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NEW ZEALAND
BusinessROUNDTABLE
PROMOTING POLICIES FOR A BETTER NEW ZEALAND

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Review of Part 6A
Workplace Policy Group
Department of Labour
PO Box 3705
WELLINGTON

Employment Relations Act 2000: Review of Part 6A: Continuity of Employment

1.0 Introduction

1.1 This submission on the Department of Labour's Discussion Document is made on behalf of the New Zealand Business Roundtable, an organisation consisting primarily of chief executives of major New Zealand firms. Our interest is in sound public policies reflecting overall national interests, not simply the interests of the business sector.

1.2 We are happy for the contents of this submission to be a matter of public record.

2.0 General

2.1 In our view issues relating to Part 6A of the Employment Relations Act need to be seen in the context of the government's overriding goal of lifting average New Zealand incomes to Australian levels by 2025. As the minister of labour notes in the foreword to the Discussion Document, "The Government aims to put employment relations on sound and solid footings so that New Zealand can focus on building more productive businesses and higher wages." To achieve that goal, major improvements in labour productivity growth are required, given the slump in productivity growth resulting in large part from ill-conceived policies of the previous government. The Employment Relations Act was one such policy. It undermined the freer and more flexible employment relations environment created by the Employment Contracts Act 1991, imposed higher costs on employers, and inhibited productivity improvements. These trends need to be reversed if the 2025 goal is to be achieved.

2.2 In submissions on the Employment Relations Bill in 2000 and the Employment Relations Law Reform Bill in 2004, the Business Roundtable argued that the legislative provisions regarding contracting out, the sale and transfer of a business, and the protection of so-called 'vulnerable workers' were unjustified and hampered the ability of firms, and the economy more generally, to adapt and restructure. Typically the whole purpose of such transactions is to reorganise working arrangements and conditions and achieve operating efficiencies. The Discussion 'Document notes that "a change in service provider is sometimes motivated by perceptions of poor quality service." The under-performance of an employer due to the make-up of its staff often motivates a restructure and this critical factor is not acknowledged in the current legislation. Flexibility in all dimensions is needed more than ever in the current

environment in which many firms are struggling to grow and when major restructuring is required to shift resources from the domestic sector of the economy to internationally trading industries to reduce the current account deficit and New Zealand's exposure to the risk of international financing constraints.

2.3 In our view the provisions in Part 6A of the ERA were politically motivated and lacked any economic justification. We have heard them described as a Service and Food Workers Union Benefit Act. The Labour government withdrew similar provisions that were in the Employment Relations Bill in 2000 in response to justified criticism but revived and enacted them in 2004. We submit that Part 6A of the ERA should be scrapped in its entirety.

3.0 Comments on the Discussion Document

3.1 Our first comment on the Discussion Document is that it contains no Regulatory Impact Analysis or equivalent framework. This is in breach of the Cabinet Manual requirements for official discussion documents. The essence of an RIA is a comparison of the costs and benefits of any regulation. The Department of Labour should have performed such an assessment to facilitate informed submissions. We doubt whether Part 6A creates any economic benefits in national welfare terms (as opposed to possible transfers), whereas it imposes tangible costs.

3.2 An underlying justification for Part 6A put forward by the previous government is that employees, particularly those in the categories set out in Schedule 1A, have limited bargaining power. This argument is fallacious. As University of Chicago legal scholar Richard Epstein 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.[1]

3.3 In competitive labour markets, the reality is that employers compete with one another for workers, and workers compete with one another for jobs. Wages are driven up by productivity increases and competition for scarce labour. At times there may be a buyer's market or a seller's market for particular skills in particular locations. But there is no systematic advantage for one side over another, otherwise wages would never rise, and there is nothing special in any relevant economic sense about employment contracts. In the present context the notion that regulation 'protects' 'vulnerable workers' is misconceived. The best and, in practice, the only protection for workers as a group is a well-functioning labour market that generates ample employment opportunities. A worker with alternative employment opportunities is a difficult worker to exploit.

3.4 A fuller discussion of the myth of unequal bargaining power is contained in the 2006 study *Power in Employment Relationships: Is There an Imbalance*? by Australian labour market expert Geoff Hogbin, published by the Business Roundtable in 2006. The study is available at www.nzbr.org.nz and a copy is enclosed with the mailed version of this submission.

3.5 It follows that the term 'vulnerable workers' in the context of Part 6A is mere political rhetoric. They could more accurately be described as 'preferred workers' as no such provisions apply to other employees. Although wages for many such workers may be relatively low, this reflects their labour productivity. Employers cannot pay workers wages that exceed their marginal productivity (or they will lose money) and in competitive labour markets they cannot pay them less (or they will be bid away by

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1 Epstein, Richard (1984) 'In Defense of the Contract at Will', *University of Chicago Law Review*, 51, p 972.

other firms). Actual pay rates will depend on demand and supply in the labour market. At times increases in the wages of low income workers have exceeded those of workers on higher wages. If wages and employment conditions of workers employed by firms engaged in restructuring are constrained by statutory requirements (such as Part 6A), the result may well be higher unemployment than would otherwise be the case. With unemployment currently running at 7.3 percent of the labour force, priority should be given to the need to retain and create jobs.

3.6 Other submitters will be commenting on problems associated with Part 6A in more detail. These include the fact that it is complicated and difficult to understand, and hence gives rise to uncertainty, complex litigation and costly outcomes. The requirement that 'vulnerable workers' must be offered employment on the same terms and conditions with any new employer in the event of a sale, transfer or contracting out creates onerous obligations for employers seeking to cut costs in their organisation. This interferes with freedom of contracting, which should be the guiding principle of employment law, and prevents productivity and efficiency improvements. It may even have the unintended consequence of necessitating redundancies. Another unintended consequence of Part 6A is that it has anti-competitive effects in that it limits the ability of smaller companies to tender for work because of its costly requirements. We have seen the submissions of Business New Zealand on detailed issues and agree with them.

3.7 In relation to subpart 2 of Part 6A, we endorse Business New Zealand's view that the requirement to provide financial information is at odds with the normal process involved in a commercial transaction, which depends on purchasers undertaking due diligence and seeking to satisfy themselves that all is in order. Subpart 2 creates obligations over and above normal commercial practice. Paradoxically, it does not create any obligation that enables a new employer to ascertain the reasons for the contract being tendered (eg the poor quality of employees of the existing contractor). Subpart 2 in fact may hinder the process of sale, as it creates opportunities for delaying tactics (such as with the provision of information), which jeopardise the successful completion of the sale. This is often to the advantage of the current holder of the contract who, understandably, may be reluctant to lose it.

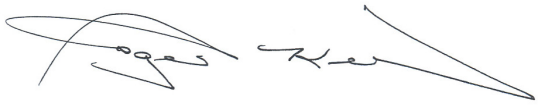
3.8 The Discussion Document refers to similar legislative arrangements in countries like the European Union (including the United Kingdom). However, it is well established that restrictive employment law is a major factor behind high unemployment and poor productivity growth in the EU economy. New Zealand should avoid such arrangements; indeed it needs to adopt superior institutions and policies to those in other countries if it is to close income gaps. The freer and more flexible labour markets of countries in the Asian region are better models for New Zealand.

3.9 In our view, the most important question in the Discussion Document is Question 29: 'What changes to the current employment relations legislation would make the most difference to productivity?' In the present context, our answer is the repeal of Part 6A in its entirety. We are confident that no sound cost benefit analysis would support its retention. More broadly, we believe substantial changes to employment legislation such as the ERA (including Part 9 on which we shall be making a submission), the Holidays Act, minimum wage legislation and ACC are needed to help raise productivity growth and employment levels. The general direction of such changes should be towards greater freedom of contract between employers and employees.

4.0 Recommendation

4.1 We recommend that Part 6A of the Employment Relations Act be repealed.

Yours faithfully



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