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National's Labour Market Policy

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Introduction

The Employment Contracts Act 1991 is the most successful piece of industrial relations legislation in New Zealand's history. The eight years since the legislation passed into law have shown that National has provided the right basis for our industrial relations framework into the next millennium. Once considered radical legislation, the Employment Contracts Act has become the model for flexible labour market legislation. It recognises that change has become a constant in the modern world.

Background

The events of the eighties provided clear evidence that New Zealand's labour market needed to be better able to cope with economic change. Not only was the industrial relations framework of the time unable to effectively adjust to adverse economic conditions, it was apparent that it would be ineffective in promoting growth in times of favourable conditions. The ability of businesses to adjust to international developments and quickly develop competitive advantages is vital for their success. If New Zealand wanted to be able to respond positively to a rapidly changing business environment and inevitable economic shocks, greater flexibility was required than that provided by the Labour Government's industrial relations regime which was designed for the 1890s not the 1990s.

By the time of the 1990 election, the National Party had a very clear view of what was needed to provide an appropriate framework for New Zealand business. We knew what workplaces needed because we listened to what they told us. Since 1990 the key points of National's industrial relations policy have remained unchanged. They are:

- Voluntary unionism;
- Flexible bargaining arrangements between employers and employees;
- Employees being able to choose their own bargaining agents;

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- Industrial agreements having the status of binding contracts;
- The flexibility for employees to decide who will represent them in dispute procedures; and
- A credible minimum code of wages and conditions.[1]

The rationale for the reintroduction of voluntary unionism and giving employees the right to choose their own bargaining agents was simple. The Government has no business telling people that they must belong to a union, let alone that they must belong to any one specific union. Equally the Government should ensure individuals can join the organisation of their choice, should they wish to do so.

The move from national awards to enterprise bargaining has been a huge success. A modern developed economy is simply too diverse for the kind of "one size fits all" national arrangements which characterised the previous legislation. Small to medium employers no longer find their interests being subsumed by the needs of a few large employers. Neither do businesses find themselves being bound to the needs of their competitors. If businesses are to develop to their full potential they must be allowed to develop the workplace arrangements that best suit their individual needs.

Flexibility has equalled success

The benefits of a flexible labour market are, of course, well documented. Countries with more flexible labour markets tend to have higher employment and less persistent unemployment problems.[2] The 1994 Job Study conducted by the Organisation for Economic Co-operation and Development (OECD) resulted in a prescription of implementing greater flexibility in the labour market to address the issues of high unemployment in developed countries.[3]

Since the Act was passed into law the benefits of flexibility have been clearly apparent. New Zealand has experienced impressive employment growth and growth in peoples' incomes. The economic reforms since 1990 have given many of those unemployed new jobs. Since 1991 employment has risen by over 256,000. That is more jobs than there are in either the Wellington or Canterbury region. There is no better way to improve the life of someone out of work than assisting them into work. Conversely the damage that is done by destroying jobs is appalling.

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1 New Zealand National Party, 8 May 1990.

2 Rafael Di Tella (*Harvard University)* & Robert MacCulloch (*ZEI, University of Bonn), The Consequences of Labour Market Flexibility: Panel Evidence Based on Survey Data,* 25 November 1998.

3 OECD, Implementing the OECD Jobs Strategy: Lessons From Member Countries, 1994.

Recently the Australian Employment Minister Peter Reith has made comments to the effect that if Australia had New Zealand's more deregulated industrial relations framework, they would have half a million more people in jobs.

Those in employment have also received significant benefits in terms of increased earnings. Average total weekly earnings have increased from $563 in 1991 to $660 in 1998. It is also important to note that more money has been put into the pockets of working New Zealanders through tax cuts and targeted assistance such as the Child Family Tax Credit, Family Tax Credit and the new Parental Tax Credit.

The freedom and flexibility the Employment Contracts Act has provided has helped achieve employment and economic growth which New Zealand had not experienced for many years. Another indicator of the success of the Act is how key elements have been adopted by other jurisdictions. Australia's Workplace Relations Act is the most obvious example. Interestingly, the majority of the proposed New Zealand alternatives to the Employment Contracts Act bear more resemblance to the current legislation than they do to the previous Labour Relations Act. The choices available to employees and employers under the Employment Contracts Act have become central to the way people see industrial relations. Some proposals still seem intent, however, on reducing workplace flexibility and the ability of employees and employers to negotiate their own arrangements.

An evolving system

Since the last election our industrial relations legislation has undergone a comprehensive and, transparent, set of reviews. While some fine-tuning of our current legislation was proposed, the reviews found no persuasive arguments for any substantial overhaul. The fundamentals of the Employment Contracts Act are sound and are continuing to contribute to New Zealand's success. The aim of the reform proposals were to clarify the law, provide greater certainty and to better balance the rights and responsibilities of employers and employees.

Some have expressed concern about the destabilising effect of the significant proportion of Employment Court decisions overturned on appeal. However, there are strong signs that many key areas of uncertainty in the Employment Contracts Act have been settled.

Recent Court of Appeal decisions have been interpreted by many as reflecting a general shift towards a more contractual view of the employment relationship. The Court of Appeal has stated that:

- provisions of the Employment Contracts Act and related industrial relations legislation such as the Holidays Act should be interpreted in a manner giving the plain and ordinary meaning of provisions in the context of the scheme of each Act as a whole;

- employment contracts should be interpreted using ordinary contractual principles, focusing on the intentions of the parties as expressed in the provisions of the contract;[4] and
- remedies should only be awarded for loss flowing directly out of the breach or harm done.

This approach to employment law is very much what was expected when the Employment Contracts Bill was being drafted. National's commitment to the current legislative framework not only maintains a system that is a proven success but also maintains an environment of increasing certainty which helps to minimise legal costs to those involved.

Bargaining

Recent reviews of the bargaining provisions of the Employment Contracts Act have found that the law in this area is generally consistent with the current framework's objectives of flexibility and choice.

The question of whether the concept of "fair bargaining" should be introduced into the Employment Contracts Act was considered within these reviews. It was considered that maintaining the present legislation would achieve the best balance between fairness, efficiency and neutrality, for the following reasons;

- it would avoid the risks of significant impacts on other parts of the system attached to any new legislation,

- the requirement to recognise the representative has now been clarified by the courts, which have developed clear rules to clarify behavioural principles which support this requirement. These rules appear to have resolved the initial uncertainty which gave rise to conflict when some employers tried to by-pass their employees' representatives,

- while the case law on bargaining still has some elements of uncertainty, this results in part from the case by case approach adopted by the courts, which reflects the diversity of employment and negotiation arrangements. An option to codify the existing case law rules was therefore also rejected.

The existing requirement to recognise the authorised representative, as clarified by the case law, has reinforced the requirement that the parties should be able to negotiate through their authorised representative.

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[4] For example, in *Lowe Walker Paeora Limited v Bennet* [1998] 2 ERNZ 558 the Court of Appeal indicated that a "contracting" approach to the interpretation of employment contracts should be used, as opposed to an approach based on equity and good conscience.

Other possible elements of fair bargaining were found to carry a risk of third party intervention to enforce compliance. This can result in influence over or determination of bargaining outcomes, including, for example, arbitration, if the objective of fair bargaining is to ensure an outcome. Enforcement actions can also lead to delaying tactics as cases are taken through courts and tribunals (as has been the case in the US).

It is simply common sense that the ability to negotiate workplace agreements should rest firmly with the employers and employees directly involved. Some would argue that the focus of negotiations needs to be shifted to favour unions and that employees' right to choose a bargaining agent should be removed. National believes that employees and employers must have the right to choose who may represent them in negotiations and be free to join, or not to join, or to leave any employees' or other organisation.

The alternative to the Employment Contracts Act that is likely to be proposed by the Labour Party will no doubt bear a striking resemblance to the New Zealand Council of Trade Unions' Workplace Relations Bill. Labour's spokesperson on industrial relations Pete Hodgson MP has described it as a "good first cut". This being the case the Labour Party intends to give unions pre-eminence in the industrial relations system.

Labour's pre-election policy is not, however, an accurate reflection of what would be passed into law should a Labour-Alliance Government be elected. The Alliance has stated that it would extend coverage of any agreement to all employees doing the working for the employer or employers party to it, which is quite similar to the blanket coverage provision of the old award systems rooted in industrial policies of the 1890s. This would not serve New Zealand well in the next millennium.

Industrial Action

A clear indication of the success of the Employment Contracts Act is the post-war low in the number of work stoppages. Since the Employment Contracts Act, as can be seen below, came into effect this reduction in strikes and lockouts has meant less lost wages and business for employees and employers respectively.

The change toward enterprise bargaining has been the primary force in reducing the level of workplace disharmony. The past eight years have provided incontrovertible proof that the best way to avoid and settle workplace disputes is at enterprise level.

The Labour-Alliance bloc have proposed that unions have the right to strike and negotiate for multi-employer agreements. This would create serious risk of industrial disruption, like we saw in the 1970s when unions used coercive strikes against other employers to force a settlement against one company.

Year	Work days lost (000's)	N°. of disputes
1986	1,329.1	215
1987	366.3	193
1988	381.7	172
1989	193.3	171
1990	330.9	137
1991	99.0	71
1992	113.7	54
1993	23.8	58
1994	38.3	69
1995	53.4	69
1996	69.5	72
1997	24.6	42

Labour Market Statistics 1998, Statistics NZ

Membership of employees' organisations

The Employment Contracts Act removed the effectively compulsory union membership imposed by the Labour Relations Act. Under the previous regime non-union members did not have access to personal grievance procedures. It is difficult to appreciate the logic of why an employment right should be dependent on an individual's choice of association. It made as much sense as restricting the right to drive on a motorway to Automobile Association members.

It has been inferred that the Employment Contracts Act alone has caused a decline in union membership. Union membership in New Zealand has indeed declined by around fifty percent since 1989. A downward trend in union membership has, however, been a trend identified in many developed economies. The main cause of the reduction of union membership has, of course, been employees choosing to let their membership lapse and new employees not joining because they have decided that unions do not provide sufficient benefits compared with the costs of joining.

Personal grievances

Personal grievances is an area in which a number of concerns have been raised, particularly by small employers concerned at the risks of hiring new staff. National remains committed to universal access to grievance procedures for all employees, although it may be appropriate to provide greater clarity to new employees and their employers. New Zealand needs employment legislation that does not create a disincentive to

employers to hire new staff. As part of the proposed industrial relations package announced last year the Government announced a number of measures which sought to increase certainty in the employment relationship.

The Government proposed to amend the Employment Contracts Act to clearly state that the Employment Tribunal would take into account all relevant conduct when setting remedies for a personal grievance. This was intended to move the balance in the Tribunal away from the procedural aspects of the dispute and place greater emphasis on the actual conduct that led to the dispute. Changes were also proposed to provide more guidance to employers on the standard of conduct required in dismissing staff. This recognises that all employees have the right to be treated in a fair manner and that the way an employer does this will be influenced by individual circumstances.

Measures were also advanced to bring greater certainty to the use of probationary periods. These periods would be limited to a six month period and it would be clarified that the performance of an employee on probation and their suitability for the position would be closely monitored from day one. Any probationary period would need to be agreed by the employer and employee in writing. Employees on probation would continue to be covered by the personal grievance provisions. Probationary periods would remain optional as they are now.

Redundancy

The unsatisfactory position of redundancy compensation liability has now been resolved. The Court of Appeal before a seven Judge bench in *Aoraki Corporation Limited v Mc Gavin* clarified the law that redundancy compensation is only payable when there is a specific agreement to pay redundancy compensation in an employment contract. An employee is still protected in the event that the redundancy is not genuine or where an employee has suffered from procedural unfairness.

Institutions

In terms of the Government's role in assisting the resolution of workplace grievances, National believes the best place to resolve disputes is as close to the level of the workplace as possible. The Employment Tribunal's mediation function puts the emphasis on parties finding their own solutions to their disputes. Currently 83 percent of applications to the Employment Tribunal are settled by mediation.

Measures that increase complexity, formality and the level of Government intervention in workplace disputes are counter-productive and will not serve the interests of employers or employees. Suggestions that all adjudication within the employment jurisdiction should

be performed in the Employment Court rather than the Tribunal are impractical and would only serve to increase costs for the parties involved and move dispute resolution further away from the workplace where it belongs.

National is committed to ensuring that the institutions integral to the Employment Contracts Act are able to maintain an acceptable level of service to employees and employers. For this reason we have increased the resources available to the institutions in successive Budgets, enabling them to better manage their workloads. In the 1999 Budget additional funding was allocated to provide for an extra Employment Tribunal Member for the Central North Island. That was on top of the $1.1 million in additional funding that the Tribunal received in the 1998 Budget.

Holidays

Clarifying the entitlements in the Holidays Act 1981 and removing outdated anomalies is long overdue. The Holidays Act has been subject to criticism from many groups in recent years. This is unsurprising since the Act was originally designed in the late 1940s when a 40 hour, Monday to Friday working week was standard. The passage of time has left the Act out of step with modern working arrangements. The Act has frequently had to be interpreted by the courts, on occasions when the general rules contained in the Act could not easily be applied to modern workplace situations. The consequence being that there are now a number of possible conflicting interpretations of what constitutes holidays or what are the entitlements to days off in lieu of public holidays.

To address the practical problems with the Act that affect workplaces the Government sought to ensure that entitlements would be clear to both employers and employees and that the law would be relevant and workable both now and in the future. In a number of areas, it was proposed that current case law be explicitly included in the Act. This would help ensure certainty of entitlement and clarity of the statute.

The Government proposed, for example, that the Act should state explicitly that employees who work on any part of a public holiday receive an alternative day off. The Act was also to state the minimum entitlement for working a public holiday, ordinary pay plus extras such as piece rates and overtime. The Act would clarify that employees engaged for less than a year may have their holiday pay incorporated in their hourly rate.

To help make the Act more relevant to a seven days a week working environment the issues surrounding the "Mondayisation" (and often Tuesdayisation) of Christmas Day, Boxing Day, New Years Day and January 2nd were addressed. People working on the weekends but not Monday or Tuesday were missing out on an extra day off. This situation was to have been remedied by observing these holidays on either the days they fall or the next working day depending on when the employee would otherwise have worked.

For matters of consistency ANZAC Day and Waitangi Day were to have been brought into line with other public holidays. The "one-tenths" rule for people in "factories and undertakings" was to have been removed to ensure all employees have the same minimum holiday entitlements regardless of where they work.

It is no secret that I would have preferred the proposals to include provision for greater flexibility by allowing some tradability of statutory holidays for cash. I still believe that employers and employees can only benefit from greater flexibility in the way their holiday entitlements are taken. This flexibility would have enabled employees and employers to come to arrangements that better suited their individual needs. In saying this it should be clarified that the National Party has no intention of removing employees' entitlements to paid leave.

It is unfortunate that the debate on the issues surrounding the Holidays Act was restricted by misleading and politically motivated statements. While the Act will inevitably be amended it has been to the detriment of the workplace that these issues have not been able to be dealt with already.

Parental leave

Last year the Government supported the referral of Laila Harre MP's Paid Parental Leave Bill for the introduction of paid parental leave to Select Committee. The Government believed that this was a necessary step as this was an issue that required full debate and careful consideration of the potential effects, both positive and negative.

The Parental Tax Credit announced in the 1999 Budget recognises the costs associated with a new born baby. It is targeted to low and middle income families and will not discriminate against mothers in those families who do not have paid employment. It will also not impose the same high costs on businesses that the Alliance's proposed payroll tax would.

The Parental Tax Credit is part of the Government's strategy to strengthen families by encouraging increased parental responsibility and enhancing the ability of parents to provide good care for their children. This strategy underlies the Government's commitment to targeted initiatives that strengthen families through specific targeted measures. When taking other areas of government assistance into account, such as free doctors visits for pregnant women, New Zealand has a very supportive environment for mothers and expectant mothers, whether in paid employment or not.

EEO

When National repealed the overly prescriptive Employment Equity Act 1990 we created a flexible and voluntary climate for employers to implement Equal Employment

Opportunities (EEO) by the means that best suited their own needs. While there has been notable progress by some employers and some fine examples of commitment to quality EEO employment practices, there is room for improvement. Employers that do not commit themselves to EEO not only risk losing talent and market opportunities, they also expose themselves to complaints and risk jeopardising their employment relations. Failure by employers to respond positively to the voluntary climate increases pressure from sections of the community for more regulation.

National will continue to assist employers through our commitment to the EEO Trust and the Government administered EEO Contestable Fund. These two initiatives have assisted businesses to develop their own solutions to the issues they face in their workplaces. The EEO Trust has been a particularly successful initiative. As an autonomous organisation funded jointly by Government and employers it has helped many medium to large businesses identify the real business benefits of family friendly policies.

Conclusion

The industrial relations framework which National instituted with the passing of the Employment Contracts Act in 1991 has met its intended objectives of increasing flexibility and facilitating employment and economic growth. The legislation has substantially improved our ability to compete in the global market and the recent economic climate has proved that flexibility is key to adjusting to external shocks.

During the debate on the second reading of the Employment Contracts Bill the Rt Hon Helen Clark described the Bill as a "recipe for anarchy at the workplace level". Time has proven Ms Clark to be wrong. Quite simply, without the Employment Contracts Act fewer New Zealanders would be in work and those with jobs would be earning less.

While some on-going fine-tuning of legislation will naturally be needed to ensure our legislation continues to be fully relevant to workplaces in the next century, the National Party believes the current framework will keep contributing to a strongly growing internationally competitive enterprise economy.

The Australian Employment Minister is currently in the process of introducing a number of changes to Australia's labour laws into the Australian Federal Parliament including:

- temporary exemptions from unfair dismissal laws for mid-to-long term unemployed people, to give them a start into jobs;
- allowing businesses that meet best practice requirements to opt out of the federal award system;
- removing disincentives to the employment of new staff by introducing a six month qualifying period before unfair dismissals apply;
- extending coverage of youth rates; and
- providing new small businesses with an exemption from unfair dismissal laws.

While some of these proposals would not fit our industrial relations environment, if Australia goes forward, and New Zealand remains static or goes backwards we will rapidly lose our competitive edge. New Zealand simply cannot afford this risk. The policies of the Labour-Alliance bloc seek to reduce the abilities of individual workplaces to implement the arrangements that best suit their needs. The casualties would be the people left without jobs.

Future National Governments will not allow the opportunities of New Zealanders and the gains that have been made since 1990 to be eroded.