NARGON

Submission

By the

National Association of Retail Grocers and Supermarkets of New Zealand

to the

Transport and Industrial Relations Select Committee

on the

Employment Relations Amendment Bill (No. 2)

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1. INTRODUCTION

1.1 This submission is made on behalf of the National Association of Retail Grocers and Supermarkets of New Zealand (NARGON), an organisation representing approximately 40% of New Zealand's food retailing industry.

1.2 NARGON has around 500 retail members who are owner-operators of retail food warehouses, supermarkets and grocery and convenience stores. In the main NARGON's retail members are aligned to a banner advertising group of stores such as Pak'N Save, New World, Super Value, Fresh Choice, Four Square and Shoprite.

1.3 NARGON is pleased to support the general thrust of this bill which will allow employers in the retail grocery industry a greater degree of flexibility in the management of their businesses.

1.4 However, NARGON has concerns about aspects of the proposed legislation that if left unamended, could be a likely source of difficulty for the future

2. RECOMMENDATIONS

2.1 That the bill proceed but amended in line with recommendations set out below, namely:

1. Amend clause 9 (section s32(6 of the Employment Relations Act (ERA)) to read:
   … this section does not, during collective bargaining, prevent an employer from communicating with union members on whose behalf the union is bargaining (including …

2. Reconsider the wording of the ERA's 90-day trial period provisions (ss67A and B, clause 12) to ensure their intention is clear and they

operate effectively, giving more potential employees the chance to obtain work.

3. Make clear that the dismissal procedure set out in subsection (3) of new s103A is for guidance purposes only and is not intended to be followed to the letter (clause 14).

4. Reconsider whether it is desirable (for reasons supplied) to insert another layer of mediation into the employment relations problem solving process (clause 20).

5. Check whether clause 26(1) should provide for 'and' in s159(1)(b) to be substituted for 'or' rather than the other way round as at present.

6. Given the proposed expansion of Labour Inspectors' powers (clause 36), consider placing the following requirement on IRD by inserting into the amendment::

> *To ensure employers are aware of their responsibilities under this Act and under other employment-related statutes, the Department of Inland Revenue must send to every new employer concise material setting out rights and responsibilities that accrue to the parties to the employment relationship. This material must be supplied to the employer together with, and in addition to, the information supplied by that Department concerning PAYE, GST and FBT requirements."*

3. DISCUSSION

3.1 *Clause 6*

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The amendment to s20A is welcomed since by its nature, the retail grocery industry is not one where staff can be expected to stop work immediately a union representative enters an employer's premises. Requiring representatives first to seek the employer's consent, with a response to be provided within two working days and consent not to be

unreasonably withheld, is a sensible compromise. Entry can then be arranged at a suitable time that does not disrupt business activities and so allows for interested parties to have a proper discussion Entry without notification is simply not good manners.

3.2 *Clause 9*

Clarifying the ability of employers to communicate factually with employees during collective bargaining is another sensible amendment. The extent to which employers are permitted to communicate has long been an area of contention, although communication can sometimes be necessary to make what the employer is proposing clear and to correct any possible misinformation.

It is suggested, however, that as collective bargaining is conducted by unions on behalf of union members (not employees in general), it would be better for subsection (6) of s32 to refer to explicitly to union members, rather than to employees

… this section does not, during collective bargaining, prevent an employer from communicating with union members on whose behalf the union is bargaining (including …

3.3 *Clause 12*

The extension of the 90-day trial period to cover all employers will provide further employment opportunities for persons who might otherwise have little chance of obtaining work. Unfortunately the Employment Relations Act's current 90-day trial period provisions (ss67A and B) have recently been the subject of a narrow interpretation by the Employment Court, defeating what appears to have been the legislative intention. The Court found the employee there was not a 'new' employee because she did not sign her employment agreement until her second day at work. The trial period did not, therefore, as s67A (2)(a) requires, start '…at the beginning of the employee's

employment….'. This interpretation would mean that an employer who, in terms of clause 10 (inserting a new s64) kept only an unsigned copy of an employment agreement would be unable to rely on a 90-day trial period clause, even if the clause were subsequently agreed in writing.

Further, there are many instances where it is not the practice to have employees sign their employment agreements but to confirm acceptance of an agreement's terms and conditions by means of an accompanying letter. This practice, too, would be likely to invalidate any 90-day trial period an agreement might include.
If the 90-day trial period is to operate as it seems was intended, greater consideration needs to be given to the wording of the statutory provisions and to what may be required where a term of this kind is included in an employment agreement.

3.4 *Clause 14*

The proposed change to section 103A is essentially a reintroduction of the test for justification in personal grievance cases found in the decision of the Court of Appeal in *BP Oil* case [1989] NZILR, 278, where Cooke P stated: *'The question is essentially what it is open to a reasonable and fair employer to do in the particular circumstances. Thus it is necessarily a question of fact and degree.'*

The current test makes it too easy for decision makers to second guess the employer's actions and many employers can incur considerable expense if a decision make decides they have got things wrong. This is particularly the case for smaller employers such as NARGON's members. Lacking human relations resources, smaller employers can often be at real risk when dealing with an unsatisfactory member of staff. The proposed change should mean all parties are treated fairly.

NARGON would, however, express some caution about the procedure set out in subsection (3) of new s103A. The legislation needs to make clear that this is for guidance purposes only and is not intended to be followed to the letter.

3.5 *Clause 15*

Removing from reinstatement its status as the primary remedy for unjustified dismissal recognises the obvious fact that where an employment relationship has broken down it makes little sense to order an arbitrary reinstatement. This is especially true for smaller employers and was recognised when the personal grievance process was first introduced. Though it was later made the primary remedy, decision makers have generally accepted that reinstatement will seldom prove successful and consequently it is rarely awarded.

3.6 *Clause 20*

While it is appreciated that this amendment represents an attempt to have parties experiencing an employment relationship problem resolve the matter as informally as possible, the likely effect will be to insert into the dispute/grievance resolution process yet another layer of bureaucracy. Mediation currently tends to operate on a ‘go away’ basis. (Rightly or wrongly the employer pays up as the least expensive option). The current proposal will scarcely cure that state of affairs while, on the other hand, it may well prolong an already protracted exercise. This is an amendment it may be advisable to rethink (along with related consequential amendments).

3.7 *Clause 26*

Subclause (1), provides for s159(1)(b) of the ERA to be amended by omitting ‘and’ and substituting ‘or’. However, the word ‘and’ does not

appear in paragraph (b) so possibly the substitution should be the other way round, that is, ‘and‘ should be substituted for ‘or’.

3.8 *Clause 36*

There must be considerable concern about this proposal to provide Labour Inspectors with further powers in relation to the enforcement of the specified statutes. Before this change is written into law more thought should be given not only to whether there are sufficient numbers of Labour Inspectors but whether there are sufficient numbers with the kind of expertise that will allow them to carry out these functions adequately.

When the Employment Relations Act was first introduced, employers pointed out that any breaches of relevant law were not generally deliberate but the consequence of a lack of knowledge of what becoming an employer involves. The New Zealand Employers’ Federation therefore recommended the inclusion of the provision set out below if the then proposal to provide Labour Inspectors with an expanded role were to go ahead (as of course it did). The same provision is still relevant.

> *To ensure employers are aware of their responsibilities under this Act and under other employment-related statutes, the Department of Inland Revenue must send to every new employer concise material setting out rights and responsibilities that accrue to the parties to the employment relationship. This material must be supplied to the employer together with, and in addition to, the information supplied by that Department concerning PAYE, GST and FBT requirements.*