

Submission by



to the

Education and Workforce Select Committee

on the

Employment Relations (Restraint of Trade) Amendment Bill¹

September 2023

¹ Background information on BusinessNZ is attached as Appendix One.

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BUSINESSNZ SUBMISSION ON THE EMPLOYMENT RELATIONS (RESTRAINT OF TRADE) AMENDMENT BILL

1. INTRODUCTION

- 1.1 BusinessNZ welcomes the opportunity to submit on the Employment Relations (Restraint of Trade) Amendment Bill. Information on BusinessNZ is attached as Appendix One.

2. RECOMMENDATION

- 2.1 That the proposed amendment bill not proceed.

3. DISCUSSION

- 3.1 The impetus for this bill has doubtless come from a recent high profile restraint of trade case which provided the use of restraint of trade clauses with greater public attention. This is not a good reason to introduce a legislative change which will see an employer who has spent time and energy training an employee or whose employee has a sound working knowledge of the employer's business faced with an unexpected competitor. The consequence will be a further increase in the cost of doing business and is therefore a legislative proposal that must be strongly opposed.
- 3.2 The use of restraint of trade clauses developed when it came to be realised that although competition is generally desirable, in some circumstances it can be unfair. An employer should not be penalised because knowledge gained working for the employer makes competition possible. At the very least, there should be a reasonable space between the employee's departure and the setting up of a new enterprise or use of the employee's expertise by an existing competitor.
- 3.4 Under the proposed legislation, an employee must be earning three times the adult minimum wage before a restraint of trade clause can apply but it is not always the case that the departure of a less well paid employee will cause no damage to the employer's business. The employee might have extensive knowledge of how the business is run and who its clients are – and be in a position to encourage a change of allegiance. This is far from an unheard-of state of affairs.
- 3.5 The bill also requires the employer to have a proprietary interest the restraint of trade clause will protect but this is not a new requirement. It was restated by the full Employment Court in *Transpacific Industries Group (NZ) Ltd v Harris and Green* [2013] 10 NZEmpC 97, where a restraint of trade clause was not upheld as the

court, on the evidence, was unconvinced that protecting the alleged proprietary interest – confidential information - was the clause's sole purpose.

- 3.6 Nor is it a new idea that restrictions should be no greater than needed to protect the employer's proprietary interest. In the *Transpacific Industries* case, the court clearly stated that a restraint must be no wider than necessary to protect the identifiable interest with the reason for the restraint made clear to the employee who had agreed to accept it. In coming to a restraint of trade decision, whether the particular circumstances justify the restraint imposed is something the courts will look at carefully.
- 3.7 Restraint of trade clauses will be upheld where there is good reason to do so. For example, in *Television NZ v Bradley*, AEC 14/95 10 March 1995, the need to protect confidential information was accepted while in *Allright v Canon NZ* [2008] 6 NZLR 367, the former employee had known a great deal about his previous employer's strategic and financial affairs. *Warmington and O'Neill v Affco NZ Ltd*, [2012] NZ EmpC 19 is another case accepting the existence of a genuine proprietary interest in confidential and commercially sensitive information.
- 3.8 Though not a restraint of trade case as such, *Smiths City (Southern) Ltd in Receivership v Claxton and Ors* [2021] NZEmpC 169, clearly illustrates the kind of problems to which employee disloyalty can lead. There, the employee's employment agreement specifically sought to prevent the employee, without prior written consent, from engaging in any business or commercial activity which conflicted with, or was likely to conflict with, the employee's ability to perform duties for Smiths City. The clause also prevented the employee from using the company's assets or property for any unlawful or unauthorised purposes and from influencing negotiations or transactions between Smiths City and its suppliers, contractors, clients, or other parties for personal gain. And without consent, an employee could not serve on the board of directors of a competitor company or act in any other capacity. These were all prohibitions the employees chose to ignore setting up their own business while working for their employer and using the employer's premises while getting started.
- 3.9 Whether in any of the cases referred to, the employees in question were paid three times the adult minimum wage is unclear, but there will be other cases of employees who have benefitted considerably from their work for one employer who go on to use the experience gained for a competitor's immediate benefit.
- 3.10 The courts recognise there are circumstances where employees' ability to take their expertise immediately to a competitor employer, or to set up in competition, should be to some degree circumscribed (and not necessarily on the basis of what they are paid).

3.11 Remedies already exist. In disputed restraint of trade cases the courts already look closely at the facts to determine whether use of the clause can be supported. Given a legitimate proprietary interest it will be or, as in the case initially referred to, will be supported but modified (there, on the basis of length). Otherwise, it will not be upheld. This bill would impose an unacceptable burden on employers, is not needed and should not proceed.

4. RECOMMENDATION

That the bill not proceed.

- [Major Companies Group](#) of New Zealand's largest businesses
- [Gold Group](#) of medium-sized businesses
- [Affiliated Industries Group](#) of national industry associations
- [ExportNZ](#) representing New Zealand exporting enterprises
- [ManufacturingNZ](#) representing New Zealand manufacturing enterprises
- [Sustainable Business Council](#) of enterprises leading sustainable business practice
- [BusinessNZ Energy Council](#) of enterprises leading sustainable energy production and use
- [Buy NZ Made](#) representing producers, retailers and consumers of New Zealand-made goods

The BusinessNZ Network is able to tap into 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.

The BusinessNZ Network contributes to Government, tripartite working parties and international bodies including the International Labour Organisation ([ILO](#)), the International Organisation of Employers ([IOE](#)) and Business at OECD ([BIAC](#)).

BusinessNZ Network

