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ASSESSING THE EMPLOYMENT RELATIONS ACT

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In my view a good deal of commentary about the Employment Relations Act has been misdirected. I want to open this panel discussion by making six brief points.

First, the standard of reference in judging the ERA should not be the Employment Contracts Act but rather the best possible employment regime that New Zealand could put in place. The ECA had the merit of being based on the principle of freedom of contract but it departed from that principle in practice, for example by having mandatory personal grievance procedures and a specialist court. Court rulings further undermined freedom of contract. Over time that had a stifling effect on economic and employment growth. Other employment legislation like the Holidays Act limits free contracting and treats employers and employees as children, not adults. Countries like the United States and the United Kingdom don't legislate for holidays.

Second, it follows that the key issue in judging the ERA is whether it is a step in the right direction or the wrong direction. I see it as a backward step. Removing individual freedom of contract is anti-worker and anti-employer, and the likely effect is to depress real wage rates. The Employment Court has described the ERA as a "return to collectivist principles" and a discarding of the previous contractual bargaining model. The ECA did not discourage collective bargaining or unions but nor did it encourage them – it was rightly neutral. But collectivism on anything other than a voluntary basis is not the way of the future. Most people want to be treated as individuals and unionisation rates continue to fall in most countries – to 13.5 percent of total employment in the United States last year, and under 10 percent in the private sector. Margaret Wilson's goal of increasing unionisation to 30 percent of the workforce in New Zealand flies in the face of workplace realities.

Third, the ERA did not return New Zealand to compulsory unionism, compulsory arbitration and national awards (despite a hankering in some quarters for multi-employer contracts). Like the ECA it is primarily an enterprise-focused regime. Therefore – and having regard to other changes such as the opening up of the economy and changes in management practice – no one should have expected

radical changes in behaviour, at least in the short term. The ERA is best understood as a shift towards European labour market models, with their emphasis on protection for existing jobs, and away from the freer US-style regimes.

Fourth, much commentary has been about things like the incidence of disputes, whether the mediation service is doing a good job or not, and whether there is less work for lawyers (as was intended) or more. These are easy for lazy commentators to focus on but not the most meaningful indicators of whether the ERA is 'working'. Strike action has declined worldwide – inflexible and dysfunctional collective agreements and strikes are just a long-run recipe for low pay, as teachers may eventually realise. Rather, the prime focus should be on whether a country's employment framework makes it a place where it is easy to do business and which is attractive to investment.

Fifth, in this regard I think the lessons from international experience are clear-cut. Employment regimes rank with tax regimes as key factors in global competition for business investment. Europe's labour laws and practices may protect existing jobs in the short run but at the expense of high unemployment for labour market 'outsiders' and of the economic dynamism which creates both greater prosperity and security in the long run. Recognising this, several European countries have taken some steps to introduce greater flexibility. The freer US environment encourages risk-taking, innovation and the development of new industries, and much higher levels of employment. Venture capitalists won't put money into risky, new technology enterprises if they can't cut their losses and lay off staff easily if they don't work out. The Australian Labor Party wanted to move employment law in the direction of the ERA but the newly elected Liberal government wants to extend workplace reform, in particular with respect to unfair dismissals. Already some business advisers – rightly or wrongly – are saying that Australia's employment regime is more attractive to business than ours. That contrasts with views in the mid-1990s and is not good news.

Finally, the overall basis for judging the ERA is not whether it has caused the sky to fall in but whether it risks causing death by a thousand cuts. In making this judgment the ERA should not be viewed on its own – it should be seen alongside

other initiatives such as the renationalised ACC scheme and proposed legislation on the transfer of undertakings, health and safety, parental leave and holidays, and other regulatory and tax initiatives outside the employment area. All this is making it harder to do business in New Zealand. Small business in particular can't hope to know for sure what a court might find 'good faith' bargaining to mean. The consequence is likely to be less investment, thus less capital and new technology for workers to work with, and hence lower growth in wages and higher unemployment.

New Zealand should be going in the opposite direction, particularly given its natural disadvantages, and seeking to 'stand out from the crowd' by creating the best possible business-friendly and worker-friendly employment framework. The essence of this is a regime based on the principle of free contracting, not on the fallacies of bargaining inequality and collectivism that underlie the ERA. The acid test of whether this assessment is right is whether the ERA and associated changes will achieve the prime minister's goals for New Zealand of average incomes in the top half of the OECD range and an unemployment rate of 3 percent or whether it is a recipe for slow growth in real wages and European-style unemployment. Commentators should be monitoring progress against this test.