

Submission by



GROWING PROSPERITY AND POTENTIAL

to the

Transport and Industrial Relations Select Committee

on the

Employment Relations (Allowing Higher Earners to Contract out of Personal Grievance Provisions) Amendment Bill

1 May 2016

SUBMISSION BY BUSINESSNZ ON THE EMPLOYMENT RELATIONS (ALLOWING HIGHER EARNERS TO CONTRACT OUT OF PERSONAL GRIEVANCE PROVISIONS) AMENDMENT BILL¹

1.0 INTRODUCTION

1.0 BusinessNZ welcomes the opportunity to make a submission to the Select Committee on the Bill. It does not seek to appear before the Committee to address its submission.

1.1 BusinessNZ supports the Bill but recommends that it be amended to reduce the risks of conflict over its application, and the erosion of its focus.

2.0 RECOMMENDATIONS

2.0 It is recommended that the Select Committee agree to the Bill subject to:

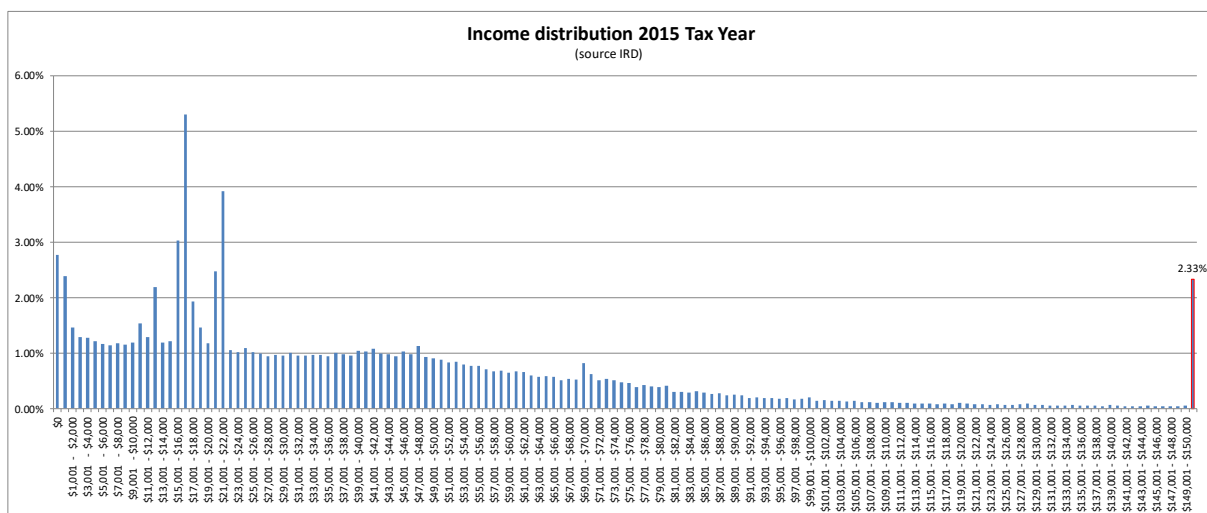
- amending proposed section 102A (1) (a) to read “an employee is negotiating with their employer, or prospective employer, to make or amend an individual employment agreement” .
- deleting “salary” in proposed section 102A (1)(b) and substituting it with “remuneration”.
- the Bill protecting the agreement of an employee who, being eligible at the time, contracted out of the personal grievance provisions of the Employment Relations Act 2000 but whose income has later fallen below the \$150,000 threshold, while remaining in the same position.
- Inclusion of a simple means of updating the threshold remuneration threshold to ensure the ability to contract out of the personal grievance provisions of the Employment Relations Act 2000 remains targeted at its intended audience.

3.0 GENERAL COMMENTS

3.0 This Bill will directly affect very few employees.

3.1 As can be seen in the graph below, just over 2% of wage and salary earners are paid more than \$150,000 per annum at the present time. Probably even fewer will want to take advantage of the Bill’s provisions. However, this is not of itself a reason for the Bill not to proceed.

¹ Background information on BusinessNZ is attached as Appendix One.



Why support the Bill?

- 3.2 Employees in the top management and professional ranks of most organisations generally are recruited to “one-off” roles for their relevant personal attributes rather than for generic skills found in multiple roles lower in an organisation.
- 3.3 Due in part to the relative uniqueness of their role, the strategic value of top ranked employees to an organisation is often very significant. It is therefore important that changes in such roles be managed smoothly. Distractions such as lengthy and complex grievance processes may impact on both the internal management and efficiency of the business and external perceptions of its market value.
- 3.4 Primarily for this reason, it is rare for personal grievances to be taken by senior employees. Instead, differences (especially those leading to departures) are normally settled behind “closed doors”. Such settlements typically recognise several factors, but almost always include the opportunity cost of not having to go through a potentially protracted and public grievance process.
- 3.5 However, while the “back room” option is often employed in management and professional situations, it is not so common in other areas of employment. Furthermore, incomes of over \$150,000 per annum are no longer the traditional preserve of senior line and professional roles. Incomes over \$150,000 are increasingly common in industries where skilled operators and technicians are required. Some of these roles are also unionised.
- 3.6 Added to the fact the Bill will impact few employees overall, it will likely attract less enthusiasm from employees not in senior line and professional roles. It will almost certainly have little effect inside collective bargaining as unions will almost certainly look to bargain exclusions on the next turn of the bargaining wheel.
- 3.7 BusinessNZ therefore expects most activity will be inside the bigger corporates for whom the relatively high percentage of higher earners poses the greater risk in terms of exposure to court action. Having the ability to agree a pathway to smooth transitions in strategic and senior roles will be of undoubted benefit. Moreover, setting out this pathway at the beginning of a relationship will have the added

benefit of not having to negotiate an arrangement when circumstances are more difficult. It is mainly for this reason that BusinessNZ supports the Bill.

Risks

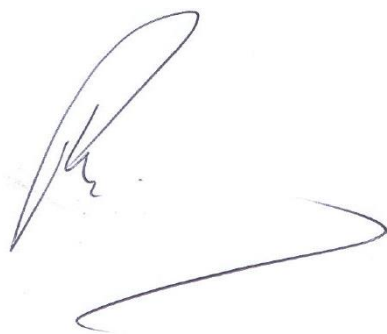
- 3.8 Using the Bill's provisions would not be without risk however. Notwithstanding the benefits outlined above, it needs to be remembered that the absence of access to the personal grievance provisions of the Employment Relations Act does not prevent an aggrieved individual from taking a common law case to the High Court. Damages claims could still be forthcoming². This being so, the parties to an agreement to contract out of the Act's provisions should take pause before the maxim *caveat emptor* before choosing their preferred option.

4.0 SPECIFIC COMMENTS ON THE BILL

- 4.0 Proposed section 102A (1) (a) contains redundant language. Since it is clear that one person is an employee and the other an employer it is less ambiguous to state the roles directly. Furthermore, as it stands now the proposed section could be read to exclude the amending of an employment agreement subsequent to appointment. We believe the right to contract out should be able to be exercised at any time by agreement, provided the threshold criteria are met. We recommend the proposed section be amended to read "*(a) an employee is negotiating with their employer, or prospective employer, to make or amend an individual agreement; and*".
- 4.1 Proposed section 102A (1) (b) restricts the application of the Bill's provisions to employees whose gross annual salary is greater than \$150,000. However the term salary does not cover employees whose remuneration comprises, for example, wages or commissions. This raises questions about the Bill's target population. Annual salaries are almost universally the remuneration mechanism for management and professional roles, whereas wages and commissions tend to be more common in technical and sales environments.
- 4.2 If the Bill is (to be) targeted at "management" it should say so. If not, it is recommended that the term "*remuneration*" be substituted for "*salary*".
- 4.3 With respect to wages and commissions, it should be recognised that these are prone to fluctuation. This raises the possibility that employees who were over the threshold at the time at the time they contracted out of the personal grievance provisions may fall under the threshold later. It is recommended that the Bill protect the situation of employees who have willingly contracted out of the personal grievance provisions and whose gross annual remuneration has fallen below the \$150,000 threshold, while remaining in the same position.
- 4.4 Finally, a means of keeping the threshold up to date needs to be included. It is recommended that the Bill include a clause permitting the threshold to be adjusted over time by means of regulation. This could be by means of a separate clause in

² *Whelan v Waitaki Meats Ltd* (1990) ERNZ Sel Co 960; [1991] 2 NZLR 74 is a cited case in New Zealand distinguishing that *Addis v Gramophone Co Ltd* prohibition of the awarding of damages for distress only applies to commercial contracts, and not to employment contracts.

the Minimum Wage Regulations which are promulgated annually, or another separate means.

A handwritten signature in black ink, consisting of a large, sweeping loop followed by a smaller, more intricate flourish.

Paul Mackay
Manager Employment Relations Policy
Business New Zealand

Promoting New Zealand's success through sustainable market-led growth

[BusinessNZ](#) is New Zealand's largest business advocacy body, representing the majority of New Zealand private sector companies as members, affiliates or through membership of BusinessNZ divisions such as the Major Companies Group, ExportNZ, ManufacturingNZ, Sustainable Business Council and Buy NZ Made.

BusinessNZ represents around 14,000 businesses that are members of four regional business organisations:

[Employers & Manufacturers Association](#) (EMA) - northern half of North Island

[Business Central](#) - central region

[Canterbury Employers' Chamber of Commerce](#) (CECC)

[Otago-Southland Employers' Association](#) (OSEA)

BusinessNZ's [Major Companies Group](#) (MCG) works with and represents around 80 of New Zealand's largest companies.

[ExportNZ](#) and [ManufacturingNZ](#) work with and advocate for New Zealand exporters and manufacturers.

The [Sustainable Business Council](#) (SBC) provides mainstream leadership on sustainable business matters.

The [BusinessNZ Energy Council](#) (BEC) is a group of New Zealand organisations taking on a leading role in creating a sustainable energy future for New Zealand.

The [Buy NZ Made](#) Campaign encourages consumers and organisations to help create local jobs and growth by buying New Zealand goods and services.

BusinessNZ's [Affiliated Industries Group](#) (AIG) is a grouping of 75 industry associations affiliated to BusinessNZ that work together on pan-industry issues.

BusinessNZ undertakes research, analysis and advocacy on behalf of all business in New Zealand.

Research activities include producing monthly surveys of the manufacturing and services sector – the *BNZ-BusinessNZ Performance of Manufacturing Index* (PMI) and *BNZ-BusinessNZ Performance of Services* (PSI) as well as other surveys on business issues.

BusinessNZ analysts work in economic, environmental, employment and skills disciplines and provide submissions on current and proposed legislation affecting the environment for business and New Zealand's growth.

Public advocacy, public speaking, work programmes with other organisations and advocacy with decision makers make up a large part of BusinessNZ's work.

BusinessNZ champions policies leading to:

- international competitiveness
- balanced employment, economic and environmental legislation
- compliance and tax levels that foster growth and investment
- innovation and skill development
- an environment fostering the production of high value goods and services