PO Box 10232, The Terrace,
Wellington, 6143

Level 4, Co-operative Bank House

20 Ballance Street, Wellington, 6011

Phone: +64 4 472 3795

Fax: +64 4 471 2861

Web: www.hortnz.co.nz

Email: info@hortnz.co.nz

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SUBMISSION TO THE EDUCATION AND WORKFORCE SELECT COMMITTEE ON THE EMPLOYMENT RELATIONS AMENDMENT BILL

Submitter: Horticulture New Zealand Incorporated

Submitted by: Mike Chapman, Chief Executive

Contact Details: PO Box 10232, The Terrace, Wellington 6143, New Zealand

T: +64 4 472 3795

E: Mike.Chapman@hortnz.co.nz

HORTICULTURE IN NEW ZEALAND

1. Horticulture New Zealand ("HortNZ") appreciates the opportunity to make a submission to the Education and Workforce Select Committee on the Employment Relations Amendment Bill ("the Bill"). We wish to appear before the Committee to present our submission.
2. This submission is endorsed and supported by the following named organisations:
    - Vegetables New Zealand Incorporated
    - Process Vegetables New Zealand
    - New Zealand Citrus Growers Incorporated
    - Onions New Zealand
    - New Zealand Avocado
    - New Zealand Apples and Pears
    - Tomatoes New Zealand Incorporated
    - New Zealand Kiwifruit Growers Incorporated
    - New Zealand Asparagus Council
    - Katikati Fruitgrowers Association
    - Central Otago Fruitgrowers Association
    - Southern Belle Orchard
    - Leaderbrand New Zealand Limited

3. There are 5,500 commercial fruit, vegetable and berry fruit growers in NZ who employ over 60,000 workers. Due to the seasonal nature of horticulture our workers are a mixture of permanent and seasonal workers with many seasonal workers progressing to full time positions after a few seasons work and training. The growers in the industry are mostly small to medium sized business with a few larger corporates in some sectors. Therefore changes in employment law can have a dramatic effect on these businesses ability to remain profitable and continue to offer job opportunities to New Zealanders. The vast majority of our employers offer training programmes and incentivise local New Zealanders into seasonal and permanent work. As such horticulture is a significant employer and a key factor in the maintenance of provincial New Zealand's cultural and social aspects.

THE BILL

4. We acknowledge the intent of the Bill is to ensure key minimum standards and protections for employees, to introduce greater fairness in the workplace between employees and employers, in order to promote productive employment relationships.
5. We submit that it is important for employment law in New Zealand to strike an appropriate balance between meeting the rights of workers and enabling businesses to grow and prosper.
6. We submit that employment law measures that do enable workplace productivity should be carefully scrutinised before being made law and, if to be made law, for the employer to be accorded appropriate compensation to enable their business to continue to trade.
7. Many of the horticulture employers are offering work and nurturing New Zealanders into a long term career in the industry. As skills grow, these workers are compensated accordingly. Therefore provisions that restrict employers' ability to offer different conditions of employment may well be detrimental to such programmes continuation. Many of our members have advised us that they will cease these programmes in the event that employment law makes it too restrictive to effectively run such programmes.
8. Horticulture by its nature requires work to be done at exactly the right time to ensure premium products are sent to market to earn the returns needed to sustain the growing operations. We submit that a requirement to take breaks at the same time will not be conducive to high productivity. We do submit in strong support of workers taking appropriate breaks during their work day. What we do not support is mandated timing.
9. We submit for a small to medium sized business to be required to help fund union activities and require new workers to join unions will also not be conducive to productivity. We have no objection to workers belonging to unions and having reasonable opportunities to do so, but submit this should not be at the expense of the employers' ability to continue to trade effectively.
10. We submit that any collective bargaining provisions should recognise that there are a multitude of employment situations and that in the height of seasonal work there is no effective time for such bargaining. We therefore submit that for seasonal workers there needs to be an effective allowance made for the time pressure that employment and that this work is conducted under.
11. Finally in these opening comments we submit that compulsorily requiring workers to become part of a union on first employment in today's society will not be acceptable to many workers. We believe that voluntary union options made available in a timely and appropriate manner are more suited to 2018.
12. We submit that the combined effect of these proposals will increase complexity, impose additional processes and costs, slow responses to business pressure and the

demands of nature and inhibit economic growth. The totality of these proposals appears to conflict both with the section 3 good faith relationships for productive work places and the Government's objectives of a high performing, high wage economy. We submit that an unintended consequence may be to return New Zealand's employment environment to one of past years and lower productivity.

13. The Employment Relations Bill is a comprehensive document. In the interests of efficiency, this submission will address only clauses where HortNZ and its supporting parties propose amendments or provides specific commentary either in support or opposition to the clauses of the Bill.

CLAUSE 4: 'AGREE' OR 'NOTIFY'

14. Clause 4 entitles union delegates to reasonable paid time to represent employee(s).
15. The structure of proposed section 18A(2) allows for two ways in which an employee can arrange to carry out duties as union delegate within work hours. Option 18A(2)(a) the employee must *agree* with the employer that the employee may undertake activities. Option 18A(2)(b) the employee must *notify* the employer- (i) when the employee intends to undertake the activities, and (ii) how long the employee intends to spend undertaking the activities.
16. This suggests that by opting for 18A(2)(b) the employee would hold a balance of power over the employer not afforded in option 18A(2)(a) which necessitates a negotiation between employee and employer.
17. We recognise this is in effort to address the perceived inequality of power in employment relationships but we submit that this takes the balance too far the other way.
18. We therefore submit that 18A(2)(b) be deleted and 18A(2)(a) be retained achieving the object of recognising that employment relationships are built on mutual obligations of trust and confidence and mutual agreement.

CLAUSE 4: "REASONABLE TIME"

19. The proposed section relating to the employee's right to reasonable paid time off is an effort to recognise the responsibilities of an employee as a union delegate.
20. We submit that 'reasonable' is broad and undefined. What constitutes 'reasonable' (or 'unreasonable') offers considerable scope between employer and employee, and between industries. Any challenge by employers under s18A(3) is an inherent source of conflict and disruption and is unlikely to reduce the need for judicial intervention.
21. We submit that potential conflict could be reduced if the employer is aware that a delegate's absence from their normal duties would not cause disruption.
22. We submit that the proposed s18(2)(b) be amended to add "(iii) what arrangements are being, or have been made to ensure the normal work of the delegate is not unreasonably disrupted while the delegate is undertaking the activities."

CLAUSES 5 – 8: UNION ACCESS TO WORKPLACES

23. The amendments and repeals made in clauses 5 through 8 are an effort to increase union representatives' access to workplaces by allowing a union representative to enter a workplace without obtaining consent, by providing that nothing allows an employer to unreasonably deny a union representative access to a workplace, and by imposing penalties on employers for refusing, without lawful excuse, to allow a representative of a union to enter a workplace.
24. We submit that the current requirement that prior permission be sought to enter the workplace serves an important heath and safety purpose. While union officials are required to comply with workplace policies and procedures, they may circumvent these requirements when they cannot find the employer or a representative of the employer.

25. This increases the risk to employers of non-employees being in the workplace without their knowledge. This decreases the employer or their delegated manager's ability to comply with Part 2 Subpart 1 Clause 30(1) of the Health and Safety at Work Act 2015, whereby A duty is imposed on a person requiring the person- (a) to eliminate risks to health and safety, so far as is reasonably practicable; and (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as it is reasonably practicable. This is particularly significant in high-risk areas which necessitate health and safety briefings and inductions for all visitors on site. The extent to which a person has, or would be reasonably expected to have, the ability to influence and control the matter to which the risks relate, as per Clause 30(2) would be significantly reduced by the ability of union representatives to be present in a workplace without the knowledge and therefore prior briefing of an employer or manager.
26. We submit that clauses 5-8 be deleted.

CLAUSES 9 – 11 AND 14: DUTY TO CONCLUDE BARGAINING

27. We are concerned that the duty to continue bargaining until all matters have been exhausted is in conflict with the Object of the Act, which is "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship – by protecting the integrity of individual choice; and by reducing the need for judicial intervention."
28. From a practical perspective, HortNZ considers that there are a number of consequences to this clause.
29. For instance, proposals to restructure businesses, often for reasons of economic survival, can be held up while bargaining continues. The proposed provision strengthens that view and we submit makes it likely that the requirement to settle a collective agreement will become a tactical tool in any attempt to resist change. This has negative prospects for growth and productivity.
30. In addition these clauses appear to be in conflict with the objectives of the Act, in particular building productive employment relationships through the promotion of good faith, and Article 4 of the Right to Organise and Collective Bargaining Convention 1949 that requires national mechanisms for collective bargaining and conciliation to be voluntary
31. We therefore submit that these clauses be deleted or amended to remove this potential tactical use of it during a business restructure.

CLAUSE 13: COLLECTIVE BARGAINING

32. This clause removes the ability for an employer to opt out of a collective bargaining process where there are more than one employer. The horticulture industry is made up of a large number of small intergenerational family businesses totalling around 5,000 spread throughout the country. The ability for all 5,000 business to be involved in collective bargaining is practically impossible.
33. We submit that this clause either be deleted or amended to restrict it operations to large scale businesses where there are only one or two operators.

CLAUSES 17 – 19: PROVISION OF INFORMATION TO NEW EMPLOYEES AND UNIONS

34. Clauses 17 – 19 are designed to ensure that new workers have all necessary information and access to unions from the commencement of their employment by requiring employers to provide unions with the details of all new employees including prospective employees to the relevant union, and to require all new employees to provide their details for transmission to the union by the employer.
35. We are concerned that the requirements for providing unions with details of all employees – including prospective employees – poses some serious privacy concerns. An employee can decline to their contact details being provided to the

union by not completing the form specified in subsection 63AA(2). However, the non-supply of this form to the union can trigger 63AA(5) whereby the employer is required to provide the union with details of all people who fail to complete and return the form, unless the employee has objected to the transmission of that information.

36. If the form in 63AA(2) is not filled in however, the objection is not registered, as the process is opt-out, via the form. Therefore a non-supply of this form is not an objection, and therefore employers are required to transmit to the union the names and details of employees who have preferred to not provide information on the requested form.
37. We submit that this compromises employee privacy, raises the issue of duress, whereby the unions will be able to contact and put pressure on a new employee to join the union.
38. Not only do these clauses clearly provide opportunity for coercion and duress, they add considerable bureaucracy to the recruitment process in businesses that have collective agreements.
39. We submit that this clause is designed to assist union efforts to recruit new members and have no beneficial implications for business productivity.
40. We recommend that Clauses 17 – 19 are deleted.

CLAUSES 18 – 20: TERMS AND CONDITIONS FOR NEW EMPLOYEES

41. Clauses 18 – 20 reinstate an earlier requirement that new employees be covered by a collective agreement for the first 30 days of their employment.
42. In addition, it adds provisions that define the clauses for scope of coverage in both collective and individual employment agreements negotiated by employees who have elected not to join a collective agreement after the first 30 days.
43. We are concerned that the operation of these clauses may inhibit what an employer may agree with a new employee who, after the first 30 days, decides not to join the union and the applicable collective agreement.
44. The effect of clauses 19 and 20 is that any individual who elects not to join the union in a workplace where there is an applicable collective agreement will not be able to negotiate terms that are inconsistent with the collective agreement.
45. Many horticultural employers prioritise offering employment opportunities whereby New Zealanders are nurtured into long-term careers in the industry. As skills grow, workers are compensated accordingly. Provisions that restrict employers' abilities to offer different conditions of employment may be detrimental to such programmes. Employment law would make these programmes too restrictive to effectively run, and would be at threat of cessation.
46. We submit that clauses 18 to 20 are deleted.

CLAUSE 35: MEAL BREAKS

47. We support the approach of Clause 35 whereby meal breaks are determined according to the length of the work period rather than how long the employee has worked.
48. We support the exemptions provided for essential services, where specified meal breaks are impractical.
49. We submit however that 69ZE(3)-(7) may have the unintended negative consequence for all employees who started at the same time being on break at the same time throughout the day. For the horticulture sector, especially during peak times such as harvest, when employees all generally commence at the same time, this would result in periods of time when little to no harvest is taking place. This has flow-on effects to post-harvest processes and reduces productivity.
50. We submit that staggered break times should be permitted where circumstances dictate due to production efficiencies.
51. We therefore submit that this clause be amended to provide for "reasonable and practicable" breaks.

CLAUSE 29: 90 DAY TRIAL PERIODS

52. We submit that the effect of this clause needs to be clarified to identify whether it applies to an actual worker count or a count of full time equivalents.
53. We further submit that placing a 20 worker limit on the 90 day trial periods will mean this provision will not apply to the majority of our horticulture operations. We therefore submit that this number be increased to enable greater participation in 90 day trial benefits as this will result in an increased number of employment opportunities given to new employees.

CLAUSES 38 AND 39: RESTORING REINSTATEMENT AS THE PRIMARY REMEDY FOR DISMISSAL

54. Causes 38 and 39 require the ERA to provide for reinstatement whenever it is practicable and reasonable to do so, as the primary remedy for dismissal.
55. Considering that the majority of dismissals result in a breakdown of trust on both sides, reinstatement is rarely likely to be "practicable and reasonable."
56. We submit that practice indicates that most parties would prefer to move on rather than return to a workplace where such a mutual feeling exists. Therefore there will be little change in reality.

CONCLUSION

57. Horticulture New Zealand is committed to ensuring minimum standards and protection for employees in order to promote productive employment relationships.
58. In our submission we draw attention to the extra work and compliance costs that these changes will create for employers, and we submit that these changes will not meaningfully enhance workplace productivity and should not be proceeded with in their current form.

Mike Chapman
Chief Executive
Horticulture New Zealand

ENDS