to greater labour market flexibility. At the same time, there has been a dramatic decline in the unemployment rate (down from a peak of 11 percent in early 1992 to around 6 percent at present). Furthermore, the impressive fall in unemployment has been achieved at the same time as the labour force expanded by over 250,000.[1] The labour force participation rate of women, in particular, has increased significantly since 1991.

4.5 Some commentators have argued that this labour market recovery is entirely a business cycle effect. This is not true. Some of the turnaround is undoubtedly linked to higher economic growth (which may well have been linked to the introduction of the Act and other reform measures). But a detailed

1 Household Labour Force Survey data, Statistics New Zealand.

econometric analysis has shown that, even after allowing for cyclical effects, the introduction of the ECA was closely associated with a significant proportion of this higher job growth.[2]

The ECA has not resulted in lower average wages

4.6 This employment result is particularly impressive given that econometric analysis also shows that the ECA was *not* associated with any net decline in average wage levels. This result is backed up by survey evidence which indicates that, while penal rates and allowances declined for some workers, on average ordinary time wage rates tended to either stay the same (40 percent of surveyed firms) or rise (50 percent of surveyed firms).[3] Moreover, the survey indicated that the ECA had encouraged a marked shift towards the use of performance-based remuneration.

The ECA has resulted in higher productivity

4.7 Some commentators have argued that the ECA has failed to contribute to improving New Zealand's poor productivity record.[4] This is simply wrong:

- Productivity data are notoriously difficult to compile. Consequently, most of the productivity performance figures quoted by these commentators have been based on simple and inaccurate measures. However, recently, a detailed study of New Zealand's productivity performance was commissioned by the Department of Labour, the Treasury and the Reserve Bank of New Zealand. Two internationally respected experts conducted the study. It shows conclusively that the post-ECA period has been one of significantly improved productivity performance.[5] In fact, to ensure robust results, the authors of the report

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2 Maloney, T (1998) *Five Years After: The New Zealand Labour Market and the Employment Contracts Act*, Institute of Policy Studies, Wellington.

3 Savage, J and Cooling, D (1996) "A Preliminary Report on the Results of a Survey on the ECA", *NZIER Working Paper 96/7*, New Zealand Institute of Economic Research, Wellington.

4 See eg Wilson, R (2000) "Productivity, statistics and the economy", *The Press*, 10 April.

5 Diewert, E and Lawrence, D (1999) "Measuring New Zealand's Productivity", *Treasury Working Paper 99/5*, New Zealand Treasury, Wellington.

derive six alternative measures of average total factor productivity. (Total factor productivity takes account of both labour and capital inputs.) *All* of these measures show that the post-ECA period was one of historically high productivity growth.[6]

- In particular, the data series that the authors believe to be the most accurate reveals trend total factor productivity growth of 1.5 percent per annum over the 1993 to 1998 period. This is a respectable figure by international standards. It compares with long-run trend growth of just 0.8 percent (from 1972 to 1998) and just 0.1 percent in the period 1984 to 1993 (See Annex Table 1). The authors describe the post-1993 period as a "productivity surge" and they specifically note the likely link to the labour market reforms of the early 1990s (p xiii). Contrary to other assertions, New Zealand's productivity rate was found to be comparable to that of Australia.

- The study also looks at the labour and capital productivity components of this improvement in overall trend productivity. It finds that the annual average growth in labour productivity rose from 1.1 percent pre-ECA (1984 to 1993) to 1.9 percent post-ECA (1993 to 1998). The equivalent figures for capital productivity show an even more dramatic turnaround, from -1.9 percent pre-ECA to 1.1 percent post-ECA (see Annex Table 2).

- This pattern is similar to that found in a number of other studies. One study explicitly adjusted for the effects of the business cycle on productivity.[7] It showed that, when similar periods of economic expansion are compared, the post-ECA period is one of significantly higher total factor productivity growth.[8] A study by the Reserve Bank

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6 See Table 1, page xii, in Diewert and Lawrence (1999). A summary of this table is reproduced in Table 1 of the Annex to this submission.

7 Hall, V (1996) "New Zealand's Economic Growth: Fantastic, Feeble, or Further Progress Needed?", *Victoria Economic Commentaries,* 13 (1*)*, Victoria University, Wellington.

8 The study shows average annual productivity growth of 2.3 percent during the 1992-1995 expansion, compared with 1.3 percent during the previous comparable expansion (1979-1987).

of New Zealand found that the trend growth in total factor productivity did experience an upward shift at the end of 1991.[9]

- Another study (published in an internationally respected academic journal) used three alternative labour productivity measures and found the range of growth rates post-1991 to be higher than in the pre-reform period (see Annex Table 2).[10] Moreover, the study noted that these gains in labour productivity were achieved at a time of expanding job opportunities – not labour shedding, as happened during the second half of the 1980s.

- Again, these quantitative results are consistent with several firm-level surveys conducted on behalf of the Department of Labour and the New Zealand Institute of Economic Research.[11] These studies unambiguously associate the ECA with improved productivity. For example, the 1996 survey by the Institute of Economic Research revealed that, in net terms, more than half the surveyed firms had higher labour productivity due to the Act, two-thirds improved their operational flexibility and half increased their training. Furthermore, three-quarters of the firms surveyed said that the overall impact of the ECA was to improve the performance of their firm.[12]
- There are limits to the extent to which productivity, especially labour productivity (and real wages for low-skilled workers), could have been expected to improve at the same time as large numbers of unskilled people were being drawn into the labour market. Their productivity

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9 Conway, P and Hunt, B (1998), "Productivity Growth in New Zealand: Economic Reform and the Convergence Hypothesis", RBNZ Discussion Paper G98/2, Reserve Bank of New Zealand, Wellington.

10 Evans, L , Grimes, A, Wilkinson, B and Teece, D (1996) "Economic Reform in New Zealand 1984-95: The Pursuit of Efficiency", *Journal of Economic Literature*, XXXIV(4), 1856-1902.

11 Armitage, C and Dunbar, R (1993) "Labour Market Adjustment Under the Employment Contracts Act", *New Zealand Journal of Industrial Relations*, 18(1), 94-112; Whatman, R, Armitage, C and Dunbar, R (1994) "Labour Market Adjustment Under the Employment Contracts Act", *New Zealand Journal of Industrial Relations*, 19(1): 53-73; Briggs, P (1993) "Analysis of the QSBO ECA Survey Results", *NZIER Working Paper* 93/11, New Zealand Institute of Economic Research, Wellington; and Savage, J and Cooling, D (1996), *op cit*.

12 Savage, J (1997) *Deregulation of the New Zealand Labour Market: Expectations, Outcomes, Lessons*, New Zealand Institute of Economic Research, Wellington.

levels were low relative to other workers. Their absorption into the workforce was helped by the more flexible labour market created by the ECA. A similar relationship between job growth and productivity has been observed in those countries in Europe that have done most to free up their labour markets and reduce unemployment, as reported in the article from *The Economist* which is attached. It seems hard to gainsay this trade-off between employment growth and labour productivity growth at a time of high unemployment.

Industrial disputes have declined significantly

4.8 Another positive aspect of the ECA is a major decline in industrial disputes. In the five years prior to the introduction of the Act, an average of 520,000 working days per year were lost due to industrial action. In the five years after the introduction of the Act this figure dropped to just 66,000.[13]

The ECA has not increased labour market disparities

4.9 Finally, the ECA has been criticised for contributing to increased disparities in labour market outcomes. The data suggest otherwise. For example:

- for most of the period since 1991, the rate of long-term unemployment has fallen faster than the overall unemployment rate. This decline in long-term unemployment has been particularly large among youth. Also, the relative position of minority groups has generally not worsened: unemployment among Maori has declined at about the same rate as the average, while it has fallen faster for Pacific Island workers. Furthermore, women have benefited disproportionately from the rise in job numbers;[14]

- the much predicted 'casualisation' of the workforce did not eventuate. In fact, one study suggests that the proportion of jobs accounted for by

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13 Statistics New Zealand data.

14 Statistics New Zealand (1999) *Labour Market*, Statistics New Zealand, Wellington.

casual jobs actually declined significantly between 1991 and 1995.[15] Further, the majority of additional jobs created since 1991 have been full-time and not part-time as often claimed; and

- the distribution of personal earned income has remained more or less static after the introduction of the ECA.[16]

Shortcomings of the ECA

4.10 Despite the benefits of the change from the previous regime to the ECA, the Act has had some shortcomings. They are a good illustration of why the proposed Bill will have further adverse consequences.

4.11 The most problematic parts of the Act relate to its personal grievance provisions and the role of the specialist Employment Court and Tribunal. The grievance provisions have led to a substantial increase in the number of unjustified dismissal claims, up from around 600 in 1990 to 5,000 in 1998. This in turn has increased the litigation, hiring and termination costs faced by firms. The personal grievance provisions have tended to advantage higher paid workers and to create inflexibility in the choice of contract arrangements available to employers and employees. More particularly, the vagueness of some aspects of the provisions have allowed the Employment Court to override private contracts and have led to considerable uncertainty about just what the rules for dismissal are.

4.12 The net effect of the provisions has almost certainly been reduced job numbers and lower wages for some workers. In fact, a detailed study found that, based on US experience, there may have been between 19,000 and 47,000 fewer jobs in New Zealand because of them, as well as a reduction in the incomes of the

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15 Brosnan, P and Walsh, P (1996) "Plus ça change: the Employment Contracts Act and Non-Standard Employment in New Zealand, *Industrial Relations Centre Working Paper* 4/96, Victoria University, Wellington.

16 Statistics New Zealand estimates show a very small widening in the distribution of personal market incomes between 1991 and 1996, but this change is not statistically significant. See Statistics New Zealand (1999) *New Zealand Now: Incomes*, Statistics New Zealand, Wellington.

lowest paid.[17] Rather than protect 'vulnerable' workers, the provisions can be expected to have discouraged firms from taking on young and less experienced workers who are most in need of a chance to prove themselves and gain experience.

4.13 This pattern is consistent with international evidence: job protection mandated through legislation has adverse employment effects and impacts disproportionately on youth and the long-term unemployed.[18]

The ECA: Summary

4.14 The ECA represented a marked shift away from the prescriptive labour market regulation and centralised wage setting that had failed New Zealand during the 1970s and 1980s. Overall, the net effects of the ECA have undoubtedly been positive. Since 1991 job numbers have increased, unemployment has almost halved and the country's productivity performance has improved. The ECA has undoubtedly contributed to these results. Moreover, these results have been achieved without any fall in average wages or a worsening in labour market disparities.

4.15 These trends are consistent with international evidence: when labour market flexibility is improved, job numbers grow, and unemployment is lower – despite more people entering the labour market.[19] International studies also reinforce the lesson that attempts at worker protection (eg via minimum wage and job security provisions) most harm those they are intended to protect, such as youth.[20] Similarly, the recent experience of the United States confirms New

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17 Baird, C W (1996) *The Employment Contracts Act and Unjustified Dismissal*, New Zealand Business Roundtable and New Zealand Employers Federation, Wellington.

18 See eg OECD (1998) "Getting Started, Settling In: The Transition from Education to the Labour Market", *Employment Outlook*, OECD, Paris; and Nickell, S and Layard, R (1997) "The Labour Market Consequences of Technical and Structural Change", Centre for Economic Performance Discussion Paper *2*, University of Oxford, Oxford.

19 See eg Di Tella, R and MacCulloch, R (1999) "The Consequences of Labour Market Flexibility: Panel Evidence Based on Survey Data", *HBS Working Paper 99-065*, Harvard Business School, Cambridge, MA; OECD (1994) *The OECD Jobs Study*, OECD, Paris; and Lazear, E (1990) "Job Security Provisions and Employment", *Quarterly Journal of Economics*, August.

20 OECD (1998), *op cit.*

Zealand's experience of labour market disadvantage: when job numbers expand rapidly, youth and minority groups often do proportionately better than others and disparities in labour market outcomes can be reduced.[21]

5 The Employment Relations Bill

5.1 Compared with the ECA, and when assessed against the criteria for sound regulation, the ERB is a significant step backwards. The Bill will override the right of individual employers and employees to form a relationship that suits their circumstances. It is based on a flawed view of the nature of labour market relationships and the exercise of bargaining power. The Bill will reduce access to jobs by the most disadvantaged workers and will be detrimental to the long-run economic performance of the New Zealand economy. This assertion is not controverted by anything in the Regulatory Impact Statement, which merely states government expectations of various results. These expectations are worthless if not soundly based on research and information about business and the economy.

5.2 At the same time, as many countries are moving towards labour market regulation that facilitates greater choice for employers and employees, New Zealand will be moving in the opposite direction.

The Bill overrides individual choice

5.3 In a number of respects (discussed in more detail later), the Bill will lead to private contracts being overridden. The fundamental objection to this is quite simply that lawful private contracts should be upheld in a free and democratic society. Provided the parties to a contract are consenting adults, and the consequences of the agreement are not to reduce the welfare of society as a whole, then there are no grounds for parliament or the courts to intervene.

5.4 In most spheres of human activity this principle is recognised. For example, courts are generally loathe to override commercial contracts unless

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21 For US evidence, see eg Freeman, R and Rogers, W (1999) "Area Economic Conditions and the Labor Market Outcomes of Young Men in the 1990s Expansion", *NBER Working Paper W7073*, National Bureau of Economic Research, Cambridge, MA.

considerations such as duress or misrepresentation can be proven. Similarly, parliaments in most democratic societies have been reluctant to override the rights of citizens to engage in consensual activities and knowingly to take risks.

5.5 In fact, in limiting freedom to contract, the Bill contradicts two of its stated objectives: protecting the integrity of individual choice and reducing the need for judicial intervention.

5.6 Even aside from the fundamental constitutional significance of protecting individual choice, there are compelling practical reasons for not overriding private arrangements. As the earlier discussion has highlighted, employment relationships (like other forms of human relationships) exist in a complex and uncertain environment. Many different factors affect the choice of agreement that employers and employees make in attempting to maximise the benefits of cooperating. These factors vary considerably across different individuals, firms and time periods. Consequently, it is individual employers and employees who are best placed to decide which form of agreement, and which terms, most closely match their circumstances. They are the only ones who have sufficient information at hand to make optimal decisions.

5.7 In a complex world, it is neither possible nor desirable for lawmakers to attempt to foresee all the permutations of circumstances that might arise, or to legislate for exceptions. As the ECA and other acts have illustrated, complexity is best dealt with through enabling legislation that encourages parties to find their own solutions to the constraints they face.

Bargaining power is not inherently unequal

5.8 The Bill is underpinned by the idea that there is an "inherent inequality of bargaining power in employment relationships". This notion is part of the 'exploitation of labour' philosophy that was used to justify the promotion of adversarial collective bargaining during the twentieth century. The notion is flawed in theory and practice. Like any other market, labour markets are affected by fluctuations in supply and demand. At times there may be a buyer's market or a seller's market for particular skills in particular locations.

But neither employers nor employees have systematic, long-run bargaining advantages in well-functioning labour markets. As an internationally respected labour market expert has commented, "the widespread belief in labour's exploitation and 'underpayment' in a … market economy is illogical and lacks a serious empirical foundation".[22]

5.9 The Bill does not define bargaining power. It does not explain in what way it is inherently unequal or why we would expect it to be so.

5.10 Bargaining power exists in all negotiations and transactions. It is simply to do with the relative ability of each party to achieve the terms and conditions they desire, given the alternatives they face.

5.11 So what does an inherent inequality of bargaining power mean? Does it mean that employers always get what they want and employees do not? Clearly this is an absurd proposition. In the labour market as elsewhere, no one party ever gets all it desires at all times. If it did, the logical extension of the argument in the labour market would be that employers would not pay anything other than subsistence wages and employees would work endless hours. As one authority has stated:

> If such an inequality did govern the employment relationship, we should expect to see conditions that exist in no labour market. Wages would be driven to zero, for no matter what their previous level, the employer could use his (inexhaustible) bargaining power to reduce them further, until the zero level was reached. Similarly, inequality of bargaining power implies that the employee will be bound for a term while the employer … retains the power to terminate at will. Yet in practice we observe both positive wages and employees with the right to quit at will.[23]

5.12 So does an inherent inequality of bargaining power mean that employers are somehow able to persistently 'underpay' workers (ie pay them less than the value of their contribution to production)? There are good reasons for believing this does not happen in any widespread or systematic fashion:

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22 Reynolds, M O (1991) "The Myth of Labor's Inequality of Bargaining Power", *Journal of Labor Research,* XII(2), p 167.

23 Epstein, R (1984) "In Defense of the Contract at Will", *University of Chicago Law Review*, 51, p 972.

- firms that were able to exploit workers in this way would make relatively high profits. This would encourage other firms to enter their industry, and over time profits would fall. Consequently, risk-adjusted rates of return on capital would tend to equalise. In fact there is sound evidence that this pattern of equalisation of returns on capital does indeed happen;[24]

- if rates of return did not equalise, then underpayment would mean that the highest profits were to be made in labour-intensive industries. There is no evidence that this is the case;[25]

- if rates of return did not equalise there would also need to be long-term barriers to entry and exit that allowed firms to act as 'monopsonist' (ie single) buyers of labour. Again there is no evidence of widespread or significant monopsony effects in labour markets. Single employers employing workers with no alternative jobs appear extremely uncommon. In fact, even studies of so-called 'one company' towns in the nineteenth century fail to find these effects: workers in these environments were actually highly mobile;[26]

- the vast majority of employers in New Zealand operate very small firms; the average firm size in New Zealand is 5.3 employees. It is difficult to see how such 'small' employers could consistently exercise 'monopsony' power over their employees. Just 0.5 percent of New Zealand firms employ more than 100 workers.[27]

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24 See eg Amacher, R and Sweeny, R (1981) "On the Integration of Labour Markets: A Definition and Test of the Radical Segmentation Hypothesis", *Journal of Labor Research,* 2: 25-37; and Browning, E and Browning, J (1986) *Microeconomic Theory and Applications*, Little Brown and Co, Boston.

25 See Reynolds (1991), o*p cit,* p 169.

26 See eg Fishback, P (1986) "Did Miners Owe Their Souls to the Company Store?: Theory and Evidence from the Early 1900s", *Journal of Economic History*, 46: 1011-1029; Boal, W (1995) "Testing for Employer Monopsony in Turn-of-the-Century Coal Mining", *RAND Journal of Economics*, 26,: 519-536; and Fishback, P (1998) "Operation of Unfettered Labor Markets; Exit and Voice in American Labor Markets at the Turn of the Century", *Journal of Economic Literature,* 36: 722-765.

27 Statistics New Zealand (1999) "New Zealand Business Demographic Statistics 1999", *Hot off the Press*, Statistics New Zealand, Wellington.

5.13 This leaves one last possibility. Does inherent inequality of bargaining power mean that workers in industries that that are not 'perfectly competitive' are unable to extract a 'fair' share of the surplus or 'rents' that they contribute to, over and above the competitive market wage? Again there is no theoretical or empirical basis for believing this to be the case.

5.14 Such situations would be expected to arise in industries where worker skills and physical capital were reasonably specific to the firm or industry. Both firms and workers would thus face limited options and wage negotiations would go on in an environment of 'bilateral monopoly' – both parties having some market power. In such situations, there is no basis for concluding that one party would necessarily get the better of the other. Indeed it is generally recognised that a 50/50 division of any surplus is the most likely result.

5.15 Furthermore, for this scenario to be widespread, most labour skills would have to be highly specific and therefore immobile. But in reality, compared with other contributors to the production process, labour is generally versatile and adaptable. Consequently, labour markets are quite highly integrated with a reasonably high degree of movement within and between skill sets and firms.[28] It is more likely that physical capital has limited mobility.

5.16 The proposition that there is unequal bargaining power in the labour market is sometimes framed around claims that many workers are in a 'take-it-or-leave-it' situation. As in any negotiation, both parties to an employment relationship are free to decline the terms offered and walk away or 'leave it'. This is exactly what happens when employees voluntarily quit. The term 'take-it-or-leave-it' has no more pejorative significance in the labour market than it does when a homebuyer declines to purchase a house at a price above what it is worth to them.

5.17 Fundamentally, the wage that is paid will reflect the balance of demand for and supply of skills in the labour market. The ability of legislation to affect demand and supply is limited and costly. In competitive product markets, firms (and hence jobs) will only survive if the wage paid equates with the

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28 Amacher and Sweeny (1981), o*p cit.*

productive value of services provided by employees. Consequently, any attempt to alter bargaining power via legislation will generally not make workers better off, overall. Rather, it will tend to:

- change the composition of wages and conditions while the total value of the wage package remains the same; or
- increase the value of the wage package to some existing employees ('insiders') while reducing the number of job opportunities available to 'outsiders'; and
- adversely affect the incentives faced by employers and employees to invest in skills and capital.

5.18 In summary, the assumption that there is an inherent inequality of bargaining power is fallacious. The forces of demand and supply relating to skills mean that firms must pay employees a wage that reflects the value-added they produce. Employers cannot persistently 'underpay' employees. All employees have at least some opportunities for alternative employment and employers are in competition with each other for the services of labour. Bargaining power is not about the relative 'size' of the parties. In other spheres of activity, for example, there is no reason to presume that 'small' consumers are necessarily at a disadvantage when dealing with 'large' banks or supermarket chains: consumer choice ensures that those enterprises offer competitive prices. Commercial law provides additional protection.

5.19 Bargaining power is about alternatives. As in other areas of law, the best contribution that regulation can make to ensuring fair treatment of all parties in the labour market is to prevent anti-competitive collusion between employers and allow incentives to be created that encourage the acquisition of skills that are in demand.

Trust and confidence cannot be legislated for

5.20 As well as the assumption of an inherent inequality of bargaining power, the approach adopted by the Bill is based on the premise that "employment is a human relationship involving issues of mutual trust, confidence and fair

dealing". Harmonious workplace relations are to be promoted by requiring employers, unions and employees to deal with each other in "good faith".

5.21 All forms of exchange involve human relationships. Whether transactions occur between businesses, retailers and consumers, employers and employees, community or family members, they always involve directly or indirectly labour services. The labour market, by definition, involves the direct exchange of labour services for income. But the exchange of goods also involves the exchange of labour services at some point. When a computer manufacturer contracts with a programming firm, is it purchasing software or the services of the programmers?

5.22 To draw an arbitrary distinction between the labour market and other areas of human endeavour is misguided. There is no reason why lawmakers should assume that mutual trust and confidence is more important in one type of relationship than another (for example than between a franchisor and franchisee). If this were the case, the logical extension of the argument would be to have strict regulation of family life, since this is presumably where the promotion of trust and confidence is especially important.

5.23 The Bill is also underpinned by the notion that conflict is inherent in labour market relationships and that it must be controlled and suppressed. The potential for conflict clearly arises in all human relationships: even though we all recognise the benefits of cooperation, we do not all have the same goals and preferences.

5.24 In the labour market, as in other spheres, it is in the interests of both employers and employees to have harmonious relationships – both parties are better off if disputes are minimised. Consequently, employers and employees have a strong incentive to develop employment arrangements that reduce the risks of conflict and encourage long-term cooperation in the workplace. In some circumstances this can be done by way of formal contractual mechanisms – for example various forms of bonding or penalty clauses if one party departs from the original agreement.

5.25 But it is widely recognised that the best way of promoting mutual trust and confidence is through informal mechanisms (eg establishing patterns of give and take over time, establishing a reputation for tolerance of differences, etc). The threat of financial penalties or litigation is unlikely to be a sustainable strategy for harmonious workplace relations.

5.26 In this context, the notion that mutual trust and confidence can be promoted by way of mandatory legislative provisions is flawed. There are a number of reasons for this. First, as outlined above, the inherent nature of 'trust and confidence' means that it cannot and should not be imposed on parties through legislation. Mandatory 'good faith' provisions simply create a legal threat which one party can hold over the other. Indeed, they are likely to engender 'bad faith'. This is especially so given that other aspects of the Bill mean that the law will explicitly favour one party, namely unions. More conflict, not less, is likely to be the result.[29]

5.27 Secondly, while both employers and employees have an interest in maintaining harmonious relationships, in any dynamic workplace it is inevitable that there will sometimes be disputes about business direction, the organisation of tasks and the terms of contracts. While these disputes are costly, they are not *necessarily* without benefit. They encourage a reassessment of approach and can lead to valuable changes in direction.

5.28 Indeed, for firms to prosper in a competitive environment, it is important that disagreements are not artificially suppressed by legislation. Benefits from conflict can only emerge if employers and employees are able to deal openly with it, with each party able to weigh up the costs and benefits of continuing the conflict, resolving it, or exiting the relationship.[30] Harmony in the workplace is most likely to be preserved when employers and employees are

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29 Ellickson, R C (1991) *Order Without Law: How Neighbors Settle Disputes*, Harvard University Press, Cambridge, MA.

30 For a discussion of these issues see Wilkinson, B (2000) *Harmony and Conflict in Workplace Relations*, paper presented to the Industrial Relations Conference for 2000, 28 February, Wellington.

left to their own devices and each party faces relatively low cost options for terminating the relationship.

5.29 The third reason why good faith bargaining is misguided is that it limits the right of each party to pursue the best possible contract terms. For this reason, in the ordinary law of contract the courts have been very cautious about imposing or enforcing a duty of good faith on negotiating parties. This point has been well articulated by a senior English judge, Lord Ackner:

> … each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest, he must be entitled, if it thinks it appropriate, to threaten to withdraw … or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms … A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party … In my judgement, while negotiations are in existence, either party is entitled to withdraw … at any time and for any reason.[31]

5.30 In summary, the Bill is founded on a misguided view of the nature of labour market relationships. All transactions involve human relationships, and all human relationships at some point involve the exchange of labour services. There is no basis for drawing an arbitrary distinction between formal employer-employee relationships and other forms of cooperative arrangement.

5.31 Ironically, the Bill actually treats labour like a commodity: it attempts to impose a relationship between unions and firms in which the two parties are, respectively, sellers and buyers of third-party workers.

5.32 Moreover, the Bill's intention to impose mutual trust and confidence via good faith bargaining is likely in practice to increase conflict in the workplace. It creates a legal threat which one party can hold over the other, and unduly limits the rights of each party to negotiate the best possible contractual terms.

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31 Lord Ackner, *Walford v Miles*, 1992, quoted on p 2 of Chapman Tripp (2000) *Counsel*, Chapman Tripp, Wellington.

The Bill will increase barriers to job opportunities

5.33 One of the most valuable attributes of the ECA was its neutrality with respect to different contract types (individual vs collective), different workers (union members vs others), and different bargaining agents. The Bill represents a significant shift away from neutrality and tilts the playing field in favour of collective bargaining, unions and union members.

5.34 The net effect of this bias will be to reduce job opportunities overall, particularly for those workers who are already facing the greatest barriers to achieving their potential. Some of those who remain in jobs will be worse off. New Zealand and international experience suggests a number of reasons for this:[32]

- Unions will be able to push up the wages of their members at the expense of non-union members. As a result, firms in competitive product markets that employ union members will be forced to employ fewer workers: only those employees whose productive effort can match the higher wages will be employed. Typically, these will be more experienced and skilled workers. Those who are less skilled and less experienced (usually young people and new entrants to the labour market) will effectively be barred from jobs.

- Employment agreements are less likely to reflect the particular circumstances of individual workers and firms. This has several consequences. First, some employees will have a mix of wages and conditions imposed on them that is not their preferred mix. Secondly, some firms will end up with employment arrangements that are inappropriate for the conditions they face. This will reduce their market

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32 For New Zealand evidence on the employment effects of unions, see Maloney, T (1997) "Has New Zealand's Employment Contracts Act Increased Employment and Reduced Wages?", *Australian Economic Papers*, 36(69): 243-264; and Maloney, T and Savage, J (1996) "Labour Markets and Policy", in Silverstone, B, Bollard, A and Lattimore, R (eds) *A Study of Economic Reform: The Case of New Zealand*, North-Holland, Amsterdam. For international evidence, see eg OECD (1997) *Employment Outlook*, OECD, Paris; Montgomery, E (1989) "Employment and Unemployment Effects of Unions", *Journal of Labor Research*, 7(2): 170-190; Blanchard, D, Millward N and Oswald, A (1991) "Unionism and Employment Behaviour", *Economic Journal*, 101(407): 815-834; and Marsden, D (1995) "The Impact of Industrial Relations Practices on Employment and Unemployment", *OECD Jobs Study Working Paper No. 3*, OECD, Paris.

competitiveness, in turn reducing employment opportunities. Thirdly, the detachment of bargaining from individual circumstances means that firms and workers facing changes in their circumstances will be less able to adjust quickly to those new circumstances. In a rapidly changing and highly competitive global economy this will be a significant constraint on New Zealand firms and their employees. For example, econometric analysis by the OECD has shown that one of the positive effects of the ECA has been to increase the responsiveness of jobs to changes in output. In other words, under the ECA jobs have been created faster when firms have faced increases in demand for their products.[33] This responsiveness will be lost under the Bill.

- Reducing the choice of bargaining arrangements and imposing new requirements on firms will increase the costs of doing business in New Zealand. This means that marginal investment decisions will be forgone, resulting in a lower overall capital stock. The net effect of this will be fewer jobs and a less capital-intensive economy. This is inconsistent with achieving a higher-skilled, higher-paid workforce.

- Wage bargaining that is detached from the competitive pressures faced by individual firms and their employees will be more inclined to produce generalised inflationary wage pressures. This will force the government to run tighter fiscal and monetary policies than would otherwise be the case, thus raising the level of unemployment at which price stability can be maintained. One of the acknowledged benefits of enterprise level bargaining under the ECA is that it has supported price stability (for example by ensuring that skill shortages alter relative wages rather than flowing through into generalised wage increases).[34] This in turn has assisted in maintaining the international competitiveness of New Zealand firms, thereby enhancing job growth.[35]

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33 OECD (1996) *OECD Economic Surveys: New Zealand*, OECD, Paris.

34 OECD (1996), *op cit.*

35 In fact, it has been noted in the academic literature that some of the adverse labour market impacts of disinflation might have been avoided if employment regulation in New Zealand had been reformed earlier than 1991. See Evans, L *et al* (1996), o*p cit.*

A spread of multi-employer agreements is likely to be a threat to competitiveness and fiscal and monetary policy.

5.35 The detrimental effects of legislative protection for unions and a shift away from decentralised bargaining are well illustrated by contrasting the performance of many European economies with other OECD countries that have less rigid and less centralised approaches to employment law. For example, during the 1990s countries such as Germany, France, Belgium and Italy have persistently exhibited poorer economic growth, job growth and higher unemployment than countries such as the United States, New Zealand and the United Kingdom. In fact, currently those European countries exhibit average unemployment rates roughly double that of the average for economies with more enabling employment law regimes.[36]

5.36 This is not to say that unions and collective bargaining *necessarily* result in poorer labour market outcomes. They can benefit the parties to an employment relationship. Thus it is not surprising that under current employment law a proportion of the workforce is covered by collective contracts and/or represented by trade unions. But the point is that the choice of bargaining agent and contract type should be made in a neutral legislative environment. In other areas the law generally penalises those who erect barriers to entry. Why should the labour market be any different? Indeed it should be covered by the Commerce Act to help prevent anti-competitive behaviour.

6 Specific Issues

6.1 The fundamental choice the drafters of an employment statute have to make is whether they are assisting contracting parties to fulfil their own objectives (eg by providing default and common form arrangements which can be contracted into or out of) or whether they intend to impose their own rules on non-consenting parties in pursuit of some social policy.

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[36] OECD data [www.oecd.org/std].

6.2 It is clear that the second choice is the one pursued in the Bill and for the reasons explained above it will be counter-productive.

Union privileges

6.3 Unions are given clear privileges in the Bill, thus breaking the principle of the rule of law that the law should apply equally to all, a principle which it should be the particular duty of the minister of labour as Attorney-General to uphold. These privileges are probably also in conflict with the provisions of ILO Conventions 87 and 98 on freedom of association and collective bargaining, with which the Act purportedly aims to conform.

6.4 Once registered in terms of the Bill, unions are treated differently by the law from other voluntary associations and are also awarded important practical privileges:

- Only unions can negotiate collective agreements as defined in the Bill (cl 2). While there is nothing to stop the staff of an employer forming a staff association, employing an agent or electing a negotiator to negotiate individual agreements in bulk, they will not have the same legal protections and privileges as a collective contract. These include the restraints on competition provided by the rule that an individual in the workplace must be employed on the same terms as the collective contract for the first 30 days (cl 76(2)) and the statutory rule regarding continuity of employment (cl 66). There is no good reason for this discriminatory treatment of one form of voluntary association as compared with another. It is not necessary for the promotion of collective bargaining and undermines the integrity of individual choice. It leads only to the conclusion that the government's agenda is to promote the interests of unions, rather than to promote collective bargaining.

- Union members are deprived of rights of access to ordinary courts to settle disputes with the union of which they are members. Instead of an expulsion being reviewed by the High Court under its equitable

jurisdiction, such a dispute, being defined as an employment relationship problem (cl 4(2)), now has to go to the Employment Relations Authority (cl 172(j)). There is only a limited right to apply to the Employment Court (arguably itself not an 'ordinary Court') for removal of a dispute into the Court (cl 189(3)). In the event of an appeal from the Authority to the Court there is no right to a *de novo* hearing. Whether an appeal is to be by way of a *de novo* hearing is a matter within the discretion of the Court and will depend partly on the Authority's view of whether the union member has cooperated in good faith with the Authority's investigation. Union members are thus deprived of a right referred to by Lord Cooke as running so deep that parliament could not abrogate it (*NZ Drivers Assn v NZ Road Carriers* [1982] 1 NZLR 374). Given the history of intimidation and victimisation by unions (eg *McIntyre v Bianchi* and *Pete's Towing Services* cases) it is objectionable that union members will not have access to ordinary court action in disputes with unions.

- Clause 67 deals with payment of union fees. Given that unions are private voluntary bodies, there is no reason for the law to concern itself with the manner of payment of their fees, to mandate that a third party be responsible for managing the payment of fees, and for treating unions differently from other forms of voluntary association in this respect.

Definition of 'employee'

6.5 The core concept of 'employee' which seems to inform employment law is of a person who turns up at someone else's premises, works a fixed period of time using equipment and other facilities provided by the employer, and then leaves and makes no further contribution to the business while absent from the premises. Much of employment law is inappropriately applied to any other arrangement, as the problems with the Holidays Act show. Unfortunately, there is a much wider range of arrangements to which employment law generally applies.

6.6 The definition of the term 'employee' is crucial since it determines the reach of the Act and of the institutions created under it. The definition is contained in cl 6 (the narrower definition in Part 7 affects only entitlement to employment relations education leave, and although it is discriminatory it does not affect the reach of the Act). Clause 154 also creates a procedure whereby a union, a Labour Inspector or a member of a class or group of persons can apply for a declaration that that group or class of persons are employees.

6.7 The ambit of the definition is highly uncertain. As Collins notes ((1990) 10 *Oxford Journal of Legal Studies* 353, 377) "every test of employment becomes disfunctional in the long run". Two criteria are therefore suggested which somewhat resemble the two-axis test proposed by Collins, but imperfectly. Collins actually mentions as a problem with the 'control' test at common law that it potentially embraces franchisees, motor vehicle distributors, tenants of petrol stations and so forth. The definition and factors to be taken into account in cl 6 raise the prospect that the Authority and the Court will find that such people are employees, as may be labour-only partners in small businesses and junior partners in hierarchical professional firms such as international firms of accountants and lawyers.

6.8 This uncertainty as to the ambit of the definition effectively places enormous discretionary power in the hands of the Authority retrospectively to alter arrangements. This will invite litigation and undermine mutual trust and confidence. It will not do anything to remove new apparent anomalies in treatment between employees and contractors since each new extension of the boundary between those groups will simply create new cases of apparent unfair differences in treatment, which will lead in turn to calls for further extension of the boundaries.

6.9 A retrospective decision that someone who has been treated as a contractor was in law an employee will have serious consequences for businesses, especially small businesses and their directors and officers. For example, the business may have failed to comply with cl 80(2) making it liable to a penalty under cl 80(6). This at least is discretionary, but the imposition of liability on

directors and officers in cl 245 is not. Clause 245 is likely to operate as a severe disincentive to becoming a director of a business.

6.10 Clause 6(2)(b) raises three further concerns:

- It directs that 'less weight' – whatever that might mean – be given even to explicit statements in a contract that the relationship between A and B is not that of employer and employee. This means that a party can sign an agreement saying that he or she is not an employee and then, when it suits, will not be estopped from arguing to the contrary. It is hard to see how this will be conducive to greater mutual trust and confidence in relationships.

- An action for a declaration that a group or class of people are in fact employees may be commenced by a union without the consent or concurrence of the members of the group (cl 154). Presumably there will not be much point in the members of the group (or the party with whom they are in a contractual relationship) being represented at the hearing, since their wishes will be accorded 'less weight'.

- Clause 6(2)(b) is a direction only to the Authority and Court, which raises the possibility that in an action commenced in the High Court the common law tests will be applied with potentially conflicting results.

6.11 The overall effect of clauses 6 and 154 is that the wishes of parties to contracts are to be brushed aside in favour of the pursuit of social policy. This is to abandon one of the central features of a free society.

Good faith bargaining

6.12 Good faith bargaining is defined in a mimimalist fashion in the Bill and power is then given to the minister to approve codes of good faith either with or without the recommendation of a committee appointed by the minister for the purpose (cll 37 – 40). The power to issue these codes raises the following concerns:

- Parliament is buying a pig in a poke. It will not get the opportunity to debate the requirements of good faith bargaining at the time the Bill is before it. Either the minister and government have a clear idea what good faith bargaining consists of, in which case there is a hidden agenda, or the minister and government have no view on what good faith bargaining consists of, in which case the government is engaging in the unusual practice of putting a Bill into the House without knowing what it means or entails.

- Nor will Parliament get the opportunity subsequently to debate these codes as they would appear to be designed not to be subject to review by the Regulations Review Committee or to judicial review by the High Court.

- The provision for codes of practice presumably means that different codes may be approved applying to, for example, different industries or businesses. This means that the Committee and the minister will be involved not in the setting of generally applicable standards but in the detailed management of sectors of the economy.

- The tripartite nature of the Committee will inevitably favour large established businesses and unionised industries and protect them from competition from small businesses and start-ups; the codes of good faith could well become a device for forcing complexity on small businesses.

Sale of business

6.13 Clause 4(4)(d) applies the requirement of good faith to proposals by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell all or part of the employer's business.

6.14 This sub-clause clearly aims at involving unions not merely in the negotiation of conditions for employees but in the management of the business. The clause

is vaguely worded and gives either plenty of opportunity for litigation, in opposition to one of the stated aims of the Bill, or discretion to the Committee that will draw up the codes of good faith. The prospect of a tripartite Committee drawing up a procedure for selling businesses is one that the business world will find very worrying. No potential buyer or seller will wish to have the fact that they are interested in buying or selling broadcast to trade unions, and the trade unions will complain that a requirement that does not apply until the deal is done is ineffective and too late.

6.15 The expression 'sale of the business' is also unclear. Many businesses take the form of a limited liability company, which may be closely held by a few individuals or may be publicly listed. The expression 'sale of the business' in commercial law would usually be taken to mean a transaction in which the company remains in being but the operation, physical assets, goodwill and debts are sold off. It is likely, however, that it is intended by the drafter also to cover the situation where the shareholders sell all the shares in the company. In the case of a closely held company the effect may be identical from the point of view of employees.

6.16 If this is the case amendment is required because the clause only applies where the "employer's business" is to be sold. The employer is the company and therefore as the Bill stands the tripartite committee has no power to draw up a code applying to the sale of shares in a company.

6.17 On the other hand, once one ventures into this area considerable difficulties are opened up. An arbitrary proportion of shares will presumably have to be chosen as the threshold to trigger the requirement. This could then well apply to overseas shareholders and to individual shareholders who have no reason to suspect that they are subject to any obligations under employment relations legislation. There are two important consequences of the committee being given power to draw up any such code:

- New Zealand share prices will fall to or remain at a lower level than they would otherwise have reached if purchasers of controlling interests

in New Zealand companies find themselves burdened with requirements not faced elsewhere; and

- the committee would be given far too much arbitrary and discretionary power for a process not subject to the scrutiny of the Regulations Review Committee or the House. If the powers of the Committee are to be widened in this way it is essential that its codes be subject to the regulations review process.

Provision of information

6.18 The requirements for employers to provide unions with financial information raise a number of concerns. Other groups representing employers have raised the question of requiring confidentiality on the part of union negotiators and how this could be policed. There are deeper concerns however:

- First, the provision of such information gives the impression that the financial state of an employer is a relevant consideration in setting wages and conditions, but it is not. The determinants of the levels of wages and non-wage benefits should be the supply of and demand for labour in any particular sector of the labour market. For example, there is no reason why a highly profitable business should raise pay and employment conditions if there happens to be a plentiful supply of labour with relevant skills available to it. The interests of the community are best served by that firm and others in the industry investing and expanding and thus absorbing available labour rather than raising wages. The provision of information should only be relevant where a company effectively asks its employees to make a present sacrifice in order to avoid a future disaster, in which case the information should be communicated directly to the employees not to the intermediary unions. Such a request is, of course, a signal to the employees that it may be in their best interests to seek employment elsewhere.

- Secondly, the provision of confidential information to unions may require unions to say to members something like: 'this is all you are

getting, for reasons we know but cannot explain to you'. This will broadcast the fact that an employer is in financial difficulties and, given recent court decisions on the consequences of trading with businesses suspected of being in difficulty, may result in the collapse of the business.

- Thirdly, a union that has to speak in that way to its members thereby puts itself essentially on the side of the firm's management and in conflict with its members. This is one of several provisions of the Bill which extend the role of the unions from representatives of their members to partners in the running of the business. The consequence may be a loss of confidence in the union leadership on the part of its members, as clearly happened in former Eastern bloc countries where unions were effectively integrated into the management of the undertakings, in the United States in situations where unions developed a symbiotic relationship with management, and in New Zealand where cases like *Dellabarca* show how easy it is for management and unions to conspire against the interests of employees.

7 Jurisdiction of Employment Relations Authority and Court

7.1 The Bill maintains the Employment Court despite the fact that it has no new role to justify its existence. The arguments made for the existence of a separate Employment Court in 1990 were clearly makeweights that did not stand up to analysis. The job of the Employment Court is to interpret and apply the law, not to settle awards or decide working conditions. Clause 115(d) of the Bill makes it clear that this is to continue to be the role of the employment institutions. There is therefore no requirement for a separate court.

7.2 Clause 199 makes clear the real reason for retaining a separate court. In the common law system courts are supposed to decide parties' disputes according to law. The Employment Court is enjoined by cl 199 to pursue a policy, namely the promotion of successful employment relationships and good faith bargaining (not necessarily in the current case). Rather than ratifying and enforcing the parties' rights, therefore, this inclines the Court towards

regarding the parties' dispute as a mere trigger to its power to pursue a social policy.

7.3 If a separate court is to remain there is no need for it to have statutory exclusivity of jurisdiction. If plaintiffs prefer the Employment Court they will file their actions in that court, and defendants would have to demonstrate that the Employment Court either lacked jurisdiction or was not the convenient forum. When it would benefit plaintiffs to file in the High Court or District Court, however, they should be allowed to do so. Examples of when it would be convenient for plaintiffs to file in the High Court include seafarers who wish to take an *in rem* proceeding in the Admiralty jurisdiction for recovery of unpaid wages (*Karelrybflot v Udenko*), or where the parties do not merely have the relationship of provider and purchaser of services but also, for example, lessor and lessee of land or even intellectual property.

7.4 These examples demonstrate that there will still be cases in which proceedings can continue in both the High Court and the Employment Court on the same set of facts, or in which time can be wasted on jurisdictional arguments. This will not be changed by the apparent extensions of the Employment Court's jurisdiction. Under the ECA the Employment Court has exclusive jurisdiction to deal with disputes "founded on a contract of employment". Under the Bill the Court will have exclusive jurisdiction to deal with "proceedings relating to employment agreements". This wording is clearly intended to be wider than the current wording, but its extent is unclear as the examples above show. It potentially includes companies in dispute with each other over the employment of someone who is subject to a restraint of trade clause and other commercial matters. This vagueness will create further opportunities for litigation and jurisdictional argument.

7.5 The provisions relating to the Employment Court also raise or fail to deal with some detailed issues, viz:

- There is no appeal to the Privy Council. This is an historical hangover. It was understandable when the labour institutions had power to settle awards and fix terms of employment, but given the role of the Court

described in cl 115(d) there is no justification for not allowing the same appeal rights as in other civil litigation.

- There is no attempt to deal with the anomalies relating to the Admiralty jurisdiction highlghted in *Karelrybflot v Udenko* and mentioned above.

- The right of appeal in cl 227 is highly unclear, especially as it refers to sets of provisions which have been criticised recently by the Court of Appeal for their complexity and lack of clarity. The Bill should spell out exactly what appeal rights are intended.

- Clause 113(1) cannot be intended to mean what it says. Presumably it is intended that the subject matter of the tort action be related to the strike or lockout.

- It is wrong that the Employment Court be given a criminal jurisdiction (eg cll 205, 246). Criminal offences in the Resource Management Act, for example, are dealt with in the District Courts, even if the judge trying the case is an Environment Judge.

Employment Relations Authority

7.6 The proposal to establish an Employment Relations Authority raises fundamental legal and constitutional problems. Some of the provisions relating to it breach basic individual rights and others breach the principles of the separation of powers.

7.7 The provisions relating to the Authority and its jurisdiction represent a clear denial of access to the courts to a number of potential plaintiffs, including union members in dispute with their union and companies which happen to be bargaining for the same collective agreement. The parties will have to bring their problems to the Authority and then have only limited access to the court. Clause 193(2) seems to contain a sinister threat that parties who stand on their rights will be found not to have "participated in the Authority's investigation in

a manner designed to resolve the issues involved" and hence be deprived of the right to a hearing *de novo* on appeal to the Court.

7.8 Despite this denial of access to the courts and despite the expressed exclusivity of jurisdiction of the employment institutions, employees are actually given a choice of forum under cl 125. This gives the opportunity to choose to take action under the Human Rights Act 1993, a non-judicial procedure leading to a hearing before the Complaints Review Tribunal This is another body with a controversial reputation and an objectionable jurisdiction.

7.9 The members of the Employment Tribunal have been told that they will not necessarily be members of the Authority and that their warrants will be cancelled once the transitional arrangements have been completed. This is curious, since whenever it is suggested that the Employment Court be abolished one reply is that this would constitute an interference in the independence of the judiciary. Responsible court reform proposals always consider and make proper provision for the redeployment or paying off of judges. The members of the Tribunal appear simply to have been told that their services may no longer be required, presumably because they have not been doing the job the present government wishes the Authority to do.

7.10 No indication is given of the kind of people who will be appointed to the Authority. It is a reasonable assumption that its staff will not be business oriented and entrepreneurial in attitude, nor have any deep understanding of the workings of labour markets. It is hard to see how employers can have any confidence in being treated fairly and sensibly by the Authority.

7.11 The Authority is expressed to be an "investigative body" but then has several powers to impose penalties. This criminal jurisdiction in all but name is reinforced by the provisions of cl 187. The one body is supposed to investigate, assist with the resolution of problems and impose penalties. This cannot be successful. The kind of procedures and adherence to natural justice required in an investigation that can lead to the imposition of penalties on one party will not encourage that party to enter into a candid problem resolution process. This mixture of roles, combined, as is highly likely, with a strong policy

orientation, makes for an objectionable jurisdiction which undermines the right to have a party's rights determined according to law by a judicial process.

Personal grievances

7.12 One of the major flaws in the Employment Contracts Act was that it applied procedures that previously had only applied to unionised personnel to all employees. In principle, the same rules should apply to all, but those rules should be that contracts are to be enforced in their own terms.

7.13 Given that statutory personal grievance procedures are to be imposed, and that these include an assumption that an employee cannot be dismissed without stated cause, these provisions should not apply to those in senior positions of confidence on whom the success of a business depends and who have always been well paid on the assumption that they would risk dismissal if the business failed to perform.

7.14 It is difficult to frame an exclusion that precisely meets this criterion. An income level is at best a crude surrogate. The manager of a new restaurant on $50,000 a year, for example, might expect the job to hinge on the profitability of the restaurant while a university professor on $80,000 might expect greater security of tenure and only to be dismissed on grounds such as serious incompetence or misconduct. It can be assumed, however, that people on reasonably high salaries are better able to negotiate on their own behalf or to assess risks than the proponents of the Bill assume lower paid people to be.

7.15 There should either be an income level at which the personal grievance provisions do not apply, or there should be a series of levels so that, for example, over $40,000 they apply unless excluded by the employment agreement, over $60,000 they do not apply unless opted into, and above $90,000 they do not apply at all.

7.16 An alternative approach would be to allow each employer to designate one 'Chief Executive Officer' position to which the personal grievance provisions do not apply and a further position for every, say, 50 employees in the firm.

Coverage clauses

7.17 Two provisions illustrate the outdated nature of the view of the working environment which informs the Bill. These are the coverage clauses in collective contracts and the requirement for employers to provide each employee with a written statement of the work to be performed.

7.18 These provisions assume and will create a static and inflexible workforce and open the way for demarcation disputes. Since any work can be described as similar to any other work in some respects and different in others, there will always be room for argument about whether work assigned is within the description originally given to an employee or within the coverage clause of a collective agreement.

7.19 Coverage clauses in collective contracts will also involve unions in the structuring and management of businesses rather than representing the interests of a named or defined group of employees.

7.20 Further, the advantage of the payment of fixed wages and salaries from the employer's point of view is that it creates a flexible workforce which can be redeployed in accordance with changing needs. If employers are required to specify in detail the work to be done, they may as well write their requirements in the form of output-based contracts for services rather than time-based employment agreements, thereby avoiding the requirements of the Bill altogether.

Bill too long and detailed

7.21 Many parts of the Bill are far too prescriptive. They attempt to give detailed instructions about how relations between employers and unions in particular will be carried out, rather than merely allocating rights and allowing the parties to decide how to act. Such complex and detailed provisions will inevitably lead to a formalised and legalistic relationship between employers on the one hand and unions and staff on the other, and will give rise to disputes about whether the rules have been complied with. This conflicts with the intention that trust and confidence in employment relationships are to be encouraged and the need for judicial intervention reduced. It also conflicts

with the government's stated aim of reducing business compliance costs. Such complex and detailed provisions will inevitably give rise to disputes about whether the rules have been complied with. This comment especially applies to clause 46 and subsequent clauses. Buried in this mass of detail are provisions clearly designed to advantage unions, such as the rules that enable unions to initiate bargaining and hence largely determine the form and coverage of that bargaining. Many amendments are likely to be required and much parliamentary time will be taken up with them in the next few years.

7.22 A further example of over-prescription is the mediation service provisions. The relevant part goes into enormous and inflexible detail that is more appropriate for regulations or even a departmental circular. What is not explained is why it is considered necessary to provide for mediation by statute at all. There are some 122 lawyers engaged in alternative dispute resolution who are members of LEADR and who list 'employment' as an area of expertise. Thirty-two of the 477 members of the Arbitrators and Mediators Institute give 'employment' or 'human resources' as their primary field. There is therefore no obvious reason to provide a statutory service, and if it is intended that it undercut the services provided by those in the private sector – an unwarranted action by a government agency of this kind – no reason for doing so is explained.

8 Conclusion and recommendations

8.1 The detailed contents of the Bill have not been the subject of a proper process of analysis and consultation. Nor were they the subject of election commitments; indeed the Bill would seem to give unions power in a way that was denied by present members of the government during the election campaign. The Regulatory Impact Statement is clearly deficient; indeed it states little more than that the current arrangements are contrary to government policy and that the changes in the Bill will be introduced. Many provisions of the Bill will conflict with its stated aims of protecting individual choice, enhancing good faith relationships and minimising litigation. The Bill will therefore be a failure within its own terms and the process that has been

followed turns measures designed to ensure transparent and effective policy making into a charade.

8.2 We recommend that the Bill should not proceed further pending a proper policy analysis and consultative process which examines:

- the principles that should govern regulation of the labour market;
- problems with present arrangements; and
- reform options and proposals, having regard to the costs and benefits of particular regulatory provisions.

This process should be undertaken by an expert group and involve consultation documents and the opportunity for public submissions. Its starting point should be the Employment Contracts Act and a proper identification of problems with it. The current inquiries into the electricity and telecommunications industries provide possible models.

8.3 In respect of specific clauses in the Bill, we commend to the select committee's attention the issues raised in sections 6 and 7 of this submission and the recommendations of the New Zealand Employers Federation.

ANNEX

PRODUCTIVITY PERFORMANCE POST-ECA

TABLE 1: TREND TOTAL FACTOR PRODUCTIVITY GROWTH RATES (PERCENT PA)

	Post-ECA	*Pre-ECA*	*Long-run*	
Alternative measures	*1993-1998*	*1984-1993*		
			1972-98	*1978-98*
Diewert-Lawrence database				
Diewert-Lawrence preferred	1.47	0.07	0.81	1.26
Diewert-Lawrence with HLFS hours	1.17	-0.15	0.36	0.95
Official database				
Preferred base case	1.46	0.76	---	1.09
Highest estimate	1.48	1.00	---	1.25
Lowest estimate	1.63	0.14	---	0.58
ABS* equivalent for NZ	2.38	1.35	---	1.56

*ABS = Australian Bureau of Statistics

Source: Based on Table 1 (p.xii) of Diewert, E and Lawrence, D (1999) *Measuring New Zealand's Productivity*, Treasury Working Paper 99/5, The Treasury, Wellington [http://www.treasury.govt.nz/workingpapers/default.htm].

TABLE 2: LABOUR PRODUCTIVITY GROWTH RATES (AVERAGE PERCENT PA)

	Post-ECA	*Pre-ECA*	*Pre-reform*
	1991-1995	*1984-1991*	*1971-1984*
Evans *et al* (1996)			
Range of estimates (3 measures)	1.65-1.80	0.76-1.17	0.66-0.84
Average of 2 employment-based measures	1.72	0.97	0.75
Hours-based measure	1.8	1.01	---
	1993-1998	*1984-1993*	---
Diewert and Lawrence (1999)			
Diewert-Lawrence preferred	1.9	1.1	---

Source: Based on Table 2 (p 1881) of Evans, L, Grimes, A, Wilkinson, B and Teece, D (1996) "Economic Reform in New Zealand 1984-95: The Pursuit of Efficiency", *Journal of Economic Literature*, XXXIV(4): 1856-1902; and Diewert, E and Lawrence, D (1999), *op cit*.