Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi
on the
Minimum Wage (Contractor Remuneration) Amendment Bill

P O Box 6645
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1. Introduction

1.1. This submission is made on behalf of the 36 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 325,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. The CTU is grateful for the opportunity to submit on the Minimum Wage (Contractor Remuneration) Amendment Bill ('the Bill'). Through our affiliated unions, the CTU covers workers in all of the services listed in the Schedule of the Bill. We support the intent of the Bill to provide protection to potentially extremely vulnerable workers.

1.4. Ultimately, this Bill is about the principle that a hard day's work deserves a fair day's pay. Or, as it is framed in the International Covenant on Economic Social and Cultural Rights "the right of Remuneration which provides all workers, as a minimum, with... a decent living for themselves and their families…."[1]

1.5. Regrettably, it appears that many workers[2] are being denied a decent living through contracts which place them outside of the protections of employment law (including minimum wage protections).

1.6. This submission is in two parts. Part A deals with issues of context including what we know about these workers and some examples of how this issue is dealt with in the United Kingdom and Australia. Part B deals with the detail of the Bill including suggested amendments and refinements.

[1] Article 7(a) of the International Covenant on Economic Social and Cultural Rights ('ICESCR'). ICESCR is one of two 'High Covenants' of International Human Rights along with the International Covenant on Civil and Political Rights. These two covenants and the Universal Declaration of Human Rights are sometimes called the International Bill of Human Rights. New Zealand has ratified and is bound by both of the High Covenants.

[2] This Bill presents challenges of accurate terminology. In our submission we refer to 'worker' as an umbrella category encompassing employees, dependent contractors and self-employed persons who do not employ others.

PART A: CONTEXT

2. The vulnerability of self-employed contractors

2.1. In 2013, the CTU published a major report entitled *Under Pressure: A Report into Insecure Work in New Zealand.*[3] The prevalence of self-employment is discussed at 18-19. We note that the proportion of self-employed workers has tended to sit between 10-15% of the workers but the industrial and age profiles of self-employment have changed significantly with greater numbers of older and more professional workers becoming self-employed,

2.2. At 56 of *Under Pressure* we comment on some of the vulnerabilities of the self-employed:

> Workers outside of the protections of the employment relationship are most vulnerable of all. They are not entitled to receive the so-called 'minimum code' statutory protections such as holidays and other types of paid leave, minimum wages or equal pay. Certain terms implied into every employment agreement by statute or common law are not present in ordinary contracts. For example, the obligation of good faith under section 4 of the Employment Relations Act 2000 requires the parties to be open and communicative and not to do anything likely to mislead or deceive one another.
>
> Contractors retain some rights (though they are excluded from others), including the right to a healthy workplace, some parental leave rights, and rights under the Fair Trading Act 1986 against misleading and deceptive conduct. They also retain rights and protections under general contract law. These rights are the poor cousins of the detailed law built up to protect employees from what the Employment Relations Act 2000 calls "the inherent inequality of bargaining power in employment relationships".
>
> Contractors may have their contracts terminated in accordance with the terms of the contract without the terminating party being subject to a requirement of justification. Contractors will not have access to the low-level, low- or no-cost dispute resolution services provided under the employment framework such as the Mediation Service and Employment Relations Authority.

2.3. This is consistent with the international experience. The International Labour Organisation comments that:[4]

> As self-employed workers rarely benefit from labour protection, the legal distinction between "self-employed" and "employee" has made it appealing to employers to disguise an employment relationship by claiming the employee is self-employed. The reality is that the recourse to "independent contractors" or misclassification of workers as "self-employed" has been widely [ab]used by employers to avoid their responsibilities and restrict workers' rights

[3] Detailed and summary reports available at http://union.org.nz/underpressure. Citations are from the detailed report.

[4] *From precarious work to decent work. Polices and regulation to combat precarious employment* International Labour Organisation 2011 at 28.

2.4. While there are certainly self-employed contractors who are genuinely (and happily) in business of their own account, there is no point in pretending that this system cannot be gamed. Professor Andrew Stewart's comments in his submission to the Australian Government's enquiry into Contracting and Labour Hire are equally apposite under New Zealand law:

> The reality though is that any competent lawyer can take almost any form of employment relationship and reconstruct it as something that the common law would treat as a relationship between principal and contractor (or contractor and subcontractor), thereby avoiding the effect of much industrial legislation. Establishing or reviewing the terms for such arrangements is routine work in any commercial practice.. … It really is possible, despite what some judges say, to "create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck".

2.5. The transfer of risks and costs from the principal to the worker is, of course, detrimental to the worker (we discuss examples of exploitation in particular industries in part four of our submission below).

2.6. This Bill only addresses one type of vulnerability for a small sub-set of workers. It is a thin safety net designed to catch only the most precarious workers. The CTU advocates for a range of other interventions to address these matters. There is a discussion of these proposals in *Under Pressure*.

3. International approaches - ILO, Canada, Australia and the United Kingdom

3.1. Significant discussion occurred at the International Labour Organisation throughout the 1990s and early 2000s on how to combat exploitation of workers through disguised or new forms of employment without encroaching on genuine business relationships.

3.2. The product of these discussions was the adoption by the International Labour Conference in 2006 of an important instrument, Recommendation 198 on the Employment Relationship.[5]

3.3. Article 4(b) of R198 recommends that States ensure that their national policy should include measures to:

> (b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs

[5] R198 is available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R198

> when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;

3.4. Relevantly to the subject matter of the Bill, art 17 of R198 recommends that Member States should develop effective measures aimed at removing incentives to disguise an employment relationship. One of the most effective measures will be the removal of financial incentives to disguise employment.

3.5. The United Kingdom takes a similar but more comprehensive approach to that envisioned by the Bill.[6] Under UK Law, employees are a subset of a wider group called workers.

3.6. A worker is defined (for example in regulation 2(1) of the UK Working Time Regulations 1998) as someone who works under a contract of employment or "any other contract, whether express or implied...whereby the individual undertakes to do or perform personally any work or services for another party to the contract", provided they are not a client or customer of the individual's profession or business.

3.7. In the United Kingdom, workers are entitled to, among other things, be paid the National Minimum Wage, the benefits of protected disclosure laws, working time regulation, and protection from unlawful deduction of wages. Workers who are not also employees do not receive protections relating to unjustified dismissals (such as rules relating to redundancy, and fixed term agreements).

3.8. The Bill may be characterised as a limited move to the United Kingdom model of providing some employment protection for a wider group of workers than those bound by the employment relationship.

3.9. While we are supportive of the moves in the Bill to provide a wage floor for workers providing certain services, it should be noted that there are many other important protections that these workers miss out on.

3.10. A better approach may be to expand the definition of employee. This is the approach taken in Canada and New South Wales.

3.11. Section 3 of the Canadian Labour Code defines employee (in part) as “any person employed by an employer and includes a dependent contractor….” The same

[6] For a concise explanation see ‘An employee or a worker?’ in Thompsons Solicitors Weekly Labour and Employment Law Review Issue 103 (September 2005) available at: http://www.thompsons.law.co.uk/ltext/l1520004.htm

section defines a dependent contractor as the owner of a vehicle used for hauling, a fisher or "any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person."

3.12. Section 5(3) and Schedule 1 of the New South Wales Industrial Relations Act 1996 deem persons working in a range of occupations to be employees regardless of their contractual status.[7]

3.13. These interventions to protect vulnerable groups of workers are the reverse of the unprincipled and harmful approach to the film and television industry made by the Employment Relations (Film Production) Amendment Act 2010.

3.14. We recommend consideration of the expansion of the definition of employee beyond minimum remuneration protections alone.

4. Remuneration for contract workers

4.1. What do we know about remuneration for contract workers? Is there genuine evidence of a problem here?

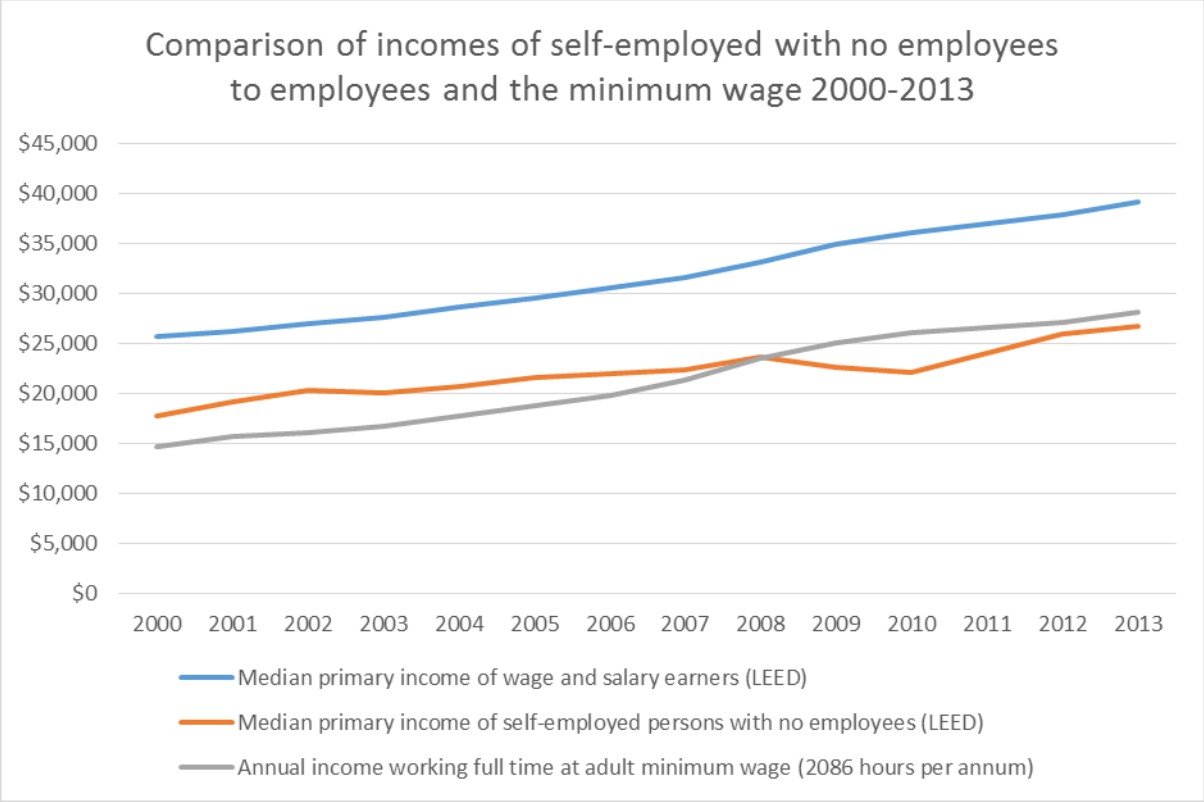
4.2. It is difficult to draw firm conclusions about the income of the self-employed contractors who fall within the ambit of the Bill or about contractors generally. Statistics New Zealand keeps some statistics on remuneration of the self-employed through the Linked Employer-Employee Data ('LEED') series.

4.3. Part of the difficulty is the very problem that this Bill seeks to address: Contracting rates are often not recorded as time-based (and are not collected by Statistics New Zealand in this manner) so it becomes difficult to compare rates with hourly wage rates for employees.

4.4. The best proxy we have is median annual rates of remuneration by size and type of main source of income. The graph below compares annual income of self-employed workers in firms with no employees ('own-account workers'), a reasonable proxy for

[7]Schedule 1 is available here: http://www.austlii.edu.au/au/legis/nsw/consol_act/ira1996242/sch1.html. Deemed employees include those undertaking cleaning, carpentry, joinery, brick-laying, painting, milk delivery, bread delivery, clothing manufacture outside of a factory, supply or delivery of timber, plumbing, plastering, fitting blinds, lifeguarding at council-owned pools, supply and delivery of ready-mix concrete, lorry owners for lorries used in roadworks and others set by regulations.

the specified persons covered by the Bill), with the median annual income of employees (across all sizes of business). We include a line representing the annual rate payable to a worker working full time at the applicable adult minimum wage.[8]



4.5. These data are not broken down by industry but it may be possible for Statistics New Zealand to provide the Committee with more finely-grained information.

4.6. Despite its limitations, the graph provides some useful information. From 2009 onwards, the median earnings of own-account workers were slightly less than those of a full time employee on the minimum wage. Consistently, the median own-account worker earned between two-thirds and three-quarters of the median primary income of salary and wage earners.

[8] The years represented are tax years (1 April-31 March) and are for people declaring either salary and wage or self-employment as their **main** source of income. It therefore excludes income earned from self-employment as a subsidiary income to salary and wage earnings. The full time rate at the adult minimum wage is calculated as the applicable hourly wage multiplied by 2086 hour (the usual hours worked by a full time worker in a year). It is worth noting that the other two rates include unknown proportions of both part and full time workers. Until 2007, the effective date of the minimum wage adjustment was not fixed: Rather than 1 April it usually took effect in March. To simplify the calculation, we have assumed that the rate was adjusted in April throughout. This means that the graphed average rate of the minimum wage before 2007 is a fraction lower than it really was (because each tax year would have included 1-3 weeks paid at the higher minimum wage rate).

4.7. While we do not know the remuneration distribution of own-account workers, the data suggest a significant issue of low remuneration. It is deeply concerning that half of self-employed people who do not employ workers earn less than $26,700 per year from their main source of income. Some will earn much less.

4.8. The provisions of the Bill would put a floor on that remuneration, albeit a low one, and help to prevent the grossest forms of exploitation.

5. Evidence of exploitation in particular industries

5.1. We have taken the unusual step of appending to our submission (with permission) a 2011 article written by Darien Fenton in the New Zealand Journal of Employment Relations entitled 'Insights into Contracting and the Effect on Workers'. We have done so because of the relevance of Ms Fenton's experience as the sponsor of a previous iteration of this Bill and especially because of the value of the case studies she includes in the article.

5.2. Along with examples from fast food delivery, hospitality, housekeeping and cleaning, the article includes four major case studies relating to:

- Telecom discontinuing contracts with companies employing 700 lines engineers in Auckland and Northland and offering the then redundant engineers the same work as independent contractors to Telecom subsidiary Visionstream. In the process, workers lost all job security and between 50-66% of their income;
- The unsafe conditions of owner-operator truck drivers particularly those contracting with food companies;
- Couriers earning below the minimum wage due to low margins and high running costs;[9] and
- Shockingly low rates of pay for children working to deliver leaflets (estimated by Caritas as between $1.67 and $6.25 per hour).

5.3. We hope that the Committee will hear from some of the workers affected by these sorts of punishing terms. The vulnerability of many of these workers makes them less likely to speak out however because of the possibility that they will lose their livelihoods.

[9] Urgent Couriers have spoken out on the problematic business model in the courier business on several occasions. See for example: http://www.urgent.co.nz/additionalfiles/Courier%20Sustainability%20Article.pdf; http://www.urgent.co.nz/additionalfiles/lowcourierearnings.pdf

PART B: COMMENT ON THE BILL

6. Specified person (cl 6)

6.1. The term 'specified person' is not particularly useful or clear. Unlike 'principal', 'employer', 'employee' or 'worker', it does not provide a description of the role of the contractor in the system.

6.2. We recommend changing 'specifed person' to one of the following terms for clarity:

- Agent or personal agent;
- Contractor or personal contractor.

7. Exemption for under-16s (cl 6)

7.1. We note that the definition of specified person only relates to "an individual who is 16 years of age or older." This mirrors the age threshold for minimum wage protections.

7.2. However, we think that excluding under-16s misses an opportunity to address another significant issue. In 2003, the Catholic social justice agency, Caritas, undertook a Survey of Children in Employment which uncovered:[10]

- Schoolchildren working between 10pm and 1am
- Children carrying up to 20kg loads of newspapers and pamphlets in the rain
- 12 year olds driving tractors and diggers and forklifts
- Children with cuts, burns, dog bites and broken bones from their work
- Children who say their best work experiences involve access to machinery, guns and alcohol
- 11 and 12 year old cleaners of other people's homes to supplement family income.

7.3. In 2006, Caritas surveyed children delivering leaflets and newspapers with similarly awful results.[11] As Ms Fenton notes in her appended article:[12]

> Based on a crude assessment of the data, Caritas estimated that most of the pay rates fell somewhere between $1.67 and $6.25 per hour. In 2007, Fair Go ran a story about children

[10] Caritas Aotearoa New Zealand (2003) *Protecting Children at Work: Children's work survey 2003*
[11] Caritas Aotearoa New Zealand (2006) *Delivering the Goods: a survey of Child Delivery Workers 2006*
[12] Fenton, D. (2011) 'Insights into Contracting and the Effect on Workers' *NZJER*, 2011, 36(3) 44-58, 54.

> employed as independent contractors to deliver junk mail. The children, some as young as 12 [and others] aged nearly 16, were earning as little as 25c per hour. To make matters worse, they had recently had their pay unilaterally cut.

7.4. Caritas recommended that the single most important step to provide protection to child workers would be to require a direct employment relationship.

7.5. Nominal protections for children and young person under the age of 18 exist by way of the Minors Contracts Act 1969. Section 6 of that Act provides that they may apply to the District Court for an order setting aside or varying a contract that is not "fair and reasonable." However, we are unaware of this Act being used effectively for working children. The District Court is an intimidating place for a child to attempt to assert their rights. The Labour Inspectorate and employment institutions provide a much better route.

7.6. We submit that the words "who is 16 years of age or older and" should be deleted from the definition of specified person.

7.7. Many of the services set out in Schedule 2A are effectively prohibited for under-16 year olds in any case including various transport services (due to age-based licensing requirements), hazardous work such as construction, manufacturing and forestry (prohibited by the Health and Safety in Employment Regulations 1995), most forms of security work under the Private Security Personnel and Private Investigators Act 2010 (due to age-based licensing requirements). This means that this change would primarily affect children contracted to provide cleaning services, catering services, newspaper or pamphlet delivery services, personal home-care services, public entertainment services, telemarketing services and market research services.

8. Establishing actual rate of remuneration (cl 7)

8.1. It is unclear why proposed s 4B is required or whom it applies to (whether it is intended as guidance for the contracting parties or the Courts).

8.2. Our view is that it is trite to require consideration of the terms of the contract and the operation of the law when establishing actual remuneration rates (whomever is making the calculation). Some things may safely be implied into the operation of the Act.

8.3. We therefore recommend that proposed clause 4B is deleted.

9. Agreed reasonable time to provide service (cl 13)

9.1. Proposed section 11AC provides that additional remuneration cannot be recovered when the principal and specified person have agreed on a reasonable amount of time to complete the contractual services and the actual time exceeds the reasonable amount agreed.

9.2. The operation of this section requires greater clarity. Two main issues arise. First, is reasonableness defined with reference to a hypothetical specified person with a reasonable degree of ability, skill and care or with regard to someone with the characteristics of the specified person who is contracting? If the latter, must the principal know about these characteristics in agreeing a reasonable time? If the former, how would the Courts judge the characteristics and efficiency of the comparator?

9.3. These questions go to the operation of the Bill when someone who is slower than usual (perhaps through age or disability) contracts to undertake a certain service. It may be that the Courts can provide guidance on this but the clause seems vague.

9.4. Second, it is unclear what happens when a supervening event makes the performance of the contract within a specified time impossible (such as where a contractor painting a fence finds that rain has washed the paint away). Is the reasonableness of the time period judged at the formation of the contract or in light of subsequent events?

9.5. We suggest that a new subsection 11AC(3) should be added to clarify these issues as follows:

> (3) In determining whether an amount of time agreed is reasonable, the Authority must have regard to all relevant matters including:
>
> (a) The amount of time an average person would need to undertake the service;
>
> (b) Factors which the principal knew or ought to have known about that influenced the timeliness of the specified person undertaking the service; and
>
> (c) Unforeseeable external factors which influenced the timeliness of the specified person undertaking the service.

10. Services listed in Schedule 2

10.1. We understand the rationale for restriction of the provisions of the Act to particular services. The challenge of such a list is what should reasonably be included and

excluded. It is notable that in the United Kingdom, minimum wage protections apply to all workers rather than those in particular industries.

10.2. As soon a bright line such as a list of particular services is identified for protection, it creates an incentive for avoidance and arguments about demarcation.

10.3. We submit that a better approach is to begin with a presumption that all industries are covered but to allow an exemption process (perhaps through regulations). This would solve many of the challenges with defining wide enough categories to catch existing and emerging groups of exploited workers.

10.4. However, if the Committee decides to proceed with amendment to the existing list, we recommend amendment to four proposed categories:

- Building and construction services;
- Food catering services;
- Fast-food delivery services; and
- Public entertainment services as an actor, musician or singer.

10.5. *Building and construction services.* The challenge with this description that it may be read widely to include a range of ancillary and related services or narrowly to exclude them. For example, does this definition include building demolition services? Asbestos remediation? Plumbing? Plastering? Painting? Electrical services?

10.6. The description of "building and construction services" should be amended to clarify that a wide definition is intended. We submit that this is best done by reference to Australia-New Zealand Standard Industry Code Level 1: E Construction Services.

10.7. *Food catering services* is also cryptic. Is this intended to cover restaurant work? We note Darien Fenton's example of "[a] waitress employed as an independent contractor with her own "waitressing business", where her pay was dependent on the numbers of tables she served."

10.8. *Fast-food delivery services* similarly begs the question of which foods are classified as 'fast.'

10.9. We recommend that a wider definition relating to both of these services is created. Our suggested wording is "Restaurant, food preparation, catering, and delivery services."

10.10. *Public entertainment services as an actor, musician or singer.* This is a challenging issue for several reasons. First, the passage of the Employment Relations (Film Production Work) Amendment Act 2010 has effectively rendered all workers in the industry contractors. There is a potentially significant issue to be addressed. We note and endorse the submission of our affiliated union, Equity New Zealand on this issue.

10.11. Second, actors, musicians and singers are only a small part of those responsible for creating a musical or theatrical production. Stage managers, sound technicians and others may be aggrieved at their lack of coverage.

10.12. Third, many theatre and musical productions sadly do not make sufficient returns to guarantee minimum remuneration equivalent to the minimum wage if rehearsal, pre- and post-production time is factored in.

10.13. Fourth, what does public entertainment mean? Does it include filming of footage in a private place for later public broadcast?

10.14. We endorse Equity's suggested solution to these issues and recommend that minimum remuneration protection is extended to workers providing services relating to.

- Television production work;
- Film production work (as that term is defined in s 6(7) of the Employment Relations Act 2000), except where these services are remunerated solely through an Equity endorsed co-operative profit sharing arrangement that clearly stipulates that each party involved in the production is entitled to an equal share of any profits or net income derived from the production; and
- Theatre and musical performance except where these are remunerated solely through an Equity endorsed co-operative profit sharing arrangement that clearly stipulates that each party involved in the production is entitled to an equal share of any profits or net income derived from the production, or where actors have signed a written authority where they agree to defer payment or forgo minimum remuneration.

11. Authority to represent

11.1. Section 236 of the Employment Relations Act 2000 provides a blanket right for employees to choose other persons (such as union officials or lawyers) to represent

them in the exercise of their rights under various Acts (including the Minimum Wage Act 1983). A similar right is extended to employers by the same section.

11.2. The Bill proposes to introduce the new categories of 'specified person' and 'principal.' Neither has a specific right to choose another person to represent them in the same manner as employees and employers. This seems odd and unintended. It may be that this is intended to be covered by cl 12 which permits the application of the provisions of the Employment Relations Act 2000 "with necessary modifications to the recovery of minimum remuneration as if the minimum remuneration were minimum wages." Greater specificity would be helpful here.

11.3. We recommend that either s 236 of the Employment Relations Act 2000 is amended or a new section of the Minimum Wage Act 1982 is added to permit specified persons and principals to authorise others (such as union officials or lawyers) to take action on their behalf.

APPENDIX ONE:

New Zealand Journal of Employment Relations 36(3): 44-58

INSIGHTS INTO CONTRACTING AND THE EFFECT ON WORKERS

DARIEN FENTON MP[13]

Abstract

For the past three decades, there has been a steady growth in non-standard contracts and arrangements in New Zealand, including temporary workers, casual and labour hire workers, and a substantial increase in the use of independent contracting. While it may sound inviting to be “one’s one boss”, the reality of contractor relationships is that workers are not protected by New Zealand law in the way those workers classified as employees are. Being classified as an independent or dependent contractor can have many shortcomings, such as losing stable income and rights that someone in a similar job, called an “employee” has under New Zealand law. As a result, many New Zealander today find themselves struggling to make a living whilst being exposed to unacceptable working conditions, with no legal rights or law to protect them. This paper will analyse the work conditions of those in contracting arrangements in New Zealand and attempt to demonstrate the negative effects this type of work has had on range of people through the analysis of four different case studies. Finally, this paper explores the attempt to legislate the most basic of entitlements of a minimum wage for contractors and looks to the future with ideas.

Introduction

For the past three decades there has been a steady growth in non-standard work arrangements, including temporary workers, casual and labour hire workers and a substantial increase in the use of independent and dependent contracting. Some contractors are highly skilled, entrepreneurial individuals, who are able to extract a significant premium for the efforts outside traditional employment. However, for many the opportunities of earning a secure and stable income are remote, because they are classed as independent or dependent contractors for labour law purposes. This effectively gives them no rights to the minimum protections provided for those classified as employees under New Zealand Law. This means that the employment relationship, with its rights and obligations under current law, has become meaningless for tens of thousands of workers.

Context

There is now widespread international agreement that the traditional legal categories, also current in New Zealand, such as employee, independent or dependent contractor, subcontractor, etc. no longer fit with the economic and social reality of today’s working environment. New Zealand is just one of many countries who are experiencing this change.

The ability of employers to avoid the indirect employment costs of regulation and taxation has become a major competitive factor in the market and as a result, there are growing armies of dispossessed and vulnerable contractors.

The International Labour Organisation (ILO) has taken the employment relationship as the reference point for examining the various types of work relationships and the change in the global environment. In the past few years, the ILO Conference has held discussions on self-

[13] * Darien Fenton MP was the Labour Party Spokesperson on Labour Issues.

employed workers, migrant workers, homeworkers, private employment agency workers and child workers, as well as workers in cooperatives and workers in the informal economy.

In 1997 and 1998, the ILO Conference had an item on contract labour (ILO, 1998). The intention was to protect certain categories of unprotected workers through the adoption of a convention and recommendation.

The Conference failed to reach agreement on a new instrument, but passed a resolution that the unresolved matters around those workers who were being denied protection must be addressed.

A tripartite meeting of experts on workers needing protection was held in Geneva in May 2000, and later and noted:

The global phenomenon of transformation in the nature of work had resulted in situations in which the legal scope of the employment relationship did not accord with the realities of working relationships…… It was also evident that while some countries had responded by adjusting the scope of the legal regulation of the employment relationship, this had not occurred in all countries (ILO, 2006).

This was followed by a formal discussion in 2003 and 2004 on the scope of the employment relationship (ILO, 2003).

The conclusion reached was that the protection of workers "is at the heart of the ILO's mandate. Within the framework of the Decent Work Agenda, all workers, regardless of employment status, should work in conditions of decency and dignity" (ILO, 2006: 6).

Who are New Zealand's Contractors?

The extent and problems relating to contracting in New Zealand are not well known. Apart from a small number of Employment Court cases around dependent contracting, the odd District Court case, and some headlines when the issue becomes contentious, there is little data available that does these issues justice or that helps to bring the serious nature of the expansion in contracting in New Zealand to light in any empirical way.

However, in the New Zealand context we do have a data set on self-employment which gives some indication of the number of workers who could be either dependent or independent contractors.

According to the Statistics NZ June 2010 Quarter of the New Zealand Income Survey, there are 351,900 self-employed workers in New Zealand, 16% of the Labour Force. 115,000 (33%) of these workers are women. The number of self-employed people has gone down in the last 5 years from 367,000 in 2006, rising to a peak of 385,000 in 2008 then falling to 351,900 in 2010 (Stats NZ).

Compared to most of the OECD countries New Zealand has high levels of self-employment.

According to the OECD (2010) "Entrepreneurship and Migrants" Report, the percentage of the workforce self-employed in Australia, UK and the OECD average of the 26 countries are:

- Australia – average of 17.55%
- UK - average of 12.65%
- The 26 countries making up the OECD - average of 13.28%

New Zealand's self-employed are not highly paid

According to the June 2010 Quarter of the New Zealand Income Survey, the median (average) weekly income for a self-employed person as at June 2010 was $575.

This compares to the median weekly income for a salary or wage earner of $769. That's a $194 or 33% wage gap.

In June 2006 the median weekly income for a self-employed person was $821, so the weekly income for self-employed people dropped by $246 from 2006 to 2010.

A significant proportion of these self-employed workers will be dependent on only one "buyer" of their labour, which may well account for the low income average for New Zealand's self-employed (Stats NZ, 2010).

The situations of New Zealand workers who have been caught in arrangements where they have virtually no rights are many and varied and growing in numbers. For most, their only option to challenge unfair contracts and working conditions is to hire an expensive lawyer to argue their case in the District Court, or to take the long route through the Employment Court to argue that they are in fact employees. These are avenues that those on the margins cannot even contemplate.

The move from the employment relationship to independent or dependent contracting has affected even highly skilled workers, who are left doing the same job with less pay and in worse conditions than when they were employees. It is clear that signification pockets of labour have developed where independent or dependent contracting has become a way to reduce reward, undermine security, increase risk and cost to workers.

There are many sectors of the New Zealand economy where independent contracting is having a negative impact: fast food delivery workers, truck drivers, couriers, construction workers, caregivers, security guards, cleaners, telemarketing workers, forestry workers, and even those workers in our much prized arts community – actors and musicians – all have a similar story to tell. Below, I give a number of examples compiled from my own experience and information I have gathered as a Member of Parliament and Labour's spokesperson for Labour Issues.

Case 1 : Visionstream – the destruction of good jobs

On 25 June 2009, Telecom announced that its two biggest network Engineering contractors, Transfield and Downer EDI had lost their contracts to look after the Northland and Auckland network to a new company, Visionstream. 700 lines engineers were informed that their jobs were redundant and they would only get work if they transferred to Visionstream as dependent contractors. This meant buying their own vans and equipment (costing up to $60,000) and taking all of the risks of the job on themselves.

Some highly skilled lines engineers simply walked away, taking redundancy and their invaluable industry experience and skills with them. Newer workers had no entitlement to redundancy, so were in a much more precarious situation. Some were migrant workers who had been brought to New Zealand under the skilled migrant category when there had been a shortage of lines engineers. Their work permits did not allow them to transfer from being an employee to self –employed, so they had few options.

An independent analysis of the contracts offered by Visionstream calculated that as owner operators, the workers could lose up to 50% to 66% of their income. There was no guarantee of work, no minimum level of income, they would be told what to do where and

when and could be fined by Visionstream without the company needing to prove the fines were justified. Widespread industrial action was organised by the workers' union, the Engineers, Printing and Manufacturing Union (EPMU), and funds for financial support were raised and distributed. Despite this, the lines engineers were made redundant. Many were starved into submission, and one by one reluctantly became their own bosses.

The EPMU made a formal complaint under the OECD Guidelines on Multi-National Enterprises, contending that the dependent contractor model was a breach of the guidelines, but in the end there was nowhere to go with the situation. The Ministry of Economic Development in New Zealand responded to the complaint by concluding that Telecom and Visionstream's actions were within the law.

The consequences have not just impacted on the lines engineers, customers are paying too. Collins (2011) from The *New Zealand Herald* reported on 7 July 2011:

Maintenance of Auckland's telephone network at its worst in years - but the company in charge denies taking up to five days to fix faults…….

Australian-owned Visionstream told its subcontractors last week that the business was "going through the worst performance" it had experienced since taking over maintenance of the region's fixed-line network in 2009.

The company asked all installation and fault technicians to postpone days off between June 28 and July 8, and acknowledged that this came on top of having staff working every weekend for the previous nine weeks.

For the last nine weeks, on average up to 1000 customers per day in the Visionstream-managed areas have had their service impacted in one form or another" the internal memo said.

A technician, who asked to remain anonymous but has worked on the Telecom network for 37 years, claimed many subcontractors were deliberately damaging underground cables to get more money for repairs.

Visionstream paid them only a flat $80 for above-ground repairs that could take several hours, but $400 to fix underground cables.

I met many of these workers during the industrial action and see them still. They are still driving the same Chorus "badged" vans they used to and still performing highly skilled and essential work; but they have lost all employee entitlements to holiday and sick leave, and have had their pay cut significantly. Ask any of them if they are doing better as self-employed "entrepreneurs" and the answer is a resounding no.

Case Two – Underpaid, overtired and above the speed limit

Every week in New Zealand one person dies from a truck related accident and several people are injured. The social costs of truck related death and injury amounts to more than $400 million a year. Successive governments have responded by increasing road safety measures and requirements, including restrictions on driving hours, the requirement to have a half hour break after five and a half hours and chain of responsibility legislation. But the link between contracting arrangements for owner-drivers and safety has never been examined.

In April 2010, the *Sunday Star Times* featured an article entitled *"Underpaid, overtired and above the speed limit*".

The story reports a former truck driver for a major food company speaking out about contractors are driving more than the legal hours to make ends meet, leaving them exhausted and a threat to public safety .

Hugh Dearing, who quit the food company two years ago over his $30,000 salary, is concerned about truck drivers allegedly working up to 100 hours a week…

Several drivers said companies they were contracted to had slashed hundreds of dollars off their weekly pay during reviews, claiming drivers were overpaid. But they said managers would not disclose financial calculations showing how delivery runs could be done on less money. One driver said in his last pay review his income was cut so low that he now earns $9 an hour before tax for an 80-hour week.

I said [to the company], I'll have to drive seven days a week. They said, "we don't want to know that, that's up to you to sort out"

He said the Land Transport Rule: Work Time and Logbooks 2007 – banning drivers of commercial or heavy motor vehicles from working more than 13 hours in 24 and working more than 5 1/2 hours without a break – was a "joke".

You cut corners, you don't employ relief drivers, you use family members to pack and help on your run. You basically don't pay bills you should pay, like ACC and tax, until they come after you, and then you're in such financial stress you have to remortgage because the money just isn't there.

I met these drivers. They had some horrific stories. They faced financial pressures and long hours, which was impacting on their families. They told me how they scrimped on maintenance with tyres worn down to the rims and concealed on the inside wheel. Sometimes they were so tired they fell asleep at the wheel, stopping just in time at a compulsory stop. Any attempts by the drivers to complain, including trying to enforce health and safety requirements were met with punitive responses from the company. Their runs were cut, or added to with impossible deadlines. Some runs were given to another more compliant driver and the original drivers given 90 days' notice of termination of their contract. I have come across many such examples. One truck driver who contacted me told how he was employed as an independent contractor. He was promised $1,000 a week of driving work but heard nothing again for weeks. He was finally assigned a job driving every Saturday on a contract worth less than $100 a week. The driver eventually got two more contracts, but the three jobs altogether paid only $450 a week, less than half of what he had been promised. On top of that, he had to work long and sometimes dangerous hours. When the driver approached the principal contractor, his advice to the truck driver was that if he had a problem, "he should go to the Disputes Tribunal".

While the New Zealand Government studiously ignores the problem, the Australian Government is taking action. After a campaign by the Transport Workers Union and a 2008 report by Australia's National Transport Commission found contracts rewarded truck drivers who drove fast or worked long hours, which it said was "fundamentally at odds with other nationally agreed safety reform" (Australian Government, 2010: 7). It recommended minimum pay for all truck drivers to end economic incentives to drive dangerously. The Australian Government has released a discussion paper called "Safe Rates, Safe Roads" and has already taken action in other ways.

New Zealand truck drivers are not that different from Australian truckies. While there are fewer of them, they do not travel the distances of their Australian colleagues and our road trains are smaller, but the issues for New Zealand's owner-drivers need proper examination. Owner drivers invest a huge amount of money in their biggest asset – the truck. For this

investment they take out mortgages and put their homes on the line. But many are, in the end, completely dependent on one company to provide them with the work. The impact isn't just on the drivers. The driving public is at risk as well.

In July 2011, 23 Waikato truck drivers were banned from driving trucks for a month after spending too long at the wheel. The drivers appeared in Court in Te Awamutu on charges, including falsifying their logbooks, exceeding the hours they are allowed to work and not having rest breaks. Their employer, John Austin Ltd, was also in court on a total of 82 charges and was fined $20,000. The New Zealand Transport Agency says the offending was at the extreme end of the scale, with some drivers working over 300 hours without a day off. The Agency described fatigued truck drivers being as risky as drunk drivers. Pressure on owner-drivers is increasing, yet the link between low rates of pay for owner truck drivers and safe driving has had no attention (as cited in Tiffen, 2011).

Last year, I called for a Select Committee inquiry, but this was given short shrift by the National Party-dominated Transport and Industrial Relations Select Committee. I am currently sponsoring a petition to the House of Representatives calling for an inquiry into whether there is a link between truck driver remuneration, payment methods, unpaid work, driving hours, waiting times, incentive based payments and safety outcomes in the transport industry.

Case three: "We don't even earn minimum wage"

The courier industry is a good example of the impact that contracting can have on workers. As vehicle drivers have been converted from employees to contractors, drivers have been required to provide their own vehicle (and pay for the badging of the company's name), pay for vehicle maintenance, insurance registration, and other running costs.

Their contract for service requires them to ensure package delivery irrespective of their day-to-day personal circumstances. I have had numerous contacts with courier drivers. I have seen their contracts, and there is no doubt that most are barely scraping together a living. A recent email from a franchise courier driver said:

Earlier in the year, when a Fastway courier was killed on the job in Taranaki, you were quoted as calling for an inquiry into the road transport industry including courier drivers. I think something does need to be done, but wonder whether you are aware of all the pressures that can be placed upon a franchisee courier in particular?

A Fastway franchisee has to meet timetable demands (return to the depot to exchange freight etc.), also Fastway have delivery standards that have to be met - regardless of the amount of freight going into/out of your territory, failure to comply with these requirements puts your investment in "your business" under threat. The two main threats Fastway use are: 1). You are in breach of contract, which can lead to termination of the contract, and 2). Any undelivered freight in your bay will be delivered by someone else at your expense (at a lot higher cost than you get paid for delivery).

Whether or not it is physically possible for you to deliver all your freight (as well as pick up freight) in one day would seem to be totally irrelevant as far as sanctions being imposed. When a courier is working over 12 hours a day and is still unable to get all the freight delivered, Fastway"s solution (in our case) was to charge $2.50 per parcel to have it delivered – this despite the fact that they had for sometime been aware of the problems for that particular run – in fact a written request to split the run into two manageable territories had been given them some six months earlier (it took over 5 months for them to reply in writing refusing the split).

Inquiries with NZ Transport Agency regarding the chain of responsibility resulted in the information that the only way to test the „chain" was for the courier to be prosecuted – a $2000 fine and loss of license for a month – and it would then be investigated as to whether undue pressure was being applied to the courier, so not much help there!

Fastway offered neither help/practical solutions as to how to make the run manageable by one person – just threats to meet the delivery requirements in your contract. The stress and frustration from this situation resulted in my husband walking away from his business - the fourth courier in Manawatu to do so since October last year (makes me wonder what the number is nationwide that walk away from a Fastway franchise?). To walk away from a sizeable investment is not something one does lightly.

….. Interestingly, it was only after the death of the Taranaki courier that we were made aware of the requirement to have a half hour break after five and a half hours work, and the 13 hour work day."

The tragedy the writer refers to was the death of a 21-year old courier driver in a collision with a truck (Anthony, 2011). Some of his workmates spoke out about the under-regulation of the courier industry, saying it is pushing its drivers to the limits, with courier drivers clocking up to 13 hours of driving time and nearly 500 kilometers with no rest every day – all for about $80 per day. Industry experts in the courier industry are also saying many earn below minimum wage, and that something has to give (Scoop, 2010).

In a press release in December 2010, the Managing Director of a major courier company said that many New Zealand courier drivers are struggling to earn a viable living as courier companies have aggressively slashed prices they charge to gain customers, a practice that increased significantly during the recession (Scoop, 2010).

Urgent Courier's Managing Director Steve Bonnici says many courier firms are charging prices as low as they were 20 years ago. During that time input costs for the likes of fuel and vehicles have soared for driver contractors who are obliged to operate their own businesses.

"Many of our competitors pay no attention to the social impact of their businesses and have cut prices back to ridiculous levels," Mr Bonnici says. "While the cut pricing continues, it's impossible for contractors working for the discounters to earn a living wage."

While courier drivers have few of the benefits of employees, they are still obliged to wear a corporate uniform, work certain hours, apply for annual leave, and work exclusively for one company, as well as providing their own vehicle to work from

Their plight mirrors those contractors working in the film industry; earlier this month the government amended labour laws for workers on films such as The Hobbit to ensure that if they sign up as independent contractors they cannot subsequently legally claim to be employees.

In the same release, Paul Holdom, who developed Courier Post Urgent for NZ Post, and is now sales manager at InterCity Urgent, and who has been a player in New Zealand's courier industry for almost 25 years said that real courier revenue has probably dropped 20-30% since 1990 to around $3,000 to $4,000 a month. This is at the same time the costs of operating their own business has climbed and congestion has reduced the ability of drivers to make multiple journeys in cities such as Auckland.

"It's sad what's happened to our industry; there are plenty of owner-drivers out there whose revenue before expenses is barely the minimum hourly wage. After they have paid costs out of this revenue they are below the poverty line," says Holdom.

"They've invested in vehicles worth $10,000 - $30,000 and they've got families and mortgages…"

Mr Holdom says courier prices would have to rise some 30 per cent to get back to where couriers can earn a sustainable living (Scoop, 2010).

There have been attempts by courier drivers to organise themselves into groupings where they can have some bargaining power, but they have proven difficult. One courier driver I met recently was banned from entry to the base where he needed to be able to pick up his deliveries. His crime? He had the cheek to distribute a notice from the EPMU inviting them to a meeting to discuss pay and conditions for courier drivers employed by NZ Post – a State Owned Enterprise. This driver was involved in earlier attempts to set up an Owner Drivers Organisation and took a case against NZ Post in the Employment Authority to determine whether these very dependent workers were in fact employees. He got as far as mediation. NZ Post made some changes to the contracts, but in the end, he was deterred because of the costs of taking the case further.

Case Four – Out in the Cold

There has been a long tradition in New Zealand of young people delivering newspapers and leaflets. More recently, stories have come to light about the abuses of the independent contracting system used to employ workers in this line of work. Some useful research was conducted by Caritas into children's work in 2003 (see Caritas Aotearoa New Zealand, 2003). As a follow up to that survey, a report called "Delivering the Goods" was produced in 2006, from a survey of newspaper and leaflet delivery workers aged 10 to 16 years (see Caritas Aotearoa New Zealand, 2006). The majority of workers surveyed were self-employed contractors to one of three distribution companies which operate nationwide; in one case this involved contracting to a local distribution franchise.

Examples of (independent) contracts for leaflet deliverers included:

Contract A: *"The parties acknowledge that this agreement is entered into by both parties on the basis that the Deliverer is an independent Contractor and that the Deliverer is not an agent or employee of the Company….The Contractor is an independent Contractor and as such is free…to select the Contractor"s own means and methods of performing the services and, subject to the delivery window requested by [Company], the hours during which the Contractor will perform those services."*

Contract B: *"You are employed by [Company] under a contract for services, which means that you are an independent contractor. This contract does not therefore create an employment relationship between you and [Company]."*

Contract C: *"All Distributors are Independent Contractors and therefore are required to file an IR3 at the end of each year."*

Contract D: *"The Contractor is an independent Contractor and as such is free (in addition to the Contractor"s freedom to engage sub-contractors and others to use carrying equipment…) to select the Contractor"s own means and methods of performing the services…The Contractor shall bear all costs and expenses incurred by the Contractor in connection with the performance of the services.*

Based on a crude assessment of the data, Caritas estimated that most of the pay rates fell somewhere between $1.67 and $6.25 per hour. In 2007, Fair Go ran a story about children employed as independent contractors to deliver junk mail. The children, some as young as 12 and others aged nearly 16, were earning as little as 25c an hour. To make matters worse,

they had recently had their pay unilaterally cut. Fair Go reported that it had more responses to that story than to any other story in that year. I was not surprised because this is a classic example of how so-called independent contracting can exploit the most vulnerable.

Sadly, it is not only children affected. More and more older workers are involved in today's leaflet delivery industry, because they need to supplement meager pensions or benefits.

When this issue hit the headlines in 2007, I drafted a members' Bill that would outlaw the employment of children under the age of 16 as independent contractors and require them to be employed as employees. This would at least give them rights to be treated fairly, as well as rights to personal grievance, to written agreements, and other employment entitlements. The bill has been submitted to the ballot over the past couple of years, but has not been drawn. Caritas (2006) recommended that the single most important step likely to deliver protection to child workers would be to require a direct employment relationship. It strongly endorsed the approach in this bill as the best way to improve children's overall working conditions.

Other instances of hardship are listed in Appendix A.

Legislating a Solution: Minimum Wage for Contractors

Since becoming a Labour List MP in 2005, I have proposed a number of members' Bills to deal with non-standard and vulnerable work, including the Minimum Wage and Remuneration Amendment Bill, the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill, the Employment Relations (Triangular Employment) Amendment Bill (which later become a Government Bill (Mallard, 2008) and the Employment Relations Protection of Young Workers (Amendment) Bill.

The Minimum Wage and Remuneration Amendment Bill, which was drawn from the ballot in my first year in Parliament was a Bill originally drafted by the Hon. David Parker. The Bill, as introduced, extended the Minimum Wage Act's provisions to apply to all persons working under a contract for service (independent and dependent contractors).

The proposed mechanism was the same as it is in the current Minimum Wage Act for workers under a contract of service. The Governor-General would be able, by Order in Council, to make regulations prescribing the minimum rates of remuneration payable to any person working under a contract for services. That does not sound too hard does it? After all is every New Zealand worker not entitled to expect to be paid at least the equivalent of the prevailing minimum wage?

Predictably, there was opposition: Kate Wilkinson, the then Opposition Labour Spokesperson, described it to the Lexis Nexis Employment Relations Conference in 2007 as "interference in a commercial relationship and such a commercial relationship should not be blurred into an employment relationship" (Wilkinson, 2007).

As a former workers' advocate I naively thought the Bill was pretty straight-forward. In my first reading speech I argued that minimum remuneration is a baseline protection that should apply equally to all workers, regardless of whether they are in a traditional employment relationship or whether they have entered into a contract for services. "This most basic of protections will help New Zealand keep pace with the changing world of work in the 21st century and reflect the realities of new forms of work"(Fenton as cited in NZ Parliament, 2006: 4817).

The Bill passed first reading with support of Labour, Greens, United Future and the Maori Party and was referred to the Transport & Industrial Relations Select Committee. The Select

Committee process was instructive. Most submitters agreed that the principle behind the Bill was correct, even those from the Business Community who opposed it.

Many contractors contacted me during the process of considering the Bill:

- A pizza delivery worker who was employed as a contract driver, not as an employee. His boss decided that he should work 10 hours straight, as well as below the minimum wage.
- A waitress employed as an independent contractor with her own "waitressing business", where her pay was dependent on the numbers of tables she served.
- A hotel housekeeper was contracted on a room by room cleaning basis.
- A worker, in her brief experience as a subcontractor, hired to mop floors and dust offices later discovered that other workers had also signed an independent contract with the licensee of a commercial cleaning company. She was told where and when to clean, and told to buy hundreds of dollars' worth of supplies. 10 months after signing her contract, after working for what amounted to less than $6 an hour, she has no cleaning business and the company is still recruiting workers with employment ads that say: "Be your own boss".

Some contractors told the Select Committee that they could not even prove whether they had been paid fairly, or paid at all, because the contractor who engaged them did not keep any records. Interestingly, given what came later with the Hobbit debacle, the Actors Equity and the Musicians Union called on politicians to support the bill, saying:

> The poor pay and conditions of many actors and musicians are not commonly known. That's because they are classed as dependent or independent contractors, they are expected to work for a whole lot less than the minimum wage (Scoop, 2008).

Labour Department officials worked hard to find ways to make the Bill a success. To their credit, so did Business NZ, even though they fundamentally opposed the bill.

While we were quickly able to dispose of the sillier criticisms the National opposition made (e.g: someone contracted to mow lawns would be covered), there was a genuine attempt made to figure out how minimum wage could apply to contractors in the New Zealand context. The calculation of current minimum wage law is a time-based or output-based measure. In contracting, it is often more complex than this.

Workers, not employees?

In Britain, the minimum wage applies to "workers", not employees. Workers are defined as any individual who has entered into, or works under a contract of employment, or any other contract where the individual undertakes to do or perform personally any work or services for another party to the contract.

The UK jurisdiction excludes the genuinely self-employed and presumes that they agree a price for the job with the customer in advance and are paid by an invoice or a bill at the end.

Then there is **unmeasured work,** which allows the parties to come to a written agreement over a sensible estimate of the hours to be spent on the work – provided they are realistic and fair. The minimum wage is only required to be paid for the hours in the agreement rather than those actually worked. However, if there is no agreement reached, then minimum wage must be paid for all hours worked.

Making it work in New Zealand

I believe Labour came up with a Bill that would have provided for the most vulnerable of New Zealand contractors to be protected by a minimum wage calculation.

The proposed Bill required that the parties to a contract for service agree with the Principal (defined below) on what is a reasonable time to provide the service. The remuneration rate for such provision of service (which only includes the labour) should equate to at least the minimum rate set by Order in Council under the Minimum Wage Act.

The Principal would be required to keep records as to the hours agreed and remuneration paid. If there was an agreement as to the reasonable time to be worked, minimum remuneration would be calculated (provided the time agreed is reasonable), but there could be no claims for additional minimum hourly wages or other remuneration.

If there was no agreement to the reasonable time required to perform the service, the principal contractor could be liable for recovery of minimum remuneration for all hours worked. In summary, the parties could agree on a reasonable time to provide the labour component of the service. It only became a problem if the time is not reasonable.

An outline of this Bill is provided in the Appendix B.

While probably more complicated than it should have been (and it was a Members' Bill, not a Government Bill), the work done provides a pointer to the possibility of regulating basic entitlements like Minimum Wage for vulnerable contractors. In the end, it came down to voting power and politics. The Labour and the Green Party voted strongly in favour of the legislation; the New Zealand First party and United Future became wobbly; the Maori Party's four votes were not reliable, and the Independent member, Taito Philip Field, was influenced by local interests to defend the status quo. Note: Many compromises were made in the development of this Bill to try to reach broader agreement with the NZ First Party. These are not necessarily indications of where Labour might go in a future Bill.

Sadly, after months in Select Committee and after a General Election where the Government changed, the Bill was eventually defeated at the Committee of the Whole in mid-2009. In doing so, New Zealand missed an opportunity to provide leading legislation to deliver the most basic of rights for vulnerable contractors.

What Labour is doing today

Labour believes that workers should be protected against harms and risks that are broadly seen as being unacceptable, and below a necessary floor below which people should not be required to provide their labour.

In our policy development process, Labour is considering stronger protections for those who are employed in these often-precarious arrangements. Different statutory support and legal rights may be required for non-standard workers, such as independent and dependent contractors than to those in employment relationships.

Consideration could be given to extending the right to organise and collectively bargain to contractors, as well as ensuring there is an effective and cheap disputes resolution procedure. Labour is engaging with unions and businesses who are concerned about the direction that contracting has taken in New Zealand.

While we accept that there are advantages for businesses in different contracting arrangements and, for that matter, advantages for some highly skilled workers, these must

be balanced against the fundamental Labour value of fairness and equality. There is a lot of discussion and thought required. But in the end, we do not believe that it is the Kiwi way for a “law of the jungle” to prevail. If we fail to regulate the growing incidences of independent and dependent contracting, we expose growing legions of workers to having no rights at all. And in doing so, we make every other job that relies on the foundations of the employment relationship vulnerable to unacceptable competition.

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Appendix A

Here is another recent example of the kind of hardship I regularly receive in my Inbox:

For years my daughter has done junk mail deliveries for various companies, all paying around the same measly pittance. Of course she is a contractor, but unlike those contractors further up the tree, she has no opportunity to negotiate her remuneration at all. So any delusion that the contract is fairly arrived at by mutual negotiation, needs to be completely dismissed as the disgrace it really is.

Also under these contracts, she has to perform each time every time regardless of the weather and if she needs a day off, she has to find her own replacement for her runs. Moreover there are provisions for her to be fined for misconduct. Such a merciless miserly contract designed to exploit those who can"t otherwise help themselves.

Recently she had to deliver booklets each copy the size and weight of an average magazine. The bundles were big and heavy. A special outing was required to deliver these. When the pay sheet arrived I noticed that she got only one cent gross per copy which of course is one dollar per hundred. Let"s not forget that from that dollar per hundred, she pays tax, ACC levy and equipment maintenance costs. So would she get 50cents net per Hundred?

It is manipulative exploitation of the defenseless by those who pose as New Zealand"s really worthwhile people. Kids are better off doing anything else other that getting used to being so exploited. There is no good lesson in this for kids.: move to Australia."

Appendix B

Under the proposed Bill :

“Principal” was defined as a person in trade who engages a specified person (listed in the schedule) under a contract of services

Remuneration was defined as a payment by the principal to a specified person providing services that relate to the provision of labour (only).

Specified person was defined as a person who provides a service listed in the Schedule under a contract for service, or a company that has only one shareholder and one director and who personally provide the service.

Specified persons included those providing contracts for service in:

(a) building and construction services (labour only)
(b) cleaning services
(c) courier services
(d) food catering services
(e) fast food delivery services
(f) newspaper or pamphlet delivery services to letterboxes
(g) personal home care support
(h) public entertainment services as a musician or singer.
(i) Manufacturing of clothing, footwear or textiles.
(j) Telemarketing services
(k) Market research
(l) Licensed security guard services
(m) Forestry Industry services related to planting, pruning or felling.
(n) Truck driving services delivering goods.

Many of the categories had additional narrowing criteria - (b), (d), (g), (i), (m) all had two additional criteria:
i. The service is provided on an ongoing basis or under a series of regular or frequent contracts for service; and
ii. The specified person does not employ any employees to provide the service or subcontract the provision of the service to any other person.

(c and (n) had an additional criteria to the two above :

iii. The specified person primarily receives his or her income from one principal.