Tourism Industry Association New Zealand

Submission on the Employment Relations Law Reform Bill to the Transport and Industrial Relations Select Committee

February 2004

About Our Association and Industry

The Tourism Industry Association New Zealand (TIANZ) represents the interests of over 3,000 businesses in the tourism industry.

Tourism is a $14.6 billion industry and generates 13% of New Zealand's exports. The tourism industry employs 1 in 10 New Zealanders in a diverse range of businesses – the majority of which are small and medium sized enterprises. Not only is tourism important because of its size. As well as being 10% of New Zealand's GDP, it is also:

- Highly employment intensive;
- Regionally dispersed;
- Has the flexibility to change its target markets quickly as conditions change;
- Can offer a good return on investment.

The tourism industry in New Zealand consists of more than 13,000 small and medium sized businesses. Of these businesses, most employ less than five people.

New Zealand welcomes almost two million overseas visitors to its shores every year. The domestic tourism industry is also important in helping to sustain a vibrant tourism industry. TIANZ estimates that over 75 million visitor nights are spent by New Zealanders every year.

This submission consists of the following sections:

- Outlook on the Tourism Industry
- General concerns our industry has about the contents of this Bill
- Suggested amendments that should be made to the Bill if the Government is committed to pressing ahead with it.

Outlook on the Tourism Industry – Decreased Growth

Tourism has been relied upon as a growth industry over the last half decade, plus the history of a 50 year compound annual growth rate of 5%.[1] Over the past five years, visitor volume growth has also averaged 5% per annum but visitor spend growth has risen at a much faster rate at over 7% per annum.[2] In general, the visitor arrivals data produced by the Tourism Research Council New Zealand (TRCNZ) shows that tourism has shown atypical resilience through international events such as the post-September 2001 acts of terrorism, the SARS virus, and the general world economic downturn in the share market experienced at the start of this decade. Our global

[1] Government Statistician
[2] Tourism Satellite Accounts

competitors have not fared so well, and our growth rate over 2003 is now well below average at 3%.

Our export growth cannot be taken for granted in these uncertain times and TIANZ is concerned that a narrow approach to public policy will adversely impact on the future competitiveness of the industry.

Specifically:

- The growing weight of compliance activities on small businesses (discussed in more detail below) – these do not add to productivity but raise costs that reduce competitiveness.

- The increasing cross-rate value between the $Kiwi and those of our major tourism supplier nations ($, £, €, ¥). This is an important issue in our industry as the $US is the international currency for travel products. It is clear that this increase will erode demand for international travel over the near future and experience shows that below average growth significantly increases business stress as they strive to satisfy not only their customers but also their shareholders and staff.

The proposals contained in the Employment Relations Law Reform Bill raise the likelihood of the Tourism Industry facing further restraints on flexibility without any upside from improved competitiveness – even though the Industry is now regarded as one of our economy's "star" performers.

Principles espoused by the Minister in promoting the Bill are too narrow

Overview remarks by the Minister in promoting this Bill claim that its necessity was motivated by a lack of equity arising from the behaviour of Employers who, she claimed, chose to remain aloof from the principles of 'good-faith bargaining', eschewed recognition of employee bargaining agents – notably Unions and advocated against Collective Employment Agreements thereby denying employees a basic human right.

TIANZ urges the Committee to acknowledge that there are three rather than two parties who are affected by this Bill. The two obvious parties – Employers and Employees - exist only because of the patronage of a Third Party – Customers. Any principles involving employers and employees that fail to encompass the interests and behaviours of Customers are too narrow.

The Tourism Industry operates in a competitive global environment where our Visitors determine the countries and businesses they support and those they do not. Behaviours between employers and employees that do not deliver customer benefit and subsequent profit will result in business failure and job loss. Surprising as it may sound, employers and employees cannot dictate to customers if they wish to survive.

Simply put, one-sided constraints on Tourism's employers that limit their ability to respond reasonably (via the mechanisms of acceptable business practice) to global or local pressures lessens the desirability of New Zealand's products.

TIANZ sees both investor losses and job losses as perils to avoid and urges public policies that are holistic rather than sectional or narrow. It is clear to TIANZ that the principles that gave rise to this Bill are not holistic in nature and legitimise sectional behaviours that will reduce customer satisfaction thereby lessening investor confidence and business growth.

Moreover, the Tourism Industry reports that the principles adopted by the Minister in framing this Bill will also reduce employment opportunities for those whom they are designed to protect.

TIANZ has already raised its concerns to central government about the ongoing introduction of new policies and legislation that contribute even further to the existing compliance costs facing businesses.

The aggregate concerns of the business community about compliance costs are reflected in the 2003 KPMG Compliance Cost Survey[3], which identified employment-related compliance costs as an area of strong concern.

While world events are outside of the government's influence, compliance burdens are within the sphere of the government influence and the introduction of further legislation which increases them continues unabated. If Government wishes to encourage economic development, the production of higher-value added products and services and higher incomes for all New Zealanders, then compliance burdens must be lightened or its growth goals lowered.

TIANZ has further general concerns with the overall tenor of the Bill:

Lack of analysis of impacts

Government is perceived to be unwilling to work closely with business to thoroughly test proposals in the Bill, including undertaking an joint examination of the necessity and workability of proposals. We have also seen no evidence that Government is prepared to recognise that different industry sectors may have particular concerns with proposals contained in the Bill, especially sectors that are operating in rapidly changing market conditions. Most disappointing is the apparent lack of examination of the expected behavioural changes by business owners and managers if the Bill is passed.

Use civil rather than criminal remedies!

Our Industry perceives government to be making criminals of employers who breach this bill via behaviours that not only have never been a crime in the past but have also been provoked by commonplace and legitimate Customer pressures, the Government

[3] A link to this report can be found by going to the 'what's new' section of the TIANZ website: www.tianz.org.nz

leaves itself open to accusations of contempt for investors and managers who genuinely want to do their best for their businesses (and their staff) and their country. At the very least, these criminal penalties should be replaced with options for civil remedies.

Extension of good faith principal

Good faith in the Bill's terms "requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive, communicative and supportive". What that will involve is far from clear but what is evident is that the words used are subjective enough to support almost any allegation of breach of good faith that might be made in the course of bargaining (and in other situations as well). The concept of mutual trust and confidence, long held by the courts to be a feature of the employment relationship, is well understood. New and vague wording will not ensure an improvement in employment relationships.

TIANZ also believes that this provision can be used to force employers to conclude collective and multi-party agreements and/or to enforce compulsory arbitration. It could also be used for penalty purposes if bargaining for an individual agreement (of whatever kind) does not occur, to challenge the provisions of individual agreements alleged to undermine collective bargaining. The one-sided way in which 'good faith' could be applied and the fines for non-compliance make the term in itself something of an anomaly, and render the entire concept scandalous.

Good faith undermines commercial confidentiality

Clause 6 inserts a new subsection (1A) that, among other things, requires employers proposing to make a decision likely to have an adverse effect on their employees' employment to provide those employees with access to relevant information about the decision. Employees must also be given the opportunity to comment before a decision is made.

The clause introduces an element of uncertainty in that it cannot be known if and when employees will challenge confidentiality claims. Behaviourally, this also introduces a veto by employees on anything that might have an adverse effect on their employment. We are concerned this provision could undermine a proposed sale of business or transfer of a non-core activity, leading to lost employment opportunities rather than the protection of existing jobs.

Collective approach hinders competitiveness

Cabinet papers (EDC (03) 130) indicate that the aim of the Bill is to "further assist the cultural change towards increased collectivism", to enable New Zealand to "compete domestically and internationally on the basis of quality, through enhancing our ability to attract and retain labour and to promote quality investment in human capital." However the majority of New Zealand's trading partners are moving towards enterprise-based industrial relations systems in the interests of flexibility and economic growth and away from the kind of centralised system envisaged by the Bill.

Moreover, the tourism industry is typified by individual employment agreements-the choice of most tourism employees. To make it an offence to advocate the status quo is illogical.

Collective bargaining under the Employment Relations Act (ERA)

Tourism organisations and individuals have found bargaining at the enterprise level has provided more incentives and rewards than the universally collectivist approach that formerly prevailed, allowing employers to manage employment relations as they manage any other part of their business.

Good faith in relation to collective bargaining has, however, previously been understood as a process not requiring any particular outcome. This was recognised by the employer and union parties when developing the ERA's Code of Conduct for good faith bargaining.

Good faith under the Employment Relations Act does not require the parties to conclude a collective agreement but under this Bill, by contrast, good faith would pressure enterprises into collective agreements under threat of a fine. This goes beyond the Act's purpose of 'promoting' collective bargaining and effectively mandates collective bargaining. Under a threat of criminal behaviour and a fine of up to $10,000, enterprises would be required to:

- keep bargaining even if deadlocked;
- conclude a collective agreement (an enterprise may not walk away from a claim for a collective agreement but is required to settle);
- meet to discuss a claim for a multi-employer collective agreement (MECA) even if the enterprise does not want to participate in one; and
- conclude a MECA (an enterprise may not walk away from a claim for a MECA but is required to settle).

However, a system of voluntary compliance, leaving the parties free to reach their own agreements, is likely to be more durable than one based on threat of criminality.

Requirement to conclude collective agreement

Clause 12, substituting a new section 33, requires the parties to conclude a collective agreement in the absence of a genuine reason not to, extending the good faith principle beyond the requirement of mutual trust and confidence in a way that promotes unions over employers. Good faith under the current Act does not require the conclusion of a collective agreement. As the Code of Good Faith Bargaining makes clear, good faith is a process and not an end in itself. It is difficult to envisage what might constitute a genuine reason given the downsides of the criminality provisions that employers will face. In contrast, unions face no similar fines for advocating against individual contracts which are the preferred employee contract within the tourism industry.

Collective bargaining monopoly restricts choice

The Bill's extended collective bargaining provisions exacerbate the difficulties caused by the monopoly over collective agreements that the ERA gives to unions. Employers and employees who want to work under a collective rather than under a collection of individual agreements and who do not want to engage in the formalities of establishing an in-house union have only one choice – to use some existing union, even if they consider the union does not properly represent their interests.

Collective bargaining monopoly contravenes International Labour Organisation (ILO)

With reference to collective bargaining, ILO Convention 87 on Freedom of Association asserts that employees have the right to join organisations of their own choosing "subject only to the rules of the organisation concerned" (Article 2). The Convention neither mentions unions nor does it require an employees' organisation to have external rules imposed upon it, although this is the case in New Zealand. The fact that the Act limits collective bargaining to registered unions is seen as a contravention of employees' – and employers' - freedom of association.

Authorisation of union representatives

Clause 16 allows union members to authorise their representatives to sign new collectives on their behalf, bypassing the ratification process currently required. This is a device that may operate against the interests of union members since, once authority has been given, they will have lost the right to approve whatever has been agreed to by the union.

Clause 26 inserts into all individual agreements a clause providing for employers to deduct union fees from employees' wages and salaries should they in the future join a union. TIANZ submits that this forces employers to be the collectors for other non-public entities and takes away the rights of employees to spend their money as they see fit.

If this provision is retained the Tourism Industry urges the Committee to accord employers the right to charge unions for this service (in a similar vein to the fees banks charge their customers for transactions) as there are clearly costs involved.

Facilitating collective bargaining

New sections 50A to 50J insert a bargaining facilitation process as well as a process whereby the Employment Relations Authority can determine collective agreements in the event of a serious and sustained breach of good faith that has significantly undermined the bargaining. These sections represent a return to third party intervention in the bargaining process at the behest of only one party, both in respect to facilitation and in allowing the Employment Relations Authority to determine the collective agreement if agreement cannot otherwise be reached. In the latter situation, a high threshold is set but the process itself constitutes compulsory arbitration. Unions should not be able to enforce collective bargaining when they cannot achieve collective agreements through their own efforts.

Multi-employer collective agreements

Clause 14 inserts a new section 48A that provides for the coercion of enterprises into multi-employer collective agreements (see Pressure for collective agreements above). If a union makes a claim for a MECA, the employers concerned are required to meet once to discuss the claim or risk a good faith fine. However, because at the first meeting a bargaining process must be put in place, that of itself will require bargaining to continue, under threat of a good faith fine and/or compulsory arbitration, until a MECA is achieved. The standardisation of wages and conditions imposed by a MECA hampers the flexibility and competitiveness desired by enterprises.

Subsequent party clauses to enlarge Multi Employer Contract Agreements (MECAs)

Forcing employers into multi-party agreements takes no account of factors such as size of business, business profitability and market share and can also mean competitor firms become privy to commercially sensitive information.

Constraining individual agreements

The return to collectivism and the undermining of individual choice are emphasised by the approach taken to individual agreements. Clause 19 would insert into the Act new sections 59A and 59B requiring enterprises to enter into bargaining for every individual agreement, with a 'take it or leave it' approach to offering a job able to be punished with criminal penalties and similarly constrain the ability to pass on the terms and conditions of one collective to another collective. The former requirement would be particularly onerous for enterprises with large numbers of employees currently on individual agreements since it would have the effect of channelling employees towards collectives – undermining employers' and employees' freedom of choice. It is also unclear whether the new provision is intended to apply only to wages and salaries or whether any term or condition – time of starting work, for example – must be open for negotiation.

The Bill admits claims of breaching the ERA's prohibition on preference should they offer slightly better terms and conditions as a way of overcoming the difficulties posed by the new provisions.

Clause 23 underlines the above change by requiring (via a new section 63A) the parties to bargain for an individual employment agreement, whatever the nature of the agreement - individual employment agreements, terms and conditions additional to those of an applicable collective, terms and conditions after the first 30 days of employment, terms and conditions of fixed term and probationary agreements and so on. Although there will be many occasions on which bargaining over individual terms and conditions will occur, there will be other situations where bargaining is not a feasible option.

A legislative obligation to bargain rather than present an agreement that the employee or potential employee is free to accept or reject takes no consideration of varying

employer circumstances and is a cost that some businesses will be unable to bear. Prescribing what must happen in every instance, with employers potentially facing penalties if it does not happen, is an excessive intrusion on employers' right to manage their businesses in the most effective way. Discriminating against individual choice is not the way to promote collective bargaining.

An undermining of individual choice is also evident in the fact that clause 26 inserts an unrecoverable new union fee deduction clause in every individual agreement. TIANZ believes this is unnecessary and undesirable.

TIANZ urges the Select Committee to consider what would happen if all vendors were forced to bargain with customers for every sale and purchase transaction!

Fixed term employment undermined

Clause 27 effectively provides that if a fixed term agreement does not state in writing the way in which employment will end and the reasons for ending the employment in that way, the employee can treat the employment as continuing. This clause undermines the right of an employer in the tourism industry to manage staff numbers in a seasonally variable environment where customer demand changes month by month in some cases.

Probationary arrangements extended

Clause 28 entitles individuals employed under a probationary arrangement to treat the employment as continuing if the fact of the probationary period is not stated in writing. This not only undermines the right of employers to manage their business appropriately but also denies individuals the chance to undertake work for which they may well prove satisfactory, giving them employment opportunities that may otherwise not be available. Tourism is a customer focused industry and employees frequently need to shift to other areas of a business, or even to another sector altogether. We are concerned that this will lead to risk-reducing behaviour on the part of employers. This will in turn lead to reduced innovation in producing and trialling new products and services.

We urge the Committee to make provision for effective probationary arrangements so that there will be no potential for a costly personal grievance claim if the employment does not work out.

Union access and employer's right to manage

Clause 9 provides for open-ended access to unions to discuss matters with members. An obvious consequence is that Organisations can face disruption if key staff are involved in such discussions without regard to meeting the needs of customers. Again, this Bill ignores the fact that customers drive businesses. Employer-union relationships should support the ability of a business to meet the needs of its customers. Unless this is the case, employees' job security could be threatened as businesses lose custom. The Tourism Industry urges that the Committee address the unintended consequences of this open-ended clause and either impose aggregate time

limits or clarify the priority of such access so as to not impact the delivery customer service.

Personal grievance test for justification brings uncertainty

Current procedural fairness interpretations already act as a disincentive to employ – getting employment terminations right can be subject to the Employment Court's quite different view of what was fair – but deciding what is "fair and reasonable to both parties in all the circumstances" in the process considering and balancing "the legitimate interests of the employer and employee" introduces a broad element of uncertainty. Making the process of dismissing unsatisfactory employees more difficult than it is at present creates a further disincentive to employment growth, and reduces the quality of New Zealand's exports.

Sale and transfer/contracting out of business

Although there is no evidence that any real problem exists, the Bill inserts a new Part into the Act that limits the right of employers to deal with their investment in the most appropriate way. Tourism businesses are frequently sold, leased or merged or some activities are contracted out – especially those that are not part of an organisation's core business.

Sale of business/contracting out decisions are universally made in the best interests of organisational profitability or survival. The seasonal nature of tourism and the wide mix of visitor needs make mergers, sales or acquisitions inevitable so as to generate sustainable earnings. No changes to current legislation are needed here.

Transfer of business and "specified categories" of employees

The social notion of preserving the jobs of "specified categories of [vulnerable] employees" or to ensure they are compensated if jobs cannot be preserved, can only be satisfied at the expense of general employment creation.

Tourism is a 24 hour a day, 365 day a year industry and this is due to customers' choices as to the time of travel, rather than tourism businesses themselves wishing to operate around the clock. However, activity varies month-by-month in its intensity. It is a function of varying demand that many services are simply not needed for months at a time. The provisions in the Bill make it extremely difficult for businesses to shed costs that are no longer associated with income. This situation is exacerbated for tourism businesses by clause 30's provisions relating to "specified categories of employees" – engaged in cleaning, and food services (which are significant activities in most sectors of tourism), in the case of transfers of employees. Should redundancy become an issue, the obligation to pay redundancy compensation would pass to the new employer. This obligation is underpinned by the Employment Relations Authority's right to set redundancy levels in the event of a failure to agree what should be paid.

There is also the concern that the Minister can extend the categories affected and that unions in other industries will not be slow to make their own demands for similar protections. Extension is after consultation with the Minister and with employers and their representatives and employees and their representatives. TIANZ is not confident that the needs of customers and investors are respected in this Bill, but hopes this might change in the future.

Transfer of business - other employees

The Bill makes clear what is required in relation to specified categories of employees but in other cases requires employment agreements to include a process to be followed in negotiating with a new employer about restructuring and about what will be done at the time of restructuring. These requirements are not as restrictive as those that apply to specified employees; nevertheless they will produce similar consequences. Experience overseas – for example, e.g. in Australia, Europe and the United Kingdom – demonstrates the capacity of this kind of legislation to result in costly disputes.

In relation to "other employees" what is to happen by way of employee protection is left to the parties to determine. Overall, these transfer and protection provisions guarantee a less rather than more successful tourism industry in the future.

Conclusion

TIANZ urges recognition of the realities of business as this Bill is considered. Individual employees are, for example, free to walk away from their jobs as and when it suits them. Employers, however, have no corresponding ability to dismiss employees for unsatisfactory work, or to change their operations in a timely and efficient manner to ensure that their business can adapt to changing circumstances.

The Bill also does not take into account the demands on businesses imposed by customers and that prosperity only comes from exceeding customers' expectations.

TIANZ member survey: 'The Bill will lead to behaviour that reduces economic activity'

TIANZ has undertaken a qualitative survey of its sector reference groups the results of which are attached to this submission as an appendix. This survey sought to draw out the likely responses by businesses to the key proposals contained in the Bill. The survey also sought to determine behaviours by business owners/managers in response to the Bill that might be expected at the various stages in the life cycle of a business including:

- Business Start-up
- Competitive phase (a period of consolidation)

- Introducing new technology, systems and processes
- Business expansion (including restructuring)
- Sales, mergers and acquisitions

There was also a particular section in the survey investigating likely responses to increased compliance costs, penalties for breaches of good faith, and provisions that would enable Courts to settle personal grievances.

Summary of reported behavioural changes from the survey

The following key impacts are expected with the passing of this Bill in its current form, based on feedback received by TIANZ from its survey of members:

- Businesses will be more reluctant to take on more staff (or to replace existing staff when they leave) as they would be less able to offer flexible working conditions that reflect market conditions at the time

- The Bill is complex and small businesses in particular will struggle to comply with its provisions. Business owners are particularly anxious about the prospect of having to develop formal processes to involve staff (and Unions) in every decision affecting their business without compensating accountability from them if they frustrate progress towards improvements in Customer satisfaction, or efficiency.

- The Bill increases the financial risks to businesses of employing staff. It will also require them to make contractual arrangements in anticipation of future changes, without businesses knowing what conditions lie ahead for them

- Businesses will take on fewer staff, will assume higher risk of criminality in their dealings with their staff, are likely to be less innovative, and will be more hesitant in expanding.

- Some businesses (and their staff) will be financially disadvantaged where it is in their best interests to be acquired or merged but their staff are employed on inefficient contracts for the prevailing market (i.e. too many staff, conditions that are no longer appropriate). Such businesses will not be attractive to potential purchasers, or may attract a lower-than-expected price which will disadvantage investors.

- Some businesses may suffer loss of value or loss of commercially sensitive information if they are required to widely disclose financial information to staff or unions. It is business managers/owners that would suffer the direct consequences of this, however, it could indirectly impact on employees if commercially sensitive information falls into the hands of competing businesses

- Definitions in the Bill such as those for “good faith” and being “communicative, responsive and supportive” are inadequately defined. This would lead to reduced profit and business failure if businesses succumb to the temptation to “gold plate” conditions so as to minimise the risks of the Bill’s penal provisions.

TIANZ recommendations

TIANZ suggests that it is premature for the Bill to proceed in the absence of further analysis of the likely impacts of the Bill on economic activity, and without assessing the likely behaviour of employers as they adapt to the requirements of the Bill.

However, if the Committee does recommend the Bill proceed, we recommend the following amendments:

Clause-by-clause comment

Clause 5 Object of this Act (amending section 3)

Recommendation

(1) Retain the words “mutual trust and confidence” in section 3(a) and delete the words “good faith.”

Comment

The words “mutual trust” and “confidence” have been well-defined by the courts and are clearly understood. To introduce a new good faith concept is to introduce confusion that will lead to unnecessary litigation.

Clause 6 Parties to employment relationship to deal with each other in good faith

Recommendation

Delete the new subclause (1A) proposed for section 4, and new subsections (6) and (7)

Amend current subsection 4(c) by deleting the words “including the effect on employees of changes to the employer’s business”, and subsection 4(d) by inserting the words “recognising that such proposals need to be considered in the context of commercial reality and sensitivity” at the end of the subsection.

Comment

(1A) The insertion of this new subsection into section 4 is unnecessary and introduces subjective concepts which are likely to be contested in the courts. We are concerned at the litigation that might result from this.

We are concerned at provisions that will require employers to share business information where this relates to decisions that could affect the employment of staff. In many cases it is quite inappropriate to share such information (such as in the case of a sale or merger), with staff who may not necessarily treat this information as confidential to the business. While clause (1A)(c) should be deleted, current subsections 4(c) and (d) should be retained but amended by deleting the words "including the effect on employees of changes to the employer's business" from subsection 4(c) and inserting the words "recognising that such proposals need to be considered in the context of commercial reality and sensitivity" at the end of subsection 4(d).

ss (6),(7) To make it a breach of good faith to advise an employee not to be involved in collective bargaining potentially puts employers in a very difficult situation. Some employees may seek advice from their employers on which sort of contract to pursue. These provisions potentially put employers in the difficult position where they feel they are not able to provide such advice, for fear of breaching "good faith" provisions. Collective bargaining is not the preferred choice of tourism employees.

Clause 8 Prohibition on preference

Recommendation

Delete new subsection (3) proposed for section 9.

Comment

The proposed new subsection would encourage employees into collective agreement coverage and therefore into union membership. This implies that collective contracts are necessarily superior to individual contracts. TIANZ believes that the legislation should not contain any particular bias but should enable employers and employees to negotiate contracts that are mutually beneficial to both parties.

Clause 9 Access to workplaces

Recommendation

Delete proposed new subsections (4) and (5), or

Add to subsection (5) the words:

> " – provided that discussion does not exceed a period of 15 minutes or compromise services to customers and the ".

Comment

As the new subsections currently read, neither the impact on customer service nor any time limit is imposed on discussions with employees and these, as a consequence, could go on for quite lengthy periods. It is not in the interests of either the employer or the employee that productivity should be reduced in this way if it compromises customer service.

Clause 14 New section 48A inserted

Recommendation

Delete clause 14, or
If the clause is retained, delete proposed new subsections 48A (4)-(6).

Comment

Proposed new section 48A is not required as the Act currently provides for unions and employers to engage in multi-party bargaining without recourse to instructions on how to this is to be done.

Clause 15 New heading and sections 50A to 50J inserted

Recommendation

Delete clause 15 in its entirety.

Comment

The effect of these provisions would be to reintroduce a form of compulsory arbitration. Currently there is nothing to prevent the parties to collective bargaining from seeking outside

assistance if both agree. However, this should be done by agreement and not where only one party desires to use arbitration.

Clause 19 Breach of duty of good faith to pass on in individual employment agreement terms and conditions agreed in collective bargaining or in a collective agreement.

Recommendation

Delete clause 19.

Comment

This provision appears to singularly promote collective coverage. TIANZ is concerned that this provision fails to recognise that individual contracts are the chosen relationship for both employee and employer in the majority of cases within New Zealand's tourism industry. They also provide an opportunity for work conditions to be tailored to reflect the particular contribution and productivity of individual employees. We are opposed to legislation that makes it more difficult to do this.

Clause 20 Object of this Part

Recommendation

Retain the current wording of section 62(1)(a)(ii). Do not add the words "but not limited to".

Comment

The words "mutual trust and confidence" already adequately define the employer/employee relationship. Any extension of meaning can only result in unnecessary litigation to the detriment of that relationship.

Clause 21 Employer's obligations in respect of new employee who is not a union member

Recommendation

Delete section 62 (to which this clause refers), or

(1A) Where, in parenthesis, the word "employees" is used for the second time, substitute "employee"' in its place.

Comment

Employees should be able to waive the "entitlement" and, if they wish to, negotiate an individual agreement immediately.

Clause 26 New section 65A inserted

Recommendation

Delete clause 26.

Comment

Section 55 of the Act already inserts a union fee deduction clause into collective agreements (the clause may be excluded or varied) so there is no reason to insert such a clause into individual agreements (presumably anticipating that many employers and employees will not appreciate that this clause, too, can be varied or excluded). To that extent the provision largely overrides the ability of employees to make individual choices and is abhorrent for that reason.

In the event that the Committee rejects the Industry's recommendation, we further urge that costs associated with Union fee deductions be recovered at time of deduction. There is no reason why Employers should provide free revenue-collection services for anyone.

Clause 27 Fixed term employment

Recommendation

Delete clause 27

Comment

TIANZ is opposed to this provision for two reasons: first, it effectively prevents employers from recruiting for a fixed period where it is not precisely certain whether a job will be ongoing. The effect will be to discourage some employment . A further reason is that some employees' desire fixed term employment as this suits their personal circumstances. We

advocate for the continued ability for employers to offer fixed term contracts with the possibility rather than certainty of renewal at the end of the term, or the conversion of the position into a full time one where this is mutually desired.

Clause 30 New Part 6A inserted

Recommendation

Delete clause 30.

Comment

Specified categories of employees

The proposed new Part 6A relating to the continuity of employment in the event of business restructuring should be deleted in its entirety.

TIANZ is especially concerned with these provisions for the following reasons:

- They potentially create a situation where employees from one enterprise transferring from one enterprise to another will have either better or worse conditions than the employees in the other company. This situation leads to inequalities in conditions, and eventual resentment.
- Employers engaged in restructuring will, regardless of their ability to pay, be penalised either by a requirement to pay redundancy or by having to accept a lesser price than might otherwise have been expected for their business in the case of a sale. This is because the redundancy requirement, if not met, passes to the new employer. This could create a significant financial burden for the employer that inherits the employees.
- They may put some employers off taking on new people, especially if their business operates in a rapidly-changing industry. At an aggregate level, this might have a negative impact on economic growth.

TIANZ believes that redundancy provisions should be negotiated between employer and employees and payments should be restricted to what is specified in contracts.

We are also opposed to the Employment Relations Authority being able to set redundancy levels. Such conditions should be

determined by the employer and the employee and not set by a third party that is not involved in the business, and has no accountability for its future.

Consequential amendment

Delete Schedule 1.

Other employees

TIANZ believes that redundancy provisions should be negotiated between employer and employees and payments should be restricted to what is specified in contracts.

We are also opposed to the Employment Relations Authority being able to set redundancy levels. Such conditions should be determined by the employer and the employee and not set by a third party that is not involved in the business.

Clause 31 Interpretation (in relation to Employment relations education leave)

Recommendation

Delete the definition of "eligible employee" and retain the current definition.

Comment

Currently only union members covered by collective agreements or engaged in collective bargaining are eligible for employment relations education leave. Given the problems experienced by employers who are required to allow employees coming within these categories time away from work, education leave eligibility should not be extended to all union members. Lost productive time is not in anyone's interest.

Clause 37 New section 103A inserted

Recommendation

Delete clause 37.

Comment

TIANZ is concerned that introducing a "test for justification" will lead to greater litigation and will require a subjective judgment to balance the interests of both the employer and employee. We also expect that there will be few circumstances where any act leading to the dismissal of an employee will be seen as being in the "legitimate interests" of the employee. These provisions make disciplining and in some cases dismissing an unsatisfactory employee even more difficult and traumatic and they will serve to dissuade some businesses from taking on new people, especially potential staff with limited experience.

Clause 53 Jurisdiction

Recommendation

Delete clause 53.

Comment

TIANZ is opposed to any third party intervention in the bargaining process or in determining redundancy compensation.

Clause 66 New section 237A inserted

Recommendation

Delete clause 66

Comment

Our comments relating to new Part 6A apply here.

Clause 67 Recommendation

Delete clause 67

Comment

The proposed new Schedule IA should be deleted in line with recommendations in relation to clause 30 (re restructuring and specified categories of employees).

Clause 72 Recommendation

Reword clause 72(a) as follows:

> "The purpose of this Part is to address gender-based discrimination in pay by –
>
> (a) requiring an employer, in relation to the same or substantially similar work, to provide equal pay to employees of the same or substantially similar capabilities and experience employed in the same or substantially similar circumstances."

Omit subparagraphs (i) and (ii).

Comment

There are many reasons why not all employees performing the "same or substantially similar work" will necessarily receive the same rate of pay. This should therefore be included in the purpose statement to acknowledge from the outset that some employees (of whatever gender) are more valuable than others – and more effective in their work–performance. TIANZ believes that, even in the case of identical jobs, employers should still have the freedom to pay employees different rates that reflect their contribution to a business.

We recommend that subparagraph (ii) be deleted to remove the possibility of across-employer comparisons and to reflect that employers are able to negotiate individual terms and conditions with their employees.

Clause 74 Interpretation

Recommendation

Remove the term "multi-employer collective agreement".

Comment

As noted, across-employer comparisons of the kind envisaged should not be permissible.

Clause 76 Recommendation

Reword subclause (2) as follows:

> "An employer must provide equal pay to each of his or her employees who, having the same or substantially similar capabilities and experience and being employed in the same or substantially similar circumstances, performs the same or substantially similar work."

Omit subclause (2).

Comment

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These are consequential amendments required on the basis of recommendations made in relation to clause 72. The first recommended change serves to reinforce subclause (4).

TIANZ advocates the inclusion of provisions that enable parties to appeal against any decision made by a Labour Department Inspector in relation to equal pay.

TIANZ wishes to have the opportunity to speak to this submission before the Select Committee.

Tourism Industry Association New Zealand (TIANZ)
February 2004