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17 February 2020

Employment Standards Policy
Labour and Immigration Policy
c/- Ministry of Business, Innovation and Employment
Wellington

By email: ContractorsConsultation@mbie.govt.nz

Re: Better Protections for Contractors – Discussion Document for Public Feedback

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the MBIE discussion document, *Better Protection for Contractors - Discussion document for public feedback* on how to improve outcomes for contractors (discussion document).

2. The Law Society's Employment Law Committee has considered the discussion document and responses to consultation questions are set out below. The comments focus on the workability of the proposed changes and we have not expressed a view on matters of policy.

What the government wants to achieve

Q1. *Do you agree with the objectives and risks outlined in this section? Please provide a reason for your answer.*

3. The Law Society agrees with the objectives and risks outlined in this section. A further risk is that extending the protections of minimum employment entitlements to contractors as proposed would involve a significant change to the principles underpinning employment law. We reiterate the comments made on this point in the Law Society's recent submission on designing a Fair Pay Agreement system:[1]

> 23. As a general comment, the Law Society agrees with recommendation three of the Working Group which noted extending coverage to include contractors could significantly change employment law in New Zealand. Such a significant change could detract from rather than enhance how the FPA system will function.
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> 24. The Law Society notes a stated objective of the Working Group and proposed FPA system is to complement and not replace existing employment law. **Extending coverage to workers who are not employees risks undermining existing employment law premised on determining the real nature of working relationships**.
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> 25. Longstanding case law principles outline a series of tests when determining the "*real nature*" of the relationship. Section 6 ERA 2000 defines an employee as excluding contractors and specific types of work such as real estate agents and sharemilkers. These principles already protect employees (if an employer attempts to falsely label a relationship as one of contractor when the reality of the relationship is employment) against what the Working Group says would be a "*perverse incentive to define work outside employment*."

[1] Available at: https://www.lawsociety.org.nz/__data/assets/pdf_file/0004/141790/l-MBIE-Fair-Pay-Agreements-27-11-19.pdf (emphasis added; footnotes omitted).

26. **Any exceptions to expand coverage beyond employees ought to be well considered and incremental if they are to complement existing employment law rather than replace it**.

4. Although employment law already protects employees incorrectly labelled as contractors, there are barriers to the ability to claim that protection, which is an access to justice issue: it requires knowledge of one's rights under employment law, and the resources to enforce them. The Employment Court has noted a "*discernible upswing*" has occurred in cases involving "…'*confused identity' cases – cases involving litigants who do not know whether they are in an employment relationship or not*."[2] This can add a layer of complexity to proceeding, and cost.[3]

5. The Law Society considers however, that existing employment law does not currently protect contractors in the "*grey zone*"[4] because they do not clearly fall within the jurisdiction of the relevant legislation. The Employment Relations Act 2000 (ERA 2000) aims to build productive employment relationships through promoting good faith in all aspects of the employment environment and of the employment relationship.[5] The ERA 2000 does not aim to protect contractors (either independent or dependent). Extending the protections of employment law to contractors would mark a significant shift outside the current legislative objectives.

6. A previous MBIE discussion paper which highlighted the vulnerability of small businesses to unfair contract terms[6] may helpfully address the underlying concerns and offer mechanisms to protect those who are in substance contractors, rather than resorting to employment law (which aims to protect employees).

Q2. *Do you have any other ideas for defining what we should aim to achieve through this work? If yes, please provide details.*

7. If protections under employment law are to be extended to contractors, the Law Society suggests any change is limited to improving the overall workability of the legislation. For example, any changes could limit the scope of extended protections to specified minimum entitlements (such as minimum wage) rather than the full suite of protections afforded employees such as the right to bring a personal grievance.[7]

8. To achieve the stated aim of reducing the imbalance of bargaining power between firms and "vulnerable" contractors, any coverage ought to be limited to contractors identified as

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2 Page 5, per Chief Judge Christine Inglis, "*A brave new technological world: Opportunities for gain and pain*…" New Zealand Labour Law Society Conference 24 November 2017, NZJER, 43(2).

3 Page 6, per Chief Judge Christine Inglis, "*Costs are likely to be higher where complex issues of employee and employer status arise, as they increasingly do*."

4 The discussion document at p8 identifies the 'grey zone' as that which exists between employee and contractor status. Only dependent contractors fall within this category as "they operate their own businesses and may use their own equipment but depend on one firm for most of their income and have little control over their daily work. Like independent contractors, these workers pay their own tax and ACC levies and are not covered by most employment-related laws. However, some may not enjoy the choice and flexibility commonly associated with self-employment".

5 Section 3(a), ERA 2000.

6 Including a lack of resources to effectively manage negotiations and unfair contract terms such as taking on disproportionate and increased business risk and cost. See paragraphs 60 to 66, at pages 19-20: *Protecting businesses and consumers from unfair commercial practices* (December 2018).

7 And the rest, such as those outlined on page 12 of the discussion document.

operating in a vulnerable way; for example, by limiting cover to individual contractors paid less than the minimum wage when hours of work are taken into account.[8]

Potential issues and challenges

Q3. *Do you agree with this characterisation of the key issues? If yes, do you think both of the issues identified are of equal importance? If no, what other issues and challenges should be considered?*

9. Yes. We agree that misclassifying employees as contractors is an ongoing issue appropriately addressed by employment law. We do not consider the current objectives of employment law, including those outlined in the ERA 2000, to be currently focussed on those who are not employees.

10. However, we do not agree with the discussion document's classification that "dependent contractors" are in a "grey zone" in the legal sense. Although the distinction between contractor and employee is not an easy one to make all of the time, in the Law Society's view, dependent contractors are either a contractor or an employee (there is currently no third category in New Zealand law that combines contractor and employee characteristics). An analysis of the factors for and against being an employee or contractor will, however, require careful consideration. This requires a specialist lens and is the reality of the "*real nature*" test. Some situations will be more finely balanced than others and dependent contractors is one of these finely balanced situations.

Q4. *From your perspective, what make dependent contractors vulnerable to exploitation? What situations should we be most concerned about?*

11. The question of assessing who works in a way that can appropriately be categorised as vulnerable to exploitation is a matter of policy dealt with currently in employment law through protections afforded to workers in certain industries.[9]

12. Generally, those in low paid industries with little bargaining power and knowledge of their rights, may be more vulnerable to exploitation. For example, as noted above at [7] – [8], Matiu, a contractor earning below the equivalent of the minimum wage for the hours worked, may be more vulnerable.

Q5. *How could these problems (either as outlined in this document or in answer to Questions 3 and 4) affect different groups of people in New Zealand?*

Q6. *In your view, which sectors or occupations are most affected? Where possible, please provide evidence or information to support your view.*

13. See our answer to Q4 above.

Q7. *How urgent is the need for change?*

14. The Law Society makes no comment on whether urgent change is required.

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8 For example, the situation of Matiu, the courier driver described on page 21 of the discussion document.

9 Schedule 1A, ERA 2000.

Options for change

Q8. *Is there enough information available about the difference between employment and contracting arrangements, and how to hire workers using the appropriate relationship? If yes, how helpful is it? If no, what other information or guidance would be helpful?*

15. Guidance readily available online and elsewhere for free is helpful. The topics identified as additional resources required would assist individuals and businesses looking for guidance in this area. Further cohesion is desirable between various resources such as general information on the MBIE website, Mediation Services, Employment Relations Authority, Employment Court, Community Law Centres and Labour Inspectorate. Access to advice specific to a person's situation is still the best way to ensure information is relevant and tailored to their needs.

Q9. *Other than guidance, what other non-legislative tools could we use to prevent misclassification and improve protections for vulnerable contractors?*

16. Consideration could be given to providing Mediation Services to parties not in an employment relationship under section 144A of the ERA 2000. This would prevent parties refusing to attend mediation for fear it could indicate acceptance of an employment relationship existing. Extending mediation services in this way would require additional resource, however.

Q10. *How effective do you think non-legislative tools could be (either guidance as outlined above, or other things in your answer to the previous question)?*

17. A multi-faceted approach with both non-legislative tools and legislative change is likely to be more effective than solely one or the other (as discussed below at paragraphs 83 – 84).

Q11. *Do you think we need to change the law? Why, or why not?*

18. The Law Society does not consider legislative change is required to address the classification of workers as employees or contractors. Law changes will be required to increase Labour Inspector powers if this course of action is proposed (see our answer to Q15 below).

19. Changing the law will not solve existing issues around access to justice. A symposium on this issue identified ideas warranting further discussion, including:[10]

    (a) better funding for improving access to advice and advocacy including improved access to legal aid funding;

    (b) improving support for small businesses in complying with the law and responding to problems;

    (c) adopting a general no costs regime in the Authority; and

    (d) anonymising party names in Authority determinations so parties are not discouraged from pursuing issues due to fear of publicity or 'blacklisting' as a result of a Google search.

20. These are matters of policy[11] on which we do not express a view.

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10 Pages 75-76, "*Barriers to participation*" by Robin Arthur, Lawtalk 923, November 2018.

11 As noted by Robin Arthur in his Paper presented at a further symposium on 22 May 2019 : https://workresearch.aut.ac.nz/__data/assets/pdf_file/0005/284315/Reprising-themes-Robin-Arthur.pdf

Options to deter misclassification of employees as contractors

Q12. *From your perspective what do you think causes or contributes to the misclassification of employees as contractors?*

21. Anecdotally, it is likely that misinformation and misunderstanding of the law causes parties to misclassify employees as contractors. It may also be deliberately done to avoid certain employment entitlements. However, misclassification may be difficult to establish, particularly when relationships regularly contain factors for or against being an employee or contractor.

Q13. *Should we respond differently depending on whether misclassification is accidental or intentional? What if misclassification does not result in exploitation, and is knowingly accepted by all parties?*

22. It is difficult to distinguish (and prove) intentional misclassification from accidental misclassification. Similar standards of proof to those outlined in Part 9A of the ERA 2000 for breaches of minimum entitlement provisions would be required (and problematic given the preliminary question of employment).

23. Where parties have knowingly accepted and entered into an arrangement that is contracting in nature (but as a result of misclassification), this would favour classification as a contractor rather than an employee and would warrant different treatment where exploitation ensues. Again, proof in this situation is problematic.

24. We also note that currently a person must consent to an order declaring their status as an employee.[12] The Employment Relations Authority in practice regularly makes such declarations due to exclusive jurisdiction granted to it under section 161(1)(c) of the ERA 2000. This appears to avoid the requirement under section 6(6) of the ERA 2000 to ensure a person has consented to the application (although in practice an applicant generally does consent as the application forms part of a number of claims such as minimum entitlements or a personal grievance).

Q14. *Are there any options we should consider to prevent and resolve misclassification?*

25. As above in answer to Q13. Extensive education campaigns for workers, in particular new immigrants, may also be beneficial.

Q15. *What do you see as the main benefits, costs and risks of this option?*

26. Allowing a Labour Inspector to investigate and determine whether someone is an employee will assist in allowing workers to pursue a claim with less cost and risk of publicity. Doing so requires an expansion of current jurisdiction and powers of Labour Inspectors, as discussed in the Law Society's recent submission on the Regulatory Systems (Workforce) Amendment Bill (No 2):[13]

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12 Section 6(5)-(6) of the ERA 2000 gives the Employment Court the power to issue an order declaring whether a person or persons named in an application is an employee. Such an application may be made by a union, Labour Inspector or one or more other persons. However, the Court must not make such an order unless the person is the applicant or has consented in writing to another person applying for the order, and the other person (alleged to be the employer), is a party to or has had an opportunity to be heard on the application.

13 Submission dated 25 March 2019, available at https://www.lawsociety.org.nz/__data/assets/pdf_file/0008/132965/Regulatory-Systems-Workforce-Amendment-Bill-No-2-25-3-19.pdf.

3 Labour Inspector powers

3.1 Clause 5 proposes to amend the powers of Labour Inspectors to enable them to investigate the question of whether a person is an "*employee*." Proposed new section 229A also empowers a Labour Inspector to investigate whether any place is a "*workplace*," and whether any person for whom work is being performed is an "*employer*."

3.2 The core function of a Labour Inspector is to determine, ensure, monitor and enforce compliance with relevant Acts and employment standards. These functions require a Labour Inspector to investigate the question of whether someone is an employee. The Law Society agrees that expanding the powers of a Labour Inspector to expressly include investigating whether any person performing work is an employee will clarify current uncertainty. **This change will better support a Labour Inspector's core functions, particularly around whether an Inspector may investigate in the absence of a complaint or other reasonable grounds to reasonably believe an individual is an employee.**

27. Expanding the jurisdiction and powers of a Labour Inspector in the way proposed in the Bill would make it easier and more cost-effective for workers to seek a declaration as to their status as an employee. Where appropriate, existing provisions in Part 11 of the ERA 2000 could be extended, including the ability to object to an improvement notice dealing with worker status.[14] Any changes would require additional resourcing.

28. The Law Society considers the Employment Relations Authority, a specialist and impartial decision-making body, is best suited to making substantive determinations about worker status, should parties disagree with a Labour Inspector's declaration.

Q16. *What changes should be made to improve the effectiveness of this option?*

29. As above in answer to Q15.

Q17. *Should misclassification be a priority for investigation by Labour Inspectors? Or should misclassification only be prioritised where there is an element of exploitation (e.g. employees being treated as contractors and being paid less than minimum wage)?*

30. Given current resourcing constraints, Labour Inspectors should prioritise misclassification where there is an element of exploitation.

Q18. *Should Labour Inspectors be able to challenge how a firm has hired its workforce, even if individual workers do not want to make a complaint themselves?*

31. Individual workers should not be forced to participate in the process.

Q19. *What do you see as the main benefits, costs and risks of this option?*
Q20. *What changes could be made to improve the effectiveness of this option?*
Q21. *Should Labour Inspectors be able to make decisions about workers' employment status?*

32. As above in answer to Q15.

Q22. *Should Labour Inspectors need the consent of at least one of the parties to a working relationship (e.g. a worker or their firm) before making employment status decisions? Or is there sufficient public interest in the issue of misclassification that they should be able to make employment status decisions without either party's consent?*

[14] Current Section 223, ERA 2000.

33. Ideally a Labour Inspector would obtain permission from the parties to a working relationship before making a decision. Where there is potentially significant exploitation such as significant minimum entitlement breaches, there may be sufficient public interest in a Labour Inspector initiating a decision without the parties' consent.

Q23. *If Labour Inspectors are given the power to make employment status determinations, what should the legal effect of these determinations be?*

34. As noted above at [28], the Employment Relations Authority is best suited to making substantive determinations about worker status.

35. Any determinations made by a Labour Inspector should have similar status to decisions that are made currently in relation to other minimum entitlement breaches and subject to existing mechanisms around the ability to challenge to the Authority, as outlined in part 11 of the ERA 2000.

Q24. *What do you see as the main benefits, costs and risks of this option?*

36. The benefits, costs and risks outlined at p32 of the discussion document are a succinct summary of the concerns. Another risk may be the difficulty of proving when misclassification may have been done intentionally.

Q25. *What changes could be made to improve the effectiveness of this option?*

Q26. *Even if this option doesn't increase our ability to detect misclassification, it is worth pursuing? What other changes could this option be combined with?*

37. As above in answer to Qs 22-24.

Q27. *In what circumstances should the penalty apply? For example:*

(a) Should *there be a penalty if both parties genuinely wanted a contracting arrangement? If yes, should both firms and workers be liable for the penalty?*

38. Penalties are unlikely to be a deterrent to those who can be proven to have deliberately misclassified the arrangement. A penalty seems misplaced where both parties genuinely want a contracting arrangement but are mistaken or genuinely confused.

(b) Should *there be a penalty if firms claim that the misclassification was a mistake, or a result of confusion on their part? If so, how could this be proven?*

39. As above.

(c) Could *there be a penalty for parties with significant control or influence over an employee and breaches minimum employment standards?*

40. Extending liability to a non-party could be considered under the existing penalty provisions for an employment agreement or Part 9A of the ERA.[15]

Options to make it easier for workers to access the determination of their employment status

Q28. *From your perspective, what do you think hinders or stops workers from challenging their employment status?*

41. Primarily a lack of knowledge, bargaining power and cost prevents people from challenging their employment status: if they do not know about their rights, they cannot enforce them; if

[15] Under section 134 of the ERA 2000 the Authority may impose a penalty if someone incites, instigates, aids or abets any breach of an employment agreement.

they cannot afford to challenge their status, they cannot do so even if they know about their rights; if they fear losing their job, they will not challenge their status.

Q29. *Which options are likely to make the biggest difference for workers, in terms of encouraging them to come forward when they may have been misclassified as contractors?*

42. The options that are most easy to access will make the biggest difference for workers. This includes introducing disclosure requirements so that people are aware of their rights as well their ability to enforce those rights.

Q30. *Are there any other options we should consider to make it easier for workers to challenge their employment status?*

43. Mediation under section 144A of the ERA 2000 could be considered.

Q31. *What do you see as the main benefits, costs and risks of this option?*

Q32. *What changes could be made to improve the effectiveness of this option?*

Q33. *In what sorts of contracting arrangements should firms have to disclose information about the arrangement to contractors?*

44. The Law Society makes no comment.

Q34. *What information should contractors receive before agreeing to a contract?*

45. Primarily information around the differences between contractors and employees so that they are aware of their rights as well as how they may wish to challenge their status as a contractor if the reality of the relationship is more akin to an employment relationship.

Q35. *Should this requirement to disclose information also be extended to existing contractors?*

46. Law changes ought not to apply retrospectively. To ensure awareness, there should be a grace period to allow businesses to comply with any changes.

Q36. *What do you see as the main benefits, costs and risks of this option?*

47. Eliminating the application fee may assist to make the Employment Relations Authority more accessible. However, this is an insignificant change. Currently costs can be awarded in the Authority ($4,500 for a one-day hearing). If there is a risk of costs being awarded against someone for an unsuccessful determination around status, then this could be a further barrier.

Q37. *What changes could be made to improve the effectiveness of this option?*

48. There could be a no-costs regime introduced for determinations around worker status.

Q38. *What are the different types of costs involved in taking legal action?*

49. Aside from a filing fee and legal costs, there is also a cost in terms of the time taken to prepare for the hearing and for lost productivity.

Q39. *Which costs present the biggest barriers and how could these be reduced?*

50. As above in answer to Q37, we consider the costs regime, even though on a tariff basis, is a barrier and could be reduced by introducing a no-costs regime for worker status.

Option six: put the burden of proving a worker is a contractor on firms

Q40. *What do you see as the main benefits, costs and risks of this option?*

51. A key benefit is that option six catches a very wide range of relationships and thus reduces the hurdles faced by workers in establishing they are employees rather than contractors. The first immediate problem is that on its face, this would catch all situations involving engagement of any person as a contractor, even if the engagement was on its face entirely appropriate and legitimate (e.g., a commercial enterprise engaging a skilled and qualified plumber who appears to be in business on their own account to carry out renovations or repairs). Some sort of triaging process would be required. Presumably, for example, there would need to be a threshold requirement which could be that the worker is an individual, rather than supplying their services through a company. Generally, we think the difficulties of designing a principled triaging process to ensure such a provision did not result in overreach are very considerable.

***Q41**. What changes could be made to improve the effectiveness of this option?*

52. As noted above, we consider some form of triaging, confined to individuals rather than those who contract through a company, could make this option more workable. A further check on its reach could be by way of applying this option only to certain classes of work activity; for example, cleaning, catering, or hospitality.

***Q42**. Is it fair to put the onus on firms to prove the relationship is one of contract rather than employment?*

53. No comment.

***Q43**. Is it realistic to expect firms to have the information needed to prove a relationship is a contracting arrangement, and if yes what records should be required?*

54. Members of the legal profession note that large enterprises with modern procurement processes will not have any difficulty generating the required information as they will capture all or most of it in their procurement processes and will usually carry out some form of due diligence on contractors. The mid- to small-sized enterprises may adopt a more casual approach and may not carry out as much due diligence. As to which records would need to be generated and retained, at a minimum there would need to be a written contractor agreement. Presumably any business will retain some sort of record of payments which will in turn usually record hours worked if the payment is on an hourly rate basis. The problematic area will be in relation to instructions and work orders. Even for genuine contractors these may be of a fairly cursory and casual nature.

55. Absence of any formal documentation and a primary reliance on personal relationships in business dealings, are features of business relationships in some immigrant communities. This too presents a problem for this approach.

Option 7: extend the application of employment status determinations to workers in fundamentally similar circumstances.

***Q44**. Main benefits, costs and risks of this option*

56. This option could be a faster and more efficient way to address exploitative dealings if there are a number of contractors who work for the same business in the same role. The challenge will be determining whether they are indeed "in the same role" and are "hired on fundamentally similar conditions".[16] Taking the example of a restaurant where there are cooks, wait staff and cleaning staff, would a ruling that the cooks were employees, not

[16] See p 40 of the discussion document.

contractors, apply to the wait staff and cleaning staff? Establishing a clear basis for determining true commonality will be vital.

***Q45**: what changes could be made to improve the effectiveness of this option?*

57. Tighter drafting of the range of work potentially covered by the application will be required.

***Q46**. What degree of similarity should be needed between workers for a decision about employment status could be extended?*

58. This is not a situation similar to, for example, the coverage clause of a collective agreement. Coverage clauses can specify a range of different roles, job titles, or work functions within a worksite/enterprise. In fact, they can refer to "all workers" engaged in the worksite/enterprise. But the characteristics separating contractors from employees are such that considerable specificity will be needed to be able to say that a group of workers are "fundamentally similar" in that their relationship with the "employer" may be that of a contractor. The degree of similarity will need to focus not just on occupational role/duties, but also on the manner in which the "employer" engages with the workers in terms of selection for work, allocation of work, mode of payment, whether the worker uses their own assets in the role, and all the other tests for contractor/employee differentiation. We see this as a very difficult drafting task.

***Q47**. Should limits be set on how far an authority/court decision can be extended?*

59. It would not be appropriate to extend a decision to contractors engaged by a different, separate, enterprise to the one in which the "contractors" making the application are actually engaged.

Options to change who is an employee under New Zealand law

***Q48**. Do you agree we should treat vulnerable contractors as employees?*

***Q49**. Should affected vulnerable contractors be allowed to keep working as contractors if they want to?*

60. We have no further comment.

***Q50**. Is there some other way to provide protections to vulnerable contractors without treating them as employees?*

61. In broad terms, the only system we can envisage is one in which, if a contractor derives all, or almost all, of their remuneration from a single principal, a "minimum wage" type of approach sets a floor for the amount of that remuneration. This in itself presents difficulties if the contractor has any degree of control/influence over their own costs and efficiency of their work, since that will affect their ultimate usable income independently of a minimum wage approach to their incoming remuneration.

Define some occupations of workers as employees

***Q51**. What you see as the main benefits, costs and risks of this option*?

62. This option has the benefit of simplicity and definitiveness from a technical legal viewpoint. It could work well in clear cases, for example cleaners or kitchen hands, where it is hard to see any basis for suggesting that a person in that occupation can ever truly be "in business on their own account". It does, however, take away freedom of contract and flexibility, particularly for more skilled workers/tradespeople where the case for defining the occupation as that of an employee is much more debatable.

63. Designating categories of workers as employees may arguably be a breach of freedom of association principles under ILO Convention 87 and of international legal guidelines that require recognition of genuine commercial relationships (ILO Recommendation 198).[17]

***Q52**. What changes could be made to improve the effectiveness of this option?*

64. If this option is pursued, it should be confined to very clear cases as noted above.

***Q53**. How should occupations be chosen for inclusion in the legal definition of an employee?*

65. We suggest guidance is taken from the standard base test for defining a contractor, the "fundamental reality test"; is this person truly in business on their own account? In particular, this will refer to assets employed by the worker, degree of control they have over the way they carry out the work, risks taken, liabilities incurred, and ability to influence the profit outturn of their activities by making improvements in systems and efficiencies. If no assets are employed, if no risks are taken, if few or no liabilities are incurred, and there is little ability to influence the profit outturn, these suggest an occupation/role that could be chosen for inclusion. The degree of skill and training required for the occupation will also be a relevant factor.

***Q54**. In what situations should workers be allowed to opt out?*

66. We have no comment.

***Q55**. How can we manage the risk of undermining workforce flexibility/limiting freedom of contract?*

67. A narrow definition/high threshold for inclusion should minimise this risk.

Option 9: Changing the tests used by courts to determine employment status

***Q56**. Main benefits, costs and risks.*

68. The current legal tests are well understood. The problem the paper seeks to address is met by improving access to justice and developing mechanisms to detect abuses. Primarily, solutions will be provided through applying the existing tests speedily and efficiently, coupled with addressing exploitation of a relatively narrow band of truly vulnerable contractors in occupations where it would be odd to say that a person is in business on their own account. Changing the existing legal tests raises a significant risk of a long period of extended litigation and uncertainty while employment institutions settle on how those revised tests should be applied.

***Q57**. What changes could be made to improve the effectiveness of the option?*

69. We have no comment.

***Q58**. Should existing common law tests be codified?*

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[17] ILO Recommendation 198: Employment Relationship Recommendation, 2006, para 11: For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:
(a) allowing a broad range of means for determining the existence of an employment relationship;
(b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and
(c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

Q59, 60 and 61. *Should new tests be added, how should the tests be assessed, should they be weighted?*

70. As above, the existing tests are well understood and should be well capable of being applied consistently by employment institutions. This suggests no need for codification.

Options to enhance protections for contractors without making them employees

Q62*. What rights and protections are appropriate to extend to contractors in the grey zone without changing their employment status?*

71. In the Law Society's view, the simplest and most fundamental protection possible is to provide a floor on remuneration.

Q63*. Are there other ways to protect vulnerable contractors without making them employees?*

72. We have no further comment.

Option 10: extend the right to bargain collectively to subcontractors.

Q64*. Main benefits costs and risks of this option*

73. The main risk of option 10 is overreach, in the sense that in areas where competition between contractors is desirable in the interests of economic efficiency, collective bargaining will undermine competition. The approach of the Australian Competition and Consumer Commission to the possible introduction of a class exemption allowing collective bargaining for businesses with an aggregated annual turnover of less than a specified amount, would go some way to avoiding such overreach.

74. Another risk is that applications for authorisation to negotiate collectively are likely to attract litigation challenges from industry representative groups.

75. Further, with whom would a group of contractors bargain; with individual customers? With an industry representative group? And would any terms so fixed bind all potential principals who might engage contractors from the group, even if principals had not engaged in the collective bargaining and were not members of the industry representative group?

Q65*. What changes could be made to improve the effectiveness of this option?*

76. Careful design would be required to restrict access to collective bargaining to categories of contractors who can demonstrate that they suffer from economic vulnerability and from exploitative behaviour by principals who engage them. It would seem odd to extend the right to collectively bargain to categories of contractors who are highly skilled, are in demand, and can easily command high fees/contract prices; doing so would potentially facilitate anti-competitive behaviour. This distinction in turn raises difficult questions about analysing markets.

Q67*. If an FPA system is introduced for employees, should that be extended to contractors? If so, which contractors?*

Q68*. Other than an FPA system, is there any other framework or process we should consider to support collective bargaining by contractors?*

Q69*. Are there some contractors in particular who would benefit from collective bargaining, or who should be covered by collective agreements?*

77. We have no comment on these questions other than our general comments made in the two preceding questions.

Create a new category of workers with some employment rights and protections: "Dependent Contractors"

***Q70**. Main benefits, costs and risks of this option?*

78. The Law Society agrees with the observations of the Organisation for Economic Co-operation and Development that this option is likely to be the most difficult to implement in terms of defining this new group of workers and determining the appropriate threshold for access and rights that apply. At present, the employee/contractor distinction is reasonably clear. The issue the paper seeks to address appears primarily to result from the inability of contractors in exploitative situations to get access to justice to have their position rectified.

79. The Law Society observes that the difficulties which have occurred in Italy, a much larger economy than that of New Zealand, would likely be compounded with a smaller economy and less deep institutions.

***Q71**. What changes could improve the effectiveness of the option?*

80. We have no comment.

***Q72**. What employment rights and protections would make the most difference to vulnerable contractors?*

81. Observation of cases in the Employment Relations Authority and Employment Court suggests that minimum wage and possibly minimum entitlements of other kinds, coupled with responsive and effective enforcement mechanisms, are most likely to make the most difference.

***Q73**. Which contractors would benefit from a third category being introduced?*

***Q74**. Ways of introducing a third category without introducing the risks of "gaming the system"?*

82. We have no comment.

Summary of options

***Q75**. What option/combination of options should be pursued?*

83. Based on the experience of employment lawyers and members of the legal profession working in related fields, we consider the options most likely to have a worthwhile effect are those designed to make it easier for workers to access a determination of their employment status (including better investigation and detection resources); those that potentially give labour inspectors the ability to decide workers' employment status (with review by the ERA); and those that introduce penalties for deliberately misrepresenting an employment relationship as a contracting relationship.

84. The Law Society also considers (based on cases in the employment institutions) that a more vigorous educative programme on employment rights, the contractor/employee distinction, and the role of labour inspectors, in particular for new immigrants and immigrant communities, may be a worthwhile step.

***Q76**. Are there any other ideas you think we should consider to address the problems faced by vulnerable contractors? If so, please provide details.*

***Q77**. Which contractors would be most helped by your preferred options?*

***Q78**. Do you think there are any options we should not pursue? Why?*

***Q79**. When thinking about workers in the 'grey zone,' do you think we should do whatever it takes to help vulnerable contractors like Matiu, even if it might impact on other worker in the 'grey zone' like Anya, who prefer to work as contractors?*

85. We have no comment on these questions. We do observe however, that in terms of reported cases in the Employment Relations Authority and the Employment Court, the most extensive exploitation based on abuse of the contractor/employee distinction appears to occur in areas such as catering/food preparation, hospitality (including restaurants), cleaning, some carer-type occupations, and sales. The question whether contractors in the "grey zone", such as courier drivers, who do use their own assets to provide services and can be said to be in business on their own account, should be provided with additional protections (for example, the ability to collectively bargain) is ultimately a policy question.

Yours faithfully

Andrew Logan
Vice President