

Submission

By



to the

Transport and Industrial Relations Select Committee

on the

**Employment Relations (Workers' Secret Ballot for
Strikes) Amendment Bill 2010**

May 2010

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**EMPLOYMENT RELATIONS (WORKERS' SECRET BALLOT FOR STRIKES)
AMENDMENT BILL 2010**

SUBMISSION BY BUSINESS NEW ZEALAND

INTRODUCTION

1. Business New Zealand welcomes the opportunity to make a submission on the Employment Relations (Workers' Secret Ballot for Strikes Amendment Bill ("the Bill"). It wishes to appear before the select committee to talk to its submission.
2. Business New Zealand generally endorses the Bill and recommends that it proceeds. Notwithstanding our general support, we have some recommendations that we believe could improve the Bill.

RECOMMENDATIONS

3. Business New Zealand recommends that the Bill proceeds but that
 - a. the commencement date be the date of Royal assent.
 - b. proposed new subsection 81(4) be reworded as follows:

“(4) A strike that is lawful under section 83 may not proceed unless

 - (a) a secret ballot has been taken of all employees eligible to take part in the proposed strike; and
 - (b) at least 75% of returned votes are in favour of the strike. “
 - c. A new subsection (5) be inserted to read:

“(5) A ballot conducted under subsection (4) -

 - (a) must be conducted by either –
 - a. the union whose members are eligible to vote,
 - b. a person chosen for the purpose by the employees who are eligible to vote.
 - (b) must not enable the identification of an employee who either voted or did not vote”

COMMENCEMENT DATE

4. Business New Zealand does not support a lengthy delay in the introduction of this clause. Statistics New Zealand is reporting an increase in the number of strike related workplace stoppages in the March 2010 quarter and given the continuing tight economic conditions and the growing proximity of election

year, there is no reason to assume that the frequency and severity of stoppages will alter significantly in the short to medium term. There is no legal reason that requiring secret ballots to be taken before strikes should be delayed. Indeed, given that there is broad support for the proposed provision from across the political spectrum, including the CTU, inserting the provision as soon as possible seems sensible.

5. Business New Zealand recommends that the commencement date be the date of Royal assent.

BALLOT REQUIREMENTS

No ballot for strikes on grounds of health and safety

6. Before looking at appropriate wording for the proposed requirement to hold secret ballots, it is necessary to distinguish between the two grounds on which strikes (and lockouts) are lawful. The first is in support of collective bargaining. The second is in relation to health and safety.
7. Strikes for reasons related to collective bargaining are usually the result of a breakdown in the process of bargaining after a period of bargaining has elapsed. Typically there are few, if any, situations where calling a strike at short or no notice will make a significant difference to the outcome of the bargaining. Indeed advice that a strike or lockout is imminent is often the very lever required to bring the parties back to the bargaining table.
8. On the other hand, strikes for health and safety reasons can stem from a belief that failure to withdraw quickly from the workplace will result in harm to someone. Such situations can and do arise at short or no notice. It therefore seems inappropriate to require a, relatively speaking, lengthy process of balloting in such circumstances.
9. Accordingly Business New Zealand does not support the introduction of a requirement to conduct secret ballots where the reason for a proposed strike is health and safety.

Adequate redress exists

10. This does raise the possibility that some may adopt tactics that try to avoid any requirement to hold a secret ballot before striking, by calling for strikes on what might prove to be spurious health and safety grounds.
11. However, the lawful opportunity for such a tactic can arise only during a concurrent period of collective bargaining. The existence of collective bargaining at a time when a strike called on health and safety grounds has occurred has been found in the past to create effective grounds for doubt.
12. Business New Zealand therefore does not believe that any threat of maverick behaviour is so great that it requires specific counter measures. It should simply be noted that the Employment Relations Act's requirement, and the

ability of the Employment Court to impose penalties for breaches, of good faith provide bulwarks against maverick behaviour.

Requirement to hold ballot for strikes related to collective bargaining

13. The stated objective of the Bill is:

“to require unions to hold a secret ballot of their members to approve a strike before undertaking any strike action.”

14. Business New Zealand supports this objective. However, the wording of proposed new subsection 81(4) does not achieve the objective. The proposed subsection states

“a strike may not proceed under this Act, unless *the question has been submitted* [emphasis added] to a secret ballot of those employees who are members of the union that would become parties to the strike if it proceeded.”

15. The effect of the proposed wording is that a strike may not proceed unless “the question” has been submitted to a secret ballot. Technically this would permit *any* result of the ballot, including a minority in favour, to fulfil the terms of the proposed section.

16. What in fact is required is a provision that not only requires a secret ballot but also that the result be a clear majority in favour of striking.

17. Furthermore, *who* is to be balloted needs to be clear. Experience has shown that meetings called to vote on a strike are sometimes ill attended other than by the more fervent union members. To remove inconsistency in the genuine representativeness of strike votes, it seems appropriate that a secret ballot should be taken of *all* employees in respect of whose work a proposed strike would proceed. This does envisage the possibility that a secret ballot might on occasion need to be conducted “remotely”, e.g. by postal or email balloting, thus ensuring all eligible employees have at least the chance to vote.

18. It should be noted here that the changes suggested by Business New Zealand refer to “employees” not union members or unions. Even though Business New Zealand recommends that secret ballots for strikes be restricted to strikes related to collective bargaining (in which only union members can participate) we have taken into consideration the potential enactment of the government’s 2008 election commitment to eventually permit non union employees to bargain for a collective agreement.

19. For this reason Business New Zealand has also stopped short of making a recommendation supported by many members, namely that union rules must contain a requirement for secret ballots before striking. If (or when) non union employees can bargain collectively, such a requirement might prove discriminatory. That said, and in the event that the government chooses not to deliver on its commitment, Business New Zealand would support such a requirement being inserted.

20. By definition, a secret ballot must protect the identity and voting choices of participating employees. The use of such devices as unique identifiers on ballot papers would damage the integrity of a secret ballot; such devices therefore should be proscribed.

21. Lastly, a strike is a serious undertaking for employees. In particular, it denies them income for the duration of the strike. There is plenty of historical and anecdotal evidence to suggest that it is common for many workers to privately oppose strike action, yet feel no alternative but to show support lest their more fervent colleagues and union officials target them later. To be fair to all employees, it is suggested that a clear (e.g. 75%), rather than simple (50%) majority be required for a strike to proceed.

22. Business New Zealand recommends that the Bill proceeds but that, taking into account the points made above;

a. proposed new subsection 81(4) be reworded as follows:

“(4) A strike that is lawful under section 83 may not proceed unless -

(a) a secret ballot has been taken of all employees eligible to take part in the proposed strike; and

(b) at least 75% of returned votes are in favour of the strike. “

b. A new subsection (5) be inserted to read:

“(5) A ballot conducted under subsection (4) -

(a) must be conducted by either –

a. the union whose members are eligible to vote,

b. a person chosen for the purpose by the employees who are eligible to vote.

(b) must not enable the identification of an employee who either voted or did not vote”

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Business New Zealand is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association – and 73 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.