

14 February 2020

Employment Standards Team
Labour and Immigration Policy
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140

Via email: contractorsconsultation@mbie.govt.nz.

Better protections for contractors consultation

Thank you for the opportunity to submit regarding the 'Better protections for contractors' discussion document.

Through our three membership brands, the Wellington Chamber of Commerce, Business Central and ExportNZ, our organisation represents around 3,500 businesses across the central and lower North Island. Our organisation is one of the four regional organisations that make up the Business New Zealand family and is also accredited through the New Zealand Chambers of Commerce network.

The Wellington Chamber of Commerce has been the voice of business in the Wellington region since 1856 and advocates policies that reflect the interests of Wellington's business community and the development of the Wellington economy as a whole. Business Central represents employers and provides employment, health and safety, and human resources advice, and advocates policies that reflect the interest of the business community.

As members of Business New Zealand, we support and endorse their submission on the consultation document. This submission highlights the issues most important to our members and us.

Overall, the ability of contractors to independently negotiate their own arrangements with other businesses provides the economy with necessary flexibility and certainty. Losing this ability by reclassifying large parts of the workforce as employees will negatively affect New Zealand companies, but also take away the freedoms and flexibility contractors value. In the discussion document, some cases and examples are used to illustrate the problems the government believes exist. However, these examples seldom move beyond anecdotes or issues that have already been found to breach existing laws. Therefore, the fundamental question arises, what is

the scale and impact of the problems the government is seeking to solve with these proposed policy changes? So New Zealand is potentially giving up flexible business models that allow rapid innovation without any stated benefit in return.

Business Central supports three of the proposed changes in the discussion document, options 1, 4 and 5 covering:

- Increase proactive targeting by Labour Inspectors.
- Introduce disclosure requirements for organisations when hiring workers.
- Reduce costs for workers seeking employment status determinations.

Breaches of the law, where it does occur, should be unearthed and investigated. Therefore, we support additional resources and oversight by Labour Inspectors.

We do not support giving labour inspectors the ability to decide workers' employment status (option 2). The legal demarcation between who is and isn't an employee is incredibly complex, as illustrated by legal cases such as *Bryson v 3Foot6*, which was reversed by multiple courts on its path to the Supreme Court. Placing the task of categorisation onto Labour Inspectors is unfair on them and diverts time away from their other responsibilities.

We do not support penalties for misrepresenting an employment relationship as a contracting arrangement (option 3). As explained in Business NZ's submission, a more effective remedy would be to increase detection and punishment. To achieve this, labour inspectors could be given the power to ask a business why someone has been classified in a certain way.

We do not support putting the burden of proving that a worker is a contractor on organisations (option 6). There is an essential relationship between this proposal and option three above. Combining the ability for labour inspectors to penalise businesses and for the burden to then be on business to prove their innocence is a significant boost to government power. It goes against the principle of innocent until proven guilty.

We do not support the broader application of employment status determinations (option 7). Massively amplifying decisions of lower courts across the wider economy when further arguments and appeals are ongoing will increase uncertainty and disruption. Unreasonable risk would increase further if labour inspectors themselves able to make these economy-wide declarations (option 2).

We do not support defining hand-picked occupations as "employees" in legislation (option 8). Designating whole categories of workers contravenes New Zealand's international obligations under ILO conventions and takes away freedom of choice. All work should be assessed and categorised the same way, rather than picking out specific industries for different treatment.

We do not support including 'vulnerable contractors' in the tests to determine employment status (option 9). Further complicating already complex legal definitions will not aid the courts in their work and has not worked in overseas jurisdictions.

We do not support contractors bargaining collectively (option 10). The outcome of such collective action would be various commercial entities banding together to agree on minimum

contractual conditions they are prepared to work for. Such agreements in other commercial environments are banned as cartel behaviour. This reduction in competition will produce negative economic consequences - similar to the problems that would be introduced by Fair Pay Agreements. Where a businesses' ability to innovate and do things differently from their competitors is constrained by an industry-wide arrangement they are bound to follow regardless of whether they participated in its negotiation or not.

We do not support creating a new category of worker with some employment rights and protections (option 11). The experience in other jurisdictions is unconvincing and does not support introducing a new category, particularly with the additional confusion and complexity it brings. This proposal risks the government achieving the opposite of what it intends. By creating a middle ground between contractors and employees, rather than lifting the rights of contractors, the government may actually see employees being shifted to this new category.

In conclusion, where there are businesses who are found to be engaging in exploitative practices, those firms are prosecuted and sanctioned. This protection for contractors is already occurring under existing law. So the question is what harm is occurring within current laws that requires remedying? What current behaviour by businesses is so harmful and widespread that the law requires changing so those practices can be reclassified as an employment relationship and prevented? The discussion document provides no evidence to support such a view and it is unclear what the exact 'problem definition' actually is.

Thank you again for the opportunity to submit.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Milford', with a stylized flourish at the end.

John Milford
Chief Executive
Wellington Chamber of Commerce, Business Central