EMPLOYMENT RELATIONS LAW REFORM BILL-SUMMARY AND QUESTIONS TO CONSIDER (an edited and abbreviated version of a summary report produced by Business New Zealand)[1]

This legislation amends the existing Act particularly in relation to:

- providing protection to particular employees where business undertakings are sold, transferred or contracted out.
- good faith
- collective bargaining
- the resolution of employment relationship problems.

This report provides a summary of the key changes proposed in the Bill. At the end of each section, questions are provided for TIANZ members to consider in light of their own business situation.

Although all of these provisions will impact on tourism businesses, TIANZ believes that the "Continuity of Employment" provisions are of particular concern, given the extensive use of contracting out of food and cleaning services within the tourism industry.

Continuity of employment

Specified categories of employees

Where restructuring occurs (meaning sale and transfer, contracting out, termination of contract or arrangement under which employer carried out work on behalf of another person) particular employees receive special protection. These are persons engaged generally in cleaning and food services and include education sector (public and private) caretakers and laundry workers, and orderlies and laundry workers in the health sector.

Such employees have the right to elect to transfer to a new employer on the same terms and conditions of employment and, subject to their employment agreements, to bargain for

[1] TIANZ is affiliated to Business New Zealand

redundancy entitlements from the new employer if the new employer makes them redundant for reasons relating to the restructuring. If redundancy entitlements cannot be agreed with the new employer, the Employment Relations Authority (ERA) may determine them.

Good faith requires the employer to provide reasonable opportunity for the employees to make an election to transfer to a new employer and to tell them the date by which the right to make the election must be exercised. If a contract under which an employer carried out work for another person is terminated and the work is to be carried out by some new person, the person terminating the contract must give the employer who is losing the contract sufficient notice of the restructuring to enable that employer to comply with the above.

Before deciding whether or not to transfer, an employee can bargain with the employer for alternative arrangements.

There is no entitlement to redundancy if an employee who has elected to transfer is employed on same terms and conditions as previously (including whether the employee is full or part-time). Employment is treated as continuous.

If an employee elects not to transfer, that employee's employment agreement is unaffected (that is, the employee remains entitled to redundancy compensation if the agreement provides for this).

A new employer becomes party to a collective agreement in relation to any transferring employee if the employee is bound by a collective agreement and the employer was not previously bound by it.

A transferring employee may bargain for redundancy if the new employer proposes to make the employee redundant or the employment agreement does not provide for redundancy in this circumstance or does not expressly exclude redundancy entitlements. The employee is entitled to redundancy from the new employer and both parties must bargain with a view to reaching agreement on appropriate entitlements. In the event of a failure to agree, the employee or new employer may apply to the ERA to investigate the bargaining relating to the matter. The ERA may conclude (after investigation) that the bargaining should continue but if it considers further bargaining to be not warranted it can itself determine the entitlements.

On the recommendation of the Minister (having consulted employers and employees and their representatives as he or she considers appropriate), categories of employees may be omitted from the schedule or the categories may be varied based on the following criteria:

- whether the employment is in a sector where businesses are frequently restructured
- whether the restructuring has tended to undermine employment terms and conditions
- whether the employment is in a labour intensive sector in low paid work where the employees have little bargaining power.

Questions for TIANZ members:

- *How will your business be affected by these provisions?*
- *What are the cost implications of these proposals?*
- *How will these proposals affect the competitiveness of your business?*

Other employees

Employment agreements (new and existing) relating to all other employees must contain employment protection provisions relating to negotiations between the employer, and a new employer relating to the transfer of affected employees to the new employer. An employment protection provision has to include a process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees. It must also include matters to be negotiated, including whether they will transfer on same terms and conditions, and the process to be followed at the time of restructuring to determine what entitlements, if any, are available to non-transferring employees.

An affected employee is one whose employer's business is being or is proposed to be restructured so that the employee will no longer be required to perform the work specified in his or her employment agreement and the type of work, or work that is substantially similar, is, or is to be, performed by the new employer's employees.

If an employer arranges for an affected employee to transfer to the new employer the employee has the right to choose whether or not to transfer.

Questions for TIANZ members:

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- *What are the cost implications of these proposals?*
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Good Faith

Extends the meaning of good faith beyond that of mutual trust and confidence, adding that employment relationships are also built on "a legislative requirement for good faith behaviour". Parties are required to be active and constructive in establishing and maintaining a productive employment relationship by being responsive, communicative and supportive. This includes imposing an obligation on employers to provide affected employees with access to relevant information and the opportunity to comment on it before making a decision that will or is likely to have an adverse effect on their employment. (The employer need not provide access to confidential information if there is good reason to maintain confidentiality.)

It is a breach of good faith to advise an employee not to be involved in bargaining for a collective agreement or not to be covered by a collective agreement.

Failure to comply with the duty of good faith attracts a penalty if it was serious and sustained or intended to undermine bargaining for an individual or collective agreement, the agreement itself, or the employment relationship.

Questions for TIANZ members:

- *How will your business be affected by these provisions?*
- *What are the cost implications of these proposals?*

- *Are these proposals necessary? If not, why not?*

Good faith in relation to collective bargaining

In bargaining for a collective agreement the parties must, even though they have reached a deadlock, continue to meet and consider and respond to each other's proposals in respect to other matters on which they have not reached agreement. This applies whether the bargaining started before or after the commencement of the Act.

With respect to multi-party bargaining – each union and each employer must attend at least the first meeting in order to enter into a bargaining arrangements (as s32 of the Act)).

Questions for TIANZ members:

- *How will your business be affected by these provisions?*
- *What are the cost implications of these proposals?*
- *Are these proposals necessary? If not, why not?*

Breach of good faith in relation to collective bargaining

Where there has been a "serious and sustained" breach of good faith a party may apply to the Employment Relations Authority (ERA) for a determination "fixing" the provisions of the collective agreement. The ERA may fix the provisions if satisfied that the grounds have been made out and it is appropriate to do so. The grounds are that: there has been a breach of good faith *sufficiently serious and sustained* as to *significantly* undermine the bargaining, all other alternatives for reaching agreement have been exhausted, and fixing the collective's provisions is the only effective remedy for the party or parties affected by the breach of good faith. The collective agreement then becomes binding and enforceable. This is a high threshold but is nevertheless a backdoor way to compulsory arbitration.

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- *Are these proposals necessary? If not, why not?*

Undermining collective bargaining or collective agreement

It is a breach of good faith to pass on collective agreement terms and conditions in an individual employment agreement if this is done with the *intention* of undermining the collective agreement and has this *effect.*

It is also a breach of good faith to pass on in a collective agreement the provisions of another collective, again if this is intended to undermine the bargaining and has this effect. Criteria similar to those referred to above apply in determining the matter.

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- *What are the cost implications of these proposals?*
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Discrimination

Lawful participation in a strike becomes a ground on which discrimination is prohibited (the Human Rights Act (HRA) is amended accordingly).

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- *What are the cost implications of these proposals?*
- *Is this proposal necessary? If not, why not?*

Employment Relations Authority

The jurisdiction section (s161) is widened to confer specifically the power to determine redundancy entitlements where necessary.

The ERA may exercise its jurisdiction in the absence of one or more of the parties but must provide any relevant material received to the absent party and allow opportunity for comment. (The ERA can nevertheless make ex parte orders.)

If a party to a matter before the ERA is dissatisfied with its decision or any part of the decision and elects to have the matter heard by the Employment Court, the election can be subject to a cross-challenge (which can proceed even if the original election is withdrawn).

No party may apply to have a determination of the ERA heard by the Court in relation the facilitation of collective bargaining unless the allegation is one of serious and sustained breach of good faith undermining the bargaining or a party has applied to have the ERA fix the provisions of a collective agreement because of such a breach.

No review proceedings can be initiated unless the ERA has issued final determinations on all matters relating to the subject of the review application and, if applicable, the party initiating the review proceedings has challenged the determination in the Court and the Court has decided the matter.

It is not the Court's function to advise or direct the ERA in relation to the exercise of its investigative jurisdiction or the procedure followed (or that may be followed).

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- *What are the cost implications of these proposals?*
- *Are these proposals necessary? If not, why not?*

Equal Pay

The intention is to bring existing equal pay provisions (in the Equal Pay Act) up to date so they can be used for current equal pay claims (at present they relate essentially to the award system). This is *not* an equal pay for work of equal value (pay equity) exercise.

Equal pay must be provided to each employee doing the same or substantially similar work. In equal pay matters, the parties must deal with each other in good faith.

In relation to multi-employer collective agreements, equal pay is required for the employees of one employer as compared with the employees of another employer bound by the agreement and doing the same or substantially similar work.

Labour Inspectors can take enforcement actions to recover arrears of equal pay, to recover a penalty for breach, and to enforce compliance.

Pay in the equal pay context includes productivity and incentive-based payments, overtime, bonuses and other special payments, allowances, fees, commission and any other emolument or benefit whether in one sum or several sums and whether paid in money or not.

However, it is possible to have a special pay rate (provided it is not based on the sex of the employee) to recognise an employee's particular skills, knowledge, experience or other attributes.

In determining whether work is the same or substantially similar regard must be had (among other things) to the extent to which:

- the work or class of work requires the same, or a substantially similar degree of skill, knowledge, effort and responsibility, and
- the work is performed under substantially similar conditions.

Questions for TIANZ members:

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- *How will your business be affected by these provisions?*
- *What are the cost implications of these proposals?*

Equal pay queries

An employee can ask his or her employer whether or not he or she is receiving equal pay and the employer must reply in writing within 20 working confirming one way or the other (to the best of the employer's knowledge).

If the employer confirms that the employee is not receiving equal pay the employer must, within a month, comply with the duty to pay equal pay and also arrears for the period when equal pay was not paid.

A Labour Inspector may also conduct an investigation if an employee is not satisfied with the employer's response and must identify a comparable employee with whom to compare pay rates. In doing so a Labour Inspector may require a copy of the complainant employee's employment agreement, job description, information about the classification of the employee's work, a copy of the wage and time record, and any rules or policies relating to pay scales, progression in the workplace, job structure or other relevant information (other than personal information).

Questions for TIANZ members:

- *Are these proposals necessary? If not, why not?*
- *How will your business be affected by these provisions?*
- *What are the cost implications of these proposals?*

Enforcement

If, in respect to an equal pay claim, an employee could take enforcement action or a personal grievance under the Employment Relations Act, or a complaint under the Human Rights Act (HRA), the employee must decide which course to take. Enforcement action under the Employment Relations Act is taken when proceedings are commenced by a Labour Inspector (the only person who can take equal pay enforcement and arrears actions) and under the HRA when a complaint is commenced either by the complainant or by the Commission. The penalty for an individual employer is $5,000 and for a corporate employer, $10,000.

Questions for TIANZ members:

- *Are these proposals necessary? If not, why not?*
- *How will your business be affected by these provisions?*
- *What are the cost implications of these proposals?*

Send your comments to TIANZ Policy Manager, David Barnes by 1 February 2004 at email: davidb@tianz.org.nz