

# EMPLOYERS' POSITION PAPER ON THE EMPLOYMENT RELATIONS BILL (JUNE 2012)\*



## About this paper

This paper is a concise statement of the position of employers' as tripartite partners, on the Employment Relations Bill June 2012 (ERB). The paper begins by stating the employers' broad policy position on employment law reforms. It then provides the employers' position in respect of specific content issues in the ERB.

This position paper is a brief. Further material, containing more detail, is available from the Vanuatu Chamber of Commerce and Industry (VCCI).

This position paper is based on extensive consultation by the VCCI about the ERB with employers in Vanuatu. It is largely based on results of the Employers' Survey conducted by the VCCI in 2014. Three hundred and seventy three (373) businesses, from every province in Vanuatu, responded to this survey, with 156 businesses answering a long form of the questionnaire that asked for opinions on employment laws. In this report where statements about the percentage of employers are made, this means the percentage of respondents to the survey. Following this survey a series of consultations in Port Vila and Santo were conducted to refine positions.

## Employers' policy position

Employers agree with the intent of the ERB, as stated in paragraph A of the long title of the ERB:

An Act to provide for a legislative framework which promotes the well-being and prosperity of all people in the Republic of Vanuatu by –

(A) Creating a fair and optimum working environment through the maintenance of minimum and acceptable labour standards that are fair to both workers and employers, with the view to building productive and sustained employment relations;

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Employers want a fair, workable situation that will lead to employment growth and private sector led development for the good of all of Vanuatu. More job opportunities and more job security for workers should be the main aim of any employment law reforms.

This intent reflects the principles of decent work, which employers are committed to. Employers are also conscious of that:

Three elements are essential to the achievement of decent work objectives: the need for jobs, the honouring of core labour standards, and the pursuit of further improvements in job quality...[but] beyond some point the achievement of one of these objectives may come at the expense of another. (Gary S Fields, 'Decent work and development policies' (2003) 142(2) *International Labour Review* 239, 240.)

Social partners acting to create employment laws and policies that further the decent work agenda have a responsibility to ensure that measures to promote the creation of jobs do not undermine job quality, but at the same time that measures to improve job quality do not come at the expense of job creation. The ERB needs to reflect this delicate balance in a manner which is appropriate for Vanuatu's social and economic context.

Employers are concerned that the current law discourages growth of secure full time employment opportunities through setting high level of benefits (including annual leave, sick leave, maternity leave and severance). This is particularly bad for the large number of young school leavers and female workers seeking employment. Work with generous conditions and benefits for the small number of skilled workers, but no work or precarious work for the vast majority of low-skilled workers is not decent work and is not in the best interests of the well-being of all people in Vanuatu. Social partners should work together to ensure that the ERB avoids this outcome.

Employers maintain that both employers and workers need to engage in a process of "give and take" in order to arrive at a fair outcome that will promote the well-being of all people in Vanuatu and be realistic for the Vanuatu context.

Realistic employment law which promotes decent work should be based on the following principles:

- The law should comply with all ILO Conventions that Vanuatu is a party to (including the fundamental Conventions);
- The law needs to be easy to understand and use;
- The law should be flexible enough to fit a variety of employment situations;
- The law should minimise red tape for businesses;
- Benefits should be at a similar level to other Pacific countries;
- The law should reduce/remove politicisation of minimum wage reviews and other aspects of labour relations;
- The law should not stop small ni Vanuatu entrepreneurs from being able to grow and develop their businesses.

*The employers' position is that the current draft of the ERB does not meet these principles and needs to be refined.*

### **Preliminary issue: the structure of the ERB**

Considerable uncertainty remains about the ERB, with only 29% of employers supporting the introduction of a new ERB. In contrast 37% support keeping but amending the Employment Act.

One reason for this is a concern about the length of the ERB. Employers, and particularly small, primarily ni-Vanuatu, business operators are concerned about the length of the ERB. Employers who have seen the ERB are immediately put off by its size. Employers are used to having employment laws in separate Acts.

Irrespective of the content, the approach of combining the Employment Act, the Trade Disputes Act, the Trade Unions Act and the Minimum Wages Act into one single law makes the law intimidating and inaccessible.

Further, following Cyclone Pam, all businesses are facing a period of uncertainty. Revising existing laws to introduce some of the principles currently contained within the ERB helps to reduce uncertainty.

*The employers' position is that if the ERB continues to be pursued, then the ERB should be divided into separate Acts. At the very least there should be a division into 2 parts:*

- *The Employment Act, which should regulate the content of individual employment contracts.*
- *The Labour Administration, Minimum Wages and Industrial Relations Act which should regulate labour administration, minimum wages and industrial relations.*

*It would also be possible to separate labour administration, minimum wages and trade disputes into separate Acts, as is the current drafting approach in Vanuatu law. Separation may be desirable if stage by stage reform of industrial relations is desired, or if tripartite parties can only agree on some aspects of law reform.*

### **Moving forward?**

Whilst many employers would prefer that the current Employment Act is kept and revised to reflect some of the changes in the ERB, employers are also mindful of the work that has already gone into the ERB and would like to assist in moving matters forward.

There are many drafting issues in the ERB. These drafting issues were presented by employers in a technical appendix on the ERB at the December 2014 Tripartite Labour Advisory Council (TLAC) meeting.

Following discussions with workers in June, which indicated broad agreement to separating the ERB into an Employment Act and one or more other acts. Employers attempted to develop a draft Employment Contracts Bill. The Employment Contracts Bill was largely based on the ERB, and addressed some drafting issues in the ERB but did not modify it too greatly. When this was presented to VCCI members for validation in August it was, however, rejected as still being too complex.

*The employers' position is that:*

- *Further detailed discussion of the content ERB, following the plan at the December 2014 TLAC is needed in order to determine consensus policy positions.*

- *TLAC should come to policy agreements and then new employment laws drafted, starting with a “clean slate” on the drafting.*
- *As the development of the ERB is likely to take some time, **in the interim** the Employment Act should be amended to introduce provisions that provide better job security for workers and increase job opportunities by removing existing barriers to employment. Particular areas are identified for amendment are:*
  - *Formation of employment contracts*
  - *Termination and payments on termination*
  - *Leave benefits*

*Proposals are discussed in more detail below. A draft Employment Act, containing proposed amendments is also attached.*

## **Position: formation of employment contracts**

The main differences between current law and the ERB in relation to formation of employment contracts are: (1) that more contracts need to be in writing; and (2) that new definitional categories of contract – full time, part time and casual – are created.

### (1) Requirements for contracts to be in writing

The majority of employers (59%) agree that having more contracts in writing is a good proposal. However, given literacy rates, and also current practices regarding contracting, with 57% of businesses currently not using written contracts, a more gradual shift to written contracts is proposed.

*The employers' position is that the current requirements for when contracts should be in writing should be kept and expanded to include a requirement that contracts must be in writing if requested by the employee.*

Drafting proposal: The proposal is that section 9 be repealed and replaced with the following provision that clarifies the drafting of the existing section 9, expands the range of contracts that must be in writing and also creates a pro-forma.

### (2) Categories of contract

The majority of employers (61%) agreed that clearly recognising casual workers is a good thing. The definition of casual workers, full time workers and part time workers was not, however, clear. These definitions were also used for the purposes of leave entitlements, but not for the purposes of termination, making it very difficult to determine obligations under the ERB. It is important to ensure these definitions are clear, as they affect rights to benefits and rights in respect of termination. Two particular areas to clarify, in order to ensure that workers are fairly protected are: the definition of casual workers, in order to ensure that people under contracts for an indefinite duration are not “mislabelled” casual in order to avoid the termination regime; and situations in which successive ongoing fixed term contracts can be used, in order to ensure that fixed term contracts are not misused in order to avoid the termination regime

*The employers' position is that casual workers be defined using the Australian common law approach, of being in irregular employment on demand by the employer. To prevent potential abuse any casual worker who works systematically and continuously for 6 months should be deemed to no longer be a casual worker.*

Drafting proposal: It is proposed that a new section 9A be added to the Employment Act.

## **Content: termination and payments on termination**

### 1. Termination of employment

The ERB radically departs from current law in respect of termination in that it only allows termination of contracts for an indefinite period and early termination of fixed term or fixed task contracts for cause. The intended trade-off for greater job security when the ERB was proposed is that payments on termination are also modernised, with payments only becoming available for redundancy.

The majority of employers (64%) agreed with this shift in approach.

*The employers' position is that the ERB approach of moving to termination for cause should be accepted, with drafting clarified and administrative processes simplified as far as possible.*

Drafting proposal: Provisions on termination of employment are found in Part 10 and section 67 of the Employment Act. It is suggested that they are substantially changes, based on the provisions in the ERB.

Section 49 which allows for termination without cause by giving notice should be repealed and replaced with a new section 49 and 49A that only allow termination for cause.

Section 50, which deals with summary dismissal for serious misconduct should be amended to clarify what serious misconduct is.

Section 50A, containing provisions to provide for termination in the event of less serious wrongdoing or incompetence by a staff member should be added.

Existing provisions relating to termination because of redundancy contained in section 67 should be repealed and replaced with section 50B.

Section 50C, containing provision on termination by the employee by notice and termination by the employer because of retirement should be added.

Section 50D, containing provisions on length of notice should be added.

### 2. Payments on termination

The ERB provides that the amount of payment on redundancy is 4 week's salary for the first year of service, and 2 week's salary for subsequent years of service, capped at 6 months. Employers are concerned about this level of payment, as redundancy can be difficult for businesses as they are being asked to pay when they are struggling and there is a real risk that they do not have money to pay. Reducing the amount of payment in this situation helps to keep struggling businesses going. Benchmarking against other recent Pacific employment law, Fiji's Employment Relations Promulgation provides 1 week's redundancy per year of service.

It should be noted that employers are not averse to paying severance allowance in some form, with 62% agreeing that, in the absence of other social security, employers contributing to severance allowance is a good thing. However, problems exist with the amount of severance and clarity of severance provisions. 55% of employers reported changes to hiring practices or staffing levels due to severance allowance changes in 2008/2009. There are also practical problems in relation to businesses that have to terminate staff due to poor performance either being unable to pay severance allowance or "going under" due to a combination of

poor performance and the cost of severance. Employers were asked to consider whether a regular payment into VNPF, with early draw down of a portion of VNPF being possible on termination of employment was preferable to severance allowance. 50% of respondents agreed this was a preferable approach, although many employers were also hesitant due to concerns about management issues within VNPF.

Consultations also indicated that an unemployment insurance benefit paid for from a pooled contributory scheme may provide workers with better benefits and be less costly for employers. Once sufficient data to properly cost and design such a scheme is available the feasibility of this option should be explored further.

A longer paper explaining the position on severance is available separately.

*The employers' position is that in the short term:*

*The direct employer's redundancy payment at the time of termination should be 1 week's salary per year of service, capped at 3 months; and*

*VNPF should increase by 4%, to be shared equally by employers and workers, with the VNPF Act being amended to allow for early withdrawals of this component of VNPF in the event of unemployment and also provide for better oversight and management of the VNPF; and*

*the current severance allowance regime should be removed, with worker's existing entitlements to severance being frozen at the date of the change to the new unemployment benefits regime.*

*Further, the Vanuatu government should explore the feasibility of a pooled unemployment insurance scheme to replace the redundancy and VNPF savings approach as a matter of urgency.*

Drafting proposals: Part 11 should be renamed to payments on termination. Sections 54, 55 and 56 should be repealed.

A new section 54, taken from the ERB and modified that details redundancy pay should be added.

A new section 55, addressing transition provisions in respect of severance allowance should be included.

Section 57 should be amended to clarify deductions from severance that can be taken.

Section 25 and Part 8 of the Vanuatu National Provident Fund Act will need to be amended. Specific drafting proposals are not presented but can be prepared on request.

## **Content: leave benefits**

### Introduction

The leave provisions in the ERB are similar to current law. The ERB simplifies annual leave by setting a flat rate. It also provides sick leave and maternity leave. Major changes in the ERB are that: it provides annual leave and sick leave on a pro rata basis to part time employees; it provides compassionate leave; and it creates a statutory obligation to pay people double time for public holidays that they work and their normal rate of pay for public holidays that they do not work.

Employers are concerned about current leave levels in Vanuatu, which increased in 2009. Current sick leave and annual leave rates are the highest in the Pacific region. More than one third of businesses that were in operation in 2009 reported changing hiring practices or reducing staff in 2009 due to annual leave and maternity leave changes. A further 25% had already structured employment to minimise these costs or were not aware of changes, so were not affected. This suggests current employment laws hinder the government policy of promoting secure job opportunities through private sector led development. Setting benefits at a fair level that promotes secure employment growth must therefore be kept in mind.

The ERB increases eligibility for annual leave and sick leave by extending it to part time employees, and decreases eligibility for maternity leave by removing it from casual workers. The ERB does not, however, clearly define part time or full time employees and, despite lots of discussion employers could not identify definitions that would be easy to apply. Further, 44% of employers were concerned that pro rata leave entitlements would be difficult to manage and 59% preferred keeping the current law on eligibility for leave. Whilst the current law is not clear (entitlements for leave strictly apply if someone has worked for 22 days or more per month) the most usual practice is that employers provide leave if a worker works 4 or more days per week (the definition used for severance allowance entitlements). Using this definition effectively and consistently extends leave entitlements to some part time workers. Further, employers should be advised through the Employer's Guidebook to consider providing leave to part time workers by contract.

*The employers' position is that entitlement to annual leave and sick leave should remain as it is in the current law, and eligibility for maternity leave specified, with the law on eligibility being clarified to reflect current usual practice.*

Drafting proposal: Sections 29, 32 and 34 be amended to clearly define continuous service.

### 1. Annual leave

The ERB sets annual leave at 20 days a year and also provides compassionate leave of 3 days per year. Survey results on the length of leave indicated that 42% did not agree with the length of annual leave and 48% did not agree with compassionate leave. During discussions it became clearer that 20 days leave, plus 3 days compassionate leave (which currently is absorbed into annual leave) is considered too long. Benchmarking against Samoa and Fiji, both of which have revised employment laws in the past 10 years, 10 days annual leave is standard. Employers in Vanuatu recognise that Vanuatu has historically provided more generous leave. 15 days was therefore proposed as a medium position between the ERB proposal and regional benchmarks. Employers noted that Vanuatu provides a generous amount of public holidays, and that these should be reviewed as they also provide employees with paid leave days. The drafting of leave provisions was found to be overly complex. Employers were also concerned about the lack of clarity in eligibility for compassionate leave and also felt that over-regulation reduces the development of personal relationships between the employer and employee. Instead, employers should be advised through the Employer's Guidebook to consider providing compassionate leave.

*The employers' position is that the amount of annual leave should be set at 15 days per year and that provisions for taking annual leave should largely be based on current law.*

*The employers' position is that compassionate leave should not be a statutory entitlement.*

*The employers' position is that the amount of public holidays should be reviewed.*

Drafting proposal: Section 29 should be amended.

## 2. Sick leave

The sick leave provisions were supported, with 70% of employers agreeing with the length of sick leave in the ERB. Accumulation of sick leave was, however, not supported by 50% of employers, with concerns that it would be difficult to manage, particularly for less formal businesses. In consultations employers thought that accumulation of sick leave is something that should, instead, be promoted through the VCCI Employer's Guidebook as one way of structuring contracts to discourage abuse of sick leave by employees.

*The employers' position is that whilst the sick leave provisions are broadly agreeable accumulation of sick leave for up to 3 years will be difficult to manage and should not be a statutory requirement.*

Drafting proposal: Section 34 should be repealed and replaced with the simpler drafting of the ERB.

## 3. Maternity leave

The ERB is more flexible for women as to when maternity leave is taken, and also provides greater protections from termination because of pregnancy. The broader protections for women in respect of termination due to pregnancy were supported. However, employers did not support increasing the length of maternity leave, with 55% saying it should remain at 12 weeks. Employers were also very hesitant about supporting the payment on maternity leave being 66%. As part of a separate social protection policy paper employers were also interested in pursuing a national maternity insurance scheme, which would increase security of maternity benefits.

*The employers' position is that whilst provisions about maternity leave are broadly agreeable the maternity leave benefits should be paid for a period of 12 weeks, at a rate of 50% of usual remuneration.*

*The employers' position is that the Vanuatu government should continue to explore the feasibility of a national maternity insurance scheme for workers.*

Drafting proposal: Section 36 and 37 should be repealed and replaced with a new section 36 and 37 that follows the drafting of the ERB.

## Other issues

### 1. Rights provisions

Employers acknowledge the Vanuatu is a party to the main International Labour Organisation Conventions in this area, the Equal Remuneration Convention 1957 (Convention 105), the Discrimination (Employment and Occupation) Convention 1958 (Convention 111) and the Worst Forms of Child Labour Convention 1999 (Convention 182). Employers also acknowledge Vanuatu's commitments under other Conventions, including the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child.

There is concern, particularly amongst ni-Vanuatu employers operating smaller less formal businesses, as to how the child labour provisions of the ERB will fit with the realities of work provided as part of usual family practices or customary practices. For instance, children may accompany parents to work, particularly in agriculture.

*The employers' position is to accept in principle the rights provisions of the ERB, with simplified/clarified drafting in some areas, and an express acknowledgement that the child labour provisions do not prevent children from accompanying parents or guardians to work.*

### 2. Labour administration, dispute resolution and collective industrial relations

There were considerable concerns about the workability of proposed ERB changes in respect of establishing a mediation service, employment tribunal and employment court, with only one third of employers thinking it sounded workable. It also was thought that the current reconciliation service, arbitration tribunal and Supreme Court can work quite well, and more attention should be given to how to make current structures work better. Most employers do not have direct experience of collective industrial relations. A consultation just with employers that have collective agreements was held. These employers thought the current law can work quite well and found the ERB provisions to be complex and unworkable. There were also concerns that the ERB forced employers into collective bargaining, in violation of the constitutional right to freedom of association. Whilst the ERB was not rejected outright, further consideration of these parts of the ERB are needed.

*The employers' position is that whilst current provisions around the Tripartite Labour Advisory Council are acceptable, they may be refined following tripartite discussion.*

*The employers' position is the approach to dispute resolution outlined in the ERB will be costly and difficult to implement in Vanuatu, and must be considered further by tripartite partners.*

*The employers' position is the approach to collective bargaining outlined in the ERB interferes with freedom of association of employers, and must be considered further by tripartite partners.*

### 3. Minimum wage setting

Minimum wage setting provisions were considered in consultations and as part of analysis of drafting. There are concerns that the drafting is very unclear and allows for greater politicisation of minimum wage setting, which is not a desirable outcome.

*The employers' position is that the content of the ERB allows for politicisation of the minimum wage setting process and that the current law should be retained until further consideration is given to these provisions.*

#### 4. Vanuatu National Provident Fund

An issue that frequently arose during consultations was the payment of Vanuatu National Provident Fund contributions for casual workers, who may only be working for 2 or 3 days in a month and want the full benefit of their wages. A number of small ni Vanuatu businesses also noted that they were not yet paying VNPF because the business is not strong enough.

When the VNPF Act was introduced the minimum wage was 7,000 vatu per month. The obligation to contribute to minimum wage once an employee earned 3000 vatu per month, was 43% of minimum wage.

Raising the threshold will mean developing businesses will not have to break law but can be transitioned in when their employment situation is more regular. Casual workers who need all the money they earn will not be encouraging employers to break law.

*The employers' position is that the threshold for compulsory contribution to VNPF to be earnings of 40% of minimum wage for a continuous period of 3 months.*